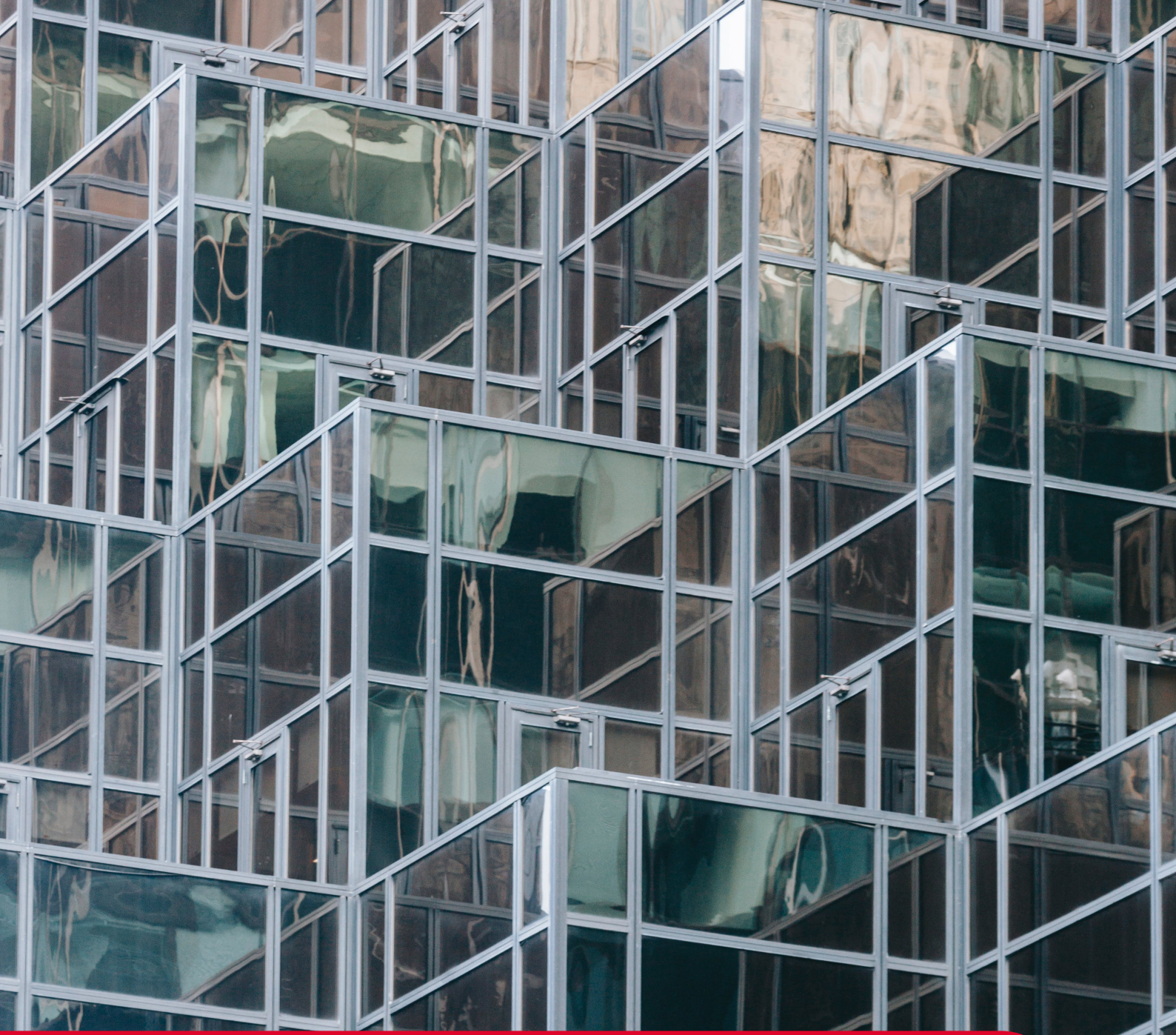

Moving your company across Dutch borders

2024

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Introduction

The reasons why companies relocate from one jurisdiction to another are diverse. For instance, a relocation of a company can be based on business considerations, personal circumstances of the stakeholders and/or legal and tax considerations.

