

NovioTax

Setting up *and* maintaining
a joint venture company in the Netherlands

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About NovioTax

NovioTax is a Dutch research-based tax advisory firm, which members have many years (20+) of experience in AAA advisory firms and have strong connections in the UK, US and Luxembourg. In our DNA we are a research based advisory firm that is programmed to excel in quality and service.

Through research, we develop our intellectual capital. For instance, every member of NovioTax is required to participate in research activities. We believe that through the use of research we will discover new ideas and opportunities that support our clients.

We also strongly believe in a superior service. We are dedicated to invest in getting to know our clients, listening to them and enabling that our advices add value to clients. Our aim is to actively leverage our experience and knowledge for our clients as transparently and accessibly as possible.

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Joint venture companies in the Netherlands

There are several legal entities in the Netherlands that can be used to partake in a joint venture. Most commonly used is the Besloten Vennootschap (B.V.) since there is no minimum capital, limited liability, many subsidies and many more advantages. In light of this, the following presentation take note of basic information about setting up and maintaining a Dutch B.V.

The Dutch besloten vennootschap

Besloten vennootschappen or B.V.'s are private companies with limited liability which are typically used for holding purposes. Under Netherlands' law no minimal capital requirements apply. Also a specified authorised capital is not required in the articles of association. In the context of capital protection, it is further not necessary to submit an auditor's statement in case of a non-cash payment on shares. Additionally, the capital can be denominated in a foreign currency. Shares do not need to be paid up in full and the parties are free to make arrangements as to when this will happen.

A B.V. may issue non-voting shares with dividend rights as well as voting shares without dividend rights. It provides a flexible manner to separate profit-sharing and voting rights. In addition, the articles of association can provide that holders of certain types of shares can exercise multiple votes. Additionally, shareholders' meetings can be held outside of the Netherlands (if provided for by the articles of association or those entitled to attend shareholders' meetings have provided their consent). Furthermore, it will also be possible to adopt resolutions without holding a meeting in person, provided that those entitled to attend the shareholders' meeting have provided their consent to this manner of adopting resolutions. This does not mean, however, that every shareholder has to vote in favour of the proposal.

Possible statutory restrictions

It is not required to include provisions in the articles of association that restrict the transferability of shares, such as making a transfer subject to the shareholders' or the managing board's approval, or providing for a right of first refusal. However, if the articles of association do not include any provision on the transferability, the statutory provision applies which typically provides the other shareholders with a right of first refusal. Other restrictions are also possible if they do not lead to transfers becoming extremely difficult or impossible.

In this context it should be noted, though, that a lock-up, during which the transfer of shares is prohibited for a certain period of time, is possible. If a shareholder wishes to transfer shares but cannot do so because of the applicable transfer restrictions, then such shareholder must always be able to dispose of its shares for a price that can be agreed between the parties. In this context, the articles of association may include a pricing mechanism (in case of an exit-scenario).

The managing board

Managers or board members do not necessarily have to reside or actually be established in the Netherlands. The general meeting will have the right to appoint, suspend and dismiss managing and supervisory directors. The meeting of holders of shares of a certain type may also have this right, if provided for in the articles of association. However, each shareholder with voting rights should have the opportunity to participate in the decision-making process of the appointment of at least one board member or supervisory board member. Additionally, the articles of association can limit the circle of eligible persons. The binding nature of a nomination for appointment is still possible, but no more than one person is required. Another important item is that the managing board can be given specific instructions by the general meeting of shareholders or another corporate body. The managing board must comply with these instructions, unless following such instructions would be detrimental to the company.

Arrangements between shareholders can be included in the articles of association, such as tag-along rights or special requirements in relation to the identity of the shareholder. The inclusion of these provisions in the articles of association are favourable because a breach will have third party effect and the B.V. can, if the shareholder fails to comply, suspend the payment of dividends and the exercise of voting rights by a defaulting shareholder. We do note that the articles of association are publicly available meaning that any third party can obtain a copy of the articles of association from the trade register.

Exit scenarios

If the NewCo B.V. company qualifies as a Dutch tax resident we will not face tax leakage (at source) on any distributions due to the absence of withholding taxes on royalty/service payments in the Netherlands. In addition tax leakage on up streamed dividend or on the transfer of shares in case of an exit scenario will be limited (based on the information provided). It could be considered to use a Dutch cooperative association as an investment platform by the participants or to await for legislative amendments (e.g. dividend WHT).

Blocker entity

To anticipate on a potential exit-scenario it could be considered to set-up Netherlands blocker entities (see next slide). By doing so downsides (tax and legal point of view) can be limited. The shareholders for instance can transfer the shares in the NewCo B.V. whereby any gains are exempted by virtue of the Netherlands participation exemption. In addition the management of NewCo B.V. can be performed by these blocker entities (limiting liabilities). Subsequently the blocker entities can be liquidated (e.g. accelerated strike-off procedure). Please note that in respect of the France-Netherlands DTAA this will be recognized as a capital gain, whereas the Netherlands-Slovenia DTAA actually treats this event as a dividend. Both items should be manageable (or at least should be checked in advance of selecting any exit-approach).

