VAN OERS accountancy & advies

Ambitie • Ondernemingszin • Resultaat

# LEA Rome – Dutch case presentation

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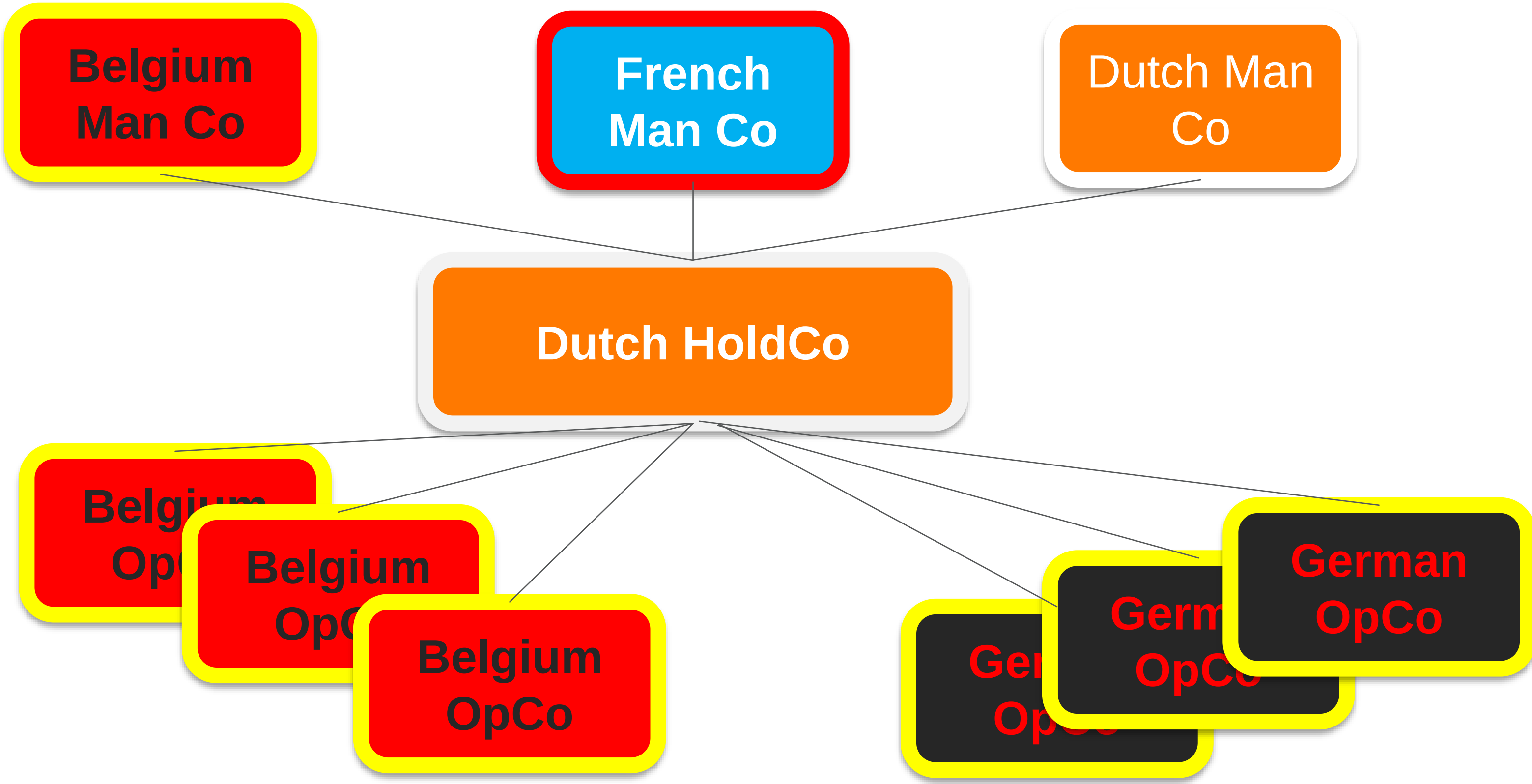
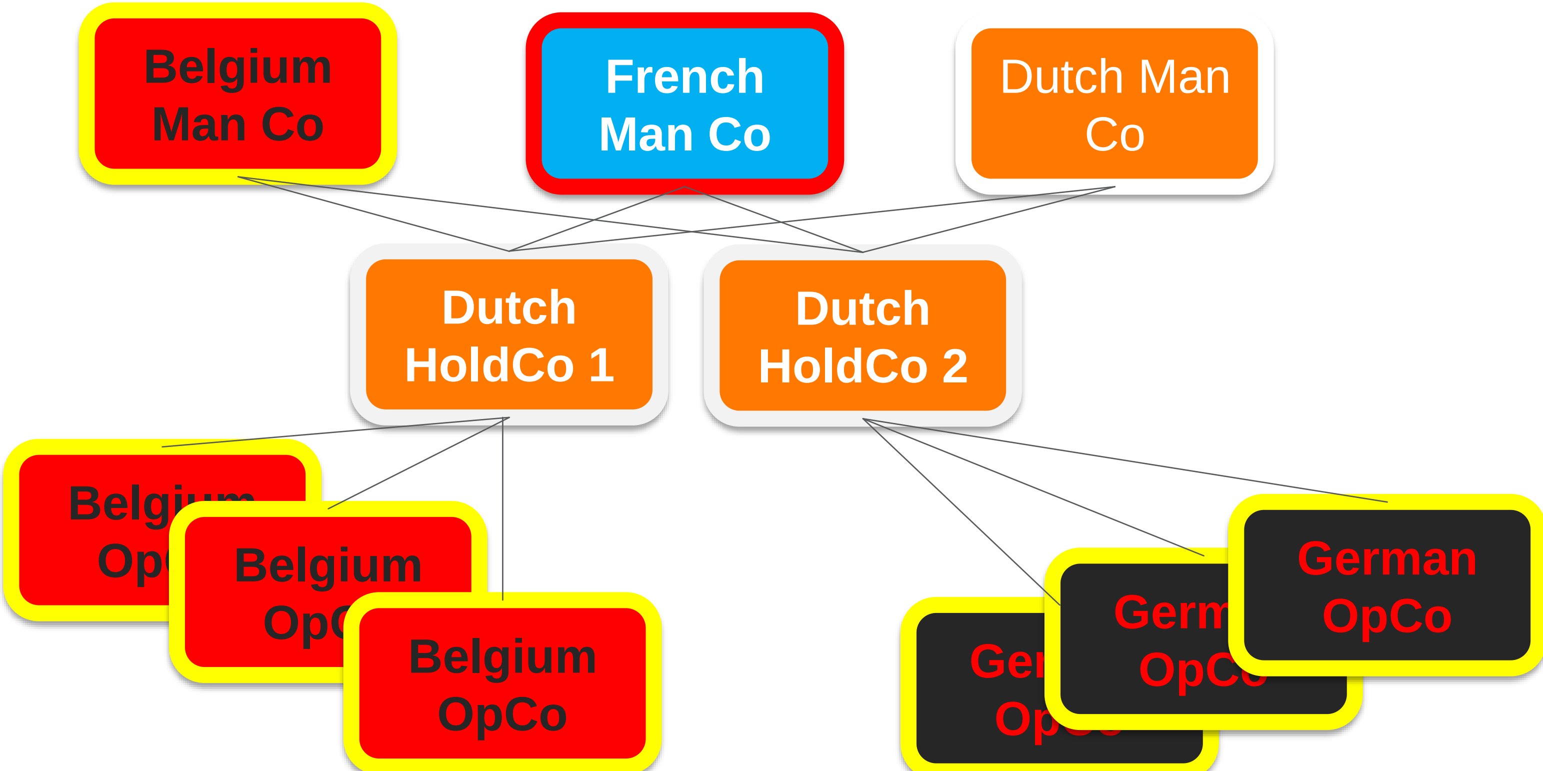
## (relevant) structure



