In this newsletter, we summarize the main changes as per 1 January 2017 in Dutch corporate income tax ("CIT") and dividend tax legislation, to the extent relevant for the international tax practice. We furthermore describe certain anticipated changes to the Dutch CIT and dividend tax legislation, as well as the most recent Dutch tax treaty developments.

LIMITATION OF INTEREST DEDUCTION: AMENDMENT ANTI-TAX BASE EROSION RULES

The anti-tax base erosion rules of article 10a of the Dutch CIT Act ("CITA") limit the deduction of interest (including related costs and currency exchange results) on related party loans if (i) the funds are used to finance a tainted transaction (e.g. the acquisition of a subsidiary, the distribution of a dividend), (ii) the debt and/or the related transaction is/are not entered into for business reasons and (iii) the interest income is not subject to a reasonable percentage taxation at the level of the creditor (i.e. an effective tax rate of at least 10% calculated according to Dutch tax rules, whereby there is no compensation of losses or use of tax credits as a result of which the interest is effectively not subject to a tax rate of at least 10%). In short, parties are related if one party holds a direct or indirect interest of 1/3rd or more in the other party or if a third party holds a 1/3rd or more interest in both parties.

The definition of a "related party" has been expanded in such manner that it now also includes companies which are part of a "collaborating group", owning a total combined interest of at least 1/3rd in a Dutch company. Whether a collaborating group is present has to be determined based on the facts and circumstances. In addition, based on the explanatory notes, a collaborating group is in any case deemed to be present if (i) the effective control of the investment and the joint interest effectively is vested in one coordinating (legal) person, and (ii) all shareholders provide equity and loans under similar conditions and in a similar ratio.

The new definition applies as from 1 January 2017. No grandfathering regime applies for existing loans or transactions that took place in the past.

LIMITATION OF INTEREST DEDUCTION: AMENDMENT ANTI-ACQUISITION DEBT FINANCING RULES

Article 15ad CITA limits the deduction of interest due by a fiscal unity with respect to loans relating to the acquisition or expansion of an interest in Dutch target companies included in the fiscal unity. This rule aims at limiting the deduction of interest against profits of the Dutch target company which is included in the fiscal unity with the acquisition vehicle.

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The interest deduction is limited to the lower of:

(i) The annual interest expenses exceeding the own profits of the acquisition vehicle minus € 1,000,000; or
(ii) The annual interest expenses on the excessive part of the acquisition debt.

The acquisition debt is considered to be excessive to the extent it exceeds 60% of the acquisition price of a target company which is included in the fiscal unity. This percentage is annually decreased by 5% until a minimum percentage of 25% of the acquisition price has been reached.

As of 1 January 2017, above-mentioned limitation of interest deduction rules also apply to interest on loans obtained by the Dutch target companies which are used to refinance the before-mentioned loans. In addition, another anti-abuse provision is implemented targeting the artificial increase of the amount of the second threshold. The annual decrease of the minimum percentage by 5% will continue also if the Dutch target company is transferred to a "related company" within the meaning of article 10a CITA (see above).

Grandfathering rules exist for debts in relation to companies acquired and subsequently included in a fiscal unity before 15 November 2011. If such fiscal unity is included in a new fiscal unity on or after 1 January 2017, these grandfathering rules will no longer be applicable.

AMENDMENT INNOVATION BOX RULES

The Dutch innovation box reduces the effective Dutch CIT rate to 5% in respect of profits attributable to qualifying innovative activities. As per 1 January 2017, the requirements to apply the innovation box have changed in order to comply with the recommendations provided in action 5 of the OECD BEPS report. The main changes of the Dutch innovation box regime can be summarized as follows:

Introduction nexus approach
In line with the OECD recommendations, the nexus approach seeks to limit the benefits of the innovation box to qualifying benefits, which are calculated as follows.

Qualifying benefits = (qualifying expenses * 1.3) / total expenses * benefits

Qualifying expenses are expenses incurred by the taxpayer in the current and preceding tax year(s) to create a qualifying intangible asset, minus expenses related to research and development ("R&D") activities outsourced to related parties. Benefits are defined as the income attributable to the qualifying intangible asset, determined on a case by case basis. The outcome of the above formula is limited to the total amount of the benefits and certain corrections may need to be applied.

Qualifying assets
For 'small taxpayers', intangible assets created in connection with an R&D certificate (in Dutch "*WBSO-verklaring*") issued by the relevant Dutch competent authority will qualify. A taxpayer qualifies as 'small' if (i) the cumulative net group income is less than € 250 million in the relevant book year and the preceding four book years and (ii) benefits to which the Dutch innovation box has been applicable in these years do not exceed € 37.5 million. The intangible assets of 'large taxpayers' (taxpayers other than small taxpayers) qualify for the application of the innovation box if an R&D certificate has been issued and an 'entry ticket' (i.e. a patent, plant breeding right, software, EU trade permit for medicine additional protection certificates issued by the patent centrum and registered utility models) has been or will be obtained. No separate entry ticket is required for intangible assets which can be considered connected with an asset for which an entry ticket has been obtained ("tag-along rule").

Grandfathering regime
For intangible assets created no later than 30 June 2016, the current innovation box rules remain applicable for book years ending no later than 30 June 2021. Moreover, subject to certain conditions, for "small taxpayers", the State Secretary of Finance approves that existing settlement agreements in relation to intangible assets created after 30 June 2016 remain valid. Furthermore, intangible assets created between 30 June 2016 and 1 January 2017 for which a patent or breeder's right is obtained (but without R&D certificate), will continue to have access to the innovation box.