Since the relocation of a company results in various legal and tax consequences in multiple jurisdictions, we recommend stakeholders to seek advice on the impact of a relocation before its implementation.

This document provides general information on the main Dutch legal and tax considerations of cross-border relocations of a Dutch private limited liability company (B.V.) and comparable non-Dutch private limited liability companies from and to The Netherlands. The first chapter summarizes the key steps of a cross-border relocation from a Dutch legal perspective. Thereafter, in the second chapter, key characteristics of a cross-border relocation from a Dutch tax perspective are described.

Dutch legal aspects of moving your company across borders

This chapter highlights the key steps from a Dutch law perspective of a cross-border conversion of Dutch private limited liability company (B.V.) into another company with share capital governed by the laws of another EU Member State and vice versa.

Conversion in this case means that the legal form and the jurisdiction which laws govern such a company are changed, while this entity continues to exist (i.e. without dissolution and/or liquidation) and retains its legal personality. The conversion of a Dutch private limited liability company into a company that shall be governed by the laws of another jurisdiction is typically referred to as an outbound conversion and the reverse situation as an inbound conversion. This memorandum is limited to the conversion of a private limited liability company, the most common legal form.

On 1 September 2023, the Act implementation directive on cross-border conversions, mergers and divisions (hereinafter: "the Act") entered into force, providing a Dutch legal framework for the cross-border conversion. The Act implements Directive (EU) 2019/2121, also referred to as the European Mobility Directive. Before the Act entered into force, cross-border conversions were possible based on the case-law of the European Court of Justice and in the absence of a legal framework, Dutch legal practitioners sometimes struggled with the applicable rules. The Act, inter alia, pertains to the cross-border conversion of a company with share capital that is established under the laws of the Netherlands into a company with share capital that shall be governed by the laws of a different EU Member State or the laws of a different member state of the European Economic Area, and vice versa. It provides for a set of rules in relation to cross-border conversions. The process regarding cross-border conversions is divided into three phases: (1) the preparatory phase, (2) the decision-making phase and (3) the execution phase.

Outbound cross-border conversion

In case a Dutch private limited liability company intends to convert into a limited liability company governed by the laws of another EU Member State, the following steps should be implemented from a Dutch law perspective:

Preparatory phase

1. Drafting a cross-border conversion proposal in which the management board of the company (the "**Management Board**") proposes to convert the company.
2. Drafting supervisory board resolutions to approve the cross-border conversion (proposal), if applicable.
3. Appointing an auditor in order to draft an auditor's report (if applicable).
4. Drafting a notice in which the Management Board informs the shareholders, creditors and the works council (or if there is no works council: the employees) of the company that they may submit their comments on the cross-border conversion proposal.
5. Drafting a declaration of the shareholder(s) of the company (the "**Shareholder(s)**") in which the Shareholder(s) approve(s) that (i) no written

explanation to the cross-border conversion proposal and (ii) no auditor report shall be drafted.
6. Drafting a written explanation to the cross-border conversion proposal in which the Management Board explains the reasons for the conversion and the consequences thereof for the employees, if applicable.
7. Execution of the cross-border conversion proposal by each managing director of the Management Board.
8. Execution of the aforementioned supervisory board resolutions, if applicable.
9. Execution of the aforementioned declaration of the Shareholder(s).
10. Filing the cross-border conversion proposal, the report by the auditor (if applicable) and the notice with the Dutch trade register of the Dutch Chamber of Commerce.
11. Filing the cross-border conversion proposal, the report by the auditor (if applicable), the notice and any comments thereon, the written explanation(s) (if applicable) and any written recommendations or comments that have been submitted by the works council, participation council or association of employees, at the office of the company or have been made accessible by electronic means.
12. Announcing the filings in the Dutch Government Gazette (*Nederlandse Staatscourant*).
13. One day after the announcement the three months' waiting period commences.

