

# REAL ESTATE RENTAL: REGULAR ASSET MANAGEMENT OR ACCOMMODATION ENTERPRISE?

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## INTRODUCTION

In March 2022 the Curaçao Minister of Finance announced that in order to combat sales tax evasion, new legislation should be introduced in which online rental platforms (e.g. Airbnb, Booking, Micazu) shall be assigned as collectors and remitters of sales tax if they facilitate the rental<sup>1</sup> of accommodations in Curaçao. Even though as of the time of writing this article no draft legislation related to the topic has been presented to Parliament, it can already be anticipated that such legislation can provide the Tax Authorities with information for imposing additional tax assessments, such as i.a. income tax and its subsequent collection. Sales tax returns and other disclosure requirements<sup>2</sup> could provide the Tax Authorities with new data that can reveal the nature of the activities performed in relation to the rental activities.<sup>3</sup> This data can in turn be used as contra-indication for imposing additional assessments on (non-) resident taxpayers. Given that differentiation between regular asset management and entrepreneurship is surrounded with uncertainty, this contribution aims to provide certain pointers to assist private accommodation landlords to better ascertain their income tax position.<sup>4</sup>

## KEY PREMISE

For Curaçao income tax purposes, income derived from immovable property can be classified as either proceeds from: (1) regular asset management or (2) accommodation enterprise. Based on the internationally recognized situs-principle, Curaçao levies income tax on income derived from immovable property located in Curaçao. Conversely, where a permanent establishment is deemed present, Curaçao levies income tax on income derived from a fixed place of business that actively partakes in its economy. Thus, (non-)residents<sup>5</sup> who own and rent accommodations located in Curaçao are liable for income tax for the income derived from these properties. It is important to differentiate between the two sources of income, considering that the qualification of the activities in either category (1) or (2) will ultimately determine the income tax implications.



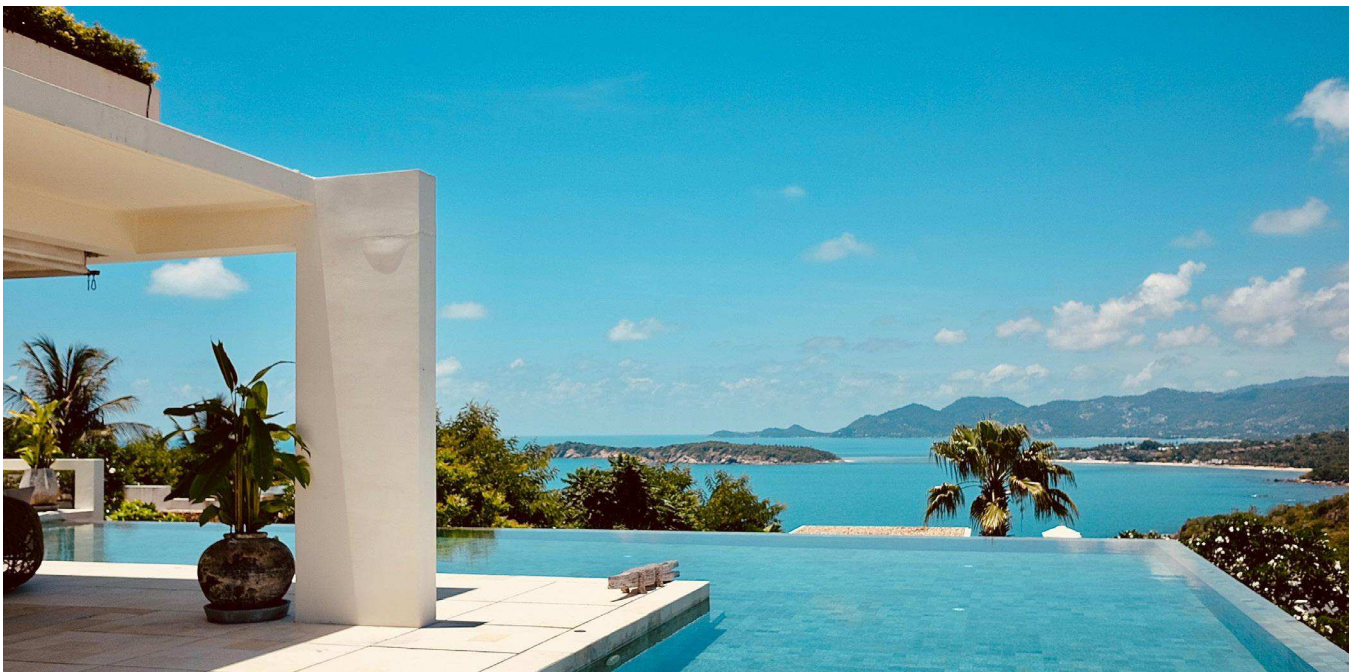
## PROCEEDS FROM REGULAR ASSET MANAGEMENT

Income is classified as proceeds from regular asset management<sup>6</sup> if the rent is merely the compensation for contractual usage of an asset. The immovable property is the proverbial fruit-bearer, since value is not being created but the rental income is derived from the asset itself. Only certain costs can be deducted from the gross proceeds, such as resident charges. After the deduction of these costs, a fixed 65% of the proceeds minus interest and costs arising from loans pertaining to the asset shall be subject to tax.<sup>7</sup> The fixed 65% currently acts as a de facto tax stimulus for private real estate investors, as the remaining 35% is excluded from taxation. The following example can help illustrate this notion.

