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On September 20, 2016, the Dutch government presented the Tax Plan 2017. This article lists the key changes which are expected to be introduced for corporate tax, dividend tax, wage tax and value added tax.

Dutch Tax Plan 2017

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I. Corporate Income Tax

A. Dutch Corporate Income Tax Rate

Currently, the Dutch corporate income tax rate is 20 percent for profits up to 200,000 euros and 25 percent for the excess. It is proposed to gradually increase the lower bracket with the following steps: the reduced tax rate will apply for profits up to 250,000 euros (2018), 300,000 euros (2020) and 350,000 euros (2021), respectively. The reduced corporate tax rate is part of the package to improve the Dutch investment climate.

B. Changes to Interest Deduction Limitation Rules

In the Dutch corporate tax framework, several interest deduction limitation rules are embedded. For two of these rules, amendments have been proposed. We will discuss the key aspects of these changes below.

We do note that the Dutch interest deduction limitation rules (including the currently proposed changes) may also be affected by the proposed earnings stripping rules as proposed in the OECD base erosion and profit shifting ("BEPS") Action Plan. It is currently expected that the BEPS rules will be introduced as per 2018.

1. Changes to the Base Erosion Interest Deduction Limitation Rules (Article 10a Dutch CIT Act)

Under the Dutch corporate income tax ("CIT") framework, interest on intercompany debts obtained from affiliated parties is non-deductible if the funds are used for financing certain "tainted transactions" (i.e., dividend distributions, capital contributions, acquisitions of affiliates).

Under the current framework, parties will be considered "affiliated" when a mutual connection of at least 1/3 of capital interest or voting rights is present (e.g., parent-subsidiary relations or sister companies with a mutual parent company).

Under the proposed rules, the definition of "affiliated entities" will be expanded. These new rules mainly target structures in which multiple parties engage in a joint investment (e.g., private equity structures) while the respective investors do not meet the 1/3 ownership requirement on a stand-alone basis (i.e., they are currently not affected by this limitation rule). To ensure that these types of structures are also covered by this interest deduction limitation rule, an additional criterion will be introduced—the "cooperating group".

Whether companies are part of a cooperating group will be reviewed on a case-by-case basis. Key indications for a cooperating group may be that the decisive powers/management of the investment are centralized at one coordinating entity (e.g., with a general partner in an investment fund) and that all investors have provided funds under more or less similar conditions.

In the event that a coordinated investment by a cooperating group is considered present, the interest deduction limitation rule will apply as if the funds (interest bearing debt) were provided by one coordinating entity. The deduction limitation will therefore apply, irrespective of whether the underlying creditors meet the 1/3-mutual connection criterion on a stand-alone basis.

We do note that the regular safe harbor rules will be available for intercompany financing by cooperating groups.

The rules will become effective for financial years starting on or after January 1, 2017.

2. Changes to the Interest Deduction Limitation Rule for Leveraged Acquisitions (Article 15ad Dutch CIT Act)

Under the current CIT framework, interest related to the acquisition of a target company that is subsequently included in a fiscal unity for CIT purposes with the acquisition vehicle, is non-deductible to the extent that excessive interest cannot be offset against the profits of the acquisition vehicle. The purpose of this deduction limitation rule is to prevent that target companies finance their own acquisition. The legislative proposal entails two changes to this interest deduction limitation rule.

Under the existing rules, the interest limitations only affect the acquisition debt obtained by the acquisition vehicle itself. This means that following structure is currently not fully covered by the interest deduction limitation rule: the target takes out a loan, distributes the funds obtained as a dividend to the acquisition vehicle, after which the acquisition vehicle in turn repays the original debt. Leverage in other words is dropped down to the target company, while redeemed at the acquisition vehicle. In that case, the financing structure would not be fully covered by the interest deduction limitation rule. Changes are proposed to target these types of structures.

Secondly, changes are proposed to target the following structure. The current interest deduction limitation rule limits the deduction of interest insofar as the acquisition debt exceeds 60 percent of the acquisition price in the year of the acquisition. This percentage is subsequently gradually reduced to 25 percent with 5 percent per year. In practice, companies circumvented this reduced amount by transferring the target to another “acquisition vehicle” within the group. Under the proposed rules, these structures are targeted. The higher threshold is not available if the target is transferred within the group.

C. Innovation Box

Under the current innovation box regime, income derived from certain qualifying intangible assets is taxed against an effective tax rate of 5 percent (instead of 20–25 percent).

Changes to the innovation box regime are proposed to reflect the conditions set out in BEPS Action 5 and to include the “modified nexus approach”.

In the first place, it will be explicitly included that the innovation box only applies to self-developed IP. Although this requirement already applies under the current regime, specific wording will now be included that the taxpayer has to carry out the research and development (“R&D”) activities itself. Furthermore, the taxpayer should have sufficient functions to actually be able to carry out the activities.

