Corporate Tax Alliance

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Lessons learned from Apple's tax policy

by Tony Malik (Schwartz International)

In the wake of dwindling government coffers globally, the tax-planning strategies of well-known multinational companies as Starbucks, Google, Amazon and Apple are subject to a heated public debate. Recently the U.S. Congress has been publicizing the tax saving efforts of technology giant Apple Inc. The Permanent Subcommittee on Investigations of the U.S. Senate did not find any evidence that Apple engaged in any illegal activity intended to reduce or eliminate taxes. Government officials are looking, however, to have more expanded discussion focusing on systemic problems in the U.S. tax code.

> "Ideally tax reform leads to true simplification, not complex fixes"

A lengthy examination by Senate Investigators found that Apple materially reduced income tax liability to any single national government in spite of earning revenues of tens of billions of dollars. Apple legally accomplished this by arbitraging differences in international tax laws particular to distinct sovereign jurisdictions. The two jurisdictions that constituted the focal point of the Senate panel's report were the U.S. and Ireland.

Specifically, Apple redesigned its legal ownership structure to proactively use tax residence rules, among others, to reduce global tax. Apple's units in Ireland have long been the base for the global giant's operations in Europe, the Middle East, India, Africa, Asia and the Pacific. Because the profits were not repatriated to the U.S. and due to specific U.S. anti-deferral rules, profits generated by these units are generally free from U.S. taxation. Ireland on the other hand, prescribes to a different concept of residence, treating corporate entities as Irish residents to the extent that they are managed and controlled within Ireland.

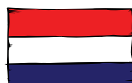
The U.S. Senate's contention is not that Apple is evading or otherwise illegally avoiding taxes. Rather the Senate panel seems most interested in discussing tax reforms designed to encourage different corporate behavior. The prevailing rhetoric seems most to promote the idea of profit repatriation, a financial maneuver that many U.S. multinationals are very reluctant to pursue given the high rates of U.S. taxation that repatriated profits are immediately subjected to. Given the sluggish U.S. economy's demand for cash infusion and the possibility for U.S. tax authorities of collecting even modest amounts of revenues from U.S. multinationals' overseas income, the U.S. Senate has begun serious discussions ultimately headed towards working out the details required to execute the policy shift.

The irony of course is that it is Congress that created the complex U.S. tax rules in the first place. Any true reform should start there. Let's see less grandstanding and more policymaking. Ideally we would see true simplification, not simply the complex 'fixes' we've seen since 1987.

INDEX

- Lessons learned from Apple's tax policy 1
- Dutch tax credit for tax free income 2
- Cyprus: still the best jurisdiction for Russian investments 3

Dutch tax credit for tax free income *by Jos Peters*



A Dutch tax credit for foreign dividend w/h tax, even though the dividend received is not taxed in the Netherlands, due to the Dutch participation exemption.

The Netherlands is under heavy attack lately, because of its undisputed number one status in the world as treaty shopping jurisdiction. Foreign tax authorities and even the OECD and the European Commission seem to believe that the Dutch government, over the years, has created quite a few tax planning instruments to attract foreign businesses. Only insiders know that this is not true: most of the attractiveness of the Netherlands in international tax planning stems from its favorable tax treaty network (i.e. international tax measures which a foreign tax authority has explicitly agreed to) and another substantial part stems from Dutch supreme tax court case law.

The Dutch supreme tax court has always been miles ahead of most other tax jurisdictions via its modern interpretation of a number of basic tax rules that apply everywhere else too. But contrary to what happened in those other jurisdictions, the Dutch supreme tax court has introduced items such as ''transfer pricing adjustments" and ''non-discrimination", long before these measures got to be explicitly established as such elsewhere.

> "The Dutch supreme tax court has always been miles ahead of most other tax jurisdictions via its modern interpretation of a number of basic tax rules that apply everywhere else too"

The few measures the Netherlands has taken explicitly to boost its position as an attractive tax planning location often go unnoticed! What I am about to describe below is an international tax feature which the Netherlands has introduced already many years ago to boost its effectiveness as a favorable jurisdiction for intermediate holding companies which even savvy Dutch tax advisers often forget to mention when doing a presentation on tax planning via the Netherlands, however odd this may seem.

