



Film Financing and Television programming

A Taxation Guide



Now in its eighth edition, KPMG LLP's ("KPMG") Film Financing and Television Programming: A Taxation Guide (the "Guide") is a fundamental resource for film and television producers, attorneys, tax executives, and finance executives involved with the commercial side of film and television production. The guide is recognized as a valued reference tool for motion picture and television industry professionals.

Doing business across borders can pose major challenges and may lead to potentially significant tax implications, and a detailed understanding of the full range of potential tax implications can be as essential as the actual financing of a project. The Guide helps producers and other industry executives assess the many issues surrounding cross-border business conditions, financing structures, and issues associated with them, including film and television development costs and rules around foreign investment. Recognizing the role that tax credits, subsidies, and other government incentives play in the financing of film and television productions, the Guide includes a robust discussion of relevant tax incentive programs in each country.

The primary focus of the Guide is on the tax and business needs of the film and television industry with information drawn from the knowledge of KPMG International's global network of member firm media and entertainment Tax professionals.

Each chapter focuses on a single country and provides a description of commonly used financing structures in film and television, as well as their potential commercial and tax implications for the parties involved. Key sections in each chapter include:

Introduction

A thumbnail description of the country's film and television industry contacts, regulatory bodies, and financing developments and trends.

Key Tax Facts

At-a-glance tables of corporate, personal, and value-added (VAT) tax rates; normal nontreaty withholding tax rates; and tax year-end information for companies and individuals.

Financing Structures

Descriptions of commonly used financing structures in film and television production and distribution in the country and the potential commercial tax implications for the parties involved. The section covers rules surrounding co-productions, partnerships, equity tracking shares, sales and leaseback, subsidiaries, and other tax-efficient structures.

Tax and Financial Incentives

Details regarding the tax and financial incentives available from central and local governments as they apply to investors, producers, distributors, and actors, as well as other types of incentives offered.

Corporate Tax

Explanations of the corporate tax in the country, including definitions, rates, and how they are applied.

Personal Tax

Personal tax rules from the perspective of investors, producers, distributors, artists, and employees.

Digital Media

For the first time, we have included a discussion of digital media tax considerations recognizing its growing role in the distribution of film and television content.

KPMG and Member Firm Contacts

References to KPMG and other KPMG International member firms' contacts at the end of each chapter are provided as a resource for additional detailed information.

Please note: While every effort has been made to provide up-to-date information, tax laws around the world are constantly changing. Accordingly, the material contained in this publication should be viewed as a general guide only and should not be relied upon without consulting your KPMG or KPMG International member firm Tax advisor.

Production opportunities are not limited to the countries contained in this Guide. KPMG and the other KPMG International member firms are in the business identifying early-stage emerging trends to assist clients in navigating new business opportunities. We encourage you to consult a KPMG or KPMG International member firm Tax professional to continue the conversation about potential approaches to critical tax and business issues facing the media and entertainment industry.

Thank you and we look forward to helping you with any questions you may have.

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The Netherlands

Introduction

The Netherlands has long been considered the most favoured location for the establishment of holding, financing, and licensing companies. It continues to hold substantial advantages over its competitors due to advantageous local tax legislation and an extensive and expanding tax treaty network.

Key Tax Facts

Highest corporate income tax rate	25%
Highest personal income tax rate	52%
VAT rates	0%, 6%, 21%
Annual VAT registration threshold	No minimum threshold
Regular nontreaty withholding tax rates:	
Dividends	15%
Interest	0%
Royalties	0%
Tax year-end: Companies	Accounting year-end
Tax year-end: Individuals	December 31

Film Financing

Financing Structures

Co-production

A Dutch resident investor may enter into a co-production joint venture (JV) with a non-resident investor to finance and produce a film in the Netherlands. The exploitation rights may be divided worldwide among the JV members or each investor may retain exclusive media rights in its own jurisdiction with an appropriate income share to be derived from the remaining jurisdictions. Alternatively, the JV partners could allocate specific jurisdictions to specific investors.

Who is a Tax Resident?

Such an arrangement does not make the investors subject to tax in the Netherlands. The position of each investor must be determined separately. In the absence of specific film rules, this determination must be based upon generally accepted tax principles.

The Netherlands

A foreign investor is only subject to corporate income tax (CIT) in the Netherlands if they are engaged in a trade or business in the Netherlands and if they conduct this trade or business through a permanent establishment.

Generally, to be engaged in a trade or business requires active participation in an economic activity in order to obtain a profit in excess of an ordinary return on passive investments. In other words, if the foreign investor only invests cash in order to obtain a normal return on capital, they will not generally be regarded as being engaged in a trade or business. If, on the other hand, they actively take part in the economic activity, i.e., production, in order to increase their investment income, they will be considered to be engaged in a trade or business. A loan to an active enterprise, i.e., apparently earning passive income, can under specific circumstances be reclassified as an equity investment. The fact that the investor's ultimate return is not fixed, but depends on the successful exploitation of the film rights, is a strong indication that they are engaged in a trade or business.

When drafting a JV agreement, attention should be given to the qualification "passive investor" versus "entrepreneur."

If the activities of the foreign investment company become more active, the company also risks being regarded as a Dutch tax resident as it then meets the "management and control" criteria. The foreign company would therefore be subject to tax in the Netherlands on its worldwide income. It would only be able to claim treaty or unilateral relief in order to avoid double taxation. In that case, foreign income could be exempt or a credit for foreign income could be obtained.

Once it has been established that the investor is involved in a trade or business, it must be determined whether their film exploitation activity is attributable to a Dutch permanent establishment. As a general rule, the Netherlands follows the definition of a permanent establishment included in the OECD Model Tax Treaty.

Provided that the exploitation can be kept separate from the production, and the film exploitation activities are exercised outside the Netherlands, foreign investors should not be subject to Dutch tax on their income.

