Bird & Bird

2017 Dutch Tax Plan & other recent Dutch tax developments

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The Dutch government released, on September 20, 2016, the Dutch Budget 2017, which includes proposals for amendments to the Dutch tax laws, i.e. the 2017 Dutch tax plan. In the upcoming months the proposed amendments will be discussed in Dutch parliament.

Below we summarize several key recently proposed amendments to Dutch tax laws.

Dutch corporate income tax

Lowering of Dutch corporate income tax rate

Currently the Netherlands levies corporate income tax (**CIT**) at a rate of 20% for the first € 200.000 profits (the **First Bracket**) and 25% for taxable profits exceeding € 200.000. In order for the Netherlands to remain an attractive investment jurisdiction the 2017 Dutch tax plan proposes to lower the effective CIT rate by means of:

- increasing, starting 2018, the First Bracket to € 250.000;
- further increasing the First Bracket to € 300.000 in 2020; and
- further increasing the First Bracket to € 350.000 in 2021.

Interest deduction limitations

The 2017 Dutch tax plan proposes amendments with respect to two interest deduction limitations in the Dutch corporate income tax Act 1969 (**CITA**), being article 10a CITA and 15ad CITA.

Article 10a CITA

Article 10a CITA in principle denies deduction of interest on debt provided by a related entity or individual in case such debt is legally or *de facto* connected with a 'tainted' transactions being certain dividend distributions, capital contributions or (external) acquisitions. Exceptions to the denial may apply if the taxpayer can demonstrate that both the debt and connected transaction are predominantly entered into for business reasons or –in principle- that the interest received by the creditor is subject to a reasonable (compared to Dutch standards) income tax (i.e. effective tax rate of 10% over a comparable basis).

Currently, article 10a CITA provides that two entities are related if (i) the taxpayer holds an interest of at least $1/3^{rd}$ in the other entity or vice versa or (ii) another entity or individual holds an interest of at least $1/3^{rd}$ in both entities.

It is now proposed to extend the definition of related entities to also include a group of companies that work together (even if the 1/3 threshold is not met). Whether a cooperating group should be recognized depends on the facts and circumstances of the specific case. The explanatory notes provide examples to outline when a cooperating group could be recognized.

Article 15ad CITA

Article 15ad CITA is a specific interest deduction limitation related to excessive acquisition debt. If a Dutch target company is acquired by a debt funded Dutch acquisition company, interest expenses would arise at the level of the Dutch acquisition company. If the Dutch acquisition company and the target would form a fiscal unity, interest expenses of the acquisition could be set-off against the target's profits. Article 15ad CITA limits interest deduction in such cases.

The proposed amendments include a provision to prevent circumvention of article 15ad CITA by so-called 'debt push down', where the acquisition debt is pushed down to the target company, effectively making the acquisition interest deductible. Another proposed amendment relates to the calculation of the amount of non-deductible interest. Under article 15ad CITA only 60% of the acquisition price is deductible whereas such percentage is, in a seven year period, reduced annually by 5% to 25%. In practice, if the shares in the fiscal unity are sold to another acquisition holding company, the percentage restarts at 60%. The proposal entails that such 'restart' would no longer be possible in case the shares in the fiscal unity are sold to a related party. Moreover the grandfathering rule, with respect to debt funding already in place at the time of the introduction in the 2012 Dutch tax plan, shall no longer apply to such "old" debt funding in case the Dutch acquisition company is included in a new fiscal unity.

The interest deduction limitations and the EU Anti-Tax Avoidance Directive (ATA Directive)

The ATA Directive shall introduce a general earnings-stripping rule. In the 2017 Dutch tax plan it is stated that with the implementation of the earnings-stripping rule the need for article 15ad shall be evaluated. However, the Dutch government expects that article 10a CITA will still be relevant at such time.

Dutch fiscal unity regime: extension in accordance with EU law

In June 2014 the EU Court of Justice ruled[1] that the Dutch fiscal unity (tax consolidation) regime is in contravention with the EU freedom of establishment. The Dutch government released a legislative proposal (following a decree published in December 2014 with similar content), to further extend the Dutch fiscal unity regime for EU/EEA situations by allowing a fiscal unity:

(a) between two Dutch resident companies with (one or more) common parents resident in another EU/EEA jurisdiction; and/or

(b) between a Dutch resident parent company and an indirect Dutch resident subsidiary held through one or more EU/EEA resident intermediate holding companies.

