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***KPMG Meijburg Caribbean***

# **Curaçao's future position in the international tax arena**

**January 2012**

Seminar's subject is **“Practical interpretation of the Tax Plan 2011”**

Despite a number of recent and expected tax plans and the introduction of several new products, it is highly unlikely that the international financial services (IFS) industry will benefit from that without an international tax treaty (DTA) network!

This should not only be a big concern for CIFA and the other IFS organizations, but also for the young country of Curaçao because of the significant revenues and positive side effects involved.

Topics of this presentation:

- Curaçao's position in the past
- Curaçao's alternatives for expiring offshore regime
- Curaçao's products and tools for international tax planning
- Curaçao's tax position vis-à-vis the Netherlands
- Curaçao's tax position vis-à-vis other countries
- Recommendations

Curaçao's (former Netherlands Antilles) IFS industry has gone from unprecedented success in the previous century to a steady decline in international business as from 2001.

This decline has / had several reasons such as:

1. EU (Primarolo report) and OECD pressure;
2. Reluctant and even uncooperative position of the Netherlands;
3. Rise of several competitive jurisdictions (i.a. within the EU); and
4. A lack of DTA's with other countries.

Most interesting however is to determine which reasons were within Curaçao's own control. This determination should be used to **do things differently now and in the future**. Some reasons are:

1. Curaçao has not acted upon international developments;
2. Lack of (pro)active attitude due to insufficient cooperation private and public sectors;
3. Curaçao has not sufficiently marketed / promoted itself abroad, competitive jurisdictions did.

Nevertheless, Curaçao still has a good financial sector with skilled people and a solid infrastructure to service international financial business.

Curaçao's offshore regime will expire in 2019!

Until now, no formal confirmations have been published by the government on what will happen after 2019. Apart from offshore companies, this lack of future prospect is especially problematic for offshore banks. It is now 2012 and it is very disturbing that there still is no clarity on the post 2019 era.

**“In our business, uncertainty makes a hard sell”**

Potential alternative for the lapsing offshore regime → Introduce a new regime which is even more favorable than the current offshore regime. Characteristics potential new regime

1. Open to resident and non resident shareholders;
2. Business of companies enjoying this new regime should be focused on clients/business abroad;
3. By requiring sufficient substance, regime will be respected internationally and will stimulate local employment.
4. With a tax rate scale of between 1% and 2.5%, it will be competitive with the Barbados IBC regime (Barbados even has more than 20 DTA's); Zero tax rate not desirable because of non-DTA application.

Low tax rates are no longer a problem according to the OECD, provided that there is transparency in combination with the exchange of information to other countries.

Curaçao currently has a number of tools / products for international tax planning

- Tax Exempt Company (*Vrijgestelde Vennootschap*)
- Private Foundation (*SPF*) / Trust
- Transparent corporation
- E-zone regime
- Offshore regime
- Ruling practice within NFR
- Tonnage regime
- Renewed Civil Code creating excellent legal infrastructure for international parties

## Conclusion:

We have a number of great tax planning tools, however, due to insufficient marketing in the past and especially the lack of DTA's, it has not generated the amount of business it ought to. Therefore, we must take action now!

## The past → the currently existing BRK

Previous renegotiations for the Tax Arrangement for the Kingdom (**BRK**) did not result in a favorable outcome for Curaçao

The Netherlands have been reluctant to meet Curaçao's wishes and promises made by the Netherlands were not kept, mainly with respect to Dutch WHT on dividends.

The current BRK still contains an 8.3% WHT on dividends. Capital gains tax is attributed to the country of the alienator (seller).

A number of other competitive jurisdictions have a more favorable tax treatment vis-à-vis the Netherlands. Consequently, many offshore companies have been liquidated or transferred (away) from Curaçao during recent years.

New Curaçao/Dutch structures with Dutch Cooperatives generated some level of new business the last couple of years.

However, big change in the Netherlands per 2012 is that dividend WHT has been extended to distributions by Dutch Cooperatives in case of 'abusive situations'. A situation might be abusive if the Coop is interposed with the goal to avoid dividend WHT. The foregoing will be the case for passive holding structures.

## The present → the negotiated guidelines for the new BRK

The BRK is currently under renegotiation and the importance for the IFS sector on Curaçao is evident. In December 2011, guidelines of the new BRK have been published by the Dutch Ministry of Finance.

### Dividends

- Standard WHT rate will remain **15%**.
- WHT rate lowered to **5%** for existing and new structures if the Curaçao parent company holds at least 25% of the shares → this rule will remain applicable until 2019 or until a 'level playing field' is created for Curaçao in relation to other DTA partners of the Netherlands (with respect to the below explained anti-abuse rule).
- WHT rate of **0%** will be available for active parent companies. Although no specific guidance has been published on what active companies are, a 'limitation on benefits' rule will be implemented (LOB examples are included in the Netherlands' DTAs with i.a. Barbados, Hong Kong, Japan and US).
  - Companies with an active trade or business or companies quoted on a qualifying stock exchange usually qualify under LOB clauses.

