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Global Tax Update

Netherlands

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1. Budget day 2015

On September 15th 2015, the government's budget plans for the coming year were released in public. The budget plans contain the details of the Tax Package 2016.

The 2016 Tax Package contains some important amendments to Dutch tax law which are relevant for Dutch subsidiaries of Japanese MNC's. Please note, however, that the House of Representatives and the Senate have to approve these changes, before implementation, and that the proposals may be changed in the legislative process. Most of the changes in the 2016 Tax Package are proposed to take effect on January 1, 2016.

Corporate income tax rate : The 2016 Tax Package does not include an amendment of the corporate income tax rate. As such, the general corporate tax rate will remain at 25%.

(1) Changes in the foreign substantial interest regime and participation exemption regime

Recently, the EU Council formally adopted anti-abuse rules in the Parent-Subsidiary Directive. Before 31 December 2015, Member States should implement the anti-abuse provisions into their domestic legislation. These amendments in the Parent-Subsidiary Directive will now be implemented into Dutch legislation by;

- Amending the foreign taxpayer regime, as well as the dividend withholding tax act article relating to Dutch Cooperatives. In general, a sufficient level of substance will be required at the level of the direct foreign shareholder of a Dutch entity in order to avoid foreign entities becoming subject to the Dutch foreign taxpayer regime and/or Dutch Cooperatives becoming obliged to withhold dividend withholding tax on profit distributions; and
- Amending the Dutch participation exemption regime in order to effectuate the objective of combatting hybrid loan mismatches. Such as mismatch exists in case the payment by the subsidiary is considered tax deductible interest where the payment received is treated as tax exempt dividend with the Dutch parent company. The proposed rule now denies the Dutch participation exemption for such payments insofar the payment is tax deductible at the level of the source country.

(2) Country by Country Report

1) Country-by-Country Report ("CbCR")

The obligation to submit a CbCR ('landenrapport') is applicable to ultimate parent companies that are Dutch tax resident entities and members of a multinational group ("MNG"), with a consolidated group turnover of at least EUR 750 million in the fiscal year preceding the fiscal year to which the CbCR applies. Since the first fiscal year to which the CbCR will apply is the fiscal year 2016, it would mean that the threshold turnover should be met in the fiscal year 1 January – 31 December 2015 (calendar years) or 1 April 2015 – 31 March 2016 (for example in case of a broken fiscal year 1 April – 31 March) in order to fall within the scope of this obligation.

The CbCR should be provided to the Dutch tax authorities ("DTA") within 12 months after the concerning fiscal year of the ultimate parent company. Therefore, in the above situation, the CbCR needs to be submitted before 31 December 2017 (for calendar years) and 31 March 2018 (in the example above for broken fiscal years) respectively.

The CbCR will be exchanged automatically with countries in which the MNG is operating and with whom the Netherlands has concluded an information exchange agreement. In certain situations as listed below, however, the obligation to submit the CbCR, within 12 months after the fiscal year of the ultimate parent company, with the DTA is shifted to a Dutch group entity of an MNG instead of the ultimate parent company:

- The ultimate parent entity is not obliged to submit a CbCR according to its tax resident's country;
- The ultimate parent's country does not have a signed agreement in place regarding automatic exchange of information with the Netherlands on CbCR within 12 months after the last day of the fiscal year; or
- The inspector has informed the Dutch group entity that the ultimate parent's country company has systematically failed to comply; despite the presence of an agreement for automatic exchange if information, the other country does not exchange.

If the MNG has multiple Dutch resident group entities, and one or more of the above conditions are met, the MNE group can designate one of these group entities to fulfil the requirement to provide the CbCR.

Other provisions relate to the designation of a so-called surrogate parent entity. Such a surrogate parent entity would replace the ultimate parent company for filing the CbCR in its resident country. This would mean that the shift of obligation to file the CbCR to the Dutch group entity as mentioned above would not take place, however, provided that the above 3 situations would not apply to the surrogate parent entity as well.

2) Master file and local file

Dutch tax resident group companies of an MNG in principle have an obligation to prepare and maintain a master file and local file. The files can be prepared in Dutch or English language. Qualifying Dutch group companies are those belonging to an MNG that have a consolidated group turnover of at least EUR 50 million in the fiscal year preceding the year for which the tax return applies.

