THE DTT WITH SURINAME: A NEW PATH IN CURAÇAO'S TAX TREATY NETWORK

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1. INTRODUCTION

On 1 July 2024, the tax treaty between the Kingdom of the Netherlands (the Kingdom), in respect of Curaçao, and the Republic of Suriname was signed by Minister of Finance, Javier Silvania (Curaçao) and Minister of Finance and Planning, Stanley Raghoebarsing (Suriname). This treaty — which still needs to be ratified by both countries— is part of the two countries' efforts to eliminate double taxation without creating opportunities for non-taxation.[1] The signing of this tax treaty follows several attempts of Curaçao in the past to conclude a tax treaty with Suriname and it is also the first tax treaty negotiated by the current government of Curaçao. To date, Curaçao has concluded a tax treaty with Malta (2015) and San Marino (2023). In its relationship with the other Kingdom countries, Curaçao has concluded Tax Regulations for the Kingdom, which hold a similar position as an international convention.

The signed treaty with Suriname is a convention for the avoidance of double taxation and includes the provisions necessary to meet the Base Erosion and Profit Shifting (BEPS) minimum standards to adequately combat treaty abuse and to improve dispute resolution, namely the title and preamble of the tax treaty, the inclusion of a general anti-abuse provision, and the access to a mutual agreement procedure. Curaçao's commitment to the negotiations with Suriname was based on the 2023 Tax Treaty Policy of Curaçao.

This contribution aims to flag a few provisions of the concluded tax treaty, including Dividends (Article 10), Entertainers and sportspersons (Article 16), the Entitlement to benefits (Article 28), and the Territorial Extension provision (Article 29). However, as a way of brief background, the importance of a tax treaty network for Curaçao and the key elements of its Tax Treaty Policy will be highlighted first.

2. CURACAO'S TAX TREATY NETWORK AND TAX TREATY POLICY

For several decades, Curaçao has had a tax policy that was mainly aimed at providing favorable tax facilities. The specific characteristics of Curaçao, particularly its small scale and limited domestic market, generally have a negative impact on the economy. Therefore, Curaçao has been for decades basing its economic model mostly on tax-related financial services. As a result of offering low tax rates to non-residents for non-local activities without substance or transparency or information exchange, Curaçao was long time considered to be a so-called "tax haven". Curaçao is now part of OECD's Inclusive Framework (IF) and has committed to the new OECD standards. Consequently, the possibilities for Curaçao to stimulate its economy with (new) preferential tax regimes, have become extremely limited, mostly because of the BEPS Project, including the introduction of a minimum profit tax for Multinationals, namely the OECD Pillar Two. Considering this, Curaçao has become more aware of the need to focus more on building a tax treaty network to attract foreign investors.

In the past, Curaçao has experienced some difficulties in the process of concluding tax treaties. One of the identified obstacles concerns the lack of a sustainable tax treaty policy prioritizing the conclusion of tax treaties at the Ministry of Finance. Shortly after the current Minister of Finance, Javier Silvania, took office, Curaçao designed its tax treaty policy. The 2023 Curaçao Tax Treaty Policy is mainly based on the provisions of the OECD Model Tax Convention, and, to a lesser extent, on the provisions of the UN Model Tax Convention. This "hybrid approach" adopted by Curaçao was aimed to achieve a successful outcome during the tax treaty negotiation.

Accordingly, and unlike most countries, Curaçao has published its tax treaty policy,[2] aiming to shed some light on what it seeks to accomplish during the negotiations for a tax treaty. Within the Dutch Kingdom, each of the Caribbean Kingdom Territories of Aruba, Curaçao, and Sint Maarten enjoys autonomy in matters of taxation. They can also independently negotiate tax treaties.

In addition, the tax treaty policy of Curaçao was designed based on several political and policy principles. In this regard, three aspects can be highlighted. First, Curaçao's commitment to meeting the minimum standards of the BEPS action plan to counter base erosion and profit shifting. Second, the fact that Curaçao considers of great importance both the enforceability of Curaçao statutory rules and regulations and the growing significance of effective dispute resolution. Third, and finally, the boost of economic activities in Curaçao, which will lead, among other things, better jobs and an accelerated economic growth.

3. FLAGGED PROVISIONS OF THE DTT WITH SURINAME

As noted, the tax treaty between Suriname and Curaçao introduces a series of Articles following the OECD and the UN model tax conventions. Among these provisions, it is important to highlight some of them since they reinforce the main features of this double tax convention as well as the commitment of Curaçao to align with new OECD standards.

Firstly, the tax treaty concluded with Suriname demonstrates to be in line with the minimum standard for the avoidance of tax treaty abuse, as Curaçao and Suriname have opted to include the Principal Purpose Test (PPT) in Article 28. This Article basically provides that a benefit under the treaty will not be granted in respect of an item of income if it is reasonable to conclude, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.

A lot has already been written about the PPT since its introduction by the OECD. The PPT is doubtlessly broad and vague. Indeed, under the PPT, tax authorities may deny tax benefits, whilst objective and clear deciding factors are missing. In this sense, the tax authority is given a free hand to apply the rule. Consequently, the uncertainty of the PPT provision may lead to more tax disputes. Despite of being vague, the PPT is broadly accepted and implemented in tax treaties as an anti-abuse rule, and the signed treaty between Curaçao and Suriname is not different. To seek legal certainty and tackle the weakness of the PPT, three additional clauses have been added to Article 28 of the signed treaty.