Decision-making phase

14. Drafting the notarial record of the general meeting in which shall be resolved to, inter alia, (i) convert the company, (ii) amend its articles of association and (iii) authorize each managing director and/or each employee of the involved notary office to execute the notarial deed of conversion and amendment to the articles of association of the company. Further, the Shareholder(s) herein confirm(s) (i) to waive their rights (if any) pursuant to article 2:335i of the Dutch Civil Code, (ii) that the one month waiting period as set forth in article 2:335h paragraph 2 of the Dutch Civil Code has been taken into account and (iii) that no securities (*zekerheden*) or guarantees (*waarborgen*) shall be provided for.
15. Drafting a declaration of the Management Board stating, inter alia, that no significant changes in the circumstances have occurred since the execution of the cross-border conversion proposal.
16. Drafting (a) power(s) of attorney from the Shareholder(s) to each employee of the involved notary office to, inter alia, attend and vote at the general meeting, if desired.
17. Drafting (an) authority statement(s) in relation to the aforementioned power of attorney, if applicable.
18. Execution of the aforementioned power(s) of attorney, if applicable. Legalization of the signature(s) and having the document provided with an apostille may be required.
19. Execution of the aforementioned authority statement(s), if applicable.
20. Collect a statement from the Dutch Chamber of Commerce that the cross-border conversion proposal and the aforementioned declaration of the Shareholder(s) have been deposited with the Dutch trade register for three months after the three month's waiting period has ended.
21. Collect a statement of non-opposition from the Dutch court, stating it has not received any objections to the cross-border conversion.

