OFFICIAL TRANSLATION

I, undersigned, lic. Karel Thijs, LL.M., certify that I am a sworn translator with the Court of First Instance of Aruba and that the following English text, comprising 6 (six) pages, is a true and accurate translation of the original document in Dutch.

NATIONAL ORDINANCE containing provisions on amendments to the General National Ordinance on Taxation (AB 2004 No. 10) and the National Ordinance on Profit Tax (AB 1988 No. 47)

BILL

IN THE NAME OF THE KING!

THE GOVERNOR of Aruba,

Having taken into consideration:

- that it is desirable to take measures to bring existing regulations regarding the transparent company in line with internationally accepted standards, as recommended by the Organisation for Economic Co-operation and Development (OECD) and the European Union;
- that adjustments are desirable to counter harmful tax constructions and base erosion;
- that, in this context, it is desirable to introduce certain characteristics of real economic presence, the so-called "substance requirements," for companies with geographically mobile activities that are in line with internationally accepted standards;

Having heard the Advisory Council, and in consultation with the Aruban Parliament, has enacted the following national ordinance:

Article I

The General National Ordinance on Taxation (AB 2004 No. 10) is amended as follows:

A. the following amendments are made to Article 3b:
1° the first paragraph will henceforth read as follows:
1. A corporation[1], limited-liability company[2], or Aruba exempt company[3] will be treated as a partnership[4] pursuant to Article 3, second paragraph, letter d, only if:
a. the company's board of directors, after having been authorized to do so by each of its shareholders individually, has given notice of this to the Inspector by certified letter while submitting the authorization; and

[1] In Dutch: *naamloze vennootschap.*
[2] In Dutch: *vennootschap met beperkte aansprakelijkheid.*
[3] In Dutch: *Aruba vrijgestelde vennootschap.*
[4] In Dutch: *maatschap.*

Beëdigd vertaler
Sworn translator Traductor jurado
Lic. Karel Thijs, LL.M.

b. with regard to relevant activities, to be specified in a national decree containing general measures, the company meets the conditions for real economic presence in Aruba as laid down in said national decree.

2° the fourth paragraph will henceforth read as follows:

4. If a transparent company no longer meets the conditions referred to in the first paragraph, Article 3, third paragraph, or Article 49, fourth paragraph, the company will no longer be treated as a partnership as of the fiscal year in which the conditions are no longer met.

B. in Article 56, "in Article 49, second and third paragraphs" is replaced by: "in Article 49, second, third, and fourth paragraphs."

C. in the first paragraph, letter f, of Article 68, "in Article 49, second and third paragraphs" is replaced by: "in Article 49, second, third, and fourth paragraphs."

Article II

The National Ordinance on Profit Tax (AB 1988 No. 47) is amended as follows:

A. In Article 1, second paragraph, the period at the end of subsection b is replaced by a semicolon, and a new subsection is added that reads:

c. the real economic presence in Aruba of a transparent company as referred to in Article 3b, first paragraph, letter b, of the General National Ordinance on Taxation;

B. Article 15, fifth paragraph, is repealed.

Article III

1. This national ordinance will enter into force as of January 1, 2019, with the understanding that Article I, Section A, second point, will likewise apply to fiscal years ending on December 31, 2018.

2. For any corporation[1], limited-liability company[2], or Aruba exempt company[3] being treated as a partnership[4] prior to the entry into force of this national ordinance, Article I, Section A, first point, will enter into force as of January 1, 2022.

Given in Oranjestad,

The Minister of Finance, Economic Affairs, and Culture,

The Minister of Justice,

Beëdigd vertaler
Sworn translator Traductor jurado
Lic. Karel Thijs, LL.M.

EXPLANATORY NOTES

General Explanation

Introduction

Internationally, increasing attention is being given to countering tax regimes that can be used for tax base erosion and corporate profit shifting to other jurisdictions.

On October 5, 2015, the final report of the Addressing Base Erosion & Profit Shifting (BEPS) Project was published in Paris. The report was prepared at the request of the G20 by the Organisation for Economic Co-operation and Development.

The conclusion of the report contains fifteen Actions for countries. These Actions were set out in various forms, each with its own level of consensus, and not all are equally binding on the countries involved. The most far-reaching conclusions take the form of a minimum standard. Among others, a standard was developed for real economic presence of taxpayers who use preferential tax regimes that are or may be related to geographically mobile activities. This approach on the one hand acknowledges that preferential regimes are important instruments for promoting and improving a location's tax business climate. On the other hand, measures should be taken to prevent these regimes from being abused as instruments for tax avoidance.