**The present → the negotiated guidelines for the new BRK – *Continued***

## **Capital gains / anti-abuse**

Taxation on capital gains realized with a share transfer will remain attributed to the country of the alienator (seller).

However, the Netherlands specifically preserves the right to levy corporate income tax on transfers of Dutch participations by Curaçao parent companies in 'strictly artificial structures', which have the avoidance of dividend WHT as a (main) goal.

According to the guidelines, the possibility for the Netherlands to effectively invoke this anti-abuse rule in the BRK will not apply until 2019, or until a 'level playing field' is created for Curaçao in relation to other DTA partners of the Netherlands.

## The future → the new BRK

It is envisaged that the new BRK should enter into force per January 1, 2013. The guidelines published in December 2011 should be succeeded by further negotiations to come to a new BRK.

Although the negotiation results so far have not been bad, a better result on the taxation of dividends should be achieved so that Curaçao can actually compete with other jurisdictions, such as Luxembourg and Malta.

Given the Netherlands' own position as a favorable jurisdiction for international tax planning, it can only benefit from having a favorable BRK. Otherwise, leakage of business from the Netherlands to other competitive jurisdictions, such as Luxembourg and recently the UK, will increase.

Recently, the Supreme Court had doubts on its previous decisions and raised questions to the EU Court of Justice on whether the 8.3% dividend WHT on distributions by a Dutch subsidiary to a Curaçao parent company is permitted under the EU principle of 'free movement of capital'. Under circumstances, this EU principle can also apply to third countries, as well as to Overseas Countries and Territories (or "LGO's"). The fact that the Supreme Court raised these questions gives Curaçao additional arguments to demand a real 'level playing field' from the Netherlands with respect to Dutch dividend WHT.



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# Curaçao's position vis-à-vis the Netherlands - V

## The future → the new BRK – *Continued*

In order to maintain initiative (which is imperative to claim further advantages), Curaçao should preferably resume the negotiations before the end of next month. For success, the negotiations should be conducted in a purely rational and businesslike manner, not on the basis of emotions or otherwise disturbing (non-tax related) issues from the past.

A new BRK along the mentioned 'guidelines' will not be thrilling for our business, but it is a step in the right direction.

Because new international business via the Netherlands will not replace the already lost business, it is absolutely necessary that DTA's with other countries will be concluded.

Tax is our business

To stop the further decline of Curaçao's offshore business and to stimulate new international business, Curaçao needs to conclude DTA's with other countries now!

Often heard: "***Curaçao must be a HUB between LatAm, EU and US***".

From an international tax point of view, this cannot be realized without DTA's. A hub function for other sectors, such as logistics and transport, will be significantly optimized if DTA's are in place.

What about the **competition**? → For example, Barbados has 23 DTA's in place and 3 more under negotiation. In recent years, Panama concluded 12 DTA's and 9 are under negotiation.

In the past, DTA negotiations have been commenced and initiated with the following countries.

## Previous DTA negotiations by Curaçao

Barbados	Colombia	Ecuador
Jamaica	Mexico	Spain
Suriname	United Arab Emirates	Venezuela

Up until today, **no DTA's** have been concluded with any of these countries.

In the meantime, a large number of **TIEA's** have been concluded by Curaçao. Although this satisfies organizations such as the OCED, TIEA's alone will hardly stimulate new international business.

## Countries to potentially (re)commence DTA negotiations

Australia	Barbados	Brazil	Canada	China
Colombia	Cuba	Ecuador	India	Mexico
Panama	Peru	Portugal	Russia	Spain
Suriname	Switzerland	United Arab Emirates	USA	Venezuela

In order to commence DTA negotiations **fast**, Curaçao should preferably appoint a **High Commissioner** who **(i)** has broad experience in the international tax (and DTA) practice, **(ii)** is commercial, and **(iii)** who is an excellent negotiator. Such High Commissioner should be accompanied by a small team in which these qualifications are united.

The High Commissioner should be given a **full mandate** from the Curaçao government (e.g., MinFin) as well as from the IFS sector. Input may be given but independence is required for success.

Model DTA's are already being drafted at this moment by the TFFT → contents OECD conform.

If the new BRK between Curaçao and the Netherlands is finalized soon, Curaçao can immediately use this in its negotiations with other countries. The Netherlands should also be used to 'open doors' abroad.

In anticipation of DTA's with other countries, simultaneous efforts should be made to get Curaçao off black lists (where applicable).

## Curaçao → Get serious and (hyper)active now!

- Introduce / announce a replacement regime for the expiring offshore tax regime as soon as possible → Think of the Barbados IBC regime with 'substance requirements'.
- Resume the BRK negotiations as soon as possible so that the initiative on specific subjects / wishes lies with Curaçao.
- Appoint a High Commissioner and a small professional team to commence DTA negotiations with other countries and to get Curaçao off certain blacklists. Give this High Commissioner a full mandate from the public and private sector. Limited interference in the negotiation phase from these sectors will be key to success.
- Market / promote Curaçao abroad in the target countries / markets in a constructive manner → Small commercial and professional team with full mandate of public and private sector.

**Thank you for your attention!**

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