Execution phase

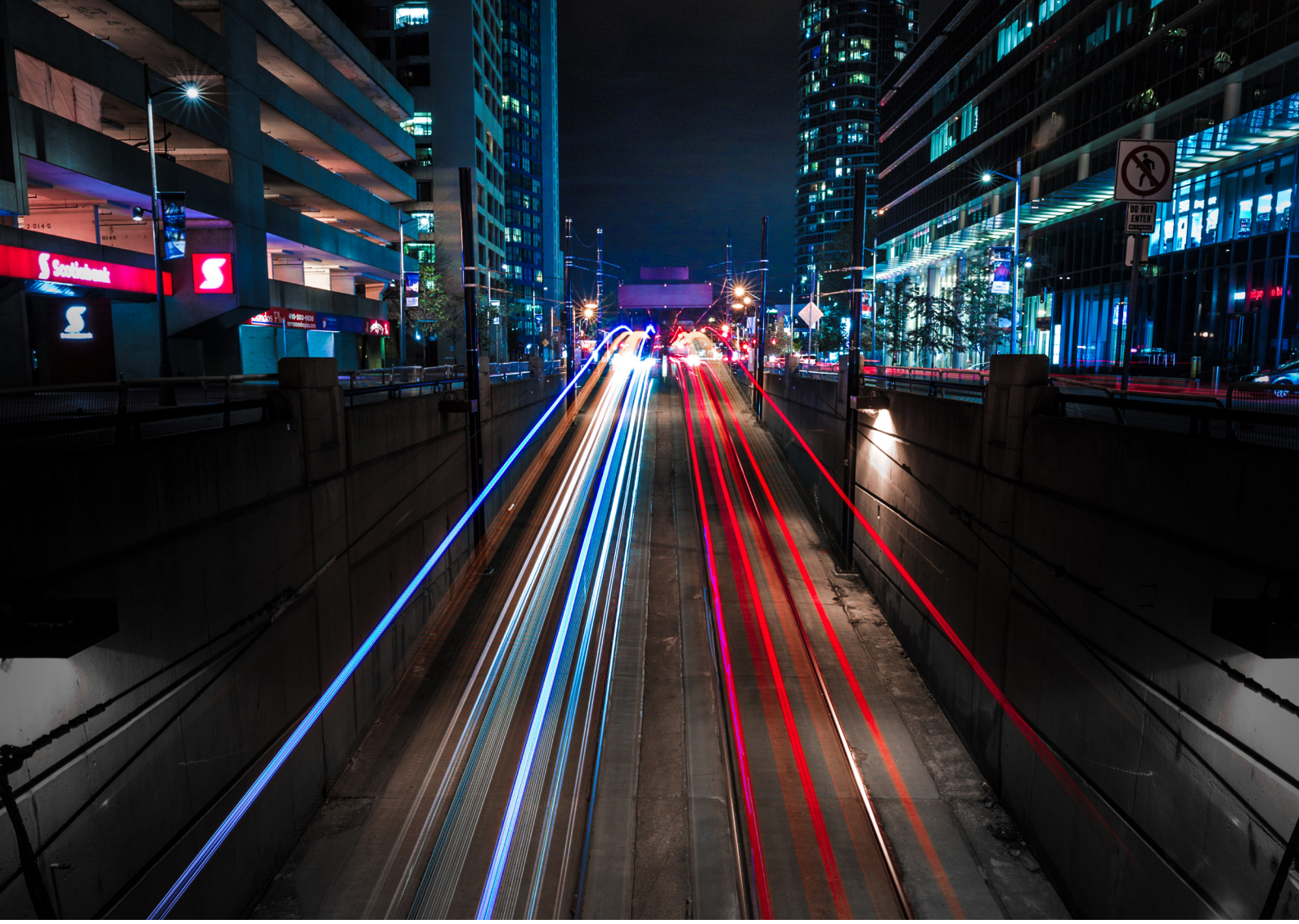
22. Drafting the notarial deed of conversion and amendment to the articles of association of the company, which contains the articles of association as they will read after effectuation of the conversion.
23. Drafting a legal opinion to be executed by a lawyer admitted to the bar of/civil-law notary in the jurisdiction the laws of which shall govern the company after the conversion stating, inter alia, that the articles of association as included in the (draft) notarial deed of conversion and amendment to the articles of association are in compliance with that jurisdiction.
24. Execution of the aforementioned legal opinion by a lawyer admitted to the bar of/civil-law notary in the jurisdiction the laws of which shall govern the company after the conversion.
25. Execution of the aforementioned declaration of the Management Board.
26. Execution of the aforementioned notarial record of the general meeting (the resolution to convert the company has to be adopted by at least two/third of the votes cast).
27. Drafting a notarial statement upon request which includes, inter alia, that the procedural requirements have been complied with for all

resolutions which are required under the (corporate) laws applicable in the Netherlands and the articles of association of the company, for the effectuation of the cross border conversion, and that in all other respects the (corporate) laws applicable in the Netherlands have been complied with in relation to the cross-border conversion;
28. Execution of the aforementioned notarial deed of conversion and amendment to the articles of association of the company before a civil-law notary.
29. Execution of the aforementioned notarial statement and the filing thereof with the Dutch trade register of the Dutch Chamber of Commerce.
30. The company will have to be registered in the relevant trade register of the inbound jurisdiction (often a so-called certificate of continuance is issued by the Registrar of the inbound jurisdiction).
31. Upon receipt of proof of registration in the inbound jurisdiction, the involved notary office shall request the Dutch Chamber of Commerce to deregister the company from the Dutch trade register and to issue a statement to that effect. Often such statement together with a true copy of the Dutch notarial deed need to be presented to the foreign Registrar after which a permanent certificate of continuance is issued.

The cross-border conversion shall take effect in the manner and on the date determined by the laws of the inbound country.