### Example

An individual owns and rents out several properties with a total market value of NAf 850,000. The resident charges amount to NAf 10,000. The interest paid on a loan to acquire the properties amounts to NAf 16,000. The properties are rented for residential purposes for longer than 1 year and the gross proceeds amount to NAf 100,000 per year.

*The rental activities do not go beyond regular asset management, as long-term rental brings about less managerial tasks than short-term rental would.<sup>8</sup> The labor performed in the scope of the rental activities is ought to be aimed at the conservation of the asset, thus also not going beyond regular asset management.<sup>9</sup> After the deduction of resident charges, 35% of NAf 90,000 is tax free. The income tax due on 65% of NAf 90,000 amounts to NAf 4,550 (rounded off). The rental income is merely the consideration for the contractual usage of the asset.*



## PROCEEDS FROM AN ACCOMMODATION ENTERPRISE

The exploitation of real estate can only be classified as an enterprise if the profitability is the result of labor that, given its nature and extent, is unmistakably aimed at achieving a higher yield from the asset than would usually result from regular asset management. A direct link is required between the labor performed and the intended return. To be more specific, the labor performed in the scope of the rental activities should be aimed at the creation of added value in addition to the income generated by the immovable property.

If the exploitation is classified as an enterprise, more costs can be deducted than would be the case if the income is deemed as proceeds from regular asset management.

### Example

An individual rents out several apartments to tourists (short-stay respectively vacation rental). As part of the rental arrangement, the host is tasked with (the supervision of) the housekeeping; the bedsheets are regularly changed and brought to a launderette. Room-service as well as airport pick-up and drop-off are additional services provided.

*The generated income shall qualify as proceeds from an enterprise. The profitability does not stem from merely the contractual use of the asset but is the clear result of labor performed in the scope of the rental activities. The fact that the individual offers a 'self-composed' service on the market, implies the intent to create added value and consequently income. As the gross proceeds are classified as proceeds from enterprise, all costs relating to the business can be deducted and the resulting net profit shall be subject to taxation.*

## PRACTICAL TOOLS

As most literature on the matter suggests, the qualification of rental income into the two categories of income is casuistic. Nevertheless, case law provides certain pointers to the relevant facts that need to be considered. These include but are not limited to:

### **The duration and frequency of the activities**

As opposed to long-term rental, sustained short-term rental seems to give rise to more labor-intensive activities than are performed in the scope of regular asset management. Furthermore, please note that long-term<sup>10</sup> rental results in sales tax exemption, which could result in less contra-information.

## The existence of additional services rendered

The continued presence of non-negligible services rendered, whether discounted in the compensation or not, can be an indication as to the nature and extent of the labor performed in relation to the rental activities.

Take into account that additional contra-information can lead to possible assessments for other levies. Some of these levies (e.g. social insurance premiums) are modelled after the income tax, thus resulting *mutatis mutandis* in the same treatment of the income.

## FINAL REMARKS

As proposed in the introduction, assigning online rental platforms as collectors and remitters of sales tax could lead to additional tax assessments for income tax purposes, among others. If immovable property in Curaçao is rented out via an online platform we recommend consulting a tax advisor, as the duration and frequency of the rental activities combined with the presence of additional services provided in relation to the rental activities are relevant factors when determining the income tax position.



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<sup>1</sup>Note that the term “rental” of real estate is used for short-term (shorter than 1 year) and “leasing” is used for longer than 1 year. For the purposes of this article, the term “rental” shall be used referring to both short-term rental as well as long-term rental.

<sup>2</sup>Article 45 of the General Tax Ordinance (in Dutch: Algemene Landsverordening Landsbelastingen).

<sup>3</sup>In the Antilliaans Dagblad of December 21, 2022 an article was published stating that the SBAB recommends to require visitors to Curaçao to disclose an invoice and the address details of their accommodation in the Digital Immigration Card System. It is unclear if this requirement will be part of the proposed legislation and if not, if there will be any legal basis for this requirement. Furthermore, other tax aspects, privacy aspects and date of effect of mentioned recommended requirement remain unaddressed.

<sup>4</sup>Alternatively, corporate structuring of real estate activities remains an alternative, which is not discussed in this contribution.

<sup>5</sup>Resident countries can provide either a tax exemption or tax credit for tax paid in the source country.

<sup>6</sup>In Dutch: “normaal vermogensbeheer”. Reference is made to <sup>7</sup>ECLI:NL:OGHACMB:2020:27, r.o. 5.6.3. ECLI:NL:OGEAC:2020:218

<sup>8</sup>Reference is made to: ECLI:NL:OGHACMB:2020:27, r.o. 5.6.3

<sup>9</sup>Cf. ECLI:NL:RBAMS:2021:6796, r.o 15 -16 and ECLI:NL:PHR:2020:1205, nr. 4.9.

<sup>10</sup>For sales tax purposes, “long-term” means longer than 12 months.