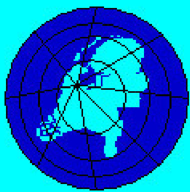

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State Secretary announces overhaul of Dutch Corporate tax

On 19 February, the State Secretary of Finance announced plans for overhauling the Dutch corporate income tax system in an address at the Free University in Amsterdam. Rather than setting details of the changes, the State Secretary set out a process which should lead to the implementation of the overhauled system by 1 January 2007.

The process will be divided into three phases. During the first phase until mid 2004, all parties are invited to come with their own proposals of what needs to be done and how it should be done and to discuss their ideas in an online forum which will be launched at the end of March. In the second phase the Ministry will draft a memorandum with their preliminary plans on the basis of the ideas formed in the first phase; this will be in the second half of 2004. The memorandum will be filed with parliament and discussed before a formal proposal of law will be prepared. This phase should be completed by approximately mid 2005. In the final phase a proposal of law will be filed (end 2005) which should be discussed, amended and adopted in 2006.

The process will be divided into a research, a development and a legislative phase

The primary reasons given for the overhaul is the improvement of the Dutch investment climate and the necessity to make the Dutch corporate income tax act EU compliant where necessary. The State Secretary did give some indications of the measures he envisions. These are:

* to only changes those aspects of the Corporate Income Tax ("CIT") which needs changing, rather than starting from scratch;
* to keep the changes revenue neutral;
* to keep things practical;
* to find national solutions for problems rather than trying to fix them through the EU or the OECD;
* to introduce specifically tailored measures rather than a broad reduction of the general tax rate, without creating regimes which can be qualified as illegal state aid in an EU context;
* to find reasonable solutions for changes required under decisions from the EU Court of Justice (e.g. should the outcome of the Marks&Spencer case force the Netherlands to allow cross border consolidations).

Primary reasons for the overhaul are EU compliance and the Dutch investment climate

Although Dutchtax.net does not agree with the State Secretary's assessment that the Netherlands is still among the leaders when it comes to investment climates in Europe, it does applaud the desire to become that and the invitation to input from all interested parties before starting the drafting process. We sincerely hope that the outcome will be as fair and free from overkill as it will be robust and free from loopholes. A rough translation of the State Secretary's speech is available for subscribers.

Q&A on Dutch participation exemption after Bosal

On 9 February 2004, the tax authorities published an update of their Q&A Decree on the participation exemption regime from 11 August 2003. This update deals with a number of issues raised after the EU Court of Justice decision in the Bosal case and other issues. See our website for further details.

Questions answered include the following:

* until the formal change of law of 1 January 2004, the outcome of the Bosal decision is also applied to minority participations within the EU and the European Economic Area (i.e. the EU plus Norway, Liechtenstein and Iceland), but not to other countries, not even the countries joining the EU in 2004. According to the tax authorities the "non-discrimination" clauses included in the association treaties with these countries only imposes non-discrimination obligations on the acceding countries, not on the existing EU members;
* when selling a call option on an existing participation and subsequently buying back that option to avoid the exercise thereof, the repurchase price is not deductible because it is covered by the participation exemption (it is unclear to us whether a. the repurchase price may be added to the basis of the participation when calculating a future loss from liquidation or whether this also means that the profit made by the option holder is covered by the participation exemption);
* subsidiaries enjoying a 50 year tax holiday do not pass the subject to tax test, but subsidiaries enjoying a 10 year holiday may do so;
* subsidiaries resident in tax free countries, but only having activities in taxable jurisdictions do not satisfy the subject to tax test either (this is in accordance with the wording, but certainly not the spirit, of the law);
* subsidiaries resident in the United Arabic Emirates are considered not to be subject to tax, unless proven otherwise;
* the Belgian Coordination Center regime is deemed to be a special regime for purposes of the EC Parent/Subsidiary Directive, meaning that for Dutch taxes, it does not qualify for protection by the Directive (amazingly, the fact that it is exempt from real estate tax seems to form part of the basis of this decision);
* finally a rather long-winded and complicated grandfathering procedure is announced for profit sharing loans concluded before 1 January 2003 extended to less than 5% participations. Taxpayers have until 1 April 2004 to apply for this grandfathering if applicable and are advised to contact their own Dutch advisers or Dutchtax.net in case of any doubt.