This would mean that the threshold turnover should be met in the fiscal year 1 January -31 December 2015 (calendar years) or 1 April 2015-31 March 2016 (as an example for broken fiscal years) in order to fall within the scope of this obligation.

Both files should be available ultimately within the period for which the corporate income tax return should be filed. In the above situation, both files should be available before 1 May 2018 (for fiscal year ending on 31 December 2016) and 1 August 2018 (for broken fiscal years ending on 31 March 2017), assuming that the maximum extension period of filing the return has been granted (5 months filing period and 11 months extension filing period).

Both files form part of the tax administration the tax payer; therefore, it should be handed over to the DTA when requested.

3) Administrative sanctions and penalties

The proposed legislation treats the non-compliance of submitting the CbCR as a criminal offense, which could result in a fine of EUR 8,100, or even custody of six months for the person involved. In case non-compliance occurs intentionally, the sanction could, besides the fine, include an imprisonment of four years for the person involved according to article 23, paragraph 4 of the Criminal Code. However, by absence of a tax disadvantage for the Dutch tax authorities, the sanction would only include a fine.

The commentary to this rule notes that criminal prosecut ion will generally be reserved for the most serious cases.

The proposed penalties for non-compliance with the CbCR requirements do not apply to the master file and the local file. These files are considered to be part of the tax administration of the taxpayer and therefore subject to the existing sanctions when being non-complaint. The sanction hereon consists of, amongst others, the reversion of burden of proof and a fine.

2. CJEU rules on Dutch dividend withholding tax cases

According to the CJEU, withholding tax imposed on a non-resident generally may not exceed the individual income tax burden imposed on a resident taxpayer.

(1) CJEU rules on Dutch dividend withholding tax cases

The Court of Justice of the European Union ("CJEU") issued its decision on 17 September 2015 in three joined cases involving the Dutch dividend withholding tax provisions. According to the CJEU, withholding tax imposed on a non-resident generally may not exceed the individual income tax burden imposed on a resident taxpayer. Where this is not achieved, even after a tax credit has been granted by the residence state under the provisions of a qualifying tax treaty, it is the responsibility of the source state to ensure that the impact of the withholding tax is neutralized. The CJEU largely follows the opinion of AG Jääskinen released on 25 June 2015.

The compatibility with EU law of dividend withholding tax levied by one EU member state on shareholders resident in another EU member state has been an ongoing issue for several years; specifically, whether such taxes infringe the freedom of establishment and free movement of capital provisions in the Treaty on the Functioning of the European Union. The CJEU has ruled in previous cases that a foreign shareholder cannot be subject to a heavier tax burden than a similarly situated domestic shareholder. The CJEU's decision in the three Dutch cases sheds more light on the appropriate comparison to be made between cross-border and domestic situations.

(2) Background and facts

When a Dutch resident company distributes dividends to its individual and corporate portfolio shareholders, Dutch dividend withholding tax is due at a rate of 15%. When dividends are paid to non-resident shareholders, the tax is considered a final levy, whereas when dividends are paid to Dutch resident shareholders, the 15% withholding tax is neutralized because the shareholders can credit the tax against their individual or corporate income tax liability, as appropriate. This could lead to a more advantageous treatment of the dividend payment in domestic situations. The Dutch Supreme Court referred the three cases to the CJEU in 2013 fora preliminary ruling on whether the Dutch tax treatment infringes EU law.

(3) CJEU decision

The CJEU ruled that a comparison should be made between the final 15% dividend withholding tax levied in a cross-border situation and the combined levy of dividend withholding tax and income tax in a domestic situation.

According to the CJEU, the comparison should be made on an annual basis, taking into account the dividends in the fiscal year in which they are distributed and the tax-free allowance that would be available to a domestic taxpayer. Under this approach, the relevant domestic tax treatment would be taken into account, and Dutch law would be considered incompatible with EU law to the extent of any difference between the tax burden that would arise in a domestic situation and the burden resulting from the imposition of the 15% flat-rate dividend withholding tax.

(4) Role of tax treaties

The CJEU also addressed the role of tax treaties, indicating that the elimination of double taxation, as provided for in an applicable tax treaty, possibly could justify the different treatment between cross-border and domestic situations in the Netherlands.

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