Inbound cross-border conversion

In case a limited liability company that is governed by the laws of another EU Member State intends to convert itself into a Dutch private limited liability company, the following Dutch legal steps have to be taken – besides the required steps from the departing EU Member State:
1. Drafting a Dutch notarial deed of conversion and amendment to the articles of association.
2.Drafting a resolution to execute the aforementioned Dutch notarial deed and power of attorney to the notary office to execute the aforementioned Dutch notarial deed.
3. Drafting a legal opinion stating, inter alia, that the aforementioned resolution and authorization/ power of attorney are in compliance with the laws of the outbound jurisdiction and each employee of the involved notary office is authorized to execute the aforementioned Dutch notarial deed.
4. Drafting a certificate of good standing.
5. Collecting a written statement of the judicial, administrative or other authorized authority, designated for that purpose by the EU Member State of departure, from which it appears that all acts and formalities required prior to the cross-border conversion under the laws of the outbound jurisdiction have been complied with.
6. Drafting (a) data card(s) for the managing director(s) of the company after entering into effect of the cross-border conversion (provided the managing director(s) is/are natural persons).



7. Collecting a true copy of the passport and a recent utility bill/bank statement evidencing the residing address of each managing director of the company after entering into effect of the cross-border conversion (provided the managing director(s) is/are natural persons), and/or a recent extract from the trade register where a corporate entity is registered, provided that a managing director (of the company after entering into effect of the cross-border conversion) is a corporate entity. The same applies mutatis mutandis in case the company shall have a sole shareholder after entering into effect of the cross-border conversion.
8. Execution of the aforementioned resolution and authorization of/power of attorney to each employee of the involved notary office to execute the aforementioned Dutch notarial deed.
9. Execution of the aforementioned legal opinion by a lawyer admitted to the bar of/civil-law notary in the outbound jurisdiction.
10. Execution of the aforementioned certificate of good standing.
11. Execution of the aforementioned data card(s), if applicable.
12. Execution of the aforementioned notarial deed of conversion and amendment to the articles of association before a civil-law notary.
13. Registration of the company and its managing director(s) as well as its sole shareholder (if applicable) with the Dutch trade register at the Dutch Chamber of Commerce.
14. Preparation of a (shareholders') register of the company, to be signed by its Management Board.

The cross-border conversion shall enter into effect on the (calendar) day following the day on which the notarial deed of conversion and amendment to the articles of association has been executed before a Dutch civil-law notary.

How can BUREN help?

We have extensive experience with cross-border restructurings, including conversions, and have assisted many clients in recent years, both with outbound and inbound transactions. Our experience also entails relocating Dutch companies to non-EU jurisdictions. Our multi-disciplinary team – consisting of tax advisors, lawyers and (candidate) civil-law notaries - is ready to advise.

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Dutch tax aspects of moving your company across borders

This chapter highlights from a Dutch tax law perspective some key characteristics of a possible relocation of Dutch private limited liability companies (B.V.'s) and comparable non-Dutch private limited liability companies, both inbound as well as outbound. From a Dutch tax perspective, a relocation takes place by changing the place of effective management and control either from the Netherlands abroad (i.e. outbound relocation) or from abroad to the Netherlands (i.e. inbound relocation). A relocation can take simultaneously place with a change of the legal form of the limited liability company, a socalled cross-border conversion.

Outbound relocation

Dutch corporate income tax aspects

In case of a change in tax residency of a Dutch tax resident company (for the purposes of the Dutch corporate income tax (**CIT**) Act or for the purposes of a treaty for the prevention of double taxation), all assets of the relocating company should be set at their fair market value at the moment immediately prior to the relocation. As a result, any gains realized by the taxpayer in this respect (i.e. hidden reserves, goodwill and/or currency exchange gains) will be included in its taxable income for CIT purposes, unless specific rules (such as the participation exemption or merger facility) apply. In 2024, the general CIT rate amounts to 25.8% (and 19% for the first EUR 200,000 of taxable income).

