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Global Tax Update

Netherlands

Deloitte Tohmatsu Tax Co.

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1. 2016 budget proposals regarding foreign tax payer regime and Dutch cooperatives

As was also mentioned in the last newsletter, the Dutch government has recently proposed amendments to the Dutch foreign tax payer regime as well as the rules for Dutch cooperatives. The idea behind the 2016 budget proposals is to combat abuse and artificial structures that do not reflect economic reality. Therefore, the focus on substance will be increased and business like reasons underlying and justifying the structure will be more important.

In this regard, the State Secretary of Finance provided some additional guidance regarding the scope of the new legislation for intermediate holding companies / cooperatives, which we will briefly explain below.

Intermediate holding companies : Currently, the foreign tax payer regime and the anti-abuse legislation for Dutch cooperatives do not apply in case the intermediate holding company performs a linking function between the parent company and a subsidiary and the shareholding (or membership rights) can be attributed to a business of the shareholder / member. No additional requirements should be met. However, under application of the proposed legislation, substance requirements should be met by the intermediate holding company (or cooperative). If, under the new situation, the intermediate holding company does not have sufficient substance in place, the foreign tax payer regime and/or the withholding tax obligation for cooperatives could apply, if the main purpose or one of the main purposes is to avoid taxation.

Additionally, the dividend withholding tax obligation for Dutch cooperatives can be avoided by bringing substance into the cooperative, which should then lead to the conclusion that the cooperative has economic significance independently. Indication for this could be that the cooperative has people on the payroll and that it is keeping an office at its disposal.

2. The Netherlands amends fiscal unity regime

The bill provides for an amendment of the fiscal unity regime for corporate income tax purposes in accordance with the case law of the Court of Justice of the European Union (CJEU) and the Dutch tax court.

(1) The Netherlands amends fiscal unity regime

The Dutch State Secretary of Finance submitted the Fiscal Unity Amendment Bill on 16 October 2015. The bill provides for an amendment of the fiscal unity regime for corporate income tax purposes in accordance with earlier case law.

In earlier judgments, the CJEU ruled that the Dutch fiscal unity regime constitutes an infringement on EU law. Specifically, the CJEU ruled that EU law is violated to the extent that the Dutch rules allow:

1) Domestic parent companies to form a fiscal unity with their domestic sub-subsidiaries only where the intermediary subsidiary also is established in the Netherlands or where it is established in another EU member state but has a permanent establishment ("PE") in the Netherlands; and
2) Domestic subsidiaries to form a fiscal unity with each other only if their parent company also is Dutch or where it is established in another member state but has a Dutch PE.

Following up on the judgment, as early as 2014 the State Secretary stated that a fiscal unity between indirectly held companies that are established in the Netherlands should be permitted. This resolution will now be codified. But the resolution will have a wider scope than the original resolution.

(2) Main alternatives

The fiscal unity regime will be extended with two main alternatives:

3) The parent company/sub-subsidiary alternative: a Dutch parent company holds shares in a Dutch sub-subsidiary through an "intermediate company" established in the EU/EEA (hereinafter: EU);
4) The "sister alternative": an EU parent company ("top holding company") holds shares in at least two subsidiaries established in the Netherlands.

Both alternatives solely allow for the Dutch resident companies to be included in the fiscal unity. Hence, the assets and the result of the EU connecting companies would not be allocated to the fiscal unity.

(3) Holding requirements

Both under the legislation of the other state and under the tax treaty this state has concluded, a top holding company and an intermediate company must be established there. The intermediate company (/ companies) and the top holding company must be liable for a profit tax in their capacity as a subject in the country of establishment "without an option and without having been exempted from this". Under the new regime the top holding company is required to hold the full legal and economic ownership. If (a part of) the shares are converted into depositary receipts for shares, the new holding requirement will no longer be satisfied. Situations existing at the moment the bill is submitted are subject to a transition period of two years after the bill has been submitted.

(4) Sister alternative

If the sister alternative is applied, the Dutch (sub-) subsidiaries must designate a company that is considered to be the "parent company" for fiscal unity purposes. The sister company that is designated to be the parent company must close its books on the date of consolidation. A decision by the top holding company to sell the shares in this (sub-) subsidiary, will dissolve the entire fiscal unity. The fiscal unity will likewise be deconsolidated if the sister company that was initially designated as the parent company is no longer considered to be part of the fiscal unity. This will only be different if immediately subsequent to this taking place, a company has become part of the fiscal unity that is considered to be the parent company from that moment onwards. A delegation provision has been included according to which a fiscal unity can change top holding companies without this being considered to be a deconsolidation of a fiscal unity under certain regimes. The explanation to the bill shows this to be subject to the requirement that the composition of the fiscal unity may not be changed in terms of the companies that are part of it.

(5) Combinations

The explanatory memorandum likewise discusses various combinations of the possible fiscal unities. The basic assumption is that the fiscal unity can be maintained, unless the parent company changes.

(6) Permanent Establishment

The regime for participating in a regular fiscal unity with a Dutch permanent establishment will be amended. Formerly, if the shares in a subsidiary had been allocated to a Dutch permanent establishment, such permanent establishment had been required to be able to act as parent company of the fiscal unity. This requirement no longer applies. This amendment may have been motivated by CJEU case law, according to which the Netherlands may not treat a domestic permanent establishment less favorable than a domestic company. If a fiscal unity between domestic sister companies is possible, the same must apply for a domestic and non-resident taxpayer, or, in other words, for a domestic company and a domestic permanent establishment. A delegation provision has been included for rules according to which a fiscal unity may be continued in case a non-resident taxpayer stops earning taxable profit through a Dutch permanent establishment in the Netherlands (including a cessation of the permanent establishment).

(7) Anti-abuse rules

The bill furthermore provides for various anti-abuse rules, to avoiding situations like double set-off of losses. The regime for liquidation losses and the limitation of participative interest deduction have been amended as well. As yet, the related implications cannot fully be determined.

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