If a link can be established between the exploitation of a film and the actual production activities performed through a Dutch permanent establishment, the income will be subject to Dutch personal income tax (PIT) or CIT. If the JV is set up as a BV, NV, an open limited partnership, or a similar foreign entity, a passive investment, e.g., a loan, may be reclassified as equity. The consequences of this are set out below.

PIT and CIT on business profits are imposed on net profits determined at arm's length based on the accrual method of accounting. This method provides the necessary flexibility in establishing the appropriate allocation of the JV's net income to all participants.

Since all Dutch treaties provide for full tax liability in the Netherlands, if trading income is allocable to a Dutch permanent establishment (as defined under the tax treaty), any relief for double taxation should be obtained abroad under the applicable tax treaty. In this case, Dutch income should not be taxable in the foreign investor's state of residence.

The Netherlands

If the foreign investor is a resident of, amongst others, the United States, China, the United Kingdom, Australia, Japan, Germany, Indonesia, or Ethiopia, Dutch income will not be exempt in all cases. Under certain conditions, the foreign investor will be entitled to a foreign tax credit, for Dutch tax paid, against the domestic tax liability. In this respect, it should be noted that the tax credit reclaim may cause a cash-flow disadvantage. Furthermore, this is the case in the tax treaties that the Netherlands has recently concluded with Zambia and Malawi, but that are not yet in force.

If the JV's film production activities are performed as a company, e.g., a BV or NV, the dividend distributions (return on equity investment) are, in the absence of tax treaties, subject to 15 percent dividend withholding tax. In other words, with respect to passive income, such as dividends, a reduction of withholding tax has to be applied for in the Netherlands, whereas double tax relief for active income allocable to a Dutch permanent establishment and subject to PIT or CIT must be obtained in the foreign investor's state of residence. The 15 percent dividend withholding tax rate is reduced under many tax treaties with the Netherlands.

As of January 1, 2007, the dividend withholding exemption applicable to EU/EEA based parent companies is granted for a shareholding of 5 percent or more. The exemption also applies to 5 percent shareholdings in open limited partnerships and common funds. Therefore, distributions to foreign investors with a shareholding of 5 percent or more who are resident in the Netherlands are not subject to dividend withholding tax.

Moreover, dividend withholding tax can be avoided if structured properly. In this respect, interposing a Dutch Cooperative should ensure that withholding tax will in principle not be withheld on distributions from the Cooperative to a foreign investor. This could be different in situations of abuse. It should be noted that a tax ruling can be obtained from the Dutch tax authorities, but this ruling might be exchanged with foreign countries. However, as the difference in treatment of profit distributions made by cooperatives and corporations resident in the Netherlands has been under scrutiny by the Dutch government and the European Commission for some time, the Deputy Minister of Finance of the Netherlands sent a letter to Parliament with proposed changes to the Dutch Dividend Withholding Tax Act. These changes include a withholding obligation for holding cooperatives in case their members hold an interest of 5% or more. Furthermore it includes an extension of the aforementioned exemption for EU/EEA based parent companies. This will be extended to both shareholders and members of cooperatives (holding a shareholding or interest of 5% or more) based in EU/EEA Member States and countries with which the Netherlands has concluded a full-scale tax treaty if there is a business structure and no abuse is involved. The letter is followed by a bill, preceded by a public internet consultation. The changes are intended to take effect as of January 1, 2018 at the latest.

Partnership

Foreign investors and foreign producers may set up a Dutch partnership to finance and produce a film. If the type of partnership (see below) allows a distinction between limited and general partners, the passive investors are generally limited partners and the active producers are the general partners. The partnership may receive royalties under distribution agreements from both treaty and nontreaty territories, proceeds from the sale of any rights remaining after exploitation, and a further payment from the distributors to recoup any shortfall in the limited partners' investment. Such proceeds may initially be used to repay the limited partners, perhaps with a premium, e.g., a fixed percentage of the "super profits."

The Netherlands

There are two types of partnerships in the Netherlands: general partnerships and limited partnerships. A general partnership does not have limited partners and is fully transparent, i.e., a proportionate share of all income and expenses is directly allocated to each partner. In addition, all partners are fully liable for all obligations of the entity. A limited partnership (CV) is a partnership with limited partners and general partners. The general partners are fully liable. Limited partners are only liable to the extent of their capital investment. However, limited partners are not allowed to carry on the business of the CV in which they participate. If they do, they lose limited partnership status and are regarded as general partners and therefore fully liable.

Under Dutch tax law, there are two types of limited partnerships: the open limited partnership and the closed limited partnership. The basic difference is the transferability of the partnership interest. Strict rules apply to the transfer of interests in a closed limited partnership, whereas an interest in an open limited partnership is more freely transferable. From a tax perspective it should be noted that only the open CV is a taxable entity subject to normal CIT rates.

Limited partners in an open limited partnership are more or less treated as shareholders, i.e., profit distributions to the limited partners are treated as dividends and therefore subject to dividend withholding tax (unless the above mentioned withholding tax exemption applies).

Limited partners in a closed limited partnership and general partners are taxed directly on the net income attributable to them. For nonresident limited partners, it needs to be established whether the income so attributable is trading income, and if so, whether it can be allocated to a Dutch permanent establishment.

As noted earlier, trading income is only taxable in the Netherlands if it is attributable to a Dutch permanent establishment. The Supreme Court ruled that if:

- A closed limited partnership is engaged in trade or business in the Netherlands through a permanent establishment
- The nonresident limited partner's participation is attributable to their trade or business in their state of residence
- The nonresident limited partner is entitled to profits, but not necessarily liquidation proceeds, of the closed limited partnership, then the nonresident limited partner is deemed to be engaged in a trade or business in the Netherlands through a permanent establishment.

As indicated above, a passive investor generally participates as a limited partner, i.e., receiving income from capital. If the JV is a partnership, but not a taxable entity, the foreign investor (limited partner) is not subject to Dutch tax, unless they actually receive trading income allocable to a deemed permanent establishment in the Netherlands. Double tax relief has to be obtained in the state of residence (see above).