Under the new rules, a distinction will furthermore be made between (i) small and medium-sized companies (“SME”s) and (ii) large companies.

Companies qualify as SMEs if (i) their consolidated turnover does not exceed 50 million euros per year (250 million euros per five years) and (ii) the gross income allocable to the IP does not exceed 7.5 million euros (37.5 million euros per five years). SMEs are eligible for the innovation box regime provided that they have obtained an R&D certificate.

Large companies are companies that exceed the turnover threshold or the income threshold applicable to SMEs. In addition to the R&D certificate, large companies should meet further requirements to become eligible for the innovation box regime (e.g., patents or breeders' rights should be obtained).

The proposal also includes the “modified nexus approach” to implement the items included in the BEPS Action Plan. Under this approach, the innovation box will not be fully available to taxpayers that outsource part of the R&D activities.

Tax rulings covering the application of the innovation box regime usually include a specific provision that the ruling will be terminated in case important legislative changes occur. For companies that qualify as an SME, rulings will in principle remain in place. For taxpayers that qualify as large companies, however, rulings may be terminated as a result of the legislative changes. Taxpayers may reach out to the tax administration to conclude a new ruling. Since the tax administration will not have sufficient capacity to re-conclude all existing rulings prior to January 2017, it has been announced that rulings with retroactive effect may be concluded under certain circumstances.

The changes to the innovation box regime will enter into effect for financial years starting on or after January 1, 2017. However, grandfathering rules may apply for intangible assets already developed ultimately on June 30, 2016. Under these rules, the current regime may remain applicable on these assets, up to and including financial years that end on June 30, 2021.

II. Dutch Dividend Tax

A. Withholding Tax Exemption and Withholding Tax Obligation

Under the current dividend tax framework, certain Dutch entities (such as private limited liability companies (“BV”s) or public limited liability companies (“NV”s)) are required to withhold 15 percent dividend tax (statutory rate) on their dividend distributions. The 15 percent withholding tax (“WHT”) rate is however often reduced under domestic law or under double tax treaties or EU Directives.

Dividend distributions from Dutch Cooperatives (“Coops”) are however exempt from Dutch dividend WHT (unless certain anti-abuse rules apply). Coops are therefore often used as alternatives for BVs or NVs, especially when no (full) reduction under domestic law, tax treaties or EU Directives is available.

It has been proposed to reconcile the withholding tax position of BVs/NVs and Coops. The proposal is twofold.

In the first place, it has been proposed that Coops that only engage in holding activities (“Holding Coops”) will become required to withhold 15 percent dividend tax on distributions to members owning 5 percent or more in the

Coop. The position of Dutch Holding Coops will as such become equal to limited liability companies. Dividends from Coops actually engaged in a material business remain exempt from WHT.

Secondly, dividend distributions from Dutch BVs and NVs will become exempt from dividend withholding tax, provided that (i) the shareholder owns at least 5 percent in the Dutch company, (ii) the parent company resides in a country with whom the Netherlands has concluded a double tax treaty, and (iii) the structure is not considered abusive. The exemption of WHT will also apply to parent companies in treaty countries for which however no 0 percent treaty reduction is available.

A formal legislative proposal has not yet been prepared for this change of law. It is therefore expected that the changes will enter into effect as per January 1, 2018.

B. New Refund Regime for Taxable Nonresident Shareholders

In response to the verdict of the Court of Justice of the European Union (“CJEU”) in the *Miljoen* case (Joined Cases C-10/14, C-14/14 and C-17/14) and the subsequent verdicts of the Dutch Supreme Court (March 4, 016), the Dutch Dividend Tax Act will be amended. As from January 1, 2017, a new refund regime will become available for taxable nonresident individual and corporate shareholders.

Currently, resident shareholders can fully offset dividend WHT with their income tax or corporate tax liability. Insofar as the Dutch dividend WHT exceeds the ultimate Dutch income tax or corporate tax due, resident taxpayers are eligible for a refund.

For nonresident shareholders, no similar refund regime was in place. To ensure that the Dutch dividend tax framework is in line with EU law, a similar refund regime will be introduced for nonresident shareholders. Nonresident shareholders will become entitled to a refund when the dividend tax withheld at their expense exceeds the personal income tax or corporate tax that would have been due by resident shareholders.

The regime covers nonresident shareholders that reside in an EU or European Economic Area (“EEA”) Member State or in a country with which an exchange of information agreement is in place (e.g., double tax treaties).

No refund will however be available if the nonresident shareholder can offset the Dutch dividend tax withheld against local income tax. No refund will be available either if the nonresident shareholder is not the ultimate beneficial owner of the dividends.

