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Budget 2017

Tuesday 20 September 2016 the Dutch budget for 2017 was introduced. In this Newsletter we report the items we believe are the most noteworthy.

Corporate income tax

- **Corporate income tax calculation.** Currently the corporate tax rate for the first EUR 200,000 taxable profit is 20% and above EUR 200,000 25%. The Dutch Government announced that the base for the first corporate income tax rate (20%) will be increased as follows:

As from 2018 to EUR 250,000,

As from 2020 to EUR 300,000 and

As from 2021 to EUR 350,000.

- **Excessive debt financing by acquisition holdings:** The Dutch CIT legislation has a limitation of interest deduction with respect to excessive debt financing by acquisition holdings. The deduction of interest is limited when after a takeover the purchased company is included in a tax group with the acquisition holding. The interest is only deductible insofar the acquisition holding has profits and neglecting the profits of the purchased company. This limitation could be avoided by applying a 'debt push down' where the debt of the acquisition holding is moved to the purchased company. As from 2017 the interest paid by the purchased company regarding its own acquisition will be added to the taxable profit.

At this moment the acquisition debt must be decreased in seven years from 60% of the acquisition price of the purchased company to 25%, in order to maintain interest deductibility. This limitation was avoided by moving the purchased company to another holding company within the group. This way the seven years period could be stretched to several more years. This avoidance will no longer be possible from 2017 on, as the seven years period will not change anymore when an acquired company is moved to another group company.

- **Innovation box:** In principle, the Dutch innovation box is for profits from intangible property, originating from patents or qualifying R&D activities from a Dutch company. The effective corporate income tax rate on qualifying profits is 5% (through exempting 80% of qualifying profits). The innovation box is NOT applicable on trademarks, logos, other similar intangible property and not on intellectual property that just has been acquired. Profits are taxed in the box when the costs to produce the intellectual property (initially deducted against the full Dutch rate of 20%-25%) have been compensated. Additional R&D wage subsidies can be obtained.

The announced legislation is implemented to make the innovation box "anti-BEPS" proof and to bring the box in line with the agreements made in the EU on substance criteria ("the nexus approach"). On European level, the nexus approach has been translated in a mathematical formula:

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Qualifying benefit = qualifying expenditure * 1.3 / total expenditure * (benefit -/ threshold)

Qualifying expenditures are: R&D costs of the tax payer regarding his own R&D of the qualifying IP, and (Contract) R&D costs of third parties regarding the R&D of qualifying IP. (Contract) R&D costs of related parties do not qualify.

Total expenditures include all expenditures in relation to the production of qualifying IP, excluding costs of debts, housing and other indirect costs that did not contribute to the development of the IP.

The threshold includes the total R&D costs of the IP and losses incurred with the IP to the extent the Innovation box did not apply to such loss. It includes also benefits from IP for the period in which the patent has been applied but not granted yet.

The Innovation box applies only for qualifying Intellectual Property (IP), i.e. IP developed on the basis of an R&D declaration and developed by, and for the risk and account of the tax payer. Large companies can only use the innovation box for IP that is attached to a specific 'ticket', i.e. patents, software, plant breeders' rights and certain medicines, as well as IP in relation thereto. Small companies can still use the innovation box for any IP that originates only from qualifying R&D, without the need for an additional 'ticket'. A small company qualifies as such when:

The total benefit from the qualifying IP is less than EUR 37.5 million in the tax year and 4 years before (EUR 7.5 million per year on average), and;
The consolidated revenue of the group is less than EUR 250 million in total, in that 5 year period (EUR 50 million per year on average).

IP developed before 30 June 2016 is grandfathered under the current legislation until 1 July 2021. Due to the relevant change of law, existing innovation box rulings in principle end for large companies, save the transitional legislation. New rulings can be concluded via the relevant tax inspector.

Personal income tax

- **Box 3 taxation:** As per 1-1-2017, the taxation in box 3 (Income from savings and investments) changes from 1.2% (based on a deemed income of 4%, of the value of the assets as per 1 January of the tax year, taxed against 30%) to 0.87% to 1.65% (based on a deemed income ranging from 2.91% to 5.5%, taxed at 30%). The 1.65 % is for a taxable base as from EUR 975,000.