## (relevant) structure



## Background information

- Dutch HoldCo 1 and 2 were incorporated by a legal demerger of Dutch HoldCo;
- By this demerger the Belgium and German activities were split;
- The majority of shares in both HoldCo 1 and 2 is (indirectly) held by Belgium Tax Residents / persons;
- Dutch HoldCo 1 is distributing dividends;

- **How does this work out…..?**

## Dividend Withholding Tax

As per January 1, 2018 the Dutch Dividend Withholding Tax Law was amended. An “*anti-abuse rule”* was introduced – the Dutch national law was brought in line with the EU Parent – Subsidiary Directive.

Basically the structure as such should not be set up to avoid (Dutch) taxes – <u>some kind of PPT</u>.

Hereto two tests were introduced:

- Subjective Test
- Objective Test

## SUBJECTIVE TEST

The Dividend withholding tax exemption will **not** apply if the foreign shareholder (entity) holds the interest in the Dutch entity with the *main purpose (or one of the main purposes*) of avoiding Dutch dividend withholding tax;

Hereto the direct shareholder of the Dutch distributing entity Dutch HoldCo 1 is **"ignored".**

**Look through the structure up to the first "active entity" and compare the applicable WHT rate.**

## Subjective Test


Belgium Man Co is “ignored” → the dividend is deemed to be distributed by Dutch HoldCo 1 **directly** to French OpCo.