If the JV is a taxable entity under Dutch law, tax may be payable twice: CIT on worldwide net income at the JV level, subject to an exemption for income allocable to foreign permanent establishments of the JV. Thereafter distributions are subject to 15 percent dividend withholding tax, again subject to treaty relief (see above).

The Netherlands

A Dutch resident limited partner in a foreign transparent limited partnership is taxed on their worldwide income, including their share of the partnership's worldwide business profits. The Dutch tax authorities only provide for an exemption to Dutch residents subject to corporation tax or a tax relief to Dutch residents subject to Dutch income tax for profits directly attributable to the permanent establishment of the foreign partnership outside the Dutch tax jurisdiction.

Equity Tracking Shares

Equity tracking shares (ETS) have the same rights as ordinary shares but provide for profit-linked dividend distributions as well as preferential rights to assets on liquidation of the company.

ETS can legally be structured as preference shares, or by creating separate classes of ordinary shares. Additional profit rights, etc., may be granted to one or more separate classes of shares.

Any dividend paid on the ETS is nondeductible for Dutch CIT purposes.

From a Dutch tax perspective, no distinction is made between ordinary shares and ETS. Subject to reduced tax treaty rates, a 15 percent withholding tax is due on dividend payments in respect of ETS (unless the above mentioned withholding tax exemption applies), and the Dutch resident investor receiving foreign dividends on ETS is to be granted tax relief under the appropriate tax treaties. Except for situations of abuse, no withholding tax should be due if a Cooperative is used. However, as mentioned above, the Dutch government intends to introduce a withholding obligation for holding cooperatives by January 1, 2018 at latest. Although Dutch resident individuals are generally granted a tax credit for foreign withholding tax under the appropriate tax treaty, no such credit is available to most corporate investors resident in the Netherlands. This is due to the fact that Dutch companies resident in the Netherlands normally benefit from the participation exemption, i.e., foreign dividends are not taxable, with the result being that no relief is given for foreign withholding taxes suffered.

Profit shares in a Dutch film production company (Dutch Company), or a film produced by such a company may also be granted without being linked to shares. In principle, any payments made by the Dutch Company to the owners of such profit-sharing rights would be treated as a dividend, e.g., the payment would not be tax deductible for CIT and would be subject to a 15 percent dividend withholding tax, although the withholding tax exemption might apply in case of EU/EEA-based parent companies (see above) or a lower rate may apply on the basis of a tax treaty.

If the profit-sharing right is granted to creditors or suppliers, an arm's length consideration for any loans granted or supplies made to the Dutch Company would be tax deductible for CIT purposes. Also, no dividend withholding tax would be due on the payments.

Yield Adjusted Debt

A film production company may sometimes issue a debt security to investors. Its yield may be linked to revenues from specific films. The principal would be repaid on maturity, and there may be a low, or even zero, rate of interest stated on the debt instrument. However, at each interest payment date, a supplemental, and perhaps increasing, interest payment may be due if a predetermined target is reached or exceeded, such as revenues or net cash proceeds.

The Netherlands

As a rule, profit-linked interest payments are, in principle, fully tax deductible for the Dutch Company, and no dividend withholding tax would be due if the creditor does not hold any shares or similar interests in the Dutch Company. In this respect, it should be noted that even without a formal shareholder relationship between a creditor and the borrowing Dutch Company, the conditions of the loan may be such that the loan is reclassified as equity.

As of January 1, 2007, only if a loan qualifies as a profit participation loan within the meaning of Dutch Supreme Court case law, will the interest on the loan be nondeductible. A statutory restriction continues to apply to certain long-term loans between affiliated parties for which no remuneration, or remuneration lower than arm's length, has been agreed on.

In the Netherlands, the classification of debt versus equity is based on all the facts and circumstances. Profit-linked debt is not automatically classified as equity. According to civil law, debt is generally also considered to be debt for tax purposes. However, Dutch case law indicates that under certain conditions a loan can be considered equity rather than debt.

The conditions under which a loan qualifies as a participating loan are as follows:

- The interest on the loan depends on profits; and
- The loan is subordinated; and
- The loan has no fixed term, but becomes eligible only in the event of bankruptcy, suspension of payment, or liquidation.

Under these conditions, certain loans, which are treated as loans under civil law, may be treated as equity for Dutch tax purposes. Such reclassification may sometimes be invalid for tax treaty purposes.

Assuming that none of these conditions are met, the investors are treated as receiving ordinary interest payments and no Dutch withholding tax is imposed. If the loan is reclassified as equity, the payments are treated as dividends and are subject to 15 percent withholding tax unless this is reduced by a tax treaty or—except for specific situations of abuse—if a Cooperative is used.

If the interest payments are not linked to the profit of the Dutch Company, but for example to gross income, or specific types of income, such as royalty income, the interest payments are tax deductible even if the creditor is also a shareholder in the Dutch Company. Nevertheless, this type of yield-adjusted debt may be reclassified as equity depending on the other conditions of the loan.

Sales and Leaseback

On August 26, 1994, the Dutch Ministry of Finance issued a decree on the tax effectiveness of certain sale and leaseback structures between a film production company seeking to avoid cash flow problems and investors in a partnership. This decree was in reaction to press coverage of possible tax abuse under such structures involving major Dutch-based multinational enterprises. This decree was issued again on January 1, 2001 when the Income Tax Act 2001 was introduced, but its content remained the same.

According to the decree, these types of transactions will only be recognized if two requirements are met:

The Netherlands

- The sale should be "realistic," i.e., all ownership rights should effectively be transferred to the buyer; and
- The main aim of the overall transaction should not be the reduction of the tax liability of those involved.

