Netherlands

Wouter Vosse & Servaas van Dooren
Hamelink & Van den Tooren N.V.

Overview of corporate tax work over last year

The last year showed a significant increase in transactional work. Next to that, multinationals are increasingly focusing on the impact that the OECD BEPS project will have on their business models. Similarly, changes with respect to the EU Directives (such as the Parent-Subsidiary Directive) are making taxpayers reconsider their legal structure. This all puts an emphasis on substance and transfer pricing. The Dutch government has repeatedly stated that it supports the initiatives of the OECD and EU, but it also stressed that it is committed to continue offering a competitive tax regime to attract foreign investments in the Netherlands.

A very significant transaction in the last year is the public bid made by Liberty Global on the shares in Ziggo, valuing the latter at approximately €10bn. The offer was made by a Dutch subsidiary of Liberty Global. The listing and trading of Ziggo shares on the Euronext Stock Exchange in Amsterdam terminated in December 2014.

Currently, the attempts of Teva Pharmaceuticals to acquire the shares in Mylan are attracting a lot of attention. In its turn, Mylan aims at acquiring the shares in Perrigo. Mylan is a Dutch public limited liability company, and has established an anti-take-over mechanism under Dutch law to avoid the (undesired) acquisition of its shares by Teva Pharmaceuticals.

Other landmark deals that were announced in early 2015 include the acquisition of TNT Express by FedEx and the acquisition of BG Group by Shell.

Key developments affecting corporate tax law and practice

General

The political and media debate concerning the use of what is referred to as "letterbox companies", thereby aiming at the alleged inappropriate use of Dutch holding, finance and royalty companies in international tax structuring is still pending. Although a certain political pressure exists to introduce measures taking away or reducing the attractive position of the Netherlands in international holding, finance and licence structures, the Dutch government has clearly taken the position that the favourable Dutch holding, finance and licensing regime is fully compatible with all international standards and that at present it has no intention of initiating any significant changes to this regime. The Dutch State Secretary of Finance has indicated that the Netherlands will follow and actively participate in the pending discussions at EU, OECD and G20 level. If these discussions would require the present tax regime to be amended, the Dutch government has indicated that in principle it is prepared to do so. Nevertheless, in anticipation of such international measures, the Dutch State Secretary of Finance introduced certain measures to promote transparency and prevent the unintended use of Dutch tax treaties. These measures will be described under the following two subheadings.

Information requirements for intra group licensing and financing companies

As per 1 January 2014, an increased information obligation applies to Dutch companies that primarily (i.e. for at least 70%) carry out intra-group financing and/or licensing activities ("Dutch group financing/licensing companies"). This is one of the measures to prevent the unintended use of Dutch tax treaties. Dutch group financing/licensing companies are now obliged to actively provide the Dutch tax authorities with information if certain minimum substance requirements are not met. These substance requirements are almost identical to the minimum substance requirements that had to be met by Dutch group financing/licensing companies in order (i) to be able to obtain a ruling (i.e. an Advance Pricing Agreement or "APA"), and (ii) to avoid a spontaneous exchange of information by the Dutch tax authorities to the relevant foreign tax authorities. If the Dutch group financing/licensing company does not meet the substance requirements, it furthermore is under the obligation to:

- disclose to the Dutch tax authorities which of the substance requirements are not met;
- provide all necessary information to enable the Dutch tax authorities to determine which of the substance requirements are met;
- provide an overview of all interest, royalty and similar payments for which the Dutch company has or could have claimed a reduction of (withholding) tax under a tax treaty or EU Directive; and
- provide the names and addresses of the entities from which interest, royalty and similar payments as described under the point above have been received.

The Dutch tax authorities will spontaneously exchange the above information with the relevant foreign tax authorities which may use this information to determine whether or not the Dutch company is entitled to the reduced (withholding) tax rates on interest/royalty payments under the application of a tax treaty or domestic rule. If the above information is not or not timely provided, an administrative penalty up to an amount of €19,500 may be imposed.

Other measures to avoid abuse of tax treaties

In addition to the above described increased information obligation for Dutch group financing/licensing companies, the following measures have been taken to promote transparency and prevent the unintended use of Dutch tax treaties:

- Requests for an Advance Tax Ruling ("ATR") or an Advance Pricing Agreement ("APA") will only be taken into consideration by the Dutch tax authorities if the Dutch company meets certain minimum substance requirements or if there is sufficient (economic) nexus with the Netherlands.
- The Dutch tax authorities intends to automatically exchange information regarding an APA with foreign tax authorities if the activities of the Dutch company only consist of intra-group financing and/or licensing activities.
- The Netherlands will propose to include anti-abuse rules in its (existing and new) tax treaties with developing countries.

