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Aruba; BES Islands; Curaçao; St. Maarten

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Legislation of BES Islands and position of Aruba, Curaçao and St. Maarten – Seminar on legal developments

On 31 March 2011, Nolot organized a seminar on the new fiscal legislation in Bonaire, Saba and St. Eustatius (BES Islands) (see TNS:2010-12-20:NL-3, TNS:2010-12-29:NL-3, TNS:2010-12-29:NL-4) and the position of Aruba, Curaçao and St. Maarten. The seminar, held in Amsterdam, was chaired by Andre Nagelmaker, ANT Trust & Corporate Service.

Mr J.W.J. Roks (KPMG Tax & Legal Services) first explained that Curaçao is considering a substantial reform which, amongst others, would include:

- a substantial reduction of the profit and income tax rates;
- a shifting from direct to indirect taxes;
- the introduction of a transparent company; and
- the introduction of a trust and a special purpose fund.

Thereafter, he gave an overview of the main aspects of the new BES legislation, with focus on the taxation of companies. As a main rule, companies established at the BES Islands are deemed to be established in the Netherlands. This rule does not apply to foundations, warehouses, certain holding companies, PEs without a headquarter in one of the Islands of the former Netherlands Antilles, qualifying PEs with a headquarter in one of the Islands of the former Netherlands Antilles and SMEs established at the BES Islands. If the BES regime applies, companies are subject to:

- 5% distribution tax; and
- 1% real estate tax.

A preserving assessment at the 34.5% profit tax rate is imposed for companies which on 1 January 2011 qualified for the BES regime. This assessment is waived if the conditions for the BES regime are met for a period of at least 5 years. If the conditions are no longer met within the 5-year period, a 34.5% profit tax and a 5% distribution tax will become due, where after the Dutch corporate income tax and dividend withholding tax will become applicable.

Benefits of the application of the Dutch regime include the application of the participation exemption, tax incentives, the group regime, the possibility to request a residence certificate and entitlement to tax treaties.

Mr A. Rambhadjan (KPMG Meijburg & Co.) explained that the following cumulative criteria must be met by a company to qualify for the BES regime:

- the place of establishment of the company is at the BES Islands;
- the company had a qualifying legal form; and
- the company is a qualifying entity, which can request the application of the BES regime.

In addition, he gave an overview of the situations under which the application of the BES regime can be requested, the most important being:

- the annual turnover of a company does not exceed USD 80,000, the value of the assets does not exceed USD 200,000 and the company is not active in the financial or trust sector;
- not more than 50% of the company's assets consists of investments, participations or assets put at the disposal of foreigners;
- the assets exceed the 50% threshold, but the company employs at least three employees in a qualifying office, although the assets exceed the 50% threshold; and
- the company is a holding company owning at least 95% in entities listed above, or in a warehouse.

Thereafter, he indicated that PEs cannot file a request for the application of the BES regime. However,

distributions by a PE qualifying for the BES regime to a foreign headquarter are exempt from distribution tax. If the headquarter is located in another part of the Kingdom, the exemption, however, only applies if certain conditions are met. If the headquarter is located in a third country, on the contrary, no conditions have to be met.

If the PE does not qualify for the BES regime and the headquarter is located in another part of the Kingdom, the consequences are:

- if the headquarter is established at Aruba, Curaçao and St. Maarten, the Dutch regime will apply; and
- if the headquarter is established in the Netherlands, an exemption or credit will be granted.

Ms Xandra M. Kleine–van Dijk gave an overview of attractive features of the tax regimes of Curaçao and St. Maarten, including:

- the *penshonado* regime, under which a retired person of 50 years or older who owns a house with a value of ANG 450,000 can opt between:
 - the application of a 10% tax rate on the foreign income; or
 - taxation at progressive rates of EUR 500,000 of foreign income;
- the private foundation, which under certain conditions is exempt from profit tax, gift tax and inheritance tax. From 2011, it is possible to opt for a taxable private foundation; and
- the preferential E-zone legislation of Curaçao and the free zones legislation of Aruba, amongst others, providing for a 2% profit tax and exemption from turnover tax and excise duties.

In respect of the E-zones and free zones legislation, she also dealt with the question whether the regimes can be maintained in the light of the harmful tax competition debate.

Mr P. van Rooy (Baker Tilly Berk) discussed cases of double taxation under the BES legislation. With respect to companies, the focus was on the fact that companies, generally, are deemed to be resident in the Netherlands, the treatment of PEs and the treatment of real estate companies.

In addition, he explained the decrees on the avoidance of double taxation in the relations between the BES Islands and the Netherlands and the BES Islands and third countries.

Finally, he explained that an amendment of the Tax Regulation for the Kingdom is unavoidable and at all events will deal with:

- a reduction of the dividend withholding tax;
- an extension of the taxing rights of the Netherlands with respect to dividends, capital gains and gifts; and
- the *penshonado* regime for retired persons, which after 4 years no longer will apply in the BES Islands.

Mr W. Geursen (VU) explained the EU consequences of the fact that the BES Islands kept its status of an Overseas Territory, including:

- that only limited freedoms of the Treaty on the functioning of the EU (TFEU) apply; and
- the non-application of the state aid rules.

Furthermore, he explained that both the Parent-Subsidiary Directive (90/435) and the Merger Directive (2009/113) apply to BES companies, which are deemed to be established in the Netherlands and Dutch companies established at the BES Islands in relations to other EU Member States. The Directives do not apply in relations to the Netherlands because it concerns an internal situation and to BES companies subject to the BES regime.

Mr P. van Agtmaal, addressed the question whether the BES Islands could act as an intermediary between Latin America and Asia. In this context, he described the following legal aspects:

- the investment protection agreements (IPAs) with Argentina, Bolivia, China (People's Rep.), Cuba, the Dominican Republic, Hong Kong, India, Indonesia, Korea (Rep.), Paraguay, Peru and Suriname;
- important features of the flexible company law, including:
 - a company must be established by notarial deed, but no declaration of no objection is required;

- no minimum capital requirement applies and shares may be issued with full, restricted or no voting and/or profit participation rights;
- with respect to the management structure, the company can opt between a two-tier board (board of management and a board of commissioners) and a one-tier board (general and executive management); and
- the possibility of a legal merger, split-up and change of legal form.

Finally, Van Agtmaal explained various tax planning possibilities a very interesting one being a Curaçao company, with an intermediary Spanish holding and a Latin American or Asian subsidiary based on the fact that since 2010, the Tax Information Exchange Agreement between the former Netherlands Antilles and Spain is effective.

Reference: TNS:2010-12-20:NL-3; TNS:2010-12-29:NL-3; TNS:2010-12-29:NL-4; CTS:AW; CTS:AN; ITS:AW; ITS:AN.

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