Curaçao 2023 Tax Treaty Policy

1. Introduction

It is of profound importance for any country to have a socially balanced society based on an adequate level of prosperity and well-being. The primary means for achieving such a balance is stable and structural economic growth on an annual basis. These principles also apply to Curaçao. This is why Curaçao is striving to achieve, among other things, an inclusive society where social inequality and exclusion are minimized. An inclusive society leaves nobody behind, and encourages everybody to realize their maximum potential and contribute to fulfilling the collective potential of Curaçao. Key to achieving this is the promotion of investments in Curaçao, both by companies established in Curaçao and by foreign companies. By creating employment, these investments provide the inhabitants with opportunities for further development, among other things.

A significant role in boosting investments is played by taxation. On the one hand, taxes can be used to attract investment and foster economic development; on the other hand, the taxation system must be prevented from inhibiting such development. Cross-border international investments and activities can easily be hampered by international double taxation. Such double taxation is undesirable and must be prevented. This is why, in 2022, Curaçao issued the *National Decree for the Avoidance of Double Taxation*[1] (hereinafter: "NDADT"). Briefly stated, this Decree provides, under specific conditions, for the unilateral avoidance of double taxation in favor of companies established, and people living, in Curaçao that are faced with international double taxation.

It is desirable, however, to approach countries with which Curaçao has more intensive (trade) relations with a view to concluding a convention for the avoidance of double taxation, because such a convention will make it easier to capitalize on the relations between both countries, as well as both countries' regulations. It will also allow for a better division of double taxation accommodation. Thus, conventions may play an instrumental role in fostering economic relations between and in both countries. More specifically, it is interesting to look into the possibility of expanding Curaçao's role as a regional platform for investments in the Caribbean, as well as investments from and in South and Central America in particular.

To date, Curaçao has signed almost no agreements for the avoidance of double taxation. Only in its relationship with the Netherlands (including the BES islands) are there the *Netherlands-Curaçao Tax Regulations*[2] (NCTR). Though not a convention in the literal sense, they do fulfill the role of a convention. Additionally, in its relationships with the other Kingdom countries, Curaçao

[1] Published in PB 2022, No. 113.

[2] In Dutch: *Belastingregeling Nederland Curaçao.* (Translator's note.)

has the *Tax Regulations for the Kingdom*[3] (TRK), which hold a similar position. Up until 2023, two full conventions for the avoidance of double taxation were concluded with third countries, namely Norway and Malta. Curaçao has a strong desire to do the same with more countries. Curaçao is, in principle, open to entering into tax treaties with any country, with due regard for the level of intensity of relations between the countries. Due to, among other things, quantitative restrictions in terms of human capacity in the Curaçao government for entering into tax treaties on a large scale, priority is given to tax treaties on a regional level. The government will also look to other countries that are key trading partners of Curaçao, or with which Curaçao wants to establish economic relations while encouraging mutual investments.

Curaçao enjoys autonomy in designing its own tax legislation, and can independently negotiate tax treaties. Under the *Charter for the Kingdom of the Netherlands*[4] ("Kingdom"), only the Kingdom has the authority to enter into treaty relations. This is why treaties are signed on behalf of the Kingdom government, and ratified exclusively by the Kingdom.
Treaties concluded by the Netherlands do not automatically apply to Curaçao. The Netherlands does, however, follow a policy of raising, during treaty negotiations with partner countries, the possibility of including an extension clause in relation to the Caribbean countries.[5] This extension clause means that the tax treaty in question, while concluded by the Netherlands, may, under specific conditions, be extended in scope to include the aforementioned Caribbean Kingdom parts. Any such extension is effected through a separate treaty. Whether a country is willing to extend the scope of a treaty concluded with the Netherlands to include Curaçao will depend, of course, on that country's viewpoint. Curaçao is striving to follow up on these extension clauses by opening negotiations with these countries with a view to concluding conventions for the avoidance of double taxation. To follow up on the extension clauses, Curaçao will seek close cooperation with the Netherlands.