Other Tax-Effective Structures

From a tax perspective, a Dutch resident investor company may favor an equity participation in the production entity, since debt financing is, generally speaking, only beneficial if the production entity has sufficient profits to absorb the deductible interest expense.

In doing so, the investor company would convert taxable interest on excess cash into non-taxable dividend receipts, if the participation exemption applied.

Another possibility is the use of a partnership, as this would allow the investor to make an immediate deduction for start-up losses.

A wide variety of methods are available to cash in on profits allocable to, for example, a U.S. investor. If payments can be structured as royalties or interest, payments can be made without any Dutch withholding tax being owed.

Tax and Financial Incentives

Investors

Until 2007, Dutch tax law contained a special tax incentive for the film industry. The incentive consisted of a system of discretionary depreciation and an investment allowance (55 percent in 2006 and 2007) for investments in films. The incentive was abolished as of July 1, 2007.

There are still tax incentives for investments in the Netherlands that may be applied by film companies. However, actual production and exploitation is required. Tax facilities are not applicable if a film was not produced.

Investment incentive

The *small-scale investment tax incentive* provides for a tax deductible allowance if specific circumstances are met. A taxpayer may apply the deduction if they make an investment of between EUR 2,300 and EUR 312,176 in certain fixed assets during the tax year. The deduction varies from 1-28 percent of the total investment.

The investment deduction requires that the film be considered a business asset.

To apply the small-scale investment deduction, the investments made by the partners in a joint venture will be combined.

Free depreciation and accelerated depreciation

As a reaction to the recent global financial crisis, the Dutch government announced a package of tax measures. The measures are intended to provide a positive impulse to the economy and prevent further economic stagnation. One of the tax measures involves accelerated depreciation on certain assets.

In order to ease the need for liquid funds and financing by companies who will be replacing or expanding their investments, a one-time reintroduction of free depreciation or accelerated depreciation took effect as of January 1, 2009.

The Netherlands

The measure allows companies that invest in tangible assets between January 1, 2009, and December 31, 2011, to depreciate them over two years, up to a **maximum** of 50% in 2009, 2010, or 2011, with the other 50% being depreciated in the following years.

The measure is limited to investment commitments made in the 2009, 2010, or 2011 calendar year or development costs incurred in 2009, 2010, or 2011. The amount of the free depreciation cannot exceed the amount paid in 2009, 2010, or 2011 with regard to the commitments or the amount of development costs incurred in that year. Furthermore, the measure only applies to new assets. Second hand assets are excluded.

Free depreciation or accelerated depreciation is available both to enterprises subject to corporate income tax and to those subject to personal income tax.

The measure will apply to *all* new purchased business assets, **except**:

- a. real estate;
- b. houseboats;
- c. motorbikes;
- d. motor vehicles;
- e. cars (exemptions are made for extremely fuel-efficient cars);
- f. intangible fixed assets (including software);
- g. animals;
- h. public works assets such as land, road, and water management facilities;
- i. company assets that are primarily made available to third parties.

Furthermore, it will not be possible to combine the new temporary measure with free depreciation for new businesses subject to personal income tax as well as environmentally friendly business assets.

The free depreciation regulation is only applicable to tangible business assets in use before January 1, 2014.

The free depreciation regulation is not applicable to films because films are regarded as intangible fixed assets.

However, the development costs of intangible fixed assets can be depreciated immediately in the calendar year in which the costs were incurred. This regime is advantageous for the productions of films.

The Netherlands

Given the prolonged crisis the measure was re-introduced for the second half of 2013. As a consequence, investments in eligible assets between 1 July 2013 and 31 December 2013 can also be depreciated up to at maximum 50%. The measure is limited to investment commitments made in this period, the amount of the free depreciation cannot exceed the amount paid in this period, and the assets have to be in use before January 1, 2016. However, the difference with the previous facility from 2009–2011 is that the remainder cannot be fully depreciated in the next year, but has to be depreciated according to the regular rules in the subsequent years. Furthermore, the same rules/restrictions apply.

Innovation box: potential for 5% effective corporate income tax

Profits from self-developed innovations (product innovations, process optimizations/software development, etc.) are subject to favourable tax if the taxpayer qualifies (and makes the election) for the 'innovation box'. Currently, the innovation box allows the income derived from qualifying intangible assets to be taxed at an effective tax rate of 5% as opposed to the general rate of 25%.

The innovation box was created in 2007 and was initially known as the patent box. As from 2017, the rules were changed to comply with the 'Modified Nexus Approach' agreed upon in the OECD and EU context.

The key characteristics of this important incentive are as follows:

- The company's R&D activity must have advanced to the stage of production of an intangible asset, i.e. a completed package of innovative technology related knowhow. Computer programs may qualify.
- The company must have developed such intangible for its own risk and account. In certain situations it may be possible to outsource a portion of the development work and also co-development with other (group) companies may be possible.
- The company must have been granted R&D Certificates by RVO (a Dutch Government agency independent of the tax authorities) with regard to all or a portion of its development work.
- In case the company's revenue or IP income figures are above thresholds mentioned in the law, the intangible must be a computer program, or the company must have obtained (or applied for) a second 'entry ticket' in respect of the intangible. E.g., a patent or plant breeder's right or another legal protection right enumerated in the law.
- An 80% exclusion is applied to the net innovation profit derived from the intangible asset. The remaining 20% is taxed at the general tax rate (25%). Therefore, on balance the innovation profit is effectively taxed at only 5%.
- The 5% effective tax rate kicks in as soon as the development costs of the intangible have been recaptured at the general tax rate.
- Negative innovation profit (innovation loss) is deductible at the general tax rate but after the company has suffered such losses it can only benefit again from the 5% effective rate after the amount of the innovation loss has been recaptured at the general tax rate.

The Netherlands

Payroll tax

As mentioned above, another specific tax incentive provides for a reduction of payroll tax due by companies engaged in qualifying research and development activities. The tax deducted from the employee's salary is not affected, and payroll tax is treated as having been paid in full. The reduction amounts to 32% (in certain cases 40%) of the relevant payroll costs and other costs and expenditure for R&D, up to a maximum of EUR 350,000, and 16% for any excess.