If a direct dividend to French OpCo is exempt there is no “abuse”.

# Subjective Test


Belgium Man Co is “ignored” → the dividend is deemed to be distributed by Dutch HoldCo 1 **directly** to the BE Tax resident and taxed with 15% Dutch Dividend withholding tax!

## OBJECTIVE TEST

If Dutch dividend withholding tax is avoided (by meeting the subjective test) it should be assessed whether the structure is considered as artificial and not set up for sound business reasons;

Valid business reasons are deemed to be met if the shareholding entity is an "*active company*" *with sufficient substance in its residence state* and its (Dutch) participation should be *functionally attributable* to that active company.

Depending upon all facts and circumstances!

## OBJECTIVE TEST

A (foreign) personal top-holding company should do more than just “holding” the shares, it should perform (management) services towards **THE** Dutch (dividend distributing) participation(s);

How should this be considered in relation to a full Dutch holding structure?

## OBJECTIVE TEST

A foreign intermediate holding company with a “switch function” (*schakelfunctie*) is deemed to be set up for business reasons when meeting the payroll and office requirement (<u>no safe harbor anymore – only indications</u>!):

- Payroll (100K year);
- Own office space (realistic – no flex office).

# National Law

## Case Law

- Belgium HoldCo without office space and without payroll → **Abuse** → 15%;
- Belgium HoldCo with office space and 500K payroll / costs → at first glance **“No abuse”** →

BUT….

The 500K payroll / costs are <u>not linked to</u> the activities performed for the dividend distributing Dutch Co → not functionally attributable!!!! → **Abuse** → 15%!!

# Double Tax Treaties

- Lowered withholding tax rate (in the case with Belgium 5%);

- Double Tax Treaty permit – to be obtained from the Dutch Tax Authorities;

→ The Dutch Tax Authorities explain the conditions to apply for DTT in the same way as they do for the exemption in its National Laws….

- Multi Lateral Instrument → Principal Purpose Test

# Change of (actual) seat


Dutch HoldCo changes its actual seat (Place of Effective Management) to Belgium;

Due to the Incorporation Fiction the Dutch Tax Authorities still consider Dutch HoldCo as a Dutch Tax Resident!

Impact MLI – PPT and MAP | full taxation in both countries?

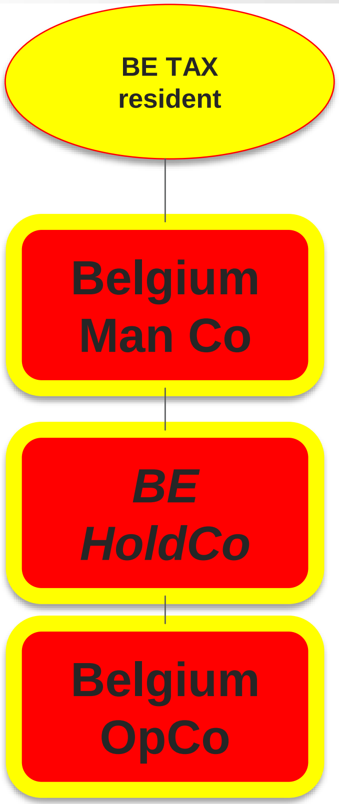
# Change of (statutory) seat


Dutch HoldCo is converted into a Belgium entity (change of statutory seat);

Due to the **Incorporation** Fiction the Dutch Tax Authorities still consider Dutch HoldCo 1 as a Dutch Tax Resident!

Impact MLI – PPT and MAP | full taxation in both countries?

# Cross border merge




Dutch HoldCo will be merged into a newly incorporated Belgium HoldCo;

Dutch HoldCo will no longer exist → no Incorporation Fiction!

Impact MLI – PPT…?

## Solutions?

- EU Directive 2019/2021 Cross-Border Conversion, Mergers and divisions → in December 2022 a law proposal was submitted → more guidance for tax consequences…?;

- Or just creating *sufficient substance* for Belgium ManCo…?

## Take Aways

- The Netherlands are still an interesting country to invest…. but,
- make sure Dutch companies are (indirectly) structured under an entity with sufficient substance in its residence State, AND
- make sure the Dutch companies / investments are functionally attributable to the (foreign) shareholder, AND
- make sure there is sufficient proof (written documentation) for this…

# Questions?

Thank you!