Curaçao's position is fundamentally different from that of other parts of the Kingdom, particularly in relation to the Netherlands, because of which some of its goals may be different.
The purpose of the Curaçao Tax Convention Policy as set out in this paper is to shed light on what Curaçao seeks to achieve during its tax treaty negotiations. This policy was designed on the basis of a number of political and policy principles.

- In 2016, Curaçao committed itself to meeting the minimum standards of the "Base Erosion and Profit Shifting" ("BEPS") action plan in an effort to counter base erosion and profit shifting. In the same year, Curaçao joined the OECD's Inclusive Framework. Even before 2016, Curaçao took strong action against tax evasion by becoming a party to the WABB[6] convention, among other things.
- Curaçao considers of great importance both the enforceability of Curaçao statutory rules and regulations and the growing significance of effective dispute resolution.

[3] In Dutch: *Belastingregeling voor het Koninkrijk*. (Translator's note.)
[4] In Dutch: *Statuut voor het Koninkrijk der Nederlanden*. (Translator's note.)
[5] *Parliamentary Records II* 2019/20, 25087, No. N, Notes on the 2020 Tax Treaty Policy.
[6] WABB, in Dutch, stands for *Wederzijdse Administratieve Bijstand in Belastingzaken*, i.e. "Mutual Administrative Assistance in Tax Matters". (Translator's note.)

- Boosting economic activities in Curaçao will lead to, among other things, better jobs and accelerated economic growth.

Of course, achieving all of the policy objectives in a tax convention will almost never be feasible, considering that every country with which Curaçao opens negotiations will have different domestic tax laws, those laws will not be implemented in the same way, and, above all, the aspirations of convention partners will be somewhat different. For each tax convention, an assessment will be made of whether a potential negotiation agreement adequately meets the objectives of this convention policy.

The budgetary effects of concluding conventions are hard to predict. They will largely depend on behavioral effects. Typically, budgetary effects are affected fairly strongly by taxation at source. Curaçao, however, does not tax at source and, from this perspective, Curaçao will not, to this extent, have to give up any taxation rights during convention negotiations. The potential intensification of economic relations, on the other hand, may lead to an increase in tax revenues.

2. Convention Policy Outline

2.1 *Based on the OECD Model Convention and OECD Commentary*

The OECD model convention and (to a lesser extent) the UN model convention are used across the world as a basis for negotiation. In spite of some differences, these model conventions largely coincide in terms of structure and contents. Both models are regularly updated, incorporating several technical aspects and recommendations in the context of the G20 and OECD BEPS project. By and large, the UN model convention is more tailored to the situation of developing countries; this model grants more taxation rights to the source country (than the OECD model convention), which mostly benefits developing countries, most of which are predominantly capital-importing. The OECD model convention was designed by and for developed States having mutual interests. It more often grants the primary taxation right to the State of residence, meaning that the source State enjoys fewer taxation rights. This benefits capital-exporting countries.
Even though, like many other countries, Curaçao has no wealth tax, Curaçao did include the wealth tax article in its treaty policy. The reason is that, if the other country does impose wealth tax, or may start to do so in the future, it would be convenient to be able to apply the tax convention to that wealth tax immediately, without the need for the contracting parties to start new negotiations. According to the OECD's list of developing countries, Curaçao is not a developing country. Nevertheless, the United Nations (UN) counts Curaçao among the so-called Small Island Developing States (SIDS), i.e. small island states that are simultaneously developing countries. Curaçao nevertheless uses the OECD model convention as a basis for its treaty negotiations. The reason is that many countries do the same, because of which it is expected to benefit the progress of negotiations with partner countries, as well as the end result. Since 1997, the OECD model convention has been expanded to include a separate section listing the positions of non-OECD countries. These are countries which point out that, while by and large following the articles in the OECD model convention and the accompanying explanatory notes ("OECD Commentary"), they take a different position on certain, specified, issues (as the OECD countries do in the OECD Commentary). This has strengthened the position of the OECD model convention as an