To avoid taxation of 50% of the income from savings and investments, it has been possible to switch before the end of the year to box 2 (Income from substantial interest) taxation and to switch back to box 3 at the beginning of the following year. Proposed new legislation is to end the box hopping by various measures, including that income from savings and investments remains taxable in box 3 when it is brought into box 2 and brought to box 3 taxation back again within 18 months.

Furthermore, it is being investigated whether the taxation in box 3 can be changed to include a capital gains tax, where also the non-realised capital gains are taxed, or a capital gains tax where the actual realised result is taxed only. A third option is mentioned where the deemed income is diversified annually and retroactively, depending on the type of investment. New legislation on this is expected to be announced early in 2018, to start a consultation procedure.

- **Further anti-abuse legislation on the "APV":** "APV" legislation exists to avoid that Separated Private Equity ("Afgezonderd Particulier Vermogen", or "APV") can exist

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without being taxed. Based on the anti-abuse legislation, the contributor (or his heirs) to a (foreign) private trust or foundation is taxable for the assets and income of that (foreign) private trust or foundation. To avoid double taxation, the Separated Private Equity is not taxed at the level of the contributor when the Separated Private Equity is subject to at least 10% tax. As tax payers use the exemption for tax planning purposes and the threshold in practice is difficult to check for the Dutch tax authorities, it is proposed that in future the 10% tax requirement only applies for active companies.

Wage tax

- **Supervisory Board Members:** The proposed legislation for 2017 strikes the legal fiction that members of the Supervisory Board are regarded employee for wage tax purposes (which fiction does not apply for the employer part of social security “werknemersverzekeringen”). This will mean that supervisory board members that are entrepreneurs no longer trigger wage tax obligations. Supervisory board members that are not entrepreneurs can use the opting-in arrangement on the basis of which they remain taxable with wage tax. The change is already practice since 1 May 2016 due to a decree of 14 March 2016 (BLKB2016/265M).
- **Taxation of Directors and Board Members:** Normally, tax treaties allocated the right of taxation of the remuneration of directors and board members of a company to the country where the company is established. In that context, the Dutch law is adjusted so that in case the director or board member receives business income or wage, such business income or wage is also taxed according to Dutch law. This guarantees that the Netherlands actually can tax income in accordance with its tax treaties.
- **Transfer of Dutch wage tax obligations of a foreign company to a Dutch group company:** Based on the proposed legislation for 2017 it will be possible that every foreign company with Dutch wage tax and/or social security obligations can transfer this obligation to a Dutch related group company that is willing to take over such obligation. For the transfer a joint request from the foreign and Dutch group companies is required. Goal of the facility is to simplify the wage tax and social security obligations for multinational enterprises.
- **Minimum Salary for innovative Start-up Directors:** From 2017, the legal minimum wage scheme is adjusted for directors/major shareholders (“DGA 's”) of innovative start-ups. The minimum wage that could be applied is the statutory minimum wage. This will be made possible for DGA 's companies that conduct research and development and are considered as a starter for the application of the R&D wage tax facility.
- **Self-managed pension schemes:** The director/substantial shareholder of a legal entity currently has the possibility to build up his pension in his own company. This possibility is being ended arguing that it is less beneficial than it has been in the past and given that it is costly and limits the possibility to pay out dividend. Based on the proposed legislation the pension can no longer be build up further. Building up of new pension claims is no longer possible ‘in-house’. The director/substantial shareholder is being given the following options in the proposed legislation.
 1. Do nothing. The current legislation remains valid. Further building up of the pension claim, apart from indexing (when contractually agreed) is not possible.

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2. Buy off the pension claim, using the tax facilities given:
 - a. tax free revaluation of the pension claim for corporate income tax purposes,
 - b. a discount on the pension claim (34.5% in 2017, 25% in 2018 and 19.5% in 2019) when determining the wage tax.
 - c. No calculation of revision interest.
3. Director/substantial shareholders that cannot or will not pay the taxes to buy off the pension claim can also choose to change the pension claim in an old age reserve that is taxed when paid out over a period of minimal 20 years, starting at a maximum of 5 years before the official pension age. Such old age reserve can at any time be used to buy an annuity at an external provider.