Other (general) tax principles

In the absence of any further specific tax incentives, any possible tax benefit must be derived through the application of general legal tax principles. Under these principles relatively small acquisition costs, but not the purchase price, of investments may be tax deductible. It should also be noted that debt is rarely reclassified as equity, as a result of which interest payments are generally tax deductible. As of January 1, 1997, specific anti-avoidance legislation applies to certain shareholder and intragroup loans that relate to certain tainted transactions. As of January 2013, interest expenses paid to group companies and to third parties may also be nondeductible in case a company owns participations that qualify for the participation exemption. This interest limitation deduction applies especially to companies with a relatively small amount of equity and a lot of nonactive participations.

As these rules only apply to legal entity investors, these limitations on the tax deductibility of interest expenses do not apply to individual investors. Of relevance for individual investors is whether the loan is related to the financing of a taxable source of income. If not, the interest deduction is limited.

Finally, it is possible to make tax deductible allocations to general and specific bad debt provisions.

Producers

Several quasigovernmental agencies, private trusts, and institutions, for example *Het Nederlands Filmfonds* <http://www.filmfonds.nl>, provide a number of subsidies, although the provision thereof is subject to certain conditions. The factors most commonly taken into account in establishing the applicant's entitlement to grants/subsidies are: the length of the film (a film shorter than 1.5 hours is considered a short film), the type of content (artistic, entertainment, etc.), the number of actors involved, location, budget, duration of shooting, etc.

Distributors

No specific tax or other incentives are available to distributors of film rights. In addition, the Netherlands does not distinguish between royalty payments made to holders of copyrights resident within the Netherlands or to those resident outside the Netherlands, i.e., no withholding tax is due on royalty payments.

Actor and artists

Generally speaking, an artist is treated as any other employee. See below under "Personal Income Tax."

Other Financing Considerations

Tax costs of share or bond issues

There is no capital tax in the Netherlands.

The Netherlands

Exchange controls and regulatory rules

There are no specific exchange controls or other regulatory rules in the Netherlands.

Corporate Income Tax

Recognition of Income

Film production company – production fee income

Dutch resident companies as defined above and nonresident companies with a Dutch permanent establishment producing a film in the Netherlands without obtaining any rights in that film, i.e., “a camera-for-hire” company, are required to report an arm’s length profit on the production. The tax authorities can question the level of taxable income reported if they consider that it does not reflect an arm’s length situation; however, prior agreement can be reached in order to prevent this issue from arising.

Whether or not a nonresident company has a permanent establishment in the Netherlands is determined based on all the facts and circumstances of the particular case (see above). It is unlikely that the film set will qualify as a permanent establishment. In particular, the fact that such an establishment is permanent may be difficult to prove. It may even be difficult to argue such a case for a production office.

Film distribution company

Dutch resident companies and Dutch permanent establishments of nonresident companies are required to report income on an accruals basis.

As such, lump sum payments for the acquisition of intangibles are amortized over time, whereas royalties are generally deductible when due. In the absence of a distinction between regular income and capital gains, both amortized payments and deductible royalties reduce trading income. However, under the flexible principle that governs the determination of taxable income, i.e., sound business practice, accelerated amortization may be allowed, as a result of which taxation may be deferred.

If the distribution company also exploits the licenses in another jurisdiction and does so through a permanent establishment, part of the expenses may be allocable to the foreign branch and therefore reduce the double taxation relief.

A distribution company must act in accordance with arm’s length principles. Transactions between unrelated parties are generally deemed to be at arm’s length.

The pricing of transactions between related parties must be substantiated on the basis of the pricing of third-party transactions.

The policy under which the Dutch tax authorities accept standard royalty spreads for back-to-back transactions has been withdrawn. As of January 1, 2006, the income to be reported in respect of intragroup back-to-back transactions must be determined on a case-by-case basis and can be lower or higher than required under the former policy. The taxpayer is required to maintain and make available documentation that demonstrates how the transfer prices were set, and whether the prices conform to the arm’s length principle. The choice of method for setting transfer prices lies with the taxpayer as long as it can be justified that an appropriate method has been applied.

The Netherlands

Following the recommendations made by the OECD in BEPS Action Plan 13, as of January 1, 2016 a new chapter was added to the CITA 1969 entitled Additional Transfer Pricing Documentation Requirements. The new requirements extend the documentation requirements of Section 8b CITA for multinational enterprises with an annual consolidated group turnover exceeding EUR 50 million. The new chapter covers Country-by-Country Reporting and Transfer Pricing documentation requirements.

As of January 1, 2006, distribution companies entering into back-to-back transactions with related parties need to assume some risk in respect of the back-to-back transactions in order to be regarded as beneficial owners of the royalty receipts for Dutch tax purposes. If the distribution company qualifies as a beneficial owner of the royalties received, withholding tax levied on that royalty income can be set off against the tax due on the royalty income. Furthermore, as of January 2014, those companies need to meet certain substance requirements if they claim treaty benefits (or benefits in an EU directive). In case one or more of the substance requirements are not met and the company has claimed treaty benefits, the Dutch tax authorities will notify the foreign tax authorities. The information received from the Dutch tax authorities could have consequences for the qualification of beneficial owner of the Dutch Company in the foreign country and thus for the possibility of reducing withholding tax on the basis of the tax treaty.

It may be possible to claim an informal capital contribution, if the film rights are contributed to a Dutch Company at a low value. As a result of such an informal capital contribution, the film rights can be capitalized and amortized on the basis of their estimated fair market value. In that case, only a proportion of the income is subject to Dutch CIT.

Rates

The top corporate income tax rate is 25 percent, levied on taxable profits, including capital gains, in excess of EUR 200,000. The tax rate applicable to the first EUR 200,000 of taxable profits is 20 percent (rates for fiscal year 2017).