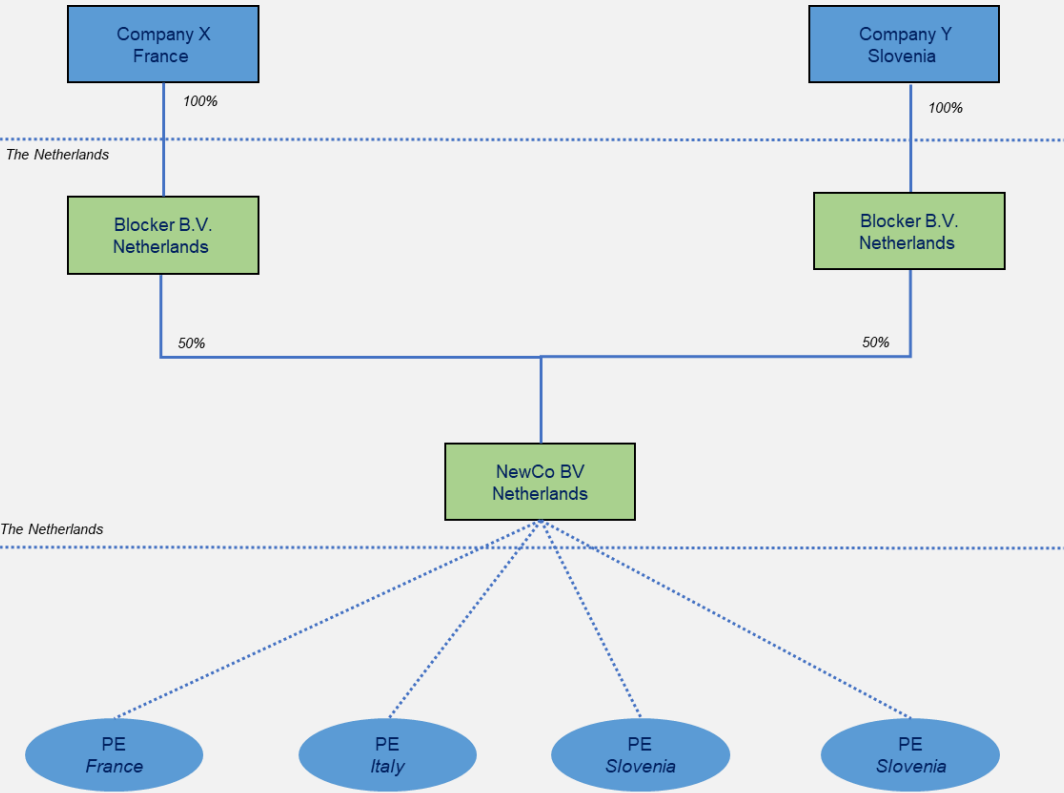
In the case at hand and based on the information provided (i.e. especially if employee contracts are concluded via the NewCo B.V.) we expect that the NewCo B.V. will have permanent establishments in the source (or PE countries). It could be concluded that there is a fixed place of business through which the business of the NewCo B.V. is carried and / or the facts could give rise to the determination of a dependent agent of the NewCo B.V. in the PE countries. Both cases would result in the same outcome: the Netherlands will attribute taxable income to the PE (e.g. following the authorized AOA approach) which, subsequently, will be exempted from Netherlands CIT based on the DTAA's.

In this respect we have checked the DTAA's between France, Slovenia, Austria and Italy with the Netherlands. Interestingly in the case of a dependent agent the Netherlands-Slovenia DTAA (art. 5(6)) might provide for some relief (this topic however does not serve the purpose of these high level slides)

If your client is reluctant in contracting personnel on behalf of the NewCo B.V. (especially observing an initial starting phase) it could be considered to assign personnel based on service agreements to the NewCo B.V. This however may trigger some questions in the various PE countries. In any case however wage withholding taxes, social security legislation and employment law provisions need to be checked by local counsel.

In terms of substance we note that the Slovenian and French shareholder's may nominate board members of the NewCo B.V. Ideally however at least half of the boards members should reside or actually be established in the Netherlands. Observing however that there are no apparent tax benefits it is however questionable whether there is any need to appoint a Dutch director. In an additional advise we can comment on the substance provisions in more detail which based on the information provided thus far does not meet the objective of these slides (merely high level).

Structure example



} Limited liabilities / anticipate on exit-approach

} No up streamed tax leakage

} Non-resident managers possible (e.g. appoint blocker entities to limit liabilities) & no capital funding requirements

} Exemption of PE income in Netherlands tax base

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