international standard. The advantage of staying as close as possible to an international standard is that, in areas where there is an international consensus, the commentary provides a great deal of clarification, in addition to being periodically adjusted to social developments. Working with the OECD model convention facilitates reaching agreement with other countries. In addition, the OECD Commentary ensures that OECD-consistent convention provisions are given a uniform interpretation internationally wherever possible. On a limited number of points, Curaçao departs from the OECD model convention. These differences will be explained in the following paragraphs.
In the event of convention negotiations with developing countries, Curaçao will also have regard to those countries' wishes, meaning that all or part of the UN model convention may be followed.

2.2 *Method of Avoiding Double Taxation*

To avoid double taxation, Curaçao will in principle apply either the exemption method or the offset method. It has laid down both these methods in the NDADT. This is why Curaçao will calculate exemptions or offsets in accordance with the NDADT.

2.3. *Anti-Abuse Measures in Tax Conventions*

To bring its tax treaties in line with the minimum standard for the avoidance of treaty abuse, Curaçao will in principle opt for application of the so-called Principal Purpose Test ("PPT"). The PPT eliminates the possibility of improper use of treaties concluded by Curaçao with a treaty partner. Through objective analysis, the PPT seeks to identify one of the principal purposes of an arrangement or transaction. If it is reasonable to conclude that obtaining convention benefits is one of the principal purposes of an arrangement or transaction, the PPT will prevent either a treaty partner or Curaçao from having its taxation authority restricted. The PPT uses open-ended standards that seek to identify, among other things, subjective elements like the intention of the arrangement or transaction. The use of open-ended standards allows combating different forms of treaty abuse without negatively affecting real economic activities. In addition, open-ended standards allow the PPT to respond to new forms of treaty abuse. However, the PPT's open-ended standards mean that its application is harder to predict.

In order to create more certainty about the practical application of the open-ended standards, Curaçao has chosen to add two additional clauses to the PPT. 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.
Under the second clause, the authorities of contracting countries that intend to rely on the PPT will have an obligation to consult with each other. Communication between authorities promotes fair treaty application as intended. In addition, a few examples could be included in tax treaties, joint explanatory notes, or Memorandums of Understanding of situations where an arrangement or transaction is not contrary to the objective and purpose of the treaty. With this, Curaçao seeks to safeguard legal certainty.

The minimum standard can also be met by combining a (simplified) Limitation on Benefits (LoB) clause with a PPT. An LoB clause makes access to convention benefits dependent on a mechanical review of a number of features of the body that wants to take advantage of those benefits. Clearly defined conditions are formulated that review whether such body has an actual presence in a contracting country, or whether other factors exist that make abuse less likely. These conditions are based on (static) assumptions that do not always do justice to reality, giving rise to the risk of abuse not being combated or real economic activities being affected. If the body fails to meet these conditions, it will be blocked—barring possible reliance on a safety net clause—from access to convention benefits. Even bodies that do meet the requirements of the LoB clause can be denied access to convention benefits under the PPT. The assumed advantage of legal certainty thanks to an LoB clause is in such case eliminated by the PPT's open-ended standards discussed earlier. In addition, an LoB clause leads to greater complexity.

Considering the foregoing, Curaçao will not choose to include an LoB clause. It is conceivable, however, that a treaty partner may propose a (simplified) LoB clause in combination with a PPT to combat treaty abuse. Curaçao is open to considering such proposals, e.g. if a treaty partner is able to show that it needs the LoB clause to adequately combat treaty abuse in this bilateral relationship.

2.4. *Kingdom Constituent Parts*

Within the Kingdom, each of the Caribbean Kingdom Territories of Aruba, Curaçao, and Sint Maarten enjoys autonomy in matters of taxation. They can independently negotiate tax treaties. In the tax treaties concluded by Curaçao, Curaçao will seek to include a clause providing that the treaty in question can, under specific conditions, be extended in scope to also apply to other parts of the Kingdom. Any such extension will need to be effected through a separate treaty.

