



Consultations between Ministry and tax consultants on special knowledge groups

On 15 May 2003 delegates from the Ministry of Finance met with delegates from various professional organisations for tax consultants in order to discuss the functioning and possible improvement of the so-called "Special Knowledge Groups" (SKG's). See our newsletters from [December 2002](#) and [May 2003](#) ("Other points of interest") for further information.

In view of the importance of the issue at hand, it is regrettable that various tax organisations seem to have had limited contact with their members in preparation for the meeting. Due thereto they seem to have been unable to provide the Ministry with concrete facts and cases. Nonetheless, a number of laudable conclusions have been reached, which we assume have much to do with the cooperative attitude of the Ministry in this instance. These conclusions include:

- * limiting the number of questions put to the SKG's by using a stricter definition of the type of questions to be asked to them. This should allow for a faster response time on the remaining questions;
- * intensifying the internal investigation into the SKG's efficiency;
- * extending the period during which tax consultants get the opportunity to respond to draft regulations;
- * having regular discussions with the tax consultant organisations.

The above is encouraging and may go a long way to improving the functioning of the Dutch tax practice and ultimately improving the Dutch investment climate. However, that this is a slow process is evidenced by another publication of the Ministry of 2 July 2003 in which it responds to an extensive and critical report from the Dutch Order of tax advisers ("*Nederlandse Orde van Belastingadviseurs*") on the current Dutch tax legislative process.

This report was published in November 2002. This 5 page response to the original 23 page report seems to be nothing more than a basic denial of the issues raised in that report. One can only hope that the Dutch parliament, who requested the response, will not accept such a half answer. A translation of the conclusions of the original report is available on [our website](#).

Adoption of tax package

On 3 June, the EU Council adopted the so-called Tax Package.

This package consists of a Code of Conduct for the elimination of deemed harmful tax competition, directives on the elimination of withholding taxes on interest and royalties between related companies and the so-called Savings Directive.

The Code of Conduct requires Member States to refrain from new harmful tax measures and to roll back any existing measures. Measures are deemed harmful if they have a significant impact on the location of business in the Union; this includes ringfencing; low tax for low substance activities; and the use of artificial taxable bases. While most regimes currently deemed harmful have to be rolled back by the end of 2005; the Belgian Coordination Centers and the Dutch Group Financing Regime may continue until 2010, with the Belgians possibly being allowed to issue extensions of the BCC regime for existing Coordination Centers in the meantime. The Council still have to take a definite decision on the last matter.

The interest and royalty directive will enter into force on 1 January 2004. A number of interim measures apply: Greece and Portugal are only subject to the directive for interest from 2005 and are allowed an interest withholding tax of 10% from 2005-2008 and 5% from 2009-2012; Spain is only subject to the directive for royalties from 2005 and can apply a 10% royalty withholding tax until the end of 2010.

Under the Savings Directive member states must provide information on interest paid to individual savers resident in other member states. Belgium, Luxembourg and Austria opted for a withholding tax on interest instead; the rates will be 15% from 2005-2007; 20% from 2008-2010; and 35% thereafter. 25% of the proceeds from the withholding tax will be retained by these states and 75% will be paid on to the resident states. The Directive might be applicable as of 1 January 2005, depending on the outcome of negotiations with a number of third countries (Switzerland; USA; Liechtenstein; Monaco; Andorra and San Marino). Current issues discussed with the Swiss include:

- * Switzerland keeping its banking secrecy and applying a withholding tax like Austria, Belgium and Luxembourg;
- * Voluntary disclosure of information instead of withholding for individuals granting permission to disclose interest payments; and
- * The possibility of extending the benefits of the parent/subsidiary and the interest and royalty directives to Switzerland (Spain will be negotiating separately with Switzerland in this regard).

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The Belgians may possibly be able to issue extensions of the BCC regime for existing Coordination Centers.

Withholding taxes on interest and royalties between related companies will be eliminated in the EU.