Based on, among others, the OECD guidelines, a large number of countries, including Aruba, were evaluated by the European Union (EU). The conclusion of this evaluation was that a number of aspects of the Aruban tax legislation are no longer in compliance with current international requirements. In its "EU List of Non-Cooperative Jurisdictions for Tax Purposes," published by the EU on December 5, 2017, the EU put Aruba on the gray list by virtue of Aruba's promise to change or abolish the existing identified tax regimes that are viewed as harmful by the end of 2018. As a result of this promise made by Aruba, Aruba was not put on the blacklist, but rather on the gray list. Considering the potential sanctions, being put on the EU's blacklist will cause considerable economic losses to Aruba, which goes to underscore the importance of the National Ordinance being proposed here, which seeks to eliminate the harmful aspects of the identified tax regimes. Apart from the foregoing, the government feels that it is desirable for Aruba to adopt the OECD and EU guidelines. For many years, Aruba has been taking active measures to counter money laundering, harmful tax practices, and the financing of terrorism, and, particularly, to promote more transparency.

The present proposal is part of a number of steps being taken by Aruba to honor the promise made to the EU. For example, in connection with this promise, Aruba has joined the OECD Inclusive Framework, a group currently including 123 countries (situation in October 2018), with a view to achieving a step-by-step implementation of the OECD/BEPS minimum standards under the guidance of the OECD. In the same context, the San Nicolas regime was terminated as of February 1, 2018. The present proposal is the last step in fulfilling the promise made. It seeks to adjust the regime of the transparent company that landed Aruba on the EU list of non-cooperative jurisdictions (gray list). EU criticism centers on transparent companies that pursue activities in the field of geographically mobile capital, which activities were further identified and demarcated in the OECD/BEPS report of October 5, 2015, on BEPS Action 5, and which are referred to in the proposal as "relevant activities." Current legislation may result in the non-existence in both Aruba and abroad of a basis for levying tax, particularly in the event a transparent company is held by a foreign shareholder. This negative aspect can be solved by imposing on transparent companies that

pursue relevant activities conditions in terms of their real economic presence in Aruba in connection with such relevant activities.

Substance Requirements
In international relations, whether or not a legal entity has enough real economic presence (or "substance," in OECD terms) is often a matter of debate. For the sake of legal certainty and transparency, criteria are provided for the minimum required substance. Based on these criteria, a transparent company pursuing relevant activities will have to perform in Aruba the functions required for core income generating activities that are related to the transparent company's relevant activities. Regard will be had to the number of people directly or indirectly employed by the legal entity in Aruba and whether such employees have enough relevant knowledge and experience to be able to handle the responsibilities and powers that come with the nature and scope of the legal entity's activities. Also, annually recurring operating costs should match the nature and scope of the legal entity's activities. For transparent companies with foreign shareholders, it stands to reason that this real economic presence in Aruba constitutes a permanent establishment in relation to such foreign shareholders.

Financial Consequences
The present proposal for tightening the requirements for transparent companies has no direct negative financial consequences for the Country.

ARTICLE-BY-ARTICLE EXPLANATION

Article I
Article 3b, first paragraph, of the GNOT is expanded to include the requirement that the company should have a real economic presence in Aruba (Section A, subsection b, first point), to the extent the company pursues specific activities as defined by national decree containing general measures. Given that the definition of requirements for real economic presence is based on so-called relative substance, with the type and scope of the activities (the "core income generating activities," in OECD terms) playing a decisive role in specifying the substance requirements, these requirements will be detailed in a national decree containing general measures.
In addition to adjusting the aspects of a tax regime that are viewed as harmful, it is likewise important for compliance to be monitored by the tax authorities (*Departamento di Impuesto*), and for legislation to provide sanctions if such monitoring reveals that a company fails to meet the tightened requirements for implementation of the tax transparency regime. This is why the second point of Section A provides, among other things, that a transparent company that no longer meets the requirements for real economic presence in any year will no longer be treated as a partnership (*maatschap*) as of the start of that year, meaning that the company will be subject to the regular profit tax rate.
Further, current legislation provides for sanctions in two situations of noncompliance with the requirements provided by law for transparent companies. If a company converts its shares, which must be registered, into bearer shares, it will be subject to a sanction consisting of a levy of 150% of the regular 25% profit tax rate (Article 15, fifth paragraph, of the National Ordinance on Profit Tax). If a transparent company fails to provide the Inspector with a list of the shareholders in the past fiscal year, as well as an opening balance sheet, a closing balance sheet, and an income statement, within 6 months after the end of the fiscal year, the sanction provided in Article 68, first

