Tax Exempt Investment Funds in the Netherlands

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In August 2007, a new type of tax exempt investment fund was introduced in the Netherlands. As a result, currently two types of tax exempt funds exist:

The "FBI", which is the abbreviation for fiscale beleggingsinstelling, and which can be translated as fiscal investment institution; this type of fund has existed since 1969.

The "VBI", which is the abbreviation for vrijgestelde beleggingsinstelling, and which can be translated as tax-exempt investment institution; this is a brand new type of fund.

Below, both regimes and their uses are described.

The FBI Regime

The FBI is a type of fund which can be used for all kinds of portfolio investments. Inter alia, it is used by large investors who invest in (Dutch) real estate. Well-known market examples of FBIs are Rodamco (currently Unibail-Rodamco), Corio and Wereldhave. These FBIs are listed on the Euronext stock exchange in Amsterdam. However, note that a listing on a stock exchange is not a requirement for an FBI.

> The FBI is used by large investors who invest in Dutch Real Estate

An FBI is subject to Dutch corporate income tax at a rate of 0%. An FBI is required to annually distribute its profits (except for capital gains) to its shareholders. Apart from this distribution requirement, an FBI is subject to various other requirements, such as shareholders' requirements and limitations with respect to debt financing.

Conditions of FBI

To obtain the FBI status, a company needs to meet the following conditions:

It must have the legal form of a Dutch public limited company (naamloze vennootschap or 'NV'), a Dutch private limited company (besloten vennootschap or 'BV'), a Dutch mutual fund, or, provided that certain conditions are met, a comparable foreign legal form.

It must be resident in an EU Member State, the Netherlands Antilles, Aruba, or in a State with which the Netherlands has concluded a tax treaty.

The objective as well as the actual activities must consist of portfolio investment activities. As a result of a change in law effective as of August 1, 2007, an FBI is allowed to undertake project development activities with respect to real estate for its own portfolio.

Comparison main aspects FBI and VBI	
FBI	***VBI***
subject to 0% corporate income tax	***exempt from corporate income tax***
subject to dividend withholding tax	***exempt from dividend withholding tax***
portfolio investments (incl. Dutch real estate)	***financial instruments (no Dutch real estate)***
distribution requirement	***no distribution requirement***
finance limitations	***no finance limitations***
shareholders' requirements	***no shareholders' requirements***
board limitations	***no board limitations***
application of tax treaties (allowance for foreign withholding tax)	***no application of tax treaties (no allowance for foreign withholding tax)***

It must distribute its profits (except for capital gains) to its shareholders annually within 8 months after the end of its fiscal year.

Its debts may not exceed (i) 60% of the fiscal book value of its real estate assets, and (ii) 20% of the fiscal book value of its other assets.

It must meet certain requirements with respect to its shareholders. These are rather complicated, and impossible to explain in a few words. Generally, the shareholder base must be diversified, i.e. it is generally not possible to have just one shareholder.

There are certain limitations with respect to management board members and supervisory board members.

The VBI is a very attractive type of fund for (pooling) investments in listed shares and bonds

The VBI Regime

As of August 1, 2007, the VBI has been introduced in the Netherlands. A VBI is a company fully tax exempt from Dutch corporate income tax; it furthermore does not need to withhold dividend tax on distributions. The VBI is a very attractive type of fund for (pooling) investments in, for example, listed shares, bonds and other financial instruments. It cannot be used for investments in Dutch real estate. It can be owned by individuals as well as corporate entities. It can be owned by two or more shareholders.

The VBI is introduced to improve the Dutch business climate both for resident as well as non-resident investment funds, and to compete with comparable regimes in for example Luxembourg (like the SICAV).

A VBI is not subject to any distribution requirements, financing limitations or shareholders' requirements (apart from the implicit requirement that the VBI should have at least two shareholders). Furthermore, compared to for example a Luxembourg SICAV, a VBI is subject to less regulatory requirements.

Since a VBI is fully exempt from Dutch corporate income tax, it will not be considered to be resident in the Netherlands for tax treaty purposes. As a consequence a VBI cannot invoke the application of tax treaties concluded by the Netherlands. This means that it generally cannot claim back foreign withholding tax on dividends or interest payments paid to the VBI. A VBI will be advantageous mainly with respect to investments of which the proceeds are not subject to foreign withholding tax.

Conditions of VBI

To obtain the VBI status, a company needs to meet the following conditions:

It must have the legal form of a Dutch public limited company (naamloze vennootschap or 'NV'), a mutual fund, or, provided that certain conditions are met, a comparable foreign legal form.

It needs to obtain approval from the Dutch tax authorities.

The objective and the actual activities must exclusively consist of investing in financial instruments. The term financial instruments is defined in the Dutch Financial Supervision Act. It includes marketable shares and bonds, commodity derivatives, forward contracts, swaps, and options on aforementioned instruments. Please note that a VBI is not allowed to invest in Dutch real estate, nor in rights which are directly or indirectly connected to Dutch real estate.

It must have a diversified risk. This requirement intends to prevent that the VBI is used by a particular company to transfer regular business profits to the tax-exempt VBI regime. It is noted that it is possible to set up recognized fund structures such as umbrella funds, fund-of-funds, and feeder funds, even in case such funds invest in only one other fund.

It must be open-ended. In other words, the shareholders must have the opportunity to sell their shares to the VBI. The Ministry of Finance has indicated that a semi-open-ended fund is sufficient. It should be relatively easy to be a semi-open-ended fund, if a shareholder can sell its shares at 1 or 2 fixed moments per year.

A VBI will be advantageous for investments where proceeds are not subject to foreign withholding tax

It is generally assumed that a VBI must have at least two shareholders. This can include one (very) small shareholder which belongs to the same group as the other (large) shareholder.

Dependent on the specific circumstances of each situation, it could be investigated whether the use of an FBI or a VBI would be attractive in a particular case.

The tax lawyers of CMS Derks Star Busmann can provide assistance in this and in other matters related to corporate tax law, international tax law and real estate, together with lawyers and civil-law notaries at CMS Derks Star Busmann and CMS - The alliance of major European law firms. ■

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