The above situations only apply if the EU/EEA parent or intermediate holding company (i) have a legal form comparable to Dutch legal entities that can be included in a fiscal unity and (ii) would be subject to Dutch CIT if they were tax resident in the Netherlands.

Another proposed amendment entails that the parent company in the fiscal unity must have complete legal and economic ownership of at least 95% of the shares in the nominal paid-up capital of the subsidiary in the fiscal unity. As a result it would no longer be possible to form a fiscal unity if the parent owns the depositary receipts (*certificaten*) while the legal title of the shares is owned by a foundation outside the fiscal unity.

Although not yet included in the amended legislative proposal of March 2016 *(nota van wijziging*), there are currently, following a ruling of the Dutch court of appeal[2], discussions whether a fiscal unity should also be allowed in non-EU/EEA cases when there is a tax treaty in place including a non-discrimination clause. We will keep you posted on developments.

Dutch innovation box (IP regime)

The Dutch innovation box allows for an effective corporate income tax rate of 5% on profits derived from self-produced intangible assets for which either an R&D-certificate (*S&O-verklaring*), breeder's rights or a patent has been obtained.

Further to OECD BEPS Action 5 and the EU discussions on EU Member States' IP regimes, the Netherlands will, same as all other EU Member States, amend its innovation box to bring it in line with the so-called nexus approach and implement recommendations from a recent study on the effectiveness of the innovation box. The proposed act brings amendments with respect to the 'entrance tickets' to the innovation box and with respect to the allocation of income that qualifies for the reduced 5% effective tax rate.

Ticket to the innovation box

The proposal distinguishes 'small' and 'other' taxpayers. A taxpayer would be regarded small if:

- it has a total (global) group-wide net turnover of lower than € 250 million in the year of application of the innovation box and the previous four years combined; and
- the total profits attributable to intangible assets which result from activities for which an R&D-certificate was given to the taxpayer, are lower than € 37,5 million in the year of application of the innovation box and the previous four years combined.

For small taxpayers the R&D-certificate would remain to be a stand-alone ticket to the Dutch innovation box. Other taxpayers only have access to the innovation box if they have an R&D-certificate and in addition, either of the following applies with respect to the intangible:

(i) the taxpayer obtained a patent or plant breeder's right;

(ii) the taxpayer is in the application process for a patent or plant breeder's right;

(iii) the intangible asset qualifies as software;

[1] ECJ cases C-39/13, C-40-13 and C-41/13

[2] Gerechtshof Arnhem-Leeuwarden, 15/00206

(iv) the taxpayer obtained a permit from an EU Member State to trade medicines;
(v) the taxpayer obtained a supplementary protection certificate from the patent center (*Octrooicentrum Nederland*);
(vi) the taxpayer was granted a registered utility model for the protection of innovation;
(vii) the taxpayer has an exclusive license to use either of (i),(iii), (iv) or (vi); or
(viii) the taxpayer has an intangible that is related to an intangible for which either one or more of the categories under (i) through (vii) applies.

Qualifying income for the innovation box

The level of profits that can be allocated to the innovation box is restricted. The qualifying profits are determined by the following formula:

$$\frac{Q*1{,}3}{T}\times O = I$$

In this formula, Q stands for qualifying R&D expenditures of the taxpayer incurred to develop a certain IP asset multiplied by 1,3 (to facilitate limited outsourcing of R&D within the group) and T stands for the overall R&D expenditures incurred to develop the IP asset[3]. O stands for the overall income from the IP asset and I stands for the income receiving tax benefits. This formula implements the nexus approach,[4] which effectively accomplishes that if more R&D activities are outsourced to related parties, less profit is allocable to an intangible resulting from such R&D activities qualifies for the lowered effective tax rate.
The "lump sum innovation box" (*forfaitaire innovatiebox)* would remain to exist, intended for taxpayers that have only limited innovation box profits.

The amendments would be effective January 1, 2017, but would only apply to financial years starting after that date.

Taxpayers may apply the currently applicable innovation box regime to qualifying intangible assets which have been developed before July 1, 2016, provided that the taxpayer chooses to apply the innovation box in the financial year in which July 1, 2016, falls. This grandfathering period will no longer apply to financial years ending June 30, 2021, at the latest. In addition intangible assets developed before January 1, 2017, qualify for the innovation box if a patent or breeder's right was obtained for the intangible, i.e. without an R&D-certificate requirement.

