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Tax alert September 2017 – multinational companies

The Netherlands - 2018 Budget Proposals

On 19 September 2017 the Dutch Ministry of Finance published its tax budget proposals for 2018. One of the most important changes regards the reduction of the Dutch Dividend Withholding Tax (DWT) to nil for international business activities. Below we will explain these changes and we will address the remaining proposed changes relevant for multinational companies. We note that the proposed changes may be subject to some amendments. Voting in the Dutch Parliament is scheduled for 16 November 2017.

Dividend Withholding Tax reduced to nil for business structures

In accordance with earlier announcements it is proposed to expand the DWT exemption (0% rate) to foreign shareholders owning at least 5% of a Dutch company even in case the applicable tax treaty stipulates a higher DWT rate. This exemption is an important step in further strengthening the Dutch fiscal climate for multinational companies. A ruling can be obtained from the Dutch tax authorities in order to confirm the 0% DWT rate. In case the 0% DWT rate is applied information regarding the dividend will need to be supplied to the tax authorities within one month after the dividend declaration.

On the other hand the DWT anti-abuse provisions will be brought in line with the principle purpose test (PPT) of the MLI (BEPS project). Note that this amendment can (unexpectedly) increase the Dutch DWT rate on future dividends, in particular in the situation (in)direct shareholders are not considered to be involved in business operations or does not meet certain newly introduced minimum substance requirements for intermediate holding entities.

We recommend to check if the proposed changes result in opportunities or disadvantages for the DWT position of a multinational group. We note that even in the situation that the shareholder is located in a non-tax treaty country the new 0% DWT rate can be obtained after a partial restructure.

Cooperative entities become subject to Dutch dividend withholding tax

Cooperatives are frequently used in Dutch international tax structures to avoid DWT since these entities are not DWT taxpayers provided certain requirements are met (which are in line with the PPT as mentioned in the previous paragraph). As from 2018 cooperatives will become subject to DWT if they predominantly (for 70% or more) operate as a holding or a financing company. After this amendment the DWT treatment of such cooperatives is in line with the DWT treatment of Dutch limited liability companies (BV/NV) for which also a DWT exemption can be available as from 2018 (we refer to the previous paragraph).

We recommend to check the DWT position of a cooperative in case it predominantly acts as a holding or financing company in the group.

Amendment of the tax treatment of certain charges relating to foreign branches

Under the current Corporate Income Tax (CIT) Act certain internal charges (i.e. royalty, rent, lease) due within a fiscal unity relating to a foreign branch can be eliminated (for determining the exempt foreign branch profit) while these charges can be deducted from the local branch profit. The Dutch Supreme Court has approved this treatment. In this respect we note that the Dutch CIT already includes an anti-abuse measure for interest expenses whereby a deduction of interest expenses is taken into account for determining the exempt branch profit instead of eliminating such charge within the fiscal unity. This anti-abuse measure will be extended to all intercompany charges (i.e. royalty, rent, lease) as from 2018.

We recommend to check the calculation of the exempt branch profit in case a foreign branch (permanent establishment) is held by a Dutch company forming part of a fiscal unity for Dutch CIT purposes with other Dutch companies.

Increase of 10A counter evidence requirements in case of third party financing

The Dutch CIT Act includes various measures to avoid the deduction of excessive interest expenses. One of the measures regards the deduction of intercompany interest relating to certain transactions such as acquisitions, capitalization of participations and dividends (article 10A CIT Act). Specific counter evidence rules exist to mitigate an adverse effect of this measure on the Dutch tax position. Under one of the counter evidence rules the taxpayer is able to substantiate that the loan and the transaction are based on business reasons. Based on the current policy these business reasons are deemed to exist if a link with a third party financing is available (emphasizing that article 10A aims to avoid the deduction of interest on intercompany loans). As from 2018 this possibility will be cancelled. As a result also in case the loan is ultimately financed by a third party loan the business reasons of the intercompany loan and the transaction need substantiation for applying this counter evidence rule.

Amendment of tax facilities to deduct losses in order to avoid misuse

Under the Dutch CIT Act losses realized upon the liquidation of a (foreign) participation is deductible for CIT purposes if various requirements are met. These losses can be fully off set against other profits. This rule is beneficial because normally the profits and losses from participations are exempt if the participation exemption applies. The deduction of liquidation losses is an exception to this rule.

In practice structures has been set-up aiming to artificially increase the liquidation loss by setting-up a series of transactions whereby an intermediate holding entity (owning the participation to be liquidated) is excluded from a Dutch fiscal unity. This accidental use is prevented by an amendment of the CIT Act.

Another repair measure regards the realization of a loss on an intercompany loan relating to an entity of which the operational losses have already been taken into account within a fiscal unity. As from 2018 these loss situations need additional attention.

Country by country reporting and voluntary filing

As from 2016 Dutch group companies (including branches) of a multinational group with a turnover of at least EUR 750 mio needs to file a country-by-country report (cbc report) with the Dutch tax authorities. This would not be necessary if the parent company is already required to meet this requirement based on its local tax regulations. As from 2018 the current policy that a voluntary filing of the cbc report by the parent company will be sufficient as well will be included in the Dutch CIT Act. The Dutch group company will need to notify the Dutch tax authorities which group company files the cbc report on its behalf prior to the end of the each book year (online link).

This change is relevant for countries that did not introduce cbc reporting requirements yet, such as US, Switzerland, Japan and Hong Kong.

We recommend to review if all the cbc requirements are met if a Dutch company is part of a multinational group with a turnover of at least EUR 750 mio. Further, we note that upon the filing of the 2016 CIT return a Master and a Local File will need to be available in the Netherlands substantiating the transfer pricing position. Note that this latter requirement exists if the Dutch company is part of a multinational group with a turnover of at least EUR 50 mio.

Increase of the lower 20% corporate income tax bracket

Currently, the Dutch CIT rate is 25% for profits exceeding EUR 200k and 20% for profits until EUR 200k (2017). It is proposed to increase this 20% tax bracket to EUR 250k (in 2018), EUR 300k (in 2020) and EUR 350k (in 2021).

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