

Welkom bij het webinar Responsible Tax – deel IV

Presentatoren:
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Start webinar 8:30 uur



Vragen

Voor het stellen van vragen tijdens het webinar zijn er twee mogelijkheden.

Inbellen met Lync:

Via chatbox aan linkerzijde

Inbellen zonder Lync:

Per email aan Mirella Amesz
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Agenda

- **Introduction**

- **Treaty abuse**

Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

- **Hybrid mismatches**

Neutralise the Effects of Hybrid Mismatch Arrangements (Treaty and Law)

- **Challenges of the Digital Economy**

Address the Tax Challenges of the Digital Economy



OECD – BEPS rapporten

- BEPS initiatief opgestart door OECD onder goedkeuring van de G20
- In de zomer van 2013 agenda met 15 actiepunten om overheden te helpen de internationale erosie van belastingen te bestrijden
- 14 maart : Abuse of tax treaties
- 19 maart : Neutralise effect of Hybrid Mismatches
- 24 maart : Challenges of the digital economy
- OECD vraagt om commentaar van alle belanghebbenden
- In september 2014 concrete aanbevelingen op onder meer bovenstaande onderwerpen



Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

Action 6

Current measures against (ab)use of treaties

- Netherlands Supreme Court: no treaty abuse if not mandated by the treaty
- Article 17: artist company (1977)
- Article 10, 11 and 12: beneficial owner (1977)
- Commentary article 5: split of contracts
- Commentary article 5: fragmentation of place of business
- Commentary to article 15: hiring out of labour
- Commentary article 1: refusal to grant treaty benefits as anti-abuse is inherent in the treaty

- Overview: United Nations Commentary to article 1 UN Model Convention

Discussion Draft “Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances”

- 14 March 2014
- Three measures proposed:
 - Include limitation-on-benefits provision (a “SAAR”)
 - Include a “GAAR”
 - Include a statement that tax avoidance/treaty shopping is not intended
- SAAR – Specific anti-abuse rule
- GAAR – General anti-abuse rule

Include a limitation-on-benefits provision

- Treaty benefits are only granted if the resident is a “qualified person”
- A person is a “qualified person” (amongst other things) if:
 - it’s an individual
 - it’s a charitable fund, pension fund etc. in either State
 - it’s a company with shares that are listed on a recognized stock exchange
 - 50% of the shareholders are qualified persons and less than 50% of the payments made to non-residents is deductible (unless paid in the ordinary course of business)
- A resident is entitled to treaty benefits on a certain item of income if:
 - the resident is engaged in an active trade or business and
 - the item of income is derived in connection with that trade or business
- New Commentary will explain the “main features”

Include a “GAAR”

- Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income if it is **reasonable to conclude**, having regard to the relevant **facts and circumstances**, that obtaining that benefit was **one of the main purposes** of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the **object and purpose** of this Convention.”

It is contemplated to introduce SAARs against

- Turning a dividend into a capital gain (escape WHT)
- Raising the shareholding above 25% (fall into the 5% instead of 15% WHT)
- Diluting the value of immovable property (get the land-rich company out of article 13(4))

The replacement of the tie-breaker for residence by mutual agreement

- Article 4(3)
- Now: “shall be deemed to be a resident only of the State in which the place of its effective management is situated”
- Future: “the competent authorities ... shall endeavour to determine by mutual agreement the ... State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated ... and any other relevant factor.”
- What if there is no mutual agreement?

Anti-abuse rule for low-taxed PEs in 3rd states

- Treaty R-S reduces WHT to 0%
 - Tax rate in PE State is 2%
 - Resident State exempts PE income
 - General rate CIT in State R is 20%
-
- No reduction of WHT, unless connected to active trade in PE



Saving clause

- To keep domestic law's anti-abuse rules effective
- E.g. French Schneider decision: article 7 prevents the application of France's CFC rules
- Article 7: “the profits of [Schneider Switz] shall be taxable only in [Switzerland], unless [Schneider Switz] has a PE in France.”

- “This Convention shall not affect the taxation, by a Contracting State, of its residents, except with respect to ...”

