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THE NETHERLANDS – INTERNATIONAL TAX DEVELOPMENTS

In this update we provide you with an overview on recent Dutch and international tax developments that are relevant to internationally operating companies doing business in the Netherlands.

CORPORATE INCOME TAX DEVELOPMENTS

As a result of (international) developments targeting base erosion and profit shifting the Netherlands has been implementing a series of corporate income tax measures targeting artificial arrangements. These measures are predominantly aimed at flow-through entities that do not have sufficient nexus with the Netherlands, and at international tax planning structures that benefit from disparities between jurisdictions. These new measures could however also (unintendedly) apply to companies with genuine business activities.

At the same time the Netherlands wants to maintain a good investment climate for companies that are carrying out genuine business activities. In this update we provide an outline of the most recent tax developments that are relevant to internationally operating companies doing business in or through the Netherlands.

1. Dutch corporate income tax rates

Per 2021, the Dutch corporate income tax rate for taxable income up to EUR 245,000 decreased from 16.5% to 15% (low tax bracket). In addition, as per 2022 the Dutch government anticipates to expand this low tax bracket to income up to EUR 395,000. The proposed tax rate for income exceeding EUR 245,000 (or EUR 395,000 in 2022) will remain at 25% (high tax bracket).

Check:
Would it be beneficial for my Dutch group companies that are included in a Dutch fiscal unity to break up the fiscal unity to individually benefit from the low tax bracket?

2. Conditional WHT on interest and royalty payments

As per January 1, 2021, a conditional withholding tax on intra-group interest and royalty payments entered into force. This withholding tax is in principle applicable if the payment is made to:

1. Companies that are residing in low tax jurisdictions or in that are EU blacklisted (see paragraph 6), or
2. Tax abuse situations, such as for example where an entity in a high taxed jurisdiction is interposed or where a payment is made to a hybrid entity, such as a US LCC.

Transitory law will be effective if there is a treaty in force between the Netherlands and the low tax jurisdiction / EU blacklisted jurisdiction that restricts the levying of withholding tax on interest and royalty payments. The withholding tax rate is equal to the highest Dutch corporate income tax rate, which is 25% in 2021.

Check:
Do I know if my Dutch group company is making intra-group interest or royalty payments, that are exposed to the new Dutch withholding tax?

3. ATAD2 – Documentation

As per January 1, 2020, the Netherlands has implemented EU anti hybrid mismatch legislation into the Dutch corporate income tax act. As part of this legislation the Netherlands has imposed a new tax compliance obligation on all Dutch taxpayers, which is to prepare a documentation file that substantiates the Dutch company's position in light of the measures of ATAD2.

The file could be straightforward if there are no qualifying transactions, or very complex in cases where these measures apply. This file should be included in the administration of the Dutch taxpayer ultimately when the Dutch corporate income tax return has been filed.

The first deadline for preparing this documentation is approaching. Without this documentation file, a Dutch intermediary is in principle not allowed to file a Dutch corporate income tax return for a Dutch company. If the 2020 annual accounts are already prepared (in draft), we recommend to start preparing the documentation file as soon as possible.

Check:
Have we already started with the preparation of ATAD2 documentation for FY 2020?

4. Increase in substance requirements for qualifying Financial Services Entities

A Dutch company of which the activities consist for 70% or more of (in)directly receiving and paying interest, royalties, rent or lease to/from group entities qualifies as a Financial Services Entity ("FSA"). In order to avoid the spontaneous exchange of information by the Dutch tax authorities ("DTA") to foreign tax authorities FSA's should meet the Dutch substance requirements.

As per January 1, 2021, FSA's need to meet the following additional substance requirements to prevent the exchange of information: a) a wage sum of at least EUR 100,000 and b) have an office space available for at least 24 months. In case these substance requirements are not met during the whole (book) year, the DTA could exchange this information with the source countries, which may result in the denial of reduced withholding tax rates.

Check:
Is my Dutch group company a qualifying FSA that meets the relevant Dutch substance requirements?

5. DAC6

As per January 1, 2021, the obligation to report aggressive tax arrangements has entered into force. An arrangement is in principle considered aggressive if it meets one or more hallmarks. Non-compliance with this obligation could result in a fine of max EUR 870,000. This obligation is imposed on intermediaries, but could shift to the taxpayer if there is no qualifying intermediary.

Intermediaries and taxpayers should meet the reporting obligations of DAC6 within 30 days after the arrangement is ready or available for implementation. Where it cannot be determined when an arrangement is ready for implementation, the arrangement should be reported within 30 days after the first step of the implementation.

DAC6 requires intermediaries and taxpayers to continuously monitor their compliance in relation to DAC6 to prevent the risk on substantial fines.

Check:
Have we set-up processes to monitor our compliance in relation to DAC6 to prevent the risk on substantial fines?

6. Low tax and non-cooperative jurisdictions 2021

Low tax jurisdictions are jurisdictions with a statutory corporate tax rate of less than 9 percent and jurisdictions listed on the EU list of non-cooperative jurisdictions. This list is important for the Dutch CFC Rules, the Dutch interest and royalty withholding tax Act 2021, the Dutch ruling practice, and an extending amount of measures such as mandatory disclosure rules (DAC6) and new regulations for Dutch corporate service providers.

