



February 2016

Updated Dutch Tax-Transparency Rules for the Dutch CV

At the very end of 2015, the Dutch Ministry of Finance published a revised decree on the tax-transparency rules for Dutch limited liability partnerships (*commanditaire vennootschap* or **Dutch CV**).¹ This revised decree replaces the decree of Jan. 11, 2007.²

A Dutch CV is often used in international structuring in order to establish an optimal tax position. It may be formed by one or more general partners and one or more limited partners that may either be private individuals or legal entities in order to jointly undertake activities with a view to profit. No legal form is required, only a partnership agreement.

One of the key-features of a Dutch CV is that it can be structured in such a way that it is regarded as either non-tax-transparent (*i.e.*, opaque) or as tax-transparent for Dutch tax purposes. An opaque Dutch CV is regularly subject to Dutch Corporate Income Tax. Conversely, a tax-transparent Dutch CV is disregarded for Dutch tax purposes and, as such, is not subject to Dutch Corporate Income Tax. This means that the profits and losses of such Dutch CV are directly attributable to its partners.

In this Alert, we will briefly recapture the history of the decree on the tax-transparency rules for a Dutch CV. Subsequently, we will explain the amendments to the existing rules that follow from the updated decree.

History of the Decree

Dutch tax law only provides for a definition of an opaque Dutch CV. According to Article 2, paragraph 3, sub c of the Dutch General Tax Act (*Algemene Wet inzake Rijksbelastingen*), a Dutch CV is not considered to be tax-transparent if limited

¹ Decree of Dec. 15, 2015, BLKB 2015/1209M, Stcrt. 2015, 46508.

² Decree of Jan. 11, 2007, Nr. CPP2006/1869, BNB 2008/289.

partners can be added or replaced without the prior consent of all existing partners.

Accordingly, for Dutch tax purposes, a Dutch CV is considered to be transparent if unanimous and unconditional prior consent is required from all partners (both limited and general) before the addition of a new limited partner, or the transfer of a partnership interest in the Dutch CV. This unanimous and unconditional consent must not only be recorded in the constitutional documents, but must also follow from the actual actions of the partners.

Because Dutch tax law lacks guidance as to the consent requirement, the Dutch Ministry of Finance has issued various decrees over the past decades in order to give further guidance to this concept. These decrees do not only include guidance on when a Dutch CV is treated as transparent from a Dutch tax perspective, but also provide guidance on the qualification of foreign-law equivalents of the Dutch CV. Furthermore, the decrees provide guidance for tiered partnership structures (where a tax-transparent partnership has an interest in another tax-transparent partnership).

The Updated Decree

The new decree of Dec. 15, 2015, amends its previous version with respect to the way in which the consent requirement is enforced in cases of mistakes, and with respect to the treatment of tiered partnerships (paragraph 5).

A new paragraph has been added to the decree that deals with the situation where, by mistake, no prior consent was given for the addition or replacement of a partner in a tax-transparent Dutch CV. As a general rule, such omission would result in the Dutch CV being deemed opaque. However, in this new paragraph, the Ministry of Finance states that, provided certain conditions are met, the requisite consent can be given afterward, and the Dutch CV will still be regarded as tax-transparent. Those conditions include, *inter alia*: (i) that the omission concerns a mistake and is only incidental, (ii) is immediately reported to the tax authorities, and (iii) is repaired as soon as possible.

Furthermore, paragraph 5 has been amended. The general rule remains that, in tiered Dutch CV structures, all partners of both Dutch CVs must give their consent prior to an addition or replacement of a partner in order to have both Dutch CVs still regarded tax-transparent (the so-called mutual consent requirement). This mutual consent requirement follows from the fact that the partners in the upper tier Dutch CV are deemed to be partners in the lower tier Dutch CV as well. However, in practice, this mutual consent requirement caused a complex operational process. Therefore, the amendment states that if the partnership agreement or articles of association provide for it, prior consent only needs to be obtained from the direct partners of a Dutch CV. The Ministry of Finance indicated that this would also apply to existing tiered Dutch CV structures without the need to immediately amend the constitutional documents if a request is filed with the Dutch tax authorities. The constitutional documents must then be brought in line with this provision in the first following amendment.

Regarding a transfer of partnership interests to existing partners, the Ministry of Finance explicitly clarified in the updated decree that prior consent of all partners is not required, provided the transferred partnership interests are being divided equally between the remaining partners.

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