Dutch dividend withholding tax

Codification refund of Dutch dividend withholding tax for non-resident shareholders

In March 2016 the Dutch Supreme Court ruled in three cases that deal with the refund of the Dutch dividend withholding tax in relation to non-resident shareholders who held portfolio shareholdings in Dutch companies, i.e. one corporate taxpayer in France and two individual taxpayers in Belgium. Previously, the three cases were referred to the ECJ for a preliminary decision.[5]

The Supreme Court ruled, in line with the ECJ, that the Dutch dividend withholding tax results in a restriction of the free movement of capital to the extent the burden of the dividend withholding tax is higher for non-resident shareholders compared to Dutch resident shareholders in the same position. On April 29, 2016, the Dutch State Secretary of Finance issued, in line with the rulings of the Dutch Supreme Court, a decree regarding the treatment of dividend withholding tax refund requests by non-residents. When making the dividend withholding tax comparison between a resident and the non-resident taxpayer (which is resident in a country that entered into an exchange of information treaty with the Netherlands), the decree states:

- that for corporate taxpayers only costs directly related to the collection of the dividends may be taken into account (e.g. bank charges, etc.), while for instance FX results or pre-acquisition dividends are not recognized as costs directly related to the dividends and thus not taken into account.

- That for individual taxpayers a reference period of a calendar year should be applied and the entire tax free threshold (*heffingsvrij vermogen*) should be deducted, while loans related to the acquisition of the shares cannot be deducted against the shares.

In both situations the Netherlands will not provide a refund of Dutch dividend withholding tax in case the different treatment is completely neutralized by means of a tax credit in the state of residence.

[3] Inter alia expenses in relation to outsourcing of R&D within the group is not qualifying and therefore included in T but not included in Q.
[4] Under the nexus approach, developed by the OECD in BEPS Action 5, IP may only benefit from preferential tax regimes if the company has sufficient ties with development of IP.

[5] Dutch Supreme Court cases 12/02502bis, 12/03235bis en 12/04717bis and ECJ cases C-10/14, C-14/14 and C-17/14

The 2017 Dutch tax plan is a codification of the decree of April 29, 2016.

It should be noted that e.g. the limitation of the deductible expenses, the exclusion of pre-acuisition dividends and the limitation of the scope of companies (only in certain countries) are debated in literature, as this could still lead to a prohibited breach of the EU freedoms.

Elimination of different treatment of Dutch Cooperatives (Coops)

The Dutch State Secretary of Finance has announced, in a letter published at the same day as the 2017 Dutch tax plan, that in the near future a legislative proposal will be published in order to eliminate the different treatment of dividend withholding tax for the Dutch BV and NV on the one hand and the Dutch cooperative (*coöperatie*) on the other hand. Currently, distributions made by a Dutch cooperative are, if certain requirements are met, not subject to Dutch dividend withholding tax.

New legislation is expected, under which cooperatives will have similar treatment as legal entities that fall within the scope of the dividend withholding tax act (e.g. the NV and BV). Consequently, members of cooperatives would in principle be subject to dividend withholding tax.

However, in the same letter also a new exemption for Dutch dividend withholding tax is announced. In short BVs, NVs and Cooperatives could be exempt from withholding dividend withholding tax obligation if the shareholder or member (i) owns at least 5% of the nominal value of the shares or membership interest, (ii) is located in a country that has a tax treaty with the Netherlands and (iii) is part of a structure that can be regarded a business structure.

Please note that the above legislative proposal is not yet published and can therefore deviate from the current suggestion.

Exchange of information tax rulings, legal basis recovery EU State Aid, EU Anti-Tax Avoidance Directive

Automatic exchange of cross-border advance tax rulings and advance pricing agreements

On September 1, 2016, the Dutch State Secretary of Finance has published the legislative proposal for automatic exchange of cross-border rulings (ATR and APA) in line with Directive 2011/16/EU as amended by Directive 2015/2376/EU.

Starting 2015 EU Member States are already obliged to automatically exchange information with other Member States in relation to five categories, being: employment income, director's fees, certain life insurance products, pensions and ownership of and income from immovable property. As of January 1, 2016, financial account data was added as sixth category in accordance with the OECD Common Reporting Standards.