3. *Main Departures from and Other Additions to the OECD Model Convention and the OECD Commentary*

3.1. *General*

As noted earlier, Curaçao seeks to stay as close as possible to the OECD model convention and the OECD Commentary, so as to ensure compliance by Curaçao with the minimum standards arising from the BEPS project. As an example, the purpose of the treaty—i.e. combating tax evasion and avoidance—will be stated in the preamble and title. In addition, a treaty will provide for a mutual consultation procedure, as well as a general anti-abuse provision.

The provisions of the OECD model convention and the OECD Commentary relate to the scope, definitions, the division of taxation powers, methods of avoidance, and other provisions. Nevertheless, the Curaçao model convention departs from the OECD model convention and the OECD Commentary on a limited number of points as a result of domestic legislation, case law, and policy considerations. The differences and additions will be explained in greater detail below. The following paragraphs will deal with these specific elements mainly in the order in which they appear in the OECD model convention.

3.2. *Investment Institutions*

The financial sector is a central pillar of the Curaçao economy and, worldwide, there has been a dramatic increase in the use of investment institutions for both private and institutional investors, but also for private equity. By concluding treaties with OECD-approved provisions for so-called Collective Investment Vehicles (CIVs), Curaçao can contribute to preserving financial services in its territory. As a departure from the 2017 OECD model convention, but in agreement with the choices offered in the Commentary to this convention, Curaçao has therefore provided two exceptions that makes the option of choosing Curaçao as a location for establishing an international investment institution more attractive.

Curaçao wishes to include in its treaties a provision that gives an investment institution located in Curaçao and subject to oversight by the Central Bank of Curaçao and Sint Maarten (a "Registered Collective Investment Vehicle") the right not to be considered a resident by the other contracting country—the source country—and to claim, on behalf of its participants, the benefits offered by the treaty between the country where the participant lives or is located and the source country. To do so, the investment institution should notify the source country.
Curaçao wants its treaties to include a provision under which the term "pension fund" is understood as including any investment institution that is entirely, or almost entirely, at the service of pension funds of the contracting countries, or of countries with which the source country has concluded a tax treaty that offers benefits to pension funds equal to or better than those provided by the treaty between Curaçao and the source country. Whether, under this provision, an investment institution qualifies as a pension fund is to be assessed by the source country. The investment institution will be required to provide the source country with any information it needs to make such assessment.

3.2. *Residency Tiebreaker*

Since 2017, the OECD model convention has included a mutual agreement clause for situations where non-individuals have double residency. Curaçao feels that this regulation, under which parties are required to consult with each other about the treaty residency in all cases of double residency, is not workable. In most cases, no such consultation will be necessary, because the customary rule that provides that the State where the actual place of residence is located [*text missing in source text; translator*] can be applied without consultation. This is why Curaçao has opted for the tiebreaker provided in the OECD model convention as it read until 2017. This means that, under the tiebreaker rule, the treaty residence is considered to be the State in which the place of effective management is located. Only when this rule fails to produce an unambiguous solution should the contracting countries settle the matter by mutual agreement.

3.3. *Permanent Establishment*

Determining the presence of a permanent establishment of an enterprise in another country is a key consideration in assigning taxation rights with regard to business profits under tax treaties. Action point 7 of the BEPS project contains a finding that there are several ways to artificially avoid permanent establishment status, and proposes different measures to address this issue.

From its beginnings, the OECD model convention has labeled several specific activities as not constituting a permanent establishment, because those activities are generally considered to be of a preparatory or auxiliary nature. In practice, some of those activities may not be just of a preparatory or auxiliary nature, but play a more important role. Nevertheless, such activities could then not be treated as a permanent establishment. The most recent OECD model convention now includes the requirement that the activity, or combination of activities, actually—i.e., on the basis of the facts and circumstances of the specific case—be of a preparatory or auxiliary nature.