The Belgian Coordination Center regime is deemed not to be sheltered by the Parent Subsidiary Directive

Taxpayers have until 1 April to request grandfathering for hybrid loans from 2002

Johann Müller, Dutchtax.net

P +31-20-664 5636
M +31-6-1135 4615
F +31-84-222 3961
JohannMuller@Dutchtax.net

US-Dutch protocol to income tax treaty signed

The protocol introduces a 0% dividend withholding tax for 80%+ participations

On 8 March 2004 the US and the Netherlands signed a new protocol to the 1992 US-Dutch tax treaty. Some of the most significant changes to the current treaty concern the following:

* an update of the (unreadable) limitation on benefits article (26). The new rules are said to be "simpler, clearer and more effective";
* a 0% withholding tax on certain dividends (like the US treaties with the UK, Australia and Mexico). Conditions include the requirement that the owner must be a company and must have held an interest of at least 80% (shares or votes) for at least 12 months before the dividend is declared;
* specific clauses on the treatment of income from transparent entities, such as partnerships;
* the protocol coordinates the two countries' tax rules relating to pensions, allowing individuals to take up employment opportunities in either country without concerns about unintended tax effects on their retirement benefits; and
* the protocol enters into force after both countries notified each other of having fulfilled all their own constitutional requirements. It shall have effect for source taxes two months later and for other taxes as of the next calendar year. The current treaty provisions can be grandfathered upon request for one extra year.

More information, together with the text of the protocol and the can be found on the US Treasury website.

Ministry publishes APA/ATR statistics

The average processing time for an advanced tax ruling is said to be 87 days

On 5 March 2004 the Dutch State Secretary updated the Second Chamber on the APA and advanced tax ruling practice (the latter concerns service companies, but the report does not indicate the types of services involved).

The figures given are too limited to provide details about the types of agreements reached. However, they do state that 417 requests were dealt with during 2003 of which 68 concerned requests filed before 1 January 2003. The average time for getting an advanced tax ruling is said to be 87 days (not clear if that includes weekends); APA's take longer. Together with 42 so-called "pre-filing meetings", of which 21 lead to the actual filing of requests, the total number of requests initiated came to (417 + 42=) 459 of which 267 resulted in an agreement. The State Secretary did promise to continuously follow the development of the Dutch APA/ATR practice in view of its importance to the Dutch investment climate.

Capital Duty relief for contribution of holding companies

It is now possible to get an exemption via the active subsidiaries of a contributed holding company

On 25 February 2004 a Decree was issued regarding the question whether the contribution of a holding company to a Dutch company can be exempt from capital duty under the so-called asset merger exemption. For Dutch capital duty purposes, the contribution of 100% of the shares in another company is treated as the contribution of an independent part of a business, provided that the contributed company actually does run an (active business) enterprise. This decree explains what qualifies as an "enterprise" and whether holding companies fall within that definition. The decree determines that if a holding company does not run an enterprise itself (i.e. it does not have its own personnel, no active management and runs no financial risk), it can nevertheless qualify as an enterprise to the extent that directly or indirectly holds 100% of the shares in entities that do run enterprises. The decree includes two clear examples which can be accessed by subscribers to our website.

Anti-abuse laws permanent establishment losses announced

Dividends from a p.e. converted into an indirect foreign subsidiary could become taxable. It is not said how.

A change of law will soon be filed to prevent unintentional consequences of the contribution of a foreign permanent establishments (p.e.) to a foreign participation. Under Dutch law the losses of a p.e. can be offset against the other taxable income of a Dutch resident. However, future gains are only exempt once these p.e. losses have been recaptured. In order to prevent such a recapture, taxpayers used to convert their p.e.'s into subsidiaries before such a recapture took place (future income would be exempt under the participation exemption). However, as of 1990, income and gains from such a foreign subsidiary would only be exempt after a recapture of the p.e. losses took place.

In order to circumvent this, a Dutch taxpayer (ABV) would interpose a foreign holding company (BCo) between the Dutch company and the p.e. converted into a company(CCo). The proposed laws will also apply the 1990 anti abuse measure to these structures. The announcement states that the proposed law will also be applicable to future distributions from existing structures. However, it does not state how and when taxation will be levied in the Netherlands, i.e. whether distributions from CCo to BCo will be treated as deemed distributions to ABV (with a "credit" for subsequent actual distributions from BCo to ABV) or whether only distributions from BCo to ABV could trigger such taxation (provided that CCo actually made a distribution to BCo). In the latter case, it would also need to be determined whether BCo would be allowed to label its dividends to ABV in the event that it receives and pays on dividends from other subsidiaries. It seems as though the Dutch authorities still have some thinking to do – especially if they want to make such a measure EU compliant. Subscribers can read the announcement here.