Nonresident investment companies that fulfill a similar function as Dutch fiscal investment institutions (*fiscale beleggingsinstelling*, or “fbi”) or exempt investment institutions (*vrijgestelde beleggingsinstelling*, or “vbi”) are explicitly excluded from the refund regime. This means that this new refund regime does not create a solution for the thousands of foreign investment companies that are claiming a refund based on EU law (Article 63 of the Treaty on the Functioning of the European Union).

III. Wage Tax

A. Supervisory Board Members

Supervisory board members of an entity used to have a deemed employment relationship with such entity. This resulted in a wage tax withholding obligation for the Dutch entity.

The deemed employment relationship will be abolished. As a result, the entity will no longer be obliged to withhold wage tax on the remuneration paid to supervisory board members. Board members can apply the “opting-in rule”, as a result of which withholding may take place. This may be beneficial if an income tax liability is expected.

Since this legislation has already been implemented by Decree during 2016, we do not foresee a major impact.

B. Taxation of Nonresident Directors

Tax treaties, in principle, allocate the right to levy income tax on the remuneration of directors to the country in which the entity is resident. The proposed legislation creates possibilities under Dutch domestic law to levy income tax from nonresident directors, irrespective of whether the income is qualified as profit, other income or wages from employment.

The Netherlands already had the possibility to levy taxes on the remuneration of directors that qualified as wages from employment. Under the new proposed legislation, this should also become possible for payments that qualify as profits or other income received by directors.

IV. Value Added Tax

A. Updated Definition of “Supply of Building Land”

The supply of “building land” is subject to value added tax (“VAT”). Case law of the CJEU (*Woningstichting Maasdriel*, Case C-543/11) has however shown that the Dutch definition of what constitutes a supply of building land under application of the Dutch VAT Act is more restrictive and deviates from the interpretation under the governing EU VAT Directive. Under the EU VAT Directive, interpreted by the said EU case law, the intention of the parties has become leading in deciding whether land constitutes building land: whether, for example, a building permit has been granted or improvements have been made in the vicinity of the land is not relevant under EU VAT law.

According to the CJEU, the supply of building land cannot be exempt from VAT where it is apparent from the overall objective assessment of the factual circumstances surrounding that transaction and prevailing at the time of supply, taking into account the intention of the parties at that time, if the land is in fact land intended to be built on. This does not change when the land has not yet been built on following the demolition of a building situated on it, even where, at the time of that supply, further land improvement works had not been carried out. This case law thus led to a quite different application of VAT compared to what was expected under the VAT Act and has caused discussions and uncertainty for market operators in the last years even though the guidance of the CJEU was quite clear.

Parliament wishes to align Dutch and EU law by updating the definition of “building land” in the Dutch VAT Act. This should prevent discrepancies in the application of VAT. By doing so, Parliament also aims to prevent tax planning as regards application of the lower Real Estate Transfer Tax (“RETT”) or VAT. After all, if the supply of land does not qualify as building land under application of the VAT Act, the supply is VAT exempt and generally subject to the lower RETT of 6 percent, or even 2 percent. When the supply of land qualifies as supply of building land, the transfer of the land is exempt from RETT, also if it currently only qualifies as building land under application of the EU VAT Directive.

Parliament furthermore wishes to clarify that land also qualifies as building land when the supplier of the land has contracted for the complete demolition of existing buildings in respect of the supply.

B. VAT Reclaims Concerning Bad Debt

The reclaim of VAT in respect of bad debt has been a longstanding topic of debate, leading to significant cash flow disadvantages for the suppliers involved. On January 1, 2017, changes are to be introduced that simplify and expedite the VAT recovery process for suppliers. The most prominent changes that are suggested are the following:

- the right to reclaim VAT unpaid exists and arises for invoices due that are left unpaid for one year;
- the VAT reclaim can be made through the periodical VAT return (rather than the current specific request);
- if (partial) payment is received once the VAT reclaim has been filed, the supplier is required to remit VAT to the extent payment is received;
- the arrangements shall not have retroactive effect: the one-year term for invoices due, issued prior to January 1, 2017, commences from this date.

Changes are also introduced in respect of factoring or, more generally, the transfer of debt. Where the initial supplier was generally required to co-sign the VAT refund request once the debt had been transferred, the factor/owner of the debt may request the bad debt VAT refund at the time the right to reclaim arises. The owner of the debt shall therefore be considered to substitute the initial supplier in all its rights and obligations. Nevertheless, VAT reclaims following transfer of bad debt must still be made by separate request.

Although these changes are very welcome, there are certainly some challenges to manage. In the event of debt transfer, for example, the owner of the debt may become legally liable to remit VAT to the Dutch tax authorities even if the customer has paid his dues on account of the initial supplier in line with the invoices that were issued.

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