Fiscal unity

The fiscal unity regime is changed following European Court of Justice case law, in which the court ruled that elements of the existing Dutch fiscal unity regime were in breach with EU law. As a consequence of this case law, a fiscal unity will now also be possible between:

(i) A Dutch corporate taxpayer owning indirectly, via one or more EU/EEA companies, a qualifying stake in another Dutch corporate taxpayer; and
(ii) Two or more Dutch corporate taxpayers held by the same EU/EEA company.

Certain variations to these possibilities may qualify as well based on the amended rules.

CIT rate: extension first corporate income tax bracket as per 2018 and future

The Dutch CIT rate currently amounts to 20% of the first € 200,000 of taxable income and to 25% for taxable income exceeding this amount. As per 1 January 2018, the reduced 20% rate will apply to an amount up to € 250,000. On 1 January 2020 and 2021, this amount will be further increased to € 300,000 respectively € 350,000.

In addition, the Dutch State Secretary of Finance published an announcement advising the next government to further reduce the Dutch CIT rate in the future in order to keep the Dutch tax climate competitive. Elections will take place in March 2017. The outcome of these elections will to a large extent determine whether a further reduction of the CIT rate can be expected.

PROPOSED ALIGNMENT DUTCH DIVIDEND TAX TREATMENT COOPERATIVES AND BVS/NVS

The Dutch Ministry of Finance announced that it will present a legislative proposal implementing two important changes to the Dutch Dividend Tax Act: (i) the introduction of a more general Dutch dividend withholding tax obligation for Dutch cooperatives, and (ii) extending the scope of the dividend withholding tax exemption for all entities that must withhold dividend tax (not only cooperatives, but also limited liability companies). Both changes, which are expected to take effect as per 1 January 2018, are addressed below.

Dutch dividend withholding tax obligation for Dutch cooperatives
According to the announcement, a Dutch dividend withholding tax obligation will be introduced for cooperatives which are engaged for 70% or more in holding activities, passive portfolio investment activities and the financing of related parties. The Dutch dividend withholding tax obligation will not apply if a member of such cooperative holds (on a standalone basis or together with related companies) an interest of less than 5%. Cooperatives may apply for the dividend withholding tax exemption (which scope will be extended, see below), provided the relevant conditions are met. With the introduction of the increased withholding tax obligation for cooperatives, it is intended to realize an equal treatment of cooperatives and other Dutch entities (such as limited liability companies) for Dutch dividend tax purposes. This should mitigate the potential State Aid risk which has been identified by the European Commission.

Extending the scope of the Dutch dividend tax exemption
Dividends distributed by Dutch entities (such as limited liability companies) are normally subject to 15% Dutch dividend withholding tax. An exemption applies if the recipient of the dividend is an EU/EEA resident company owning an interest of at least 5% in the Dutch dividend paying entity (and certain other conditions are met). In the announcement, an extension of this exemption is proposed. Besides qualifying EU/EEA resident recipients, also companies which are resident in a Dutch tax treaty jurisdiction should be eligible for a full exemption from Dutch dividend withholding tax (irrespective of the rate provided for in the relevant tax treaty). This should only be different if the structure is considered abusive. Whether a structure will be considered abusive will be interpreted in line with the anti-abuse rules for non-Dutch corporate income taxpayers (implementing the General Anti-Abuse Rule (GAAR) of the EU Parent-Subsidiary Directive).

Dutch tax treaty developments

The following developments occurred or are expected to occur with respect to tax treaties (to be) concluded by the Netherlands:

- In 2016, the Netherlands - Ethiopia treaty (accompanied by a protocol) entered into force. Furthermore, the new tax regulations between the Netherlands and Saint Martin entered into force and a protocol to the 2012 Netherlands - Germany treaty was signed. This protocol has effect for fiscal years commencing 1 January 2017 or later.
- In 2017, the Netherlands will enter into (renewed) negotiations with Andorra, Liechtenstein and Panama. Furthermore, the Netherlands will continue negotiations with – amongst others – Belgium, France, India and United States in order to reach an agreement on amendments to the existing tax treaties.
- The Netherlands has the intention to sign the Multilateral Instrument proposed by the OECD in 2017. The Multilateral Instrument – a key point of OECD BEPS project – has been negotiated between more than 100 jurisdictions.

Exchange of Advance Tax Rulings and Advance Pricing Agreements Between EU Member States

As of 1 January 2017 Dutch legislation contains provisions on the automatic exchange of tax rulings between EU Member States. These provisions implement the Directive 2015/2376/EU. On the basis of this legislation, rulings concluded (including altered or renewed) on or after 1 January 2017 should be exchanged within three months after the half-year-period lapsed in which the ruling was concluded. With regard to rulings concluded after 1 January 2012, but before 1 January 2017, information has to be exchanged before 1 January 2018. Information on rulings concluded on or after 1 January 2012, but before 1 January 2014, only needs to be exchanged when the rulings were still valid at 1 January 2014. Information on rulings existing on 1 April 2016 which are issued to persons that are, or a group of persons which is, not mainly involved in financing or investment activities and have a net group turnover of less than € 40,000,000 per year, does not have to be exchanged.

On the basis of this legislation, depending on the date a ruling is concluded, information on this ruling has to be exchanged between EU Member States. The information on tax rulings will be exchanged by means of a standard form. Taxpayers may choose to fill out this form themselves or let the Dutch Tax Authorities fill out the form.

Should you have any questions on the above, please contact your regular advisor at Hamelink & Van den Tooren at + 31 70 310 50 70 or + 31 20 333 92 80.