The above first two measures have been laid down in the recently updated Decrees on ATRs, APAs and substance requirements. These Decrees apply as per 13 June 2014. However, in practice certain elements already apply as of 1 January 2014.

Landmark decisions Dutch Supreme Court on hybrid financing instruments

On 7 February 2014, the Supreme Court of the Netherlands issued two landmark decisions on whether certain preference shares can be treated as debt for Dutch tax purposes. The court cases regarded Dutch cumulative preference shares ("CPS") and Australian redeemable preference shares ("RPS"). Based on these decisions, financial instruments that qualify as equity under Dutch corporate law also qualify as equity for Dutch tax purposes and cannot be reclassified into debt. As a consequence, the income derived from the CPS and RPS is considered income from shares that falls under the scope of the Dutch participation exemption. Thereby, no exception is made in case of hybrid mismatches (i.e. the payments on the RPS were tax deductible in Australia). The Dutch Supreme Court furthermore ruled that a refinancing of debt (i.e. a loan) into equity (i.e. preference shares) should not be considered abusive since tax payers are free to choose the manner of financing a subsidiary.

European – CJEU cases and EU law developments

New Fiscal Unity Decree

In anticipation of new legislation, the Dutch Ministry of Finance published a new Decree on 16 December 2014 regarding the fiscal unity for corporate income tax purposes. In general terms, under the fiscal unity regime, companies which are part of a wholly owned group and which are subject to Dutch corporate income tax may be treated as one taxpayer, thereby consolidating their assets and liabilities and their taxable results. The Decree introduces the possibility of establishing a fiscal unity for Dutch corporate income tax purposes between (i) Dutch resident sister companies of an EU, Iceland, Norway or Liechtenstein resident parent company; and (ii) a Dutch resident parent company with one or more Dutch resident subsidiaries held through one or more intermediate holding companies resident in the EU, Iceland, Norway or Liechtenstein. The Decree seeks to implement case law rendered by the Amsterdam Lower Court of 11 December 2014, which followed the judgment of the European Court of Justice of 12 June 2014 in which was concluded that a denial of a fiscal unity in the before situations is incompatible with EU law.

Amended EU Parent-Subsidiary Directive for hybrid loans

On 8 July 2014, the EU's Economic and Financial Affairs Council ("ECOFIN") adopted the text for amending the EU Parent-Subsidiary Directive ("PSD") to neutralise international mismatches that may arise due to international qualification differences of cross-border hybrid loans. The amendments aim to prevent double non-taxation by introducing a mandatory limitation of the exemption of payments received on hybrid loans. Pursuant to this limitation, the Member State where the recipient company is located is no longer allowed to exempt these payments to the extent the payments are deductible in the source country. The Member States have to implement the amendments in their domestic laws by 31 December 2015 at the latest. A Dutch legislative proposal to this end is expected in September 2015.

Introduction of a general anti-abuse rule in the EU Parent Subsidiary Directive

On 9 December 2014, the ECOFIN agreed on the introduction of a general anti-abuse rule ("GAAR") in the PSD. The GAAR denies the benefits of the PSD if (one of) the main purpose(s) of a (series of) arrangement(s) is to obtain a tax advantage which defeats the object or purpose of the PSD and such arrangement is not genuine. An arrangement is not considered genuine if it is not put in place for valid commercial reasons which reflect economic reality taking into account all facts and circumstances. The Member States are under the obligation to implement the GAAR in their domestic laws no later than 31 December 2015. A Dutch legislative proposal to this end is expected in September 2015.

New Tax Arrangement between the Netherlands and Curacao

On 10 June 2014, a Bill for the proposed new Tax Arrangement between the Netherlands and Curacao ("TANC") was submitted to Dutch Parliament. It was expected that this new tax arrangement would enter into force on 1 January 2015. However, the Bill is still pending before Dutch Parliament. It is now anticipated that the TANC will apply as from 1 January 2016.

In addition, with respect to the present Tax Arrangement of the Kingdom, the Dutch Ministry of Finance confirmed that also in the year 2015 the so-called substantial interest rules for non-Dutch resident corporate taxpayers will not be applied in relation to Curacao entities. As a consequence, any capital gains derived by a Curacao company from its substantial interest in a Dutch company should not be subject to Dutch taxation. This means a continuation of the favourable policy applied in 2014.

