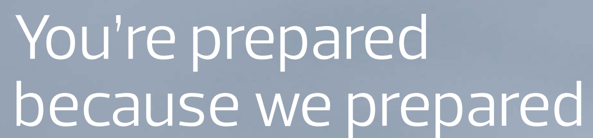

DOING BUSINESS IN THE NETHERLANDS AFTER BREXIT

On December 31, 2020, the current Brexit transition period will formally end and the UK will be fully separated from the European single market and customs union. This may affect the tax position of UK based companies doing business in the EU/EEA, or EU/EEA based companies doing business in the UK. In this update we will provide an overview of the most important consequences of Brexit on Dutch direct and indirect taxes. In addition we will also provide an overview of the opportunities Dutch tax law is still providing.

Direct taxes

As a result of Brexit, the UK is no qualifying jurisdiction anymore in the context of various EU directives, such as the EU Parent-Subsidiary Directive (exemption of dividend withholding tax and/or capital gains tax) ("EU PSD") and the EU Interest and Royalty Directive (exemption of interest and royalty withholding tax) ("EU IRD"). However, the bilateral tax treaty between the Netherlands and UK ("NL-UK") continues to apply and provides in most cases similar beneficial consequences. Please find below more information in this respect.

1. Dividend withholding tax

Due to the absence of a dividend withholding tax the UK is an attractive jurisdiction for (European) head offices. In this respect, outgoing dividends could be subject to a zero tax rate, whereas incoming dividend payments from the Netherlands are typically exempt due to the application EU PSD.

Following Brexit the EU PSD will no longer apply to dividend payments from the Netherlands to the UK and subsequently the tax treaty NL-UK will determine the withholding tax rate on dividend payments to the UK. Provided the conditions are met, the tax treaty NL-UK may provide for an exemption of Dutch dividend withholding tax upon distributions made by a Dutch company to a UK company. This exemption applies in most cases.

In this respect the Netherlands can still be considered a favorable country for UK companies to establish their mainland European holding company. Dutch holding companies can still use the EU PSD in relation to incoming dividend from EU/EEA companies.

2. Interest and royalty payments

Following Brexit the EU IRD will no longer be applicable on interest and royalty payments from the Netherlands to the UK and subsequently the tax treaty NL-UK, and the Dutch conditional withholding tax act 2021 ("WHT Act") will determine the withholding tax rate on interest and royalty payments.

Based on the WHT Act, a Dutch withholding tax of 25% is levied on interest and royalty payments to low tax jurisdictions and in case of abuse. In this respect the UK is not considered to be a low tax jurisdiction. It should however always be assessed whether there is a low tax jurisdiction in the structure that is ultimately receiving the interest or royalty payment indirectly through the UK to determine whether the situation is considered to be abusive or not. In most cases, the adverse consequences of the WHT Act will not apply in relation to the UK.

Based on the treaty NL-UK, the UK in principle has levying rights on interest and royalty payments that are made by a Dutch company to a UK company. There would therefore be no real indications that the Brexit would have adverse consequences in relation to interest and royalty payments from the Netherlands to the UK.

3. Cross border mergers

Under Dutch legislation, it is possible to implement a cross border merger between a Dutch tax resident company and a company with a UK tax residency, whereby roll-over relief can be claimed if conditions have been met. After the transition period this benefit is no longer available for cross border mergers with UK resident companies. As cross border mergers can no longer be implemented prior to Brexit, other alternatives should be considered such as for example a transfer of the seat of a Dutch company or a liquidation of a Dutch company. Please be aware of exit taxes in such cases.

4. Application of EU Court case law

The EU Court of Justice ("CJEU") has issued a number of important rulings in the past decades with regard to cross border direct taxation. After the end of the transition period the CJEU will no longer have competence in the UK. In relation to arrangements between the Netherlands and the UK this case law could however still be relevant from a Dutch tax perspective. It should be assessed on a case by case basis whether case law of the CJEU can still be applied, and whether alternatives should be considered if this would result in adverse tax consequences.

5. Ending of papillon and sister fiscal unities

For Dutch corporate income tax purposes two or more qualifying Dutch companies can enter into a Dutch fiscal unity. Dutch companies that are included in a fiscal unity only have to file one consolidated Dutch corporate income tax return.

Based on EU case law a Dutch fiscal unity can also be formed between sister companies that are held by a UK parent company, or by a Dutch parent company that is indirectly holding another Dutch company by a UK intermediary (papillon fiscal unity) . This case law only applies when the parent company or intermediate company is established in the EU/EEA.

Following the Brexit, these fiscal unities will therefore cease to exist because the condition for establishing such fiscal unities will no longer be met. This could result in additional compliance obligations, but it could also trigger anti abuse provisions. These consequences can be mitigated by amending the group structure before the end of the year in order to ensure that the requirements of the Dutch fiscal unity regime are still met at the end of the transition period.