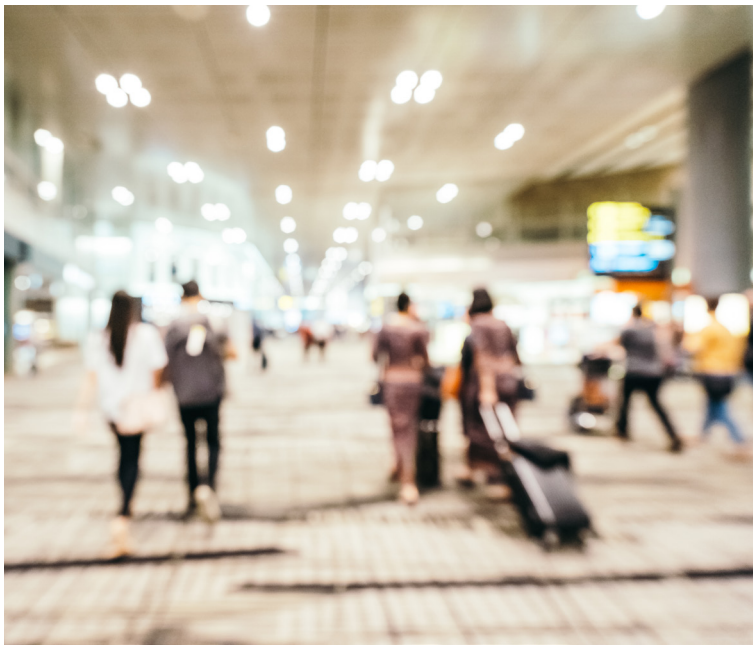
Dual tax residency

If a legal entity has been incorporated under Dutch law, this entity is deemed to be a tax resident of the Netherlands for Dutch tax purposes (with some exceptions). The Dutch tax authorities take the position that changing the place of effective management or converting a Dutch legal entity into another legal entity does not alter this, even if the entity is converted into an entity under foreign law. This implies that the foreign company would be required to file Dutch CIT returns after a conversion. If the other country will impose taxation based on actual tax residency, this will in principle lead to double taxation, unless there is protection based on a tax treaty.

Upon request, a Dutch tax inspector can decide to no longer require a relocated company to file Dutch CIT returns if he or she considers that there is no longer a levy interest. Note that the decision may be subject to certain notification conditions.

Dividend withholding tax - Conditional final settlement

A member of parliament has submitted a draft bill introducing a conditional final settlement of the dividend withholding tax (**DWT**) obligation. Since the Dutch government does not support this bill, it is likely that this draft law will not be enacted. If adopted, cross-border restructurings (including cross-border changes of seat, mergers, share mergers and de-mergers) by a Dutch resident company (Agent) would be subject to DWT under certain conditions. The DWT will be claimed if after the cross-border conversion the Agent performs a distribution (such as a dividend distribution, liquidation proceeds etc.). Based on the legislative proposal, a conditional final settlement of DWT will only be imposed insofar the Agent:



a) has profit reserves exceeding EUR 50 million; and
b) the profit reserves end up in a jurisdiction that would not impose a dividend withholding tax claim. This can be either a jurisdiction which does not levy withholding tax on dividend distributions or a jurisdiction which provides for a step-up in base.

The conditional final settlement of DWT will not apply insofar the shareholder of the Agent is eligible for the DWT exemption. The current legislative proposal has retroactive effect and would apply from 18 September 2020 onwards. In 2024, distributions by an Agent are in principle subject to 15% DWT.

Personal joint and several liability of persons involved with the transfer of the effective management
Obviously, the tax authorities would not accept that Dutch tax payers could effectively escape from taxation by way of a relocation or conversion. To prevent this the Collection of State Taxes Act (*Invorderingswet*) stipulates that any person who is responsible for the change of the tax residency (including the management board of the company) is jointly and severally liable for CIT and Dutch DWT due, unless it can be substantiated that the non-payment cannot be blamed to this person. Some authors take the position that this joint and several liability also includes taxation due after the relocation.

Anti-abuse rules and other tax risks
There are several other rules which may apply and which may lead to adverse tax consequences including active disclosure obligations. For instance, certain investment allowances may need to be repaid upon (deemed) divestment, possibly rollover facilities may be reversed in case of discontinuation of activities etc. In addition, it should be verified whether the relocation qualifies as reportable transaction(s) under the laws implementing the EU Directive regarding Mandatory Disclosure (commonly known as the DAC6).