Amortization of Expenditures

Production expenditures

If the production of a film results in the creation of a capital asset, and possibly involves additional substantial expenditures in respect of such an asset, the overall expenditures can be written down in accordance with the principle of sound business practice.

The development costs for intangible fixed assets can be depreciated immediately in the calendar year in which the costs were incurred.

The principle of sound business practice allows amortization in conformity with the expected revenue flow, i.e., if a substantial amount of income is expected to be received in the year after the creation of the fixed asset, a substantial part of the overall write-down could be allocated to that year.

Factors taken into account in determining the actual annual amortization include the expected economic life of the film, the continuity of the film production process, and the existence of contracts to guarantee minimum payment by third parties, including government subsidies.

The Netherlands

Other expenditures

With respect to the deductibility of expenses, film distribution companies and film production companies have no special status under Dutch tax law. Consequently, they are subject to the same rules as other companies. All non-capital business expenditures can be set off against current income, whereas capital assets can normally be depreciated over their economic lives. Since land is unlikely to depreciate as a result of being used by a company in the performance of its business activities, no depreciation is generally available for the purchase price of land.

Losses

Since no distinction is made between capital gains, trading profits, and other income, all such income is aggregated. This means that unrelieved losses incurred in the production or exploitation of one specific film can be set off against other income. The remainder of the loss can be carried back one year and carried forward nine years.

A temporary extension of the loss carry-back regime applies for 2010 and 2011. For losses up to a maximum of EUR 10 million per year, the period will be extended for one to three years, subject to conditions. This is a temporary measure taken as a result of the global financial crisis.

The setoff must follow an obligatory sequence. A loss suffered in 2011 will first be set off against the 2008 profit, and only thereafter against the profits for 2009 and 2010. If the temporary extension of the loss carry-back regime is used, the period for the loss carry-forward will be decreased from nine to six years.

If the loss cannot be set off against the profit from preceding years, then the loss can be carried forward. The loss carry-forward period is limited to nine years. A transitional rule applies to losses suffered in 2002 and earlier and not set off. These losses can be set off through 2011. This also applies to loss carry-forward for the purposes of personal income tax.

For limited partnerships, the loss is capped at an amount equal to the limited partnership share.

However, this is conditional on actual production taking place. If a film is not exploited, the limited partners cannot deduct their losses.

Foreign Tax Relief

Producers

Dutch resident producers are taxed on their worldwide income. However, income that can be allocated to a foreign permanent establishment is exempt for Dutch corporate income tax purposes.

Nonresident producers who derive income from a Dutch permanent establishment are taxed in the Netherlands on their Dutch source income and have to claim relief abroad.

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Distributors

Unless a treaty provides otherwise, withholding tax imposed by developed countries can only be taken into account as a deductible expense. However, many of the tax treaties concluded by the Netherlands substantially reduce foreign withholding taxes. In addition, the withholding tax imposed on passive income (dividends, royalties, and interest) received from less developed countries or countries with which the Netherlands has concluded a tax treaty, are generally creditable against the recipient's Dutch income tax liability. Moreover, several tax treaties concluded by the Netherlands provide for tax-sparing credits, i.e., a tax credit for foreign withholding taxes even if no actual withholding tax is imposed in order to promote inward investment.

Foreign distributors receiving interest and royalties from the Netherlands are able to benefit from the favourable Dutch investment climate which does not impose withholding taxes on such payments.

Indirect Taxation

Value Added Tax (VAT)

The Netherlands, like all European Union Member States, imposes VAT on the sale or supply of goods or services. The VAT paid by an entrepreneur to its suppliers is generally deductible against the entrepreneur's own VAT liability. However, such a credit can generally not be obtained for input tax on services and goods used for exempt supplies of goods or services to recipients within the European Union. Furthermore, credit is denied for VAT on goods and services used for certain nonbusiness purposes.

Three rates apply: the standard rate is 21 percent, e.g., for supplies of completed films; a reduced rate of 6 percent that applies to certain goods, e.g., food products, and certain labor-intensive services; and the zero rate, which applies mainly to exported goods and services and particular intra-EU transactions.

Entrepreneurs are obliged to register as a taxpayer if they supply goods and services taxable within the Netherlands for which a reporting obligation exists.

A partnership can be considered as a taxable person if it acts as such towards third parties. Also a permanent establishment in the Netherlands of a foreign company can be considered as an entrepreneur for VAT purposes. Consequently, also partnerships and permanent establishments of nonresident companies should register for VAT in respect of the goods and services they supply.

If a film is supplied from the Netherlands to a recipient in another EU Member State, the supply is subject to a zero VAT rate, provided that the recipient has an EU VAT identification number in the country of arrival and the supplier can provide proof of transport to another EU Member State. Such a transfer is referred to as an intracommunity supply. The supplying company should report its intracommunity supply in its quarterly listing and its periodic VAT return, and the supplier should retain proof of the export, e.g., transport documents, etc. No intracommunity supply is performed, if the film is transported to another EU Member State under a license which permits the exhibition of that film in that EU Member State.

If a film is supplied to a non-EU country, this supply is also zero rated if the supplier can provide proof of the export, e.g., customs documents.

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The company must account for VAT in the periodic VAT return. The VAT return should in principle be filed on a quarterly basis. It is also possible to file returns on a monthly or yearly basis, depending on the VAT due. In the VAT return, the company accounts for VAT due and recoverable in the applicable period.

VAT is generally due at the moment an invoice is or should be issued or at the moment the consideration is received if prior to the invoice date. An invoice should be issued before the 15th day after the month in which the goods or services were supplied.

In general, the company that is the supplier should charge VAT. The supplying company should report this VAT in its VAT return covering the period in which the pre-payment is received or when an invoice is or should be issued, whichever moment is the earliest. However, if a foreign entrepreneur without a Dutch permanent establishment supplies goods or services to a Dutch entrepreneur or legal entity, the recipient of the goods or services is liable for Dutch VAT under the “reverse charge” mechanism.