Other tax treaty developments

The following developments occurred with respect to tax treaties concluded by the Netherlands:

- In 2015, the Dutch State Secretary of Finance starts new negotiations with Iraq, Senegal and Mozambique. In addition, various negotiations with respect to amendments or new treaties are pending.
- The new tax treaty between the Netherlands and China has become effective as per 31 August 2014.
- The new tax treaty between the Netherlands and Germany will be effective as from 1 January 2016.
- The new tax treaty between the Netherlands and Ethiopia has been ratified by the Netherlands and the protocol has been signed. The ratification of the treaty by Ethiopia is still pending.
- The Netherlands has offered an anti-abuse clause to 23 developing countries. So far, five countries (Ethiopia, Zambia, Ghana, Kenya and Malawi) have agreed to include an anti-abuse provision.

Developments affecting attractiveness of the Netherlands for holding companies

One of the main reasons for international companies to own their investments through a Dutch holding company is without any doubt the Dutch participation exemption regime. Under this regime, any benefits derived from domestic and foreign qualifying participations by such company are tax exempt whereas liquidation losses are deductible if certain conditions are met. The broad scope of the Dutch participation exemption regime (e.g. 100% exemption on dividends and capital gains, only a 5% share interest is required, no holding period and operating companies generally qualify irrespective whether such companies are subject to tax), its longstanding history and the Dutch tax ruling practice all contribute to an optimal level of certainty and reliability on the application thereof. In addition, the strong tax treaty network of the Netherlands as well as various non-tax related benefits (e.g. the internationally focused economy, the open business climate, the professional corporate services providers' sector and the various bilateral investment treaties of the Netherlands) contribute to the Netherlands being a very attractive jurisdiction for holding companies.

The year ahead

The year ahead is likely to be marked by the following developments:

- Further publication of proposed measures within the BEPS framework.
- Discussions within the EU on the amendments of the EU Parent Subsidiary Directive and other anti-avoidance initiatives.

- Further discussion on the investigations by the European Commission with respect to the tax ruling framework in the respective EU countries, including the Netherlands.

In addition, it is relevant to note that the Dutch State Secretary of Finance explicitly expressed his intention to not propose significant changes to the Dutch corporate income tax system in the next few years. Besides an expected fundamental revision of the personal income tax regime, the focus of the Dutch Government with respect to the corporate income tax will be to simplify the legislation to reduce administrative burdens and to combat tax evasion and tax fraud.

Wouter Vosse
Tel: +31 20 333 92 80 / Email: wouter@hamelinktooren.com

Wouter Vosse started his career in 2004 at Loyens & Loeff in the international tax practice. He worked for a year in the New York office of Loyens & Loeff and in various CEE countries, as part of an assignment. In February 2015, Wouter joined Hamelink & Van den Tooren as a partner.

Wouter advises on Dutch tax aspects of M&A transactions and (re)structuring of cross-border investments, with a particular regional focus on US, Russia/CIS and CEE. He also acts as day-to-day tax advisor to large multinational groups with substantial operational activities in the Netherlands.

Wouter graduated in Tax Law and in Fiscal Economics, both from Maastricht University. He is a member of the Netherlands Association of Tax Advisors (NOB). Wouter lectures at Business University Nyenrode on advisory skills and tax aspects of M&A transactions.

Servaas van Dooren
Tel: +31 20 333 92 80 / Email: Servaas@hamelinktooren.com

Servaas van Dooren started his career in 1997 at Loyens & Loeff in the general and international tax practice. In January 2001 he joined Hamelink & Van den Tooren, where he has been a partner since 2006.

Servaas advises companies on domestic and international tax structuring, fund structuring, mergers, acquisitions, joint ventures and restructuring. In this context, he has developed a strong international network of legal and tax experts, notably in Russia/CIS, CEE (including Turkey), Brazil and Sweden.

Servaas graduated in Tax Law from the University of Leiden and received an LL.M. degree in International Taxation from the University of Leiden. He is a member of the International Bar Association (IBA), the International Fiscal Association (IFA) and the European Private Equity & Venture Capital Organisation (EVCA).

Hamelink & Van den Tooren N.V.
Zuidplein 140, 1077 XV, Amsterdam, Netherlands
Tel: +31 20 333 92 80 / Fax: +31 70 310 50 77 / URL: http://www.hamelinktooren.com