paragraph, letter d, of the General National Ordinance on Taxation (GNOT) may be applied. Considering the structure of Article 68 of the GNOT, and the fact that its first paragraph, letter j, explicitly refers to the statements mentioned in Article 49 of the GNOT, a suggestion is made in Section C to also make an explicit reference to Article 49, fourth paragraph, of the GNOT in this section.
For the sake of effective monitoring of the new requirements for real economic presence, it would be advisable in this case to also include an administrative sanction. Such sanction is provided in Section B. The proposed adjustment to Article 56 means that if a transparent company fails to provide the Inspector with a list of the shareholders (or other interest holders) in the past fiscal year, as well as an opening balance sheet, closing balance sheet, and income statement, within 6 months after the end of the fiscal year, the company may face a penalty of up to AWG 10,000.00.

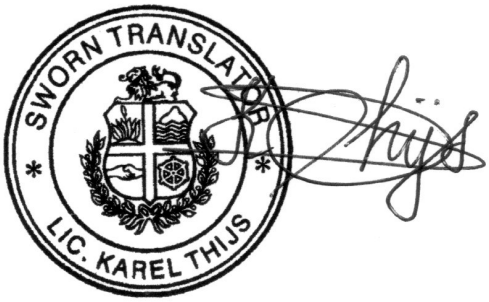
Article II

Although a transparent company that meets the requirements for real economic presence will generally qualify as a permanent establishment, a suggestion is made in Article I, Section A—for the avoidance of any uncertainty or discussion—to expand the notion of "permanent establishment" in Article 1, first paragraph, letter c, of the National Ordinance on Profit Tax (PT). This is to meet the European Union's criticism of the transparent company, which is that, if no permanent establishment exists in relation to a foreign shareholder, it is possible that no tax is levied at all from neither the company nor the shareholder.
The recognition of a transparent company as a permanent establishment means that, following the entry into force of this provision, a profit tax return will be issued to the transparent company's foreign shareholders (provided that such shareholders fall within the scope of profit tax). For purposes of the declaration to be filed by a transparent company's foreign corporate shareholders, the profit tax return will be expanded to include a number of questions that essentially make up a self-assessment in relation to the transparent company. Questions will include whether the transparent company has any relevant activities, what these activities are, and, if such activities exist, whether the requirements for real economic presence were met in the filing year. Should this not be the case, the transparent company will have to explain which requirements have not been met.
Please note that the tax authorities (*Departamento di Impuesto*) will spontaneously exchange information about the transparent company's failure to meet the requirements for real economic presence in Aruba. Such exchange will take place pursuant to the National Ordinance on International Assistance in Tax Matters (AB 2017, No. 74) with the tax authorities of the countries [of residence] of parties involved in the transparent company as either shareholder/interest holder or (relevant) contracting party, and to the extent the exchange of information with such countries is legally possible. As pointed out earlier, Article 15, fifth paragraph, of the National Ordinance on Profit Tax now provides a sanction to be applied in the event a company converts its shares, which must be registered, into bearer shares. Given that the conditions to be met by a transparent company have been expanded in the proposed Article I, Section A, to include requirements for real economic presence, which are yet to be further defined, the possibility should be created to impose a sanction in the event of failure to meet these requirements. This has been done by including in Article 1, Section A, second point, the sanction of expiration of the transparent status, and in Article I, Section B, the possibility for the Inspector to impose an administrative fine. This allows repealing the sanction provided in Article 15, fifth paragraph, of the PT. This is provided for in Article II, Section B.

Article III

In order to [fulfill] Aruba's promise to the EU to adjust the harmful aspects of the transparent company by the end of 2018, the first paragraph of Article III provides for entry into force of this bill as of January 1, 2019. Given that a transparent company is given the opportunity to meet, with regard to fiscal year 2018, the obligations laid down in Article 49, fourth paragraph, of the GNOT until 6 months after the end of the fiscal year, i.e. during the year 2019, it is explicitly provided that the sanction of Article 3b, fourth paragraph (loss of treatment as a partnership (*maatschap*)) will apply in the event of failure in 2019 to meet these obligations with regard to the data for fiscal year 2018.

For the sake of legal certainty, a transitional provision has been included in the second paragraph of Article III for companies using the transparent status on December 31, 2018. These companies will keep this status through December 31, 2021, and will therefore have time until that date to meet the requirements for real economic presence. New transparent companies, formed on or after January 1, 2019, must meet the new requirements for real economic presence as of January 1, 2019.



Lic. Karel Thijs, LL.M., lawyer and sworn translator
karelthijs@gmail.com / www.kareltranslates.wordpress.com