Inbound relocation

Dutch corporate income tax aspects
As per the date of the relocation of a company incorporated under non-Dutch law to the Netherlands, all assets and liabilities of the entity should be set at market value, except for self-created goodwill. The fair market value of the assets and liabilities is in practice often substantiated by a valuation report prepared by a valuation expert which can be used as evidence. After the relocation, the company will be subject to CIT under the rules of the Dutch CIT Act. All income realized by the company will be subject to Dutch CIT levied at the rate of 25.8% (19% on the first EUR 200,000 of taxable profits). Obviously, there may be exceptions, such as gains realized on assets to which the Dutch participation exemption or the Dutch object exemption applies.

If the relocating company would have a Dutch subsidiary, the question arises whether the relocation would lead to taxation of capital gains at the level of relocating entity under the non-resident CIT rules.

Certificate of tax residency
Only companies which are incorporated under Dutch law in practice automatically and unconditionally receive a tax residency certificate upon request. This means that the Dutch tax authorities may not be willing to issue a certificate of residency to a company incorporated under non-Dutch law unless it has a certain level of substance. This certificate of tax residence will only be provided if the company has fulfilled its CIT filing obligations and furthermore no other tax treaty jurisdiction has successfully claimed the company to be a tax resident of that country.

Tax position of shareholder
As a result of the relocation of a company incorporated under non-Dutch law to the Netherlands, the shareholder(s) may become subject to personal income tax (**PIT**), or to CIT if certain anti-abuse rules would apply (i.e. the non-resident CIT rules). Individual shareholders should be subject to 24.50% (for income up to and including EUR 67,000) and 33% (for income exceeding EUR 67,000) PIT in respect of income (e.g. dividends, capital gains) derived from a share interest of 5% or more in a certain kind of shares in a Dutch tax resident company. Any Dutch DWT paid can be credited against the Dutch PIT payable. Tax treaty application can provide for lower rates.

The acquisition price for Dutch tax purposes and the amount of capital for Dutch DWT purposes should be determined, subject to certain conditions.

Withholding taxes
After the relocation, distributions by the relocated company to its shareholders (e.g. dividends) are in principle subject to 15% Dutch DWT unless the DWT exemption would be applicable.

The Netherlands also levies a conditional withholding tax (**CWT**) on interest and royalty payments at a rate of 25.8% (rate of the year 2024). This tax is only levied on distributions (e.g. dividends) interest and royalty payments to affiliated companies in designated low tax jurisdictions (i.e. jurisdictions with a statutory CIT rate of less than 9% or those on the EU list for non-cooperative jurisdictions) and in hybrid situations. For 2024, the Dutch blacklist includes Anguilla, Antigua and Barbuda, Bahama's, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Fiji, Guernsey, Guam, Isle of Man, Jersey, Palau, Panama, Russia, Samoa, Trinidad and Tobago, Turkmenistan, Turks and Caicos Islands, the Seychelles, the US Virgin Islands, US Samoa and Vanuatu.

CWT on distributions will be levied alongside the already existing DWT, although the rates and scope of both taxes differ. The CWT rate is 25.8%. An anti-cumulation rule ensures that cumulation of CWT and Dutch dividend tax is not possible and that the effective tax levied does exceed 25.8%.

VAT aspects
After the relocation the company may be required to file VAT returns. Under Dutch VAT law, in principle any person or entity can qualify as an 'entrepreneur' (taxable person) if they act independently and perform (preparatory acts to) economic activities on a continuing base, whatever the purpose or result of those activities. Entrepreneurs acting as such are, in principle, required to file VAT returns and are entitled to a refund of (input) VAT charged, provided they are engaged in VAT taxable transactions within the territory of a Member State of the European Union.

If you have any questions regarding the above, please do not hesitate to contact us.