In its negotiations with other countries, Curaçao will take the position that it accepts the new permanent-establishment notion of the (2017) OECD model convention.
It is conceivable, however, that a contracting partner may want to hold on to the permanent-establishment notion based on the old OECD model convention[7]. Curaçao is open to considering this position.

3.4. *Dividends, Interest, and Royalties*
3.4.1. *General*

The OECD model convention grants the source country the right to charge 5% tax on so-called participation dividends (when there is a minimum capital participation of 25%), and 15% on other dividends. In addition, the OECD model convention provides a 10% withholding tax rate for interest. For royalties, the OECD model convention assigns the taxation right exclusively to the country of residence.

Curaçao's tax treaty policy follows part of the principles laid down in the OECD model convention. In principle, the treaty policy seeks to provide, in accordance with the OECD model convention, an exclusive country-of-residence taxation right in regard to royalties. For participation dividends and interest, however, the treaty policy departs from the OECD model convention.

3.4.2. *Dividends*

Curaçao does not tax dividends at source. In this sense, there consequently is no point in pursuing source State taxation with regard to outgoing dividends. For incoming dividends, source State taxation is, in principle, unfavorable to Curaçao, as any tax so levied must in principle be offset. This is no issue, incidentally, with participation dividends, because such dividends are exempted under the participation exemption, which makes offsetting (foreign) withholding taxes impossible. This is why Curaçao is of the opinion that, in the case of participation dividends, full state-of-residence taxation should always be applied, with "participation" being defined as a 10% ownership interest. For other dividends, Curaçao wishes to accept a withholding tax of up to 5%.

3.4.3. *Interest*

In terms of interest, too, Curaçao will in principle pursue exclusive country-of-residence taxation. A relevant consideration in this regard is that Curaçao does not tax at source. Furthermore,

[7] OECD Model Convention dated January 28, 2003.

withholding tax on interest is almost always levied on the basis of gross income, whereas, for purposes of offsetting, the country of residence will, rather, consider net income. The result is that there will be no adequate basis for a full offset of withholding taxes. Even though the costs associated with any remaining double taxation will in most cases be passed on, this puts foreign investors in a disadvantage in relation to investors from the source country itself. The result is that a withholding tax on interest may hamper international traffic and investment.

3.4.4. *Exceptions (Including Pension Funds)*

As a rule, pension funds are exempted from profit tax. If their investments are taxed at source, this means that those taxes are not eligible for offsetting. As a rule, no refund or reduction will then be possible. All this derives from the fact that, as a result of their subjective exemption, treaties grant no rights to pension funds. This is an undesirable situation, and, for this reason, the treaty policy seeks to make the treaty applicable to pension funds despite their subjective exemption from profit tax. This, incidentally, calls for regulation in countries' domestic legislations to provide for a withholding exemption or refund arrangement in relation to withholding taxes.

In addition, Curaçao seeks to omit any withholding tax on interest paid to or by a country or any of a country's constituent parts, interest paid to the Central Bank, interest paid under export financing programs, interest paid to financial institutions (particularly *Financieringsmaatschappij voor Ontwikkelingslanden*, i.e. the Dutch Entrepreneurial Development Bank), and interest relating to hire-purchase.

3.5. *Income from a Substantial Interest*

In the event of emigration of a Curaçao shareholder owning a substantial interest in a company, any capital appreciation of the substantial interest in the period when the substantial-interest holder was a Curaçao resident is taxed under Article 39 of the 1943 National Ordinance on Income Tax. In the event of emigration, Curaçao imposes a conservatory assessment, while granting an extension of the time for payment of tax owed. If the taxpayer still has not sold their shares 10 years later, the assessment will expire.