Most readers will know that the Netherlands, in 99% of the cases, will not charge corporate income tax on foreign dividends and capital gains realised on foreign shareholdings. To qualify for this "participation exemption" only a few easy-to-meet criteria must be fulfilled:

- The Dutch entity must own at least 5% of the economical and legal interest in the foreign entity (both dividend rights and voting rights);
- The foreign entity must have a capital divided into shares;
- The foreign entity does not have to be subject to any foreign profits tax, unless the entity qualifies as a ''passive" entity as defined by law, in which case the foreign underlying profits tax must be 10% or more.

So if a Dutch company receives a dividend from a foreign shareholding which meets these criteria, which will be true in most cases, the Dutch entity will not have to pay corporate income tax on the dividend. The same is true if the Dutch entity should realise a capital gain with the shares in the foreign entity. The Dutch participation exemption covers ''benefits of whatever kind and whatever form realized with qualifying foreign shareholdings" so a dividend is treated the same way as a capital gain, when applying the participation exemption in the Netherlands.

In many cases the Netherlands will not levy a dividend withholding tax on outgoing dividends. This is clearly the case in situations where the Dutch entity is owned by a company in another EU jurisdiction, but also some Dutch tax treaties with non-EU countries provide for a zero rate. To mention a few: Singapore, Switzerland, the United States, Malaysia, Norway and Egypt.

However, this implies that the Netherlands does levy a dividend w/h tax on distributions to very many other countries in the world, even if it has a tax treaty with

Continues on page 3>>

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Continued from page 2 >>

these countries. And vice versa! This, of course, is not an incentive for companies in those other jurisdictions to use the Netherlands as a stepping stone country to establish an intermediate holding company: one might in such a case well be able to benefit from a lower dividend w/h tax rate by using the Dutch tax treaty with a given country, but only at the cost of adding a Dutch dividend withholding tax.

So putting the Netherlands into the dividends or capital gains loop for investments in countries where the Dutch tax treaty would be more beneficial than the home country treaty requires thorough further research on what happens when the dividend received is paid onwards. Dividend w/h tax rates, if they are not zero, are often 5 or 10% in treaty situations and the Netherlands has many treaties. In many cases the Dutch treaties will likely be at least 5% ‘’cheaper” than the home country treaty rates. But as long as this potential treaty shopping benefit is undone by the fact that the Netherlands itself charges a dividend tax of its own of at least 5%, the whole exercise may become useless and would only cost money: keeping an intermediate holding company alive attracts hosting and management fees plus other expenses, of course.

Once this became clear to the Dutch Ministry of Finance in 1995 (no doubt based on information it received from international tax advisers), it was decided to introduce a special measure to boost the attractiveness of the Netherlands as a holding company location by introducing a special tax credit which is quite out of the ordinary. Because the foreign dividend is untaxed in the Netherlands, a tax credit against Dutch corporate income tax, the usual way to take foreign underlying taxes into account, is impossible. That is why the tax credit was ‘’hidden” in the Dutch dividend tax act, as follows:

- If a Dutch intermediate holding company should receive a dividend from a foreign participation which qualifies for the participation exemption, and the foreign country withholds at least 5 dividend tax under its tax treaty with the Netherlands, and:

- If the Netherlands itself has the right under the tax treaty with the home country of the parent of the Dutch entity to withhold at least 5% Dutch dividend tax on the onward payment of this foreign dividend to this foreign parent company:

- The Netherlands will grant a 3% tax credit against the Dutch dividend withholding tax, to avoid ‘’doubling up” on dividend withholding taxes.

I regularly come across brochures, flyers, seminar slides etc. in which this very easy to use Dutch international tax feature is not addressed at all! This article is intended to make a wider audience aware of its existence. Two real life examples will illustrate how this unknown Dutch tax feature, that everybody can easily benefit from when contemplating to set up a Dutch intermediate holding company, works:

Example 1: a Turkish investment in Russia

Suppose a Turkish enterprise wants to take a 20% participation in a joint venture or consortium in Russia in say the abundant Russian mining industry. In a direct investment, Russia would be allowed to withhold 15% dividend tax on dividend distributions to Turkey. But by routing the investment through a Dutch company, the Russian dividend tax would go down to 10%. So if the expected dividend amounts are big enough, the resulting 5% tax savings would easily outweigh the expenses to set up and maintain the Dutch entity.