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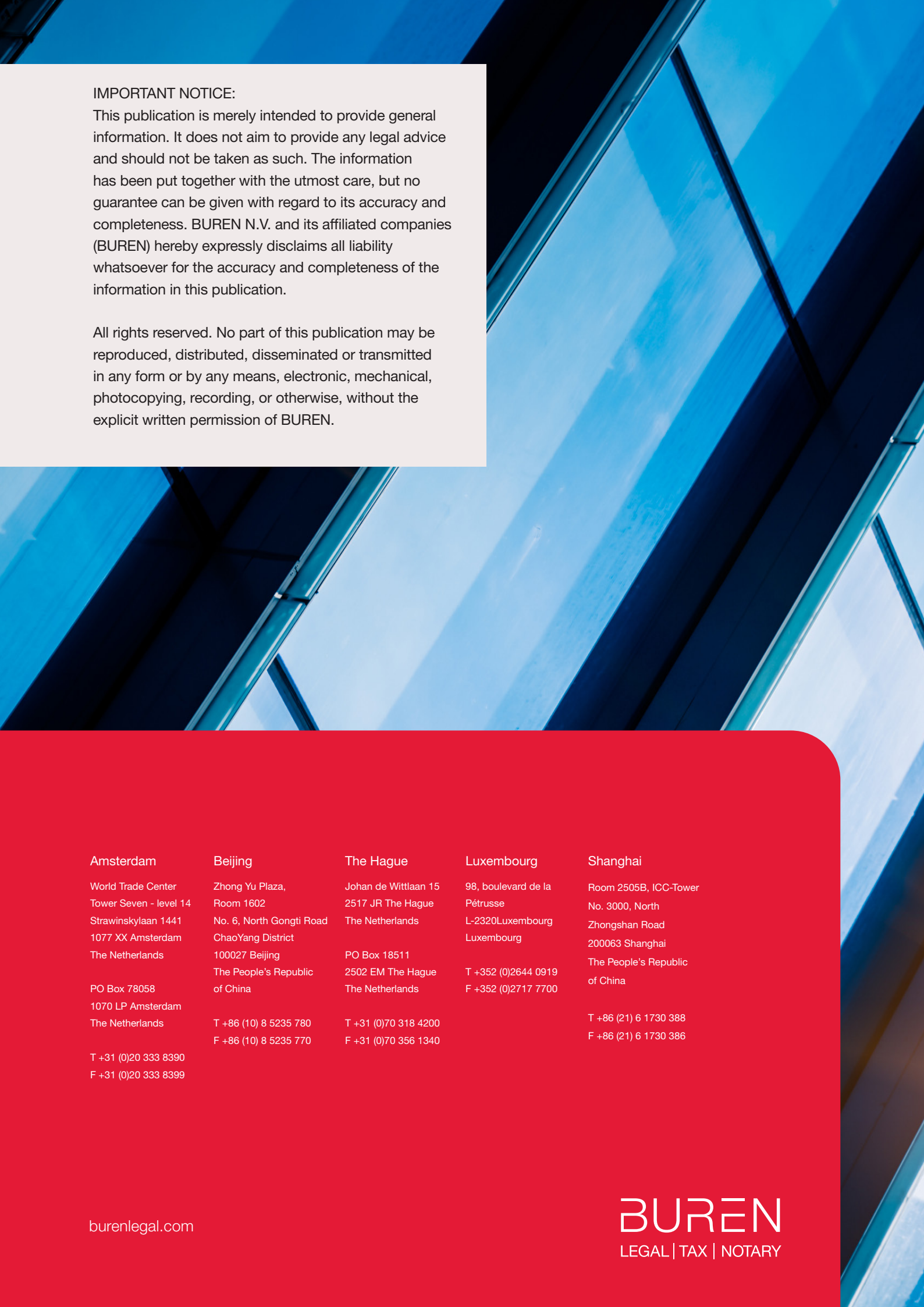

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