The benefits of the parent / subsidiary directive and the interest and royalty directive may be extended to Switzerland.

Update on relief from tax overkill distressed debtors

Following parliamentary questions, the State Secretary promised that draft legislation will be submitted during the next few weeks. This legislation will relieve debtors in financial difficulties from the overkill in the tax legislation upon conversion of their debts into equity; under current law introduced in 2001, the difference between the nominal value and the free market value of such debt is taxed upon conversion as deemed income. This makes any saving operation of companies in distress (of which there are many in the current economic climate), virtually impossible, since accepting shares for in exchange for receivables potentially leads to further (tax) debts of the company, which only weakens its own solvability and the position of its shareholders/creditors (the Receiver is a privileged creditor).

It was also asked whether the proposed legislation will have retro active effect until 1 January 2001 and if it was possible to reverse any assessments already made in this regard, in order to eliminate the overkill as of the day of its existence. Unfortunately, this request was denied in first instance due to fears of possible abuse. It is hoped that this denial will still be reversed during the parliamentary discussion of the proposed reparation and that the denial of the retroactive effect will be limited only to the deemed abusive instances.

Further limitations on the deduction of bribes

In a proposal of law dated 14 May 2003, the deductibility of bribes will be further limited in future.

Under current legislation, bribes are generally not deductible if there has been a criminal conviction regarding the bribery. Part of the problem with this, and reason for comment from the OECD, is that the Dutch criminal statute of limitations (up to 12 years) exceeds the general statute of limitations for taxation of five years. Pursuant to this proposal the requirement of a prior conviction will be removed; tax officials would be able to refuse the deduction of certain expenses if they believe, based on adequate indicators, that the expenses consist of paid bribes (in the Netherlands or abroad). The burden of proof for the tax inspector will be lighter than that for criminal proceedings: the inspector will have to show that bribery is likely, rather than show that bribery took place.

The intention of the current proposal was approved on 9 February 2001 by the OECD Council of Ministers as part of the fulfillment of the Netherlands' obligations under the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

For more information on this convention and the implementation thereof by the 34 countries which are party to it, go to the [OECD website](#).

Other points of interest

* In an extensive analysis, the Dutch Advocate General advised the Dutch Supreme Court on the refundability of VAT due on services provided in connection with the sale of subsidiaries. The Advocate General concludes that based, among others, on the BLP Group Plc (6 April 1995, C-4/94) and Cibo Participations SA (27 September 2001, C-16/00) cases of the EU Court of Justice, the VAT due on services provided regarding the acquisition of a participation may be partially refundable, but that the VAT due on services provided regarding the sale of a participation usually is not. This advice contradicts a decision of the Dutch Supreme Court on a similar case in March of this year. It remains to be seen how the Supreme Court will react.

* The EU Court of Justice decided in the KapHag Renditefonds case (26 June 2003, C-442/01) that the VAT due on service provided in connection with a new partner joining a partnership, against the contribution of cash, is not refundable, since the joining of the partnership does not constitute a service (provided by the partnership) for VAT purposes.

* In the final VAT case mentioned this month, the EU Court of Justice decided in the MKG-Kraftfahrzeuge-Factory GmbH case (26 June 2003, C-305/01) that factoring is a service subject to VAT if the debtors' risk is transferred to the factor (the service provider) against a payment. In that case, the service provider is entitled to a refund of any VAT paid in this regard.

* In a letter of 25 June 2003, the State Secretary of Finance informed the Dutch Second Chamber that as of 1 January 2004, there will be no more special tax facilities for Limited Partnerships making films (so-called Film CV's). Under the current regime, partners may have a right to an investment deduction in the film, together with free, tax deductible, depreciation of the films.

The State Secretary also mentioned that the number of requests for facilitated films in 2002 were 43, coming to a film production value of Euro 117 million and a tax budget of 20.5 million; for 2003 there were 55 requests and a budget of approximately Euro 23 million.

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