Other points of interest

Johann Müller, Dutchtax.net

P **+31-20-664 5636**
M **+31-6-1135 4615**
F **+31-84-222 3961**
JohannMuller@Dutchtax.net

* On 5 February 2004 the Dutch authorities issued a decree in connection with the Dutch-Indonesian tax treaty that entered into force on 30 December 2003. The decree deals with the administrative procedures surrounding the treaty (requests for tax refunds, etc.) and contains the announcement that the Dutch government is in the process of reviewing and simplifying the administrative procedures for treaties with a number of countries. The

new procedures and the accompanying forms will be published during 2004. In the case of Indonesia the current forms for the old Dutch-Indonesian treaty may be used until that time;

* On 17 December 2003 the High Court of Amsterdam decided that a participation of 3% in a company (ACo) qualified for participation exemption. The taxpayer originally held a 16% participation in another company (BCo) but transferred the shares in BCo to ACo in a share for share merger. In view of the fact that, among others, the taxpayer initially repeatedly requested the tax inspector to confirm that its shareholding in BCo qualified for the participation exemption and that the taxpayer's parent and the BCo group were active in the same industry, the Court decided that the participation exemption was applicable. The taxpayer argued before the Court otherwise because the BCo shares decreased in value.

* A decree was issued on 10 February 2004 regarding consolidated groups and leveraged take overs. Under Dutch law the interest due on loans from related parties can not be set off against the profits of a Dutch target company by forming a consolidated group with the target (at least not during the first 7 years after the acquisition). Under the wording of the law, interest due to unrelated companies could be set off against the target's profits, but interest from unrelated individuals not. The decree remedies this inequality by determining that the interest due to unrelated individuals can also be set off against the target's profits.

EU related tax developments

Commission consultations on corporate migration

Those interested have until 15 April to contribute in the discussions on corporate migration

The EU Commission made the following announcement: “The European Commission has launched an Internet consultation on the outline of the planned proposal for a Directive on the right of limited companies to transfer their registered office from one Member State to another. Two previous public consultation exercises, as well as the case law of the Court of Justice, have highlighted a need for clear EU framework legislation on this issue, so that companies can exercise their rights in the Internal Market. Those interested are invited to respond by 15 April 2004 to a quick and user-friendly questionnaire, using the Commission's Interactive Policy Making system and available through the Commission's dedicated consultation site "Your Voice in Europe" at: http://europa.eu.int/yourvoice/consultations.”

Further information is available at:
http://europa.eu.int/comm/internal_market/company/seat-transfer/2004-consult_en.htm

Member of Parliament questions EU compatibility of Dutch-Belgian Tax treaty

The Commission is not planning to consolidate the differences between fiscal allocation rules and social security contributions

Somewhat belatedly (or did someone get their dates wrong?), the Official Journal of the EU (Nr. C51E, vol 47 of 26 February 2004), published a question from EU member of parliament, Theodorus Bouwman, of 9 January 2003 and Commissioner Bolkenstein's answer of 13 February 2003. The question concerned the Belgian Dutch tax treaty and its interaction with Regulation 1408/71 (ensuring that workers residing in the EU are always insured once only). Mr. Bolkenstein informed Parliament that the fact that, for some categories of frontier workers, such as workers posted for longer than 183 days and for workers in international road haulage, the tax allocation rules laid down in the new Netherlands/Belgium double tax Agreement differ from the allocation rules laid down in Regulation (EEC) No 1408/71 with regard to social security, cannot in itself be considered as being in breach with art. 10 of the EC Treaty. He further stated that it is not the intention of the Commission to publish a communication about the differences between the fiscal allocation rules and the allocation rules laid down in Regulation (EEC) No 1408/71.

Johann Müller, Dutchtax.net

P **+31-20-664 5636**
M **+31-6-1135 4615**
F **+31-84-222 3961**
JohannMuller@Dutchtax.net

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