The first clause provides that, at the request of the person involved, benefits can still be granted if and to the extent such benefits, or other benefits, would have been granted even in the absence of the relevant arrangements or transactions. To the extent there has been no abuse, it will be logical in such cases to grant treaty benefits. The second clause states that the authorities of contracting countries that intend to rely on the PPT will have an obligation to consult with each other. The communication between authorities promotes fair treaty application as intended. The third clause refers to the most-favored-nation clause (MFN clause) within the PPT provision. This provision, i.e., the MFN clause, empowers residents to substitute the existing anti-abuse measures outlined in the treaty with alternative provisions drawn from a treaty that Curaçao or Suriname maintains with a third country. This flexibility ensures that the chosen replacements align with the established criteria of Article 7, as detailed in the Multilateral Convention. By adhering to these rigorous standards, both jurisdictions provide options that seamlessly integrate more robust and relevant anti-abuse strategies that combat tax avoidance, while fostering a collaborative environment aimed at maintaining fair and efficient tax systems. Thus, this clause stands as a testimony to the proactive approach of both jurisdictions in adapting their treaty obligations to meet contemporary fiscal challenges, ensuring that benefits are both equitable and sustainable.

Secondly, the distribution of taxing rights over dividends is mainly based on Article 10 of the OECD Model Convention. However, the provision in the concluded tax treaty deviates from this model in a few areas. For instance, exclusive taxation is granted to the residence state for dividends received in participation situations or by pension funds. In addition, the source state has no right to tax if the company that is the beneficial owner of the dividends is a resident of the other state (the state of residence) and holds at least 10% of the (share) capital in the dividend-distributing body or is a recognized pension fund of a contracting state. Both provisions are in line with Curaçao's Tax Treaty Policy. The minimum holding period condition, which is also included in the OECD Model Convention, has been adopted. This means that the required holding percentage of 10% must be met for at least 365 days for the exemption from taxation by the source state. Moreover, Article 10 contains a provision on dividends received by emigrated substantial interest holders.

Thirdly, Article 16 concerns the income of entertainers and sportspersons and corresponds to a certain extent with Article 17 of the OECD Model Convention. It has been pointed out many times that the international tax rules for entertainers and sportspersons, based on article 17 of the OECD Model Convention, often lead to problems mainly because of the difficulties in obtaining a tax credit. As a result, entertainers and sportspersons will

face excessive taxation or even double taxation. This has been reportedly argued by various scholars and tax experts.[3] Being mindful of these obstacles, Curaçao and Suriname have included an entertainers and sportspersons article with a (limited) source state tax. Article 16 of the signed treaty states that the right to tax income derived from the entertainers and sportspersons will not exceed 15% of the gross amount of the payment. Furthermore, the right to tax the income belongs exclusively to the state of residence if the gross receipts from the relevant activities do not annually exceed USD 30,000 for the relevant tax year. This is substantively derived from paragraph 10.1 of the OECD commentary on Article 17 of the OECD Model Convention and in line with the 2016 US Model.

Fourthly, and finally, the tax treaty provides that the scope of the treaty can, under specific conditions, be extended to other parts of the Kingdom: Aruba, Sint Maarten, the BES-islands (Bonaire, Statia, Saba) and the Netherlands (Article 29). To that end, any extension will need to be executed through a separate treaty. It must be stressed that tax systems of the four countries within the Dutch Kingdom differ significantly from each other. As a result, a one-on-one extension of a Curaçao tax treaty directly to the other countries within the Kingdom will simply not be possible. However, a territorial extension provision in a tax treaty that Curaçao has concluded with a partner country may serve as a reason for that partner country to start negotiations with a country within the Kingdom. Yet, the Netherlands already have a tax treaty with Suriname (1975). For that reason, the extension provision in the Curacao-Suriname Tax Treaty is more likely to be applicable for Aruba, Sint Maarten and the BES-islands.

4. THE FUTURE OF CURAÇAO TAX TREATY POLICY

Curaçao is open to negotiate tax treaties with any country, taking into account the level of intensity of economic relations between the countries. Curaçao will also start negotiations with countries with which it wants to establish economic relations while encouraging mutual

investments. It must be stressed that entering into negotiations with countries depends on various factors, such as whether the intended partner country has sufficient capacity and is able and willing to give priority to negotiating with Curaçao. The Ministry of Finance of Curaçao has published a negotiation plan for 2024 that indicates which negotiations Curaçao will primarily focus on. On the near future agenda in the negotiations of treaties for Curaçao, two countries are on the list: Cyprus and Mauritius.

5. FINAL REMARKS

Concluding the tax treaty with Suriname is a great accomplishment both for Curaçao and Suriname, and the result of a joint determination to strengthen their economic ties. The treaty reduces several significant fiscal and economic barriers, making the development of economic activities in both countries attractive. More importantly, in the current climate of concluding treaties not only to eliminate double taxation, but also to avoid the creation of opportunities for non-taxation or reduced taxation through tax evasion or avoidance, the signed treaty meets all international tax standards. For sure, this "hybrid" tax treaty shows that Curaçao is committed to pursue a win-win situation with trade partners.

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[1] On 25 July 2024, the Double Tax Treaty Agreement has been published in the 'Tractatenblad' (2024, 90), the Official Gazette of the Dutch Kingdom. The common explanatory memorandum to the treaty is not yet published.
[2] https://minfin.cw/en/curacao-tax-treaty-policy/
[3] D. Molenaar, Artist Taxation, Social Security and VAT, SSRN Electronic Journal, 30 May, 2024, ISSN 1556-5068.