

## **Netherlands Antilles: Curaçao's Private Foundation.**

### **History.**

Until recently Curaçao (Curaçao and Sint Maarten now are countries within the Kingdom of the Netherlands) used to be the seat of the government of the Netherlands Antilles and the main center of its economic activities. The Netherlands Antilles is considered by many industry insiders as the first offshore financial centre *avant la lettre*. Its offshore financial industry was kick-started during World War II to fill a need for managing the non- Dutch assets of residents of the occupied Netherlands. In 1998 Curaçao compared to other jurisdictions offering a private foundation regime.

A private foundation, or "Stichting Particulier Fonds" (SPF) in Dutch, is typically set up for the same reasons as a trust: to hold investments for the benefit of beneficiaries, for asset protection purposes and estate planning reasons.

By transferring assets to a foundation these assets will be beyond the reach of the creditors of the person who transferred these assets (the settlor). This holds true as long as the transfers were not made in order to defraud creditors of course. Also the assets will be outside of his estate upon his death, avoiding forced heir ship provisions and otherwise possibly lengthy probate in particular when the assets are located in different countries.

### **A Curaçao private foundation ("Stichting Particulier Fonds").**

Establishing a private foundation (SPF) instead of settling a trust might be considered the preferred option for several reasons:

- Whereas foundations are legal persons, trusts are legal instruments. Civil law jurisdictions often do not recognise assets transferred to a trust as being legally separate from those of the settlor of the trust and those that do (because they are signatories to the Hague Trust Convention) often require a substantial connection with a common law jurisdiction to be shown in order for it to be valid,
- Whether a trust is valid, depends on many factors. A trust needs to be validly constituted, otherwise it could be considered a sham trust, and rendered void. This problem could arise when the settlor retains too much control. However an SPF exists by virtue of the fact that it has been incorporated,
- In the context of obtaining tax treaty benefits there is often uncertainty as to whether a trust will be considered to be the beneficial owner of income since it is not a legal person.
- Those with civil law backgrounds will appreciate the security provided by the fact that the foundation is established by notarial deed,
- The flexibility in structuring the private foundation.

### **The private foundation regime in Curaçao.**

Curaçao's regime offers almost total flexibility in structuring the governance of a SPF. The only statutory requirements are to have objects (which can be kept generic), a founder and a board, but otherwise it is up to the founder to design the governance structure. A supervisory board, protector, or any other type of body can be appointed, and given any type of role or level of authority.

The founder can retain rights to the extent that he considers this desirable. The articles of the SPF are set out in a notarial deed which is on public record. The only issues that need to be addressed in the notarial deed are the objects of the foundation, the initial board members, the manner in which the board members can be appointed and removed, as well as to allow for other organs that the SPF might have. So if a supervisory committee or protector is to be appointed then this needs to be included in the articles; the appointees themselves do not need to be mentioned.

All other issues can be addressed in the regulations of the foundation, and these are not on public record. There are no statutory restrictions on the roles of the various persons related to the foundation. For instance: the founder need not be the same person as the settlor and a settlor can be the only beneficiary of the SPF (there is no requirement for the SPF even to have beneficiaries). The founder and settlor can in principle also fill the roles of protector, member of the supervisory committee, or even member of the board. All of the foundation's bodies can be either legal or natural persons.

Aside from the flexibility that its private foundation regime offers, what makes Curaçao attractive as a location to incorporate a foundation is that it is a reputable jurisdiction which benefits from efficient and clear administrative practices instituted by the Dutch. Curaçao has impartial and effective courts, where board members of a SPF can be effectively held to account. Not an unimportant consideration when setting up a legal entity that could potentially serve its purpose for many generations.

The SPF needs to prepare financial statements annually, although there is no requirement to file them with the Commercial Register. The information on public record can be kept to a minimum.

Other relevant features are that the SPF can continue for unlimited duration and that re-domiciliation of private foundations to and out of Curaçao is possible.

The Netherlands Antilles and now Curaçao distinguishes itself from the traditional Caribbean zero-tax offshore centre in that it does impose taxes. The reason is that in certain tax planning contexts it is necessary to prevent anti-avoidance legislation of high-tax countries kicking in. The trick is to either impose minimal taxation, as it does for ecommerce companies set up in its ezones, which are taxed at a rate of 2%, or to impose nominal taxation: i.e. to impose tax only in principle but not in practice in most cases relevant to offshore investors. An example of the latter is the respectable corporation tax rate of 27.5% it levies on the profits of companies, while allowing for a 100% participation exemption, which means that capital gains or dividends received from subsidiaries are not taxable (with a few exceptions), and not imposing any withholding taxes on outgoing payments.

The SPF is by default not taxed in Curaçao. Curaçao did inherit the legislation of the Netherlands Antilles but used its increased autonomy to enhance its attractiveness as an offshore financial center.

In particular it amended its law governing SPFs to allow an SPF to choose that its profits be taxed at a rate of 10% on an annual basis or to be tax exempt, provided that this choice is made before the start of the calendar year.

This is a very ingenious regime because during some calendar years the overall tax burden could be reduced by choosing to be taxed in Curaçao while in other years it might be preferable not to be taxed in Curaçao. 10% profit tax is often the magical level of minimum taxation required before anti-avoidance legislation kicks in. So a beneficiary of an SPF resident in a high-tax country might be taxed on undistributed income of an SPF unless the SPF itself is taxed. However, when this person moves to another country without such taxation it would be beneficial to choose the no-tax option instead.

This taxation option sets the SPF apart from regimes offered by other countries offering private foundations and makes it extremely flexible to adjust to the circumstances and to deal with future developments in international tax planning, seeing an increasing number of countries resorting to aggressive anti-avoidance legislation.

A private foundation is an entity that could exist for many generations, it is therefore of utmost importance that it can deal with future changes in this rapidly changing regulatory landscape. Secondly that the entity is established in a jurisdiction that is reliable and stable, and finally, that such an entity can re-domicile to another jurisdiction without exit taxes if such a 'move' proves to be beneficial. A SPF incorporated in Curaçao meets all of these requirements.

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