The supply of distribution rights is also taxable at the general rate of 21 percent. The supply of distribution rights to foreign resident entrepreneurs or to nonentrepreneurs resident outside the EU is taxable in the country where the recipient is established, or in the country where the recipient has a permanent establishment if the rights are supplied to that permanent establishment. The supply of distribution rights is also taxable in the country where the recipient is established if the recipient is a foreign company that does not qualify as a VAT entrepreneur, but that does have a VAT registration in another EU Member State. In the case of a supply to a third-party resident in the Netherlands, the supplier is liable for Dutch VAT if the supplier is resident in the Netherlands or has a Dutch permanent establishment for VAT purposes. In all other cases, the Dutch recipient company or legal entity is liable for the VAT due under the reverse charge mechanism.

No Dutch VAT is due on the sale of distribution rights to persons outside the EU. Please note that the supplier will retain his right to claim a refund of input VAT, accountable to that supply. Royalty payments are regarded as payments for services and are in principle taxable at the standard rate of 21 percent, provided that both parties reside in the Netherlands. Special reporting rules, apply i.e., listing, apply for cross-border intra-EU supplies of services on which the reverse charge rule is applicable. Special reporting rules for cross-border intra-EU supplies of goods are also applicable.

If a Dutch resident company pays royalties to a company resident in another country, including EU Member States, in respect of the supply of copyrights, patents, licenses, trademarks or similar rights, the service is taxable at the standard VAT rate of 21 percent in the Netherlands. The VAT liability is shifted to the recipient (Dutch resident company or legal entity/nonentrepreneur) under the reverse charge mechanism.

With respect to paid downloads, web-broadcasting, video and audio on demand and other electronic services to private individuals by a non-EU resident company, we note that the local VAT liabilities must be determined in the private individual’s EU Member State. VAT registration requirements may apply. Having a permanent establishment in one of the EU Member States may influence the VAT treatment. Companies residing in and outside the EU should determine their local VAT requirements in each EU Member State where a private individual (customer) is resident. It may be possible to charge the local VAT rate in the private individual’s EU Member State, but account for the charged VAT through one VAT registration in one of the EU Member States, i.e., the “mini one-stop-shop”. In this respect,

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attention should also be paid to the VAT treatment of telecommunication, radio and TV broadcasting services. Such supplies are taxable in the EU country where the recipient is established.

If festivals, concerts, and other cultural, artistic, sporting, scientific, educational, and entertainment activities are organized in the Netherlands, a requirement to register for VAT purposes in the Netherlands may apply.

It should be noted that the general rules and rates apply to all supplies unless the reduced rate or zero rate applies. In the absence of specific provisions, the general rules apply to the sale of peripheral goods connected to the distribution of a film as well as to promotional goods or services.

Please note that promotional services may be taxable in the country where the recipient is established if the recipient is a nonentrepreneur outside the EU or an entrepreneur.

If there is no consideration payable for the supply of promotional goods or services other than samples or gifts of little value, VAT may be due on the purchase price or the cost price at the time of supply.

In the Netherlands, the supply of hotel accommodation, food, and non-alcoholic drinks is taxed at the reduced rate of 6 percent. Other supplies and services provided by a catering company during filming will be taxed at the standard rate of 21 percent. Please note that there is no credit for input VAT paid on food and drinks in hotels and restaurants. A company cannot recover the input VAT on supplies of goods or services which are not supplied to that company but to its staff or third parties, if the company reimburses the costs of those goods or services.

Various taxes apply to imports of goods from outside the EU: VAT, import duty, excise duty, agricultural levy, anti-dumping duties and other duties, depending on the type of imported products.

Custom Duties

The following customs duties apply:

Type of goods	Customs duty rate
Cinematographic film, exposed and developed, whether or not incorporating a soundtrack or consisting only of soundtrack, of a width of 35 mm or more consisting only of soundtrack; negatives; intermediate positives 37.06.102000	0%
Cinematographic film, exposed and developed, whether or not incorporating a soundtrack or consisting only of soundtrack, of a width of 35 mm or more other positives 37.06.109900	6.5%, with a maximum of EUR 5 per 100 meters

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Type of goods	Customs duty rate
Discs, tapes, solid-state nonvolatile storage devices, "smart cards" and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs, but excluding products of Chapter 37 Other (For example video masters) 85.23.293900	0%
(Soundtrack film produced solely by processes other than photo electric, e.g., by mechanical engraving or magnetic recording is excluded)	
Other printed matter, including printed pictures and photographs Trade advertising material, commercial catalogues and the like 49.11.109000 Pictures, designs and photographs 49.11.910090	0%
Temporary imports may be exempt from import duty and VAT for 24 months. Generally, a deposit and a license are required, apart from other applicable conditions.	

It is important to notice that the customs duty rates above may differ in case of different countries of origin.

VAT is also due on imports. The taxable amount is the amount paid for the goods of services, not including the sales tax.

Personal Income Tax

Nonresident Artists

In the Netherlands, payroll tax is levied on artists in various ways. Artists may be employed under an employment contract, may choose to perform their activities in an employer-employee relationship, or may qualify for the special regime for artists.

Artist-employee

An artist who is employed by a principal is subject to the general Dutch payroll tax rules and is treated the same as other employees. In that case, the artist will not be entitled to deduct expenses. However, certain expenses specified in the law may be reimbursed or paid by the principal as tax-free allowances. As of January 2011, it is also possible for the employer to provide tax-free allowances to its employees until a maximum of 1.2% of the total salary costs. As of January 2015, this provision is obligated (see below).

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The person paying the artist is responsible for withholding and remitting payroll tax, national insurance contributions, social security contributions and income-related contributions under the Health Care Insurance Act. This is usually the principal.