However: the Netherlands itself charges a 5% w/h tax on dividend distributions to Turkey. On the face of it, this will undo the benefit of interposing such a Dutch legal entity entirely: the combined dividend withholding taxes in Russia and the Netherlands would still be 14.5% (10% in Russia and 5% in the Netherlands on the remaining 90%) and the 0.5% tax savings would not be worth wile or not enough to cover the expenses of the Dutch entity, even on substantial annual dividends.

However, because of the Dutch tax credit for Russian dividend w/h tax, even though the Netherlands will not charge corporation tax on the Russian dividend, the Dutch dividend tax on distributions to Turkey will – on request, to be filed with the dividend tax return – go down to 1.67% (the Dutch facility of 3% is given on the gross Russian dividend before the payment of Russian dividend tax so 3% of 90% which equals 3.33%. The total combined effective dividend w/h tax burden will now be reduced to 10% Russian dividend w/h tax + 1.67% Dutch dividend w/h tax, i.e. in total 11.67%. The tax benefit is now 3.33% and might well have become worth considering.

For more examples and the rest of this article, visit www.corptax.org/publications

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Cyprus: still the best jurisdiction for Russian Investments *by Aspen Trust Group*

Regardless of the recent events that shook Cyprus' economy and damaged the long-standing reputation of the country's banking system, Cyprus has not seen a massive outflow of foreign investors. Why? The answer is simple: Despite the implemented austerity measures, the benefits of Cyprus still outweigh all other international tax planning jurisdictions.

The Moscow Times recently interviewed a few industry experts who share our view of Cyprus' position as the most advantageous jurisdiction for tax planning, especially for investments from Russia. One of the people interviewed, Mr. Andrey Goltsblat, a Managing Partner at Goltsblat BLP, confidently stated that: "They just raised corporate tax, which will have no impact on business which uses Cyprus as a vehicle."

In fact, although corporate tax was increased from 10% to 12.5%, Cyprus will continue to have one of the most attractive corporate tax rates in the EU – on par with that of Ireland and Malta. It is important to note as well that most holding companies are not materially affected by the increase and that, in Cyprus, securities (including shares, GDRs, etc) are exempt from corporate tax. As for the increase in the special defence contribution (SDC) from 15% to 30%, note that non-resident companies and individuals are exempt.

> "Cyprus is far from being discarded as an international tax planning jurisdiction"

Mark Rovinskiy, Deputy Head of Tax Practice at Egorov Puginsky Afanasiev & Partners, pointed out in the same article that Cyprus is actually being used as a housing for Russian or other assets, which are not so much affected. He emphasized that although Russians could move elsewhere, no other jurisdiction offers the same beneficial conditions as Cyprus.

Furthermore, we would like to emphasize the following key advantages of Cyprus that remain unaffected by recent developments:

- Dividends managed and controlled from Cyprus are fully exempt from tax
- No withholding taxes on dividends, interest and royalties paid out to non-resident shareholders – because of this Cyprus still marks high as a jurisdiction for IP rights
- No capital gains tax for the sale of securities or real estate situated outside Cyprus
- Double tax treaty network with 45 countries, with favourable provisions in tax treaties with such prominent countries as Russia, Ukraine, India and South Africa
- Holding companies and financing companies are exempt from taxation on interest on deposits

Considering all of the above, Cyprus' geographical location, its legal system based on UK Common Law (UK Companies Law of 1948) and the country's high quality professional services, it is plain to see that Cyprus is far from being discarded as an international tax planning jurisdiction. In addition, as we have seen, Cyprus remains one of the most cost-effective solutions for international tax planning purposes, especially for certain jurisdictions, such as Russia.

Vladimir Gidirim, Partner at Ernst & Young, summarized the subject matter in the Moscow Times very well: "There is no alternative to Cyprus as a jurisdiction. The tax system for holdings is far too advanced and flexible. The Netherlands and Luxembourg contain some features, but those conditions are still not as favourable for investors. There is no direct matching. You cannot simply take a Cyprus company and replace it like a piece of Lego in Luxembourg. You would need to use several jurisdictions, with several layers of holding companies in order to achieve a cascading system of tax distributions."

The Aspen Trust Group considers the new reality of Cyprus an opportunity for their country and for them as a company. Contact the Aspen Trust Group at info@aspentrust.com to find out how they can be of assistance to you and your business.

The complete article on Moscow Times: http://www.themoscowtimes.com/business/article/havens-retain-allure-for-firms-seeking-flexibility-offshore/480057.html

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