As of January 1, 2017, EU Member States must also automatically exchange information with respect to cross-border rulings (both ATR and APA). The information to be automatically exchanged includes identification details of the entities to which the ruling relates and reference to the respective Member States likely concerned by the ruling, a summary of the content of the ruling and the period during which the ruling is applicable. The European Commission (EC) will provide for a database in which Member States should enter information about cross-border rulings they concluded. Member States can request to receive more information about a specific rulingfrom the Member State that granted the ruling. The EC will have access to the database in order to monitor the effectiveness of the automatic exchange of information. However, the EC will not have access to all information that would be used to identify cases of illegal state aid.

The new rules apply as of January 1, 2017. However, concerning rulings obtained prior to January 1, 2017, the following applies:

- rulings issued, amended or renewed between January 1, 2012, and December 31, 2013, will be exchanged to the extent that they are still valid on January 1, 2014;
- rulings issued, amended or renewed between January 1, 2014, and December 31, 2016, shall be exchanged irrespective whether they are still valid or not.

However in general Member States can opt not to exchange information on rulings issued, amended or renewed before April 1, 2016, provided that they are obtained by companies with an annual net turnover of less than €40 million at a group level. This exemption does not apply to companies conducting mainly financial or investment activities.

Legal basis for recovery of EU State Aid

The 2017 Dutch tax plan includes an updated legislative proposal with respect to the recovery of state aid. On June 15, 2016, an initial legislative proposal was already published in the course of an internet consultation.

The EC can open investigations in order to determine whether a specific taxpayer or group of taxpayers was provided with illegal state aid. In short, the published proposal provides the legal basis for the Dutch tax authorities to recover illegal state aid, following a decision of the EC that indeed illegal state aid was provided.

EU Anti-Tax Avoidance Directive

On July 21, 2016, the European Council formally adopted the Anti-Tax Avoidance Directive (ATA Directive), laying down minimum rules against avoidance of corporate tax within Member States. The ATA Directive contains five measures: (i) a general interest deduction limitation (limited to 30% of a taxpayer's EBITDA); (ii) a rule on exit taxation (applicable on the transfer of an entity, permanent establishment and/or assets out of a Member State); (iii) a general anti-abuse rule; (iv) rules on controlled foreign companies (attributing taxable income of certain low-taxed subsidiaries to the parent entity); and (v) a rule tackling hybrid mismatches (only with respect to mismatches between Member States).

The rules must be implemented in the local corporate tax laws of Member States prior to January 1, 2019, with the exception of the rule on exit taxation (January 1, 2020) and under circumstances the general interest deduction limitation (January 1, 2024).

For more information about the ATA Directive and the potential impact to different EU jurisdictions, reference is made to this recent article.

Other

Other relevant changes included in the proposals of the 2017 Dutch tax plan:

- **Abolishment of deemed employment relationship for supervisory board members.** The possibility to opt out of payroll taxation for supervisory board members has been available based on a decree by the Dutch State Secretary of Finance since May 1, 2016 in anticipation of this change.
- The so-called **"customary wage" (*gebruikelijk loon*)** required to be taken into account for individuals working for a company in which a substantial interest (5% or more of the shares) is held, will be reduced for start-up companies that benefit from the R&D wage tax credit (*WBSO*). Currently companies carry the burden of proof if they wish to apply an annual customary wage of less than EUR 44.000. It is now proposed that for the mentioned start-up companies such EUR 44.000 threshold will be lowered to the minimum wage (recalculated from a monthly to an annual basis; currently approx. EUR 1500 per month). In addition, a higher customary wage need not be taken into account even if the wage from the most similar employment would be higher.
- **Several anti-avoidance provisions will be introduced/amended to prevent certain specific forms of tax planning used by individuals**. In this context, the conversion of taxable companies into tax exempt companies (*vbi-status*) will become a taxable event for substantial interest holders (i.e. 5% or more of the shares). Besides, shifting equity back and forth between individual ownership and a personal holding company (in order to reduce exposure on the key dates) will be disregarded under certain conditions. Moreover the double taxation exception (*toerekeningsstop*) with regard to the separated private asset regime (*apv-regime*) can only be applied when an active business enterprise is involved.

Clearly, the budget contains more proposals. Should you want to discuss any of the above, please contact the authors or your regular contact person with Bird & Bird.

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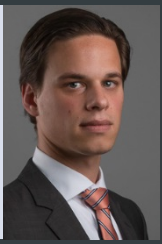

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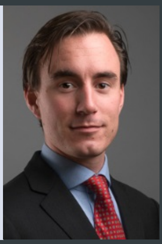

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