- Effect on:
 - Domestic GAAR (Netherlands: *fraus legis*)
 - CFC rules
 - Exit tax (article 13(5))



Include statement that tax avoidance/treaty shopping is not intended

- Preamble: “State A and B ... intending to conclude a [tax treaty] without creating opportunities for non-taxation or reduced taxation through tax evasion and avoidance (including through treaty shopping arrangements aimed at obtaining reliefs ... for the indirect benefit of residents of third States)”
- The closing stone for interpretation (ordinary meaning, context, object and purpose)

Neutralise the Effects of Hybrid Mismatch Arrangements (Treaty and Law)

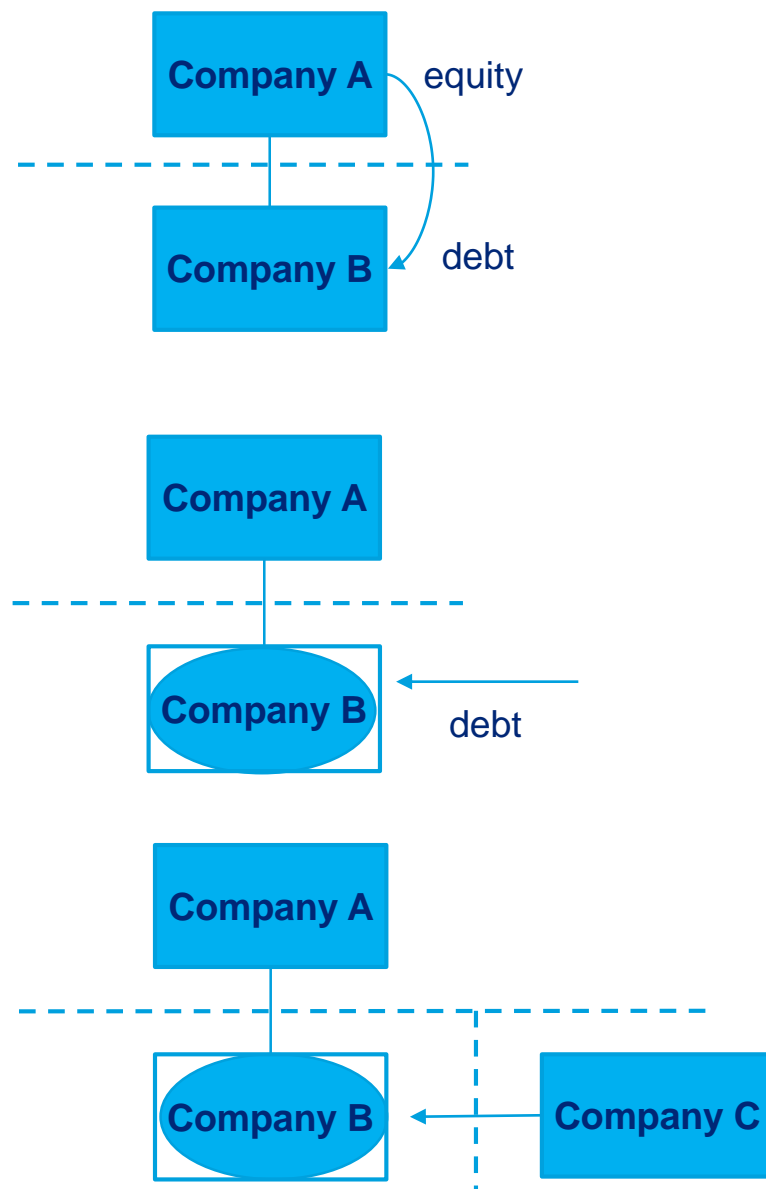
Action 2

Hybrids

- Focus of the report is on Hybrid mismatch arrangements that are:
 - An arrangement that exploits the different tax treatment in two jurisdictions to produce a mismatch in tax outcome
 - Mismatch is either two deductions for the same payment or a deductible payment that is not included in income by the recipient

