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Global Tax Update

Netherlands

Deloitte Tohmatsu Tax Co.

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Budget Day 2016 – The Netherlands

On 20 September 2016, the government's budget plans for the coming year were released in public. The budget plans contain the details of the Tax Package 2017.

The Dutch government has expressed multiple times their wishes to further simplify the Dutch tax system to improve the investment climate in the Netherlands. The fact that the Tax Package 2017 is significantly smaller than the previous years' Tax Packages and does contain remarkable improvements, is in our view in line with the above desire.

We however note that in the near future additional Dutch tax rules will be introduced as a result of global initiatives like the Base Erosion and Profit Shifting ("BEPS") project initiated by the OECD and legislation proposed by the EU. Those developments are already impacting our tax system.

The Tax Package 2017 contains some important amendments to Dutch tax law which are relevant for Dutch subsidiaries of Japanese MNC's. For your information, we have prepared a summary of the most notable items in the Tax Package 2017.

Please note 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 2017 Tax Package are proposed to take effect on January 1, 2017.

(1) Corporate Income Tax

A. The 2016 Tax Package does not include an amendment of the corporate income tax rate for 2017. As such, the general corporate tax rate for taxable income of more than EUR 200,000 will remain at 25%, while the first EUR 200,000 taxable income is taxed at 20%. However, the income brackets will change as follows:

- As of 1 January 2018, the first EUR 250,000 will be taxed at 20%, while additional income will be taxed at 25%;
- As of 1 January 2020, the first EUR 300,000 will be taxed at 20%, while additional income will be taxed at 25%;
- As of 1 January 2021, the first EUR 350,000 will be taxed at 20%, while additional income will be taxed at 25%.

(2) Other proposed legislation

A. Currently, companies with Research & Development ("R&D") activities in the Netherlands can apply the so-called innovation box upon request. In short, if certain requirements are met, net income of the Dutch corporate taxpayer that is allocable to its R&D activities is effectively taxed at a corporate tax rate of 5%. Based on the Tax Package 2017, it becomes more and more important to demonstrate that the R&D activities are performed in the Netherlands by the taxpayer itself (i.e. no contract R&D agreement with affiliate companies). This is also described as the so-called nexus approach, as developed during the BEPS project. In addition, it is important that the R&D activities result in an S&O declaration, a patent, software and/or a breeder's right. Large companies need to obtain both an S&O declaration and develop a patent, software or breeder's right in order to apply the innovation box. As a transitional provision, the Tax Package 2017 states that on request the current innovation box rules can remain applicable on intangible assets that were produced/created in a fiscal year that runs on 1 July 2016. In addition, intangible assets that were produced/created before 1 January 2017, and for which a patent or breeder's right was obtained, qualify as intangible assets for which the innovation box can be applied. Finally, current Advance Tax Rulings on the applicability of the innovation box are expected to stay applicable for smaller companies, whereas for larger companies the Advance Tax Ruling may not be applicable anymore, depending on the facts and circumstances for which the ruling was obtained.

B. In the Tax Package 2017, rules are implemented targeting undesired interest deductibility by (mainly) Private Equity structures. Under the current rules interest deductibility may be limited in case a Dutch tax payer has obtained loans from related parties for certain tainted transactions, such as the acquisition of shareholdings or a dividend distribution. In this respect, a company is considered a related party if such company holds 1/3 share interest in the Dutch company or vice versa, or one parent company holds at least 1/3 share interest in both the Dutch entity and a sister company (in the latter case, also the sister company is considered related). Under the new rules, entities are also considered related companies (possibly affecting the interest deductibility) in case – although they do not meet the 1/3 ownership requirement – they closely work together and have share interests in a jointly held company. This rule is will cover fund structures of Private Equity funds, whereby multiple funds that individually not meet the ownership criteria invest in one target company; the target company is managed by and economically owned by one ultimate Private Equity fund; all the participating funds may be considered related entities.

C. Foreign individuals and companies owning portfolio investments (i.e. <5% share ownership percentage) in Dutch entities are in principle subject to 15% Dutch dividend withholding tax on dividend distributions by the Dutch entity to the foreign shareholder. Based on the Tax Package 2017, if certain requirements are met, the Dutch dividend withholding tax withheld may be reclaimed if the dividend tax is higher than the corporate tax or personal income tax burden if the shareholder were a Dutch resident. Important requirement for a successful reclaim in case of a non-EU shareholder is amongst others that the Netherlands and the non-EU country should have a tax treaty covering the exchange of information (which is applicable for the Netherlands / Japan tax treaty). These rules follows the EU Court of Justice Jurisprudence and were already applied by Decree.

D. In case a foreign entity has employees working in the Netherlands which activities qualify as permanent establishment or permanent representative, while at the same time the foreign entity has related companies (BV or NV) located in the Netherlands, the payroll and administration of that employee can be shifted to the Dutch BV/NV without the condition that the foreign entity is lobbying in the assignment of that employee. In order to shift the administration to the Dutch entity, a request needs to be filed by both the foreign entity as well as the Dutch entity.

E. The automatic exchange of information of Advance Tax Rulings and Advance Pricing Agreements within the EU will be effective as from 1 January 2017; although not part of the Tax Package 2017, this legislation is a result of the EU Directive that contains the exchange of tax rulings between the EU Member States effective as of 1 January 2017. Further details and instructions for the specific group of companies will follow soon since in some cases, immediate action is required.

F. For Dutch dividend withholding tax purposes, dividend distributions by Dutch limited liability companies (BVs) and public limited liability companies (NVs) are generally subject to Dutch dividend withholding tax, whereas Dutch cooperatives are only subject to dividend withholding tax on dividend distributions in case of abusive structures. Although not formally part of the Tax Package 2017 but as also announced on 20 September 2016 is the alignment of the fiscal treatment for BV/NV's on one hand and the Cooperatives on the other hand for Dutch dividend tax purposes. According to the proposed plan and expected to be implemented as of 1 January 2018, dividend distributions by BVs/NVs to their tax treaty resident shareholders (holding at least 5% share interests) will not be subject to dividend withholding tax in case of operational structures (i.e. no abusive or artificial structures). Although the letter is not very clear on what an operational/business structure should imply, the general view based on the proposed letter is that in most of the structures whereby Asian based MNCs (with those countries the Netherlands generally have agreed and signed tax treaties) invest in and through the Netherlands based on solid business reasons, dividend distributions may generally become exempt from Dutch dividend withholding tax. Although further details need to be awaited, we believe this announcement contains an important improvement of the Dutch tax climate.

As the new legislation is still not finalized yet, the final proposal will be released in a later stage.

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