The most recent list is composed of: *Anguilla, Bahama's, Bahrein, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Fiji, Guam, Guernsey, Isle of Man, Jersey, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, Turkmenistan, Turks and Caicos Islands, United Arab Emirates, US Samoa, US Virgin Islands, and Vanuatu.*

Check:
Do we have any group companies that are established in one or more of the above jurisdictions, and have we assessed the tax risks connected to this presence?

ANNOUNCED & EXPECTED LEGISLATION

7. ATAD 2 — Reverse hybrids

As per January 1, 2020, the Netherlands has included EU anti-hybrid mismatch provisions in its domestic tax laws. These rules generally apply to deductible intra-group payments that are not included in the tax base of the receiver, or, are also deductible elsewhere (so called 'hybrid mismatches').

On top of these provisions the Netherlands has now announced legislation where so called reverse hybrid entities will become qualifying Dutch taxpayers. A reverse hybrid entity is any entity that is transparent from a Dutch tax perspective, while it is considered non-transparent from the perspective of the other jurisdiction. Income received by such an entity was typically not recognized as taxable income in any of the involved jurisdictions. As a result of this legislation such reverse hybrid entities will be required to annually file Dutch corporate income tax returns and pay taxes on any received income as per January 1, 2022.

8. Transfer Pricing Adjustments

Dutch taxpayers are required to use at arm's length prices for their intra-group transactions. Where intra-group income or payments are not reflecting an at arm's length price, adjustments should be made. The transfer pricing adjustments at the level of the Dutch taxpayer can potentially result in mismatches in cases where these adjustments are not taken into account by the corresponding jurisdiction.

Within the new legislative proposal it is proposed that downward adjustments (deemed expense) of the taxable profits of the Dutch taxpayer are only allowed to the extent that the corresponding adjustment is included in the taxable base of the other jurisdiction. This means that downward adjustments will not be allowed if the corresponding jurisdiction is not levying corporate income taxes at all. In situations where a corresponding adjustment is subject to tax at 0% or where it is effectively untaxed due to the settlement of losses, these rules should not apply.

The impact of these measures may for example extend to situations where deemed interest expenses are taken into account on an interest free loan at the level of a Dutch entity. These rules may also affect situations where assets are acquired from related parties. In case of the latter it is not possible to make an upwards adjustment from the purchase price of the asset to the fair market value if the country of the seller is not taking this fair market value into account.

Check:

- Review your transfer pricing policy to assess whether these measures are adversely affecting your tax position.
- Review whether applicable tax rulings and advance pricing agreements will be terminated as per January 1, 2022.

9. New CIT group regime

The Dutch State Secretary of Finance has responded to questions concerning the proposed new consolidation regime, which is to replace the current CIT fiscal unity regime as some aspects of the fiscal unity regime are contrary to EU law. A substantial difference with the current regime is that each entity of the group consolidation regime will need to determine the tax position on a stand-alone basis (stand-alone approach). Like in the current CIT fiscal unity regime, within the new group consolidation regime, losses and profits can be transferred to other members of the group, as well as pooling of results, making it still possible to off-set profits and losses between different group members. Profit consolidation will not be part of the new group consolidation regime. In addition, transactions between group members will be visible for tax purposes. The requirements and application are expected to be the same as in the current regime.

It is expected that a minimum of 5 years will be needed for the rules to come into effect.

10. ATAD2 – Cost plus income from US entities

Based on the current anti-hybrid rules under ATAD2, routine costs incurred at the level of the Dutch entity may no longer be deductible under certain cost-plus arrangements between US entities and disregarded Dutch entities. This effect of ATAD2 could result in double taxation. This overkill is acknowledged by the Dutch State Secretary of Finance and it was announced that more guidance will be provided on this in Spring 2021. We will provide an update once more clarification has been published.

11. Restriction to carry forward losses

The Dutch government announces to implement restrictions to the carrying forward of tax losses as per January 1, 2022. The tax loss carry forward period should become unlimited in time (currently six years). However, tax losses may under the proposal only be fully offset against profits up to EUR 1 million, and to 50% of any profits exceeding that amount.

VAT DEVELOPMENT FOR INTRA-GROUP TRANSACTIONS

On March 11, 2021, the Court of Justice of the European Union (hereinafter: CJEU) decided in the Danske Bank case that services provided by a Danish head office to its fixed establishment in Sweden are subject to VAT as the Danish head office was part of a VAT group in Denmark.

This judgement has an impact on intercompany services between head offices and fixed establishments. In particular when one of the entities is established in an EU Member State and is part of a VAT group, the intercompany services which are normally irrelevant become relevant. This could result in a VAT burden for the receiving entity in case it does not have the full right to recover input VAT.

Companies should map whether intercompany services are applicable between head offices and branches and whether these entities are included in a VAT group in the EU. This case could potentially change the reporting obligations and lead to a VAT burden for receiving entities. We expect that this case will mainly impact the financial services sector as in this sector it is common to work with branches.

More information?

Should you have any comments or questions, or if you require our assistance with assessing whether your group is compliant to all new legislation, please contact your trusted RSM advisor.

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