Neutralise the effects of Hybrid mismatches

- **Hybrid financial instruments**; e.g. a PPL that is treated as capital in country A (not taxable) and as debt in country B (deductible)
- **Hybrid entity payments**; e.g. a partnership that is treated as corporate in one country (A) and as transparent in another country (B) → double deduct the same (interest) expense in A and B
- **Reverse hybrid structures**; e.g. a company is treated as transparent in one country (A) and as corporate in another country (B) → interest is not taxed in A or B and deducted in C



Hybrid mismatches – the recommendations by the OECD

- The report not only covers the examples just mentioned but a whole range of variations of mismatches (incl. Repo's, double consolidation structures, deferred considerations etc.)
- For each of the hybrid mismatches the report has recommendations to prevent the double non taxation

	Primary response	Defensive rule
Hybrid instruments	Payer jurisdiction denies deduction	Payee jurisdiction includes payment as income
Hybrid entity payments	Payer jurisdiction denies deduction	Payee jurisdiction includes payment as income
Reverse hybrids	Intermediate jurisdiction implements tax filing and information requirements	Payer jurisdiction denies deduction

Hybrid mismatches - observations

- The report is extremely ambitious and challenges a wide range of international hybrid structures
- In order to be effective the recommendations do not only relate to treaty applications but also domestic laws must be changed
- The recommendations are complex:
 - How do these recommendations interact with domestic rules and doctrines?
 - How can companies comply with these recommendations?
- It applies to intergroup arrangements but the threshold for this is very low: 10%
- The recommendations rely on a primary and a secondary rule. It therefore assumes that not all countries will comply
- Are countries then required to solve the mismatches created by the laws of another country?
- Although the report seems very complete a number of structures are not covered, such as a notional interest deduction or an informal capital arrangement. These structures create the same economic benefit

Address the Tax Challenges of the Digital Economy

Action 1

Digital economy

- Discussion Draft BEPS Action 1: Address the Tax Challenges of the Digital Economy (24 March 2014)
- 1996: US Treasury: residence State taxation
- 2001: India, Doernberg: do away with physical presence (PE)
- 1997-2003: BP TAG: Commentary article 5: PE kept
 - Underestimation of development digital economy
- Discussion Draft 2014: “dematerialized” taxation nexus

- Problematic area: US no review of allocation taxation rights
- Back to double taxation?

- Final report 2014: “identifying issues ... and possible actions to address them”

General BEPS concerns for digital economy

- Artificial fragmentation into multiple POBs and group entities
- Commissionaires
- Artificial segregation of income (risks, assets) and activities that generate it
- Maximising deductions in Market Jurisdictions
- Use of preferential regimes
- Reduction of tax in Residence State (relaxed CFC rules)

General Actions against BEPS in digital economy

- Action 6: prevent treaty abuse
 - Treaty shopping
 - Dual resident companies
 - General denial of treaty benefits if double non-taxation
- Action 7: prevent artificial avoidance of PE status
 - Review of agency PE paragraphs
 - Challenge defragmentation
 - ! Par. 151: more than commissionaires?
- Action 2: neutralise the effects of hybrid mismatch arrangements
- Actions 4/9: limit base erosion via interest deductions etc.
- Action 5: counter harmful tax practices
- Actions 8-10: transfer pricing outcomes to be in line with value creation
 - Contractual risk allocation versus capacity to bear risk and management of risk
 - Review guidance to recharacterise or disregard the tax payer's transactional form
- Action 3: strengthen CFC rules

Potential specific options for digital economy

- In the DD proposals by 3rd parties
- No conclusions reached in the Task Force

- Modify exemptions of the PE status
 - 5-4-a through 5-4-d could be core functions for a business
 - Eliminate 5-4 entirely

- For “fully dematerialised digital activities” (FDDA) if in a “significant digital presence” (SDP)
 - FDDA: e.g. nothing but a server, contracts through internet, payment by credit card
 - SDP: de minimis threshold
 - Profit allocation rules (for PE or in general)

- Virtual PE:
 - Maintain a website on a server in the Market Jurisdiction
 - Agency PE if conclusion contracts through a machine

- Withholding tax on digital transactions

Vragen

Indien u nog vragen heeft over de inhoud van dit webinar kunt u een e-mail sturen naar:

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Einde webinar

Bedankt voor uw aandacht



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