Deloitte.

Global Tax Update

Netherlands

Deloitte Tohmatsu Tax Co.

February 2015

1. The Tax Administration actively in search of restriction on deductibility for holding companies

The Dutch Tax Administration actively approaches holding companies that perform economic activities, with the intention of restricting deductions in respect of holding activities.

(1) Introduction

In everyday practice we see the Tax Administration actively approaching holding companies with a full or partial right to deduction and proclaiming its position about such holding companies having to apply a restriction on deductibility in respect of the holding of shares. Holding shares is not a form of economic activities in certain cases and the VAT attributable to this is effectively non-deductible. Calculating this non-deductible VAT in the event of general costs is referred to as the “pre-pro rata”.

(2) European case law

In earlier case law the European Court of Justice ruled on the specific situations in which holding companies are entrepreneurs for VAT purposes in respect of the holding of shares. When a holding company solely holds shares this is not the case. When a holding company is involved in the management of a participation against a fee or if it otherwise performs supplies for a consideration, it does qualify as a VAT entrepreneur for the holding of the shares in that participation. If a holding company holds shares in the capacity of non-entrepreneur and it additionally performs - in full or in part - VAT taxed business operations, it follows from the “Securenta” judgment of the European Court of Justice (pronounced as early as 2008) that if it concerns general costs regarding both the holding of shares and economic activities, the VAT on these general costs is not fully deductible. According to the European Court of Justice, the calculation of the non-deductible part of this VAT must be based on a method that objectively measures which part of these general costs should effectively be attributed to each of these two operations.

(3) Recent developments

Companies whose records at the trade register show they perform holding activities, are approached by the Tax Administration to check whether a restriction on deductibility is possible in respect of the holding activities. In letters to such companies the Tax Administration indicates that an allocation formula for the allocation of general and other costs to the business operations and the holding activities should be in synchronization with objective values. In some cases the Tax Administration seems to be open to suggestions by taxable persons themselves.

In our opinion there are opportunities to influence this process and thus to arrive at a favorable and easy-to-use allocation formula.

Finally, whether the Tax Administration may even be permitted apply the pre-pro rata at all is quite doubtful. Since years published policy in the Netherlands has stated that the deductions of holding companies performing economic activities are fully determined by those economic activities. Hence, without a restriction on deductibility because of the shareholder activities. This policy may be revoked, though. If the Tax Administration imposes additional VAT assessments related to the pre-pro rata, you may contemplate on filing an objection against such additional tax assessment because of the policy published on holding companies and pending proceedings with the European Court of Justice (Larentia + Minerva and Marenave Schiffahrt).

2. Alignment of fiscal unity Policy Decree to Papillon judgement

State Secretary for Finance Wiebes has aligned the Policy Decree on the fiscal unity for corporate income tax purposes with recent developments relating to the cross border fiscal unity.

(1) Policy Decree fiscal unity

Recently a Policy Decree was published approving a “Papillon-style” fiscal unity.

The requirements laid down in the Dutch Corporate Income Tax Act do not permit the incorporation of a fiscal unity between two subsidiaries established in the Netherlands if the parent company (which does not have a Dutch permanent establishment) has its registered office in another EU/EEA Member State (hereinafter: fiscal unity between sister companies). The current statutory regulations neither permit the incorporation of a fiscal unity where the Dutch-based parent company holds a sub-subsidiary through an intermediate holding company established in another EU/EEA Member State in the Netherlands (hereinafter: Papillon-style fiscal unity). The Policy Decree includes a facility approving both the fiscal unity between sister companies and the Papillon-style fiscal unity. In short this approval means such fiscal unities are permitted as from now on, contrary to the statutory regulation.

As regards the fiscal unity between sister companies, the amended Policy Decree includes the condition for the related companies to designate the sister company which will be acting as parent company of the fiscal unity from now on. This may not be the parent company established abroad. Once the fiscal unity has been formed this request is irrevocable. The foreign parent company must be subject to a profits tax, without there being a choice and without being exempted. The background of this subject to tax requirement is not clear.

In the event of the Papillon-style fiscal unity, the Dutch parent company will obviously also continue to be the parent company of the fiscal unity. One of the issues the Decree now settles is that a fiscal unity is also possible if the shares in the Dutch subsidiary are held through more than one foreign intermediate holding company. The subject to tax requirement likewise applies to the foreign parent company, for that matter.

As stated before, this amendment of the Policy Decree by no means ends the Papillon series. In any case anti-abuse legislation is expected to be presented, for the prevention of double loss recognition in the Netherlands. This (risk) actually solely occurs in the Papillon-style fiscal unity, where double loss recognition may arise if due to the fiscal unity the loss of the consolidated Dutch subsidiary may be settled with the profit of other consolidated companies and, in addition, may be expressed through the parent company’s shareholding in the foreign sub-subsidiary.

Double loss recognition in respect of assets that are part of a participation is basically not possible due to the participation exemption. Nevertheless, if the participation exemption does not apply (such as with a non-qualified investment participation and as part of the liquidation loss

facility) that risk does exist. The risk of double loss recognition in the Netherlands may also arise with respect to money claims on the non-consolidated intermediate holding company, namely through a write down in connection with the losses of the consolidated sub-subsidiary.

Newsletter Archives

To see past newsletters, please visit our website.
www.deloitte.com/jp/tax/nl/eu

Contacts

Deloitte & Touche (Amsterdam)
Kazuki Fujio, Manager
KaFujio@deloitte.nl
Misaki Kawabata
MiKawabata@deloitte.nl

Issued by

Deloitte Tohmatsu Tax Co.

HQ・Tokyo Office
Shin-Tokyo Building 5F, 3-3-1, Marunouchi,
Chiyoda-ku, Tokyo 100-8305, Japan
TEL： +81-3-6213-3800
email： tax.cs@tohmatsu.co.jp
URL： www.deloitte.com/jp/en/tax