Indirect taxes

1. VAT

Changes to the intra-EU trade system

On January 1, 2021 the zero rated intracommunity supplies with the UK will end, due to the fact that the UK will no longer be treated as an EU member state for VAT and customs purposes. The UK will no longer be bound to the EU VAT directive and will fall back on its own VAT Act. Other consequences, among others, for UK (companies) with regard to VAT will be:

- Since the UK will no longer be subject to EU VAT legislation, UK companies will also no longer be able to make use of its benefits such as the 0% rated intracommunity supply of goods and simplified triangulation. This does however not apply to Northern Irish companies.
- The new E-Commerce legislation will apply due to the fact that the UK is qualified as a non-EU country as of January 1, 2020.
- The local EU VAT incurred by UK companies will only be recoverable by the VAT refund request for non-EU companies.
- When UK companies intend to be VAT registered in the EU and want to file VAT returns, it is mandatory to appoint a fiscal representative in some EU member states. This is however not required in the Netherlands.

Special rules in relation to Northern Ireland

Also, on January 1, 2021 the Ireland/Northern Ireland protocol will enter into force. Due to this protocol the EU VAT rules will partly still apply to Northern Ireland even though it is part of UK. Supply of goods between an EU member state and Northern Ireland will remain to qualify as intracommunity supply of goods. However, supplies of goods between Northern Ireland and the rest of the UK will qualify as export/import transactions. Please note however that Northern Ireland will be regarded as a third country for providing services.

Due to the special status of Northern Ireland, companies established there will have a significant benefit with respect to access to the free market of the EU and the corresponding VAT legislation. As a result they are still able to make use of the simplified regulations such as the new One Stop Shop mechanism and the compliance requirements of the EU. Due to the last mentioned requirements, Northern Irish companies will experience less changes to their administration and responsibilities.

Northern Irish companies will receive a new VAT ID with, presumably, the country code 'NI'. This VAT ID will also need to be provided to vendors and used for the intracommunity sales.

2. Import duties and custom formalities

When the transition period is over, trade between the EU and UK will be subject to import duties and custom formalities.

Exporting from the EU to the UK

The UK government has already announced its future border operating model. The new border operating model will be set up in three phases. This to provide businesses more time to sort out the new requirements and make arrangements. The three phases are:

Phase 1 / January 2021: Full customs import declarations have to be submitted for excise goods and goods on which import restrictions apply. These goods are also known as controlled goods. For all other goods less strict requirements apply, as a record in the commercial administration of the company at the moment of import will suffice. A supplementary declaration is to be made within 6 months however.

Phases 2 / April 2021: Animal and plant related products and other goods subject to sanitary or phytosanitary controls will be subject to additional requirements and checks at import.

Phases 3 / July 2021: From this moment on all goods imported in the UK will be subject to the full process. As a result, full import customs declarations will need to be filed for all goods.

In order to be able to import and export the goods, the importing party will require a GB EORI number, commodity codes and the customs value of the imported goods. Without the aforementioned, goods cannot be imported into the UK.

The list of tariffs and duties was published by the UK in May 2020. Please be informed that preferential treatment may apply when goods originate from for example Switzerland for customs purposes, due to the fact that the UK has a free trade agreement.

Importing from the UK to the EU

On January 1, 2021, the UK will be qualified as a third country from an EU-perspective. Which means that import tariffs are to be due on goods that are imported from the UK into the EU. This will mean that UK companies responsible for the import of the goods from the UK (or another non-EU country) will need an EU-EORI number to be able to import the goods and file customs declarations in the EU.

Currently the main concern relating to the trade of goods after Brexit is the question whether the IT and general infrastructure in the UK (and the EU) will be ready for the large amounts of imports and exports to be handled as of 1 January 2021. It is expected that great delays will occur, therefore it is advisable to take this into account when planning to import and export goods to and from the UK.

Income and payrol taxes

1. Cross border workers

An important group employees on which the Brexit can have a major impact are the cross border workers who live in the UK and work in the Netherlands. The Dutch government announced that after the transition period current cross border workers from the UK are still allowed to work in the Netherlands without a working permit, on the condition that they have a 'cross border worker' document. With this document they can prove that they have the right to travel in and out of the Netherlands. Applying for such a document can be done on the website of Dutch immigration services.

UK residents who start working in the Netherlands after the transition period will have to apply for a working permit or a residence permit with work authorization.

2. Protective tax assessment upon emigration

When a resident of the Netherlands emigrates to another country, the Dutch tax authorities aim to safeguard the right to levy taxes on any income of that resident that has not yet been taxed. In that case, a so-called 'protective assessment' is issued, in order to safeguard the tax claim on for example unrealized capital gains of a substantial shareholder, pensions or annuities.

Upon emigration to another EU Member State, the Dutch tax authorities will automatically provide a deferment of payment with regard to the protective assessment. For protective assessments imposed on 2019 or prior years, this will apply.

In case of emigration to a non-EU State such as the UK post-Brexit, the emigrating taxpayer will have to request a deferment of payment as it will not be provided automatically. Furthermore, for emigration to non-EU States, the emigrating taxpayer will have to provide collateral for the future payment of the assessment in order to obtain a deferment.

3. Social security

An EU regulation is in place for the coordination of social security within the EU. This Regulation prevents a double social security liability, and double premiums being due if a resident of an EU Member State works in another EU Member State. At the end of the transition period the regulation will no longer apply and at this moment there is no agreement between the EU and the UK about a new arrangement after the transition period.

More information?

For more detailed information and questions please contact your trusted RSM advisor.

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