The result may be concurrent taxation if the new country of residence of the substantial-interest holder taxes any alienation profit on which Curaçao, too, wants to assert its tax claim; this will be the case if the country in question applies no step-up. To prevent such concurrence, Curaçao will strive to reach specific agreements in tax treaties. In the capital gains article, Curaçao will seek to include a substantial-interest reservation to underscore that the former country of residence has the right to apply the emigration taxation. If a tax claim is outstanding and dividends are enjoyed or shares are alienated, Curaçao wishes to tax the resulting proceeds, considering that the underlying value came into existence in Curaçao. This will also prevent erosion of the tax claim. The Curaçao tax on income from a substantial interest will then be deducted from the conservatory assessment imposed at the time of emigration.

3.6 *Offset Method for Managing Directors' and Supervisory Directors' Fees*

In terms of directors' fees, which in Curaçao include supervisory directors' fees, Curaçao strives to apply not the exemption method but the offset method. Managing directors' and supervisory directors' fees are income from activities that often are not performed at a fixed location, while it will not always be clear whether and how they are taxed abroad. Curaçao wishes to tax this income in the same way as if it had been enjoyed in Curaçao, unless it is subject to a higher tax rate abroad. This means that the income of a foreign company's managing director or supervisory director living in Curaçao will be taxed at the same rate as the income of a managing director or supervisory director of a Curaçao company. In its treaties, Curaçao will include in the avoidance clause, for this income, the offset method.

3.7 *Entertainers and Sportspersons*

Under Article 17 of the OECD model convention, the country where an entertainer or sportsperson exercises their personal activities has the right to tax foreign entertainers and sportspersons, regardless of their employment relationship or legal form. Against the withholding tax in the country where the activities are exercised, the country of residence will grant a tax offset. In practice, this system may give rise to a good number of practical problems, among other reasons because the tax base in the country where the activities are exercised will often be substantially higher than in the country of residence. Under Article 17 of the OECD model convention, sportspersons and entertainers will often pay tax on this income abroad, in return for which Curaçao will have to grant an offset against its own income tax.

In agreement with international common practice, Curaçao looks to include a sportspersons and entertainers article with (limited) source State taxation. One of the optional provisions proposed in the OECD Commentary on the sportspersons and entertainers article concerns the possibility of providing a threshold amount of about $20,000 per person per year. To the extent this threshold is not exceeded, the income will be subjected to taxation in the country of residence only, and source State taxation will be prevented. The threshold amount will be agreed in bilateral treaty negotiations. If the threshold amount is exceeded, Curaçao will opt for taxation in the source State at the rate set in its domestic legislation, with a maximum of 15%.

3.8. *Pensions, Life Annuities, and Social Security Benefits*

Under the OECD model convention, the right to tax pension benefits is granted to the State of residence of the person entitled to the pension. Even though a case can be made for granting a taxation right to the Source state as well, because pensions are often built up with the benefit of tax facilities, Curaçao prefers to follow the OECD model convention on this point. Consequently, Curaçao has opted for full State-of-residence taxation. This will only be different if a pension is not paid as a (lifelong) periodic benefit, which will particularly be the case in the event of a (partial) redemption. A pension is meant as (lifelong) support, and, therefore, should not be redeemed. If a redemption nevertheless occurs, the authority to levy tax will lie (to this extent) with the source State, with the understanding that it must be certain that this State will actually tax the redemption sum.

The pension Article likewise applies to benefits paid under annuity insurances if they were built up with the benefit of tax facilities. There is no reason to make a distinction between second-pillar and third-pillar provisions for the future. Further, Curaçao is of the opinion that not just private-law pensions should be taxed under this Article, but public-law pension benefits as well. According to the OECD model convention, these benefits fall under Article 19 and, for this reason, are to be taxed by the (former) administration State. There is no reason, however, to make a distinction between private-law and public-law pension plans. Curaçao will therefore limit the Article on income received from the government to active income.

Further, Curaçao wants social security benefits to be taxed in the country paying them.