Payroll tax must be withheld at the time the wages are paid. Payroll tax is an advance levy of personal income tax. The payroll tax and national insurance contributions withheld may ultimately be credited against the personal income tax. The payroll tax rates are, in principle, equal to the personal income tax rates.

The following tax rates apply for 2017:

Taxable income	Payroll tax
EUR 0 to EUR 19,982	8,90%
EUR 19,982 to EUR 33,791	13,15%
EUR 33,791 to EUR 67,072	40,80%
EUR 67,072 and higher	52,00%

In addition, the artist may be obliged to be insured under a national insurance scheme. This is the case if the insurance obligation has been allocated to the Netherlands under international treaties. National insurance contributions are levied simultaneously with payroll tax.

The following national insurance contributions apply in 2017:

Old age pension	(AOW)	17.9%	on a maximum amount of EUR 33,791
Surviving dependents benefits	(ANW)	0.1%	on a maximum amount of EUR 33,791
Exceptional medical expenses insurance	(Wlz)	9.65%	on a maximum amount of EUR 33,791

If both payroll tax and national insurance contributions are due, the combined rate for the first bracket is 36.55 percent and that for the second bracket is 40.80 percent.

In addition to remitting payroll tax and national insurance contributions, employed persons insurance contributions must be remitted for artists working under an employment contract. No employed persons insurance contributions are due if the insurance obligation has been allocated to another country under an international treaty.

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The following social security contributions apply for 2017:

Unemployment insurance contributions	(WW)	2.64%	On a maximum amount of EUR 53,701
Health Care Insurance Act	(Zvw)	6.65%	On a maximum amount of EUR 53,701
Invalidity Insurance Act (WAO)/Work and Income Capacity for Work Act (WIA)	(WAO/WIA)	6.6%	On a maximum amount of EUR 53,701
Differentiated Invalidity Insurance Act contribution	(WHK)	Variable per employer	On a maximum amount of EUR 53,701

Opt-in

If not all the conditions for an employer-employee relationship are met, the artist and the principal may choose to qualify the employment relationship as an employer-employee relationship. They must inform the competent tax inspector of their choice by submitting a joint statement. In that case, the normal payroll tax rules apply.

Work-related costs rules

As of January 1, 2015, the work-related costs rules are mandatory for all employers. The work-related costs rules took effect on January 1, 2011. They form part of the Tax Simplification Act 2010, which passed into law at the end of 2009. These rules extensively changed the current system of tax exempt allowances, reimbursements, and similar benefits for employees.

Artist regime

A special regime exists in the Netherlands for artists who do not work in an employer-employee relationship and perform in the Netherlands under a short-term agreement or temporarily for other reasons. In this respect, "short term" is understood to mean no longer than three months. The regime does not apply to foreign artists that perform in the Netherlands and are resident or based in a country with which the Netherlands has concluded a double taxation treaty, or in Aruba, Curaçao, Sint Maarten or the BES islands.

The artist regime only applies to persons engaged in an artistic performance intended to be listened to and/or watched by an audience. Examples include pop musicians, orchestra members, DJs, or actors. Technicians do not fall under this definition. The person paying the artist's fees is obliged to withhold payroll tax on the fees. A foreign principal is only obliged to withhold payroll tax if it has a permanent establishment or permanent representative in the Netherlands.

The foreign artist's fees are subject to a 20 percent tax rate. Fees consist of the artist's total remuneration, including expense allowances, tips, and benefits in kind. Subject to specific conditions, allowances and benefits relating to consumption and meals, and travel and accommodation expenses, do not form part of the fees.

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An expense deduction decision (*kostenvergoedingsbeschikking*, KVB) can be used to qualify a portion of the fees as a tax-free allowance. The artist and the principal must submit a joint request to the Dutch Revenue's tax inspector for the issuance of such a decision. If the principal is not in the possession of such a decision, EUR 163 per performance may be exempted for the purposes of the tax levy.

Generally, payroll tax is the final levy for foreign artists because such artists are not required to file a personal income tax return. Nevertheless, foreign artists may choose to do so. If the foreign artists are not insured in the Netherlands for social security purposes, tax rates of 8.90 and 13.15 percent apply to the first and second tax brackets, respectively. In addition, foreign artists will be entitled to deduct the expenses they incurred.

When a foreign group performs in the Netherlands and its members qualify as artists within the meaning of the special regime for artists, the group qualifies as a taxpayer for payroll tax purposes. In this respect, the rules that apply to individual artists will also apply to the group.

Employer obligations

Performing activities or having activities performed in the Netherlands which are aimed at having artists perform is considered a permanent establishment. It is possible to transfer the obligation to withhold payroll tax. The person to whom the obligation to withhold payroll tax is transferred must be in possession of a withholding agents statement. Several administrative obligations apply to the foreign artist's withholding agent.

A withholding agent is obliged to verify an artist's identity based on a valid and original identity document. The identity document must be photocopied, and the photocopy must be kept with the payroll accounts for at least five years. The artist must file a payroll tax statement before commencing the activities.

The withholding agent must ensure that the artist fills in their name, address, place of residence, and national identity number (BSN number). The artist must sign the payroll tax statement. If the artist fails to provide this information, the employer is obliged to impose a penalty and withhold payroll tax at the anonymity rate of 52 percent.

If an artist has a certificate of coverage for social security purposes, i.e., formerly E-101 or E-102, now A1, this must be kept with the payroll accounts. This certificate exempts social security contributions from having to be paid.

The payroll tax and social security contributions withheld must be remitted to the Dutch Revenue on a monthly basis. Together with the remittance of the payroll tax due, a payroll tax return must be filed electronically. If the payroll tax due is not paid on time or if the payroll tax return is incorrect, an assessment and a penalty will be imposed. The payroll tax due can be paid using the collection slip attached to the payroll tax return or by transferring the amount to the Dutch Revenue's bank account.

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