VAT

- **Building lands:** The supply of building land located in the Netherlands is taxable with Dutch VAT. In the Dutch VAT legislation building land is considered any land not built on:

1. on which work is being or has been carried out;
2. which is being or has been improved for the purposes of exclusive use of the land;
3. in the vicinity of which improvements are being or have been made; or
4. for which a building permit has been granted for the purposes of constructing buildings on the land.

The Dutch Government announced to include other criteria to the VAT legislation regarding building lands based on the European Court of Justice case 'Woningstichting Maasdriel' (C-543/11). In this case, the European Court decided that the intention of parties (supported by objective evidence) should be included in the assessment of the factual circumstances surrounding the supply of land which has not been built on following the demolition of the building situated on it. As from 2017, the intention of parties will also be part of the Dutch domestic legislation to determine the building land status.

- **Unpaid invoices:** Dutch VAT charged on an invoice, must be paid to the Dutch Tax Authorities by the issuer of the invoice. It could happen that the customer does not pay the (whole) invoiced amount to the issuer of the invoice. The current VAT legislation includes an arrangement regarding issued invoices that are not paid or will not be paid (e.g. due to bankruptcy of the customer). The VAT charged on the unpaid invoices can be reclaimed by filing a formal request at the Dutch Tax Authorities.

The customer (as recipient of the invoice) can in general reclaim the VAT charged on the invoice. The customer who does not pay the (whole) charged amount on the invoice to the issuer within two years after it is issued, must (partly) pay the reclaimed VAT back to the Dutch Tax Authorities. The issuer of the invoice can also file the request to reclaim the charged VAT on the unpaid invoice.

This arrangement will be simplified by the Dutch Government as from 2017. The formal refund request is no longer necessary for the issuer of the invoice. The VAT can be reclaimed by including it in the regular Dutch VAT return of the issuer of the invoice. Furthermore, the two year period will be decreased to one year.

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Dividend withholding tax

- **New exemption for e.g. foreign and domestic pension funds.** Certain domestic entities that are exempt from Dutch corporate income tax (e.g. qualifying pension funds), and foreign resident entities that are exempt in their home country and would be exempt in the Netherlands if they would be Dutch resident, have the right to reclaim Dutch dividend withholding tax paid on dividends received. From an efficiency viewpoint it is now proposed to exempt such entities from dividend WHT altogether, by allowing companies to refrain from withholding the dividend withholding tax on dividends payable to such shareholders. Precondition is that the dividend paying company has a valid ruling from the tax authorities in its administration with respect to any shareholder to which this rule is applied.
- **Changes to implement case law of the EUCJ.** Triggered by the European cases *Miljoen* (C-10/14), *X* (C-14/14) and *Société Générale* (C-17/14) and the subsequent ruling of the Dutch Supreme Court in those cases, a measure is introduced that allows foreign individuals and entities to recover Dutch dividend withholding tax in cases where they can prove that they would pay a lower total amount of Dutch tax if they would have been Dutch residents. How the total tax burden must be calculated in such cases is delegated to the Ministry of Finance, who expectedly should publish guidance on this matter.
- **Plans to extend the taxation of cooperatives.** Currently, distributions from cooperatives are not subject to dividend withholding tax, except in cases of (deemed) abuse where a cooperative acts as a holding company to avoid dividend withholding tax or income tax at the level of another person. It is intended to introduce legislation (ultimately effective on 1-1-2018) to extend the application of dividend withholding tax on distributions from cooperatives even further. The legislation should target cooperatives in international structures that hold subsidiaries, finance related companies and have (passive) investment activities. It seems that acting as a holding company would still be a prerequisite for the intended legislation to apply; the exact details will of course become clear when the actual legislation is published. Distributions from cooperatives that are part of corporate structures and that in addition do not qualify as abusive, should in general be exempt from dividend withholding tax and therefore not be hampered by the possible new legislation.

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