In this newsletter we summarise the main Dutch, EU and international tax developments in 2014. Furthermore, we describe the main relevant changes in Dutch corporate income tax and dividend tax legislation as per 1 January 2015 and some expected future tax developments including tax treaty developments.

## 1 Summary of Dutch Tax Developments in 2014

### 1.1 Increased information requirements for intra-group financing and/or licensing 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 as announced by the Dutch State Secretary of Finance in his letter of 30 August 2013. Dutch group financing/licensing companies are now obliged to pro-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 an Advance Tax Ruling ("ATR") or an Advance Pricing Agreement ("APA") and (ii) to avoid a spontaneous exchange of information by the Dutch tax authorities to the relevant foreign tax authorities.

### 1.2 Other measures to avoid abuse of Dutch 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 ATR or an 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 intend 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; and
- 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 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.

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### 1.3 Landmark decisions Dutch Supreme Court on hybrid financing instruments

On 7 February 2014, the Dutch Supreme Court issued two landmark decisions on whether certain preference shares can be treated as debt for Dutch tax purposes. Subject of the court cases were Dutch cumulative preference shares ("CPS") and Australian redeemable preference shares ("RPS"). The court ruled that 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 benefitting from 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 the 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.

### 1.4 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 tax payer thereby consolidating their assets and liabilities and their taxable results. The afore 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.

## 2 Summary of EU and International Tax Developments in 2014

### 2.1 BEPS Action Plan

In July 2013, an action plan was published by the OECD to combat Base Erosion and Profit Shifting ("BEPS"). In this respect, the OECD published the following reports in 2014:

1. Final report on the challenges of the digital economy (action 1);
2. Draft report on the neutralisation of hybrid mismatches (action 2);
3. Interim report on countering of harmful tax practices taking into account transparency and substance (action 5);
4. Draft report on the prevention of tax treaty abuse (action 6);
5. Draft report on transfer pricing aspects of intangible assets (action 8);
6. Draft report on transfer pricing documentation (action plan 13); and
7. Final report on the development of a multilateral instrument facilitating the implementation of the actions (action 15).

In addition to the above reports, the following discussion drafts were published in 2014:

1. Discussion draft on the limitation of tax base erosion via interest deductions and other financial payments (action 4);
2. Discussion draft on the prevention of tax treaty abuse (action 6);
3. Discussion draft on the avoidance of artificial permanent establishment status (action 7);
4. Discussion draft on transfer pricing aspects of intangible assets (continuation), risk & equity, and other high-risk transactions (actions 8-10);
5. Discussion draft on data collection on BEPS and analysis thereof (action 11); and
6. Discussion draft on dispute resolution (action 14).

### 2.2 Amendment 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 parent company is located is no longer allowed to exempt distributed profits to the extent such profits are deductible by the subsidiary. The Member States have to implement the amendments in their domestic laws by 31 December 2015 at the latest.

### 2.3 Introduction General Anti-Abuse Rule in 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.

### 2.4 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 per 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.

## 2.5 Other Tax Treaty Developments

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

- In 2014, the Dutch State Secretary of Finance started negotiations with The Russian Federation, Bangladesh, Bulgaria, Egypt, The Philippines, Ghana, Morocco, Nigeria, Ukraine, Uzbekistan, Sri Lanka, Uganda, Vietnam, Zambia and Zimbabwe for amending the tax treaty. The amended tax treaties will likely contain information exchange and anti-abuse provisions;
- The new tax treaty between the Netherlands and China and the protocol thereto were ratified by both countries and entered into force on 31 August 2014. The new treaty and protocol apply to income received on or after 1 January 2015; and
- The new tax treaty between the Netherlands and Ethiopia has been ratified by the Netherlands on 14 June 2014. The ratification by Ethiopia is still pending.

# 3 Main Changes in Corporate income tax and dividend tax in 2015

The changes which occur in 2015 with respect to the Dutch corporate income tax and dividend tax are rather limited so far and consist of the following.

## 3.1 Limitation deductibility foreign penalties

As per 1 January 2015, the non-deductibility of penalties imposed by the Dutch authorities or an EU institution for Dutch corporate income tax purposes has been extended to all foreign penalties. This includes, for example, criminal, competition, environmental and traffic penalties. However, if a penalty is imposed for an offence that is not known or in conflict with Dutch law or if there is no proper judicial procedure, the penalty may be deductible based on the hardship clause.

## 3.2 Tax interest on dividend tax

As per 1 January 2015, dividend tax falls under the scope of the Dutch tax interest rules. As a consequence, as of that date, tax interest will be levied on late payments of Dutch dividend tax and tax interest will be reimbursed on Dutch dividend tax refunds. Dividend tax is paid too late if it is not paid within one month after the dividend has become payable. The applicable percentage of the tax interest is linked to the statutory interest rate for non-commercial transactions with a minimum rate of 4%. Although the new tax interest rules apply as per 1 January 2015, these rules also apply to interest periods prior to this date.

# 4 Future tax developments

The following forms a brief overview of the noteworthy future developments which are known today.

## 4.1 Pending Bill Re Participation Exemption

A Bill that provides the legal ground for the so-called "compartmentalisation doctrine" in relation to the Dutch participation exemption is under discussion in the First Chamber of Dutch Parliament. In brief, the contents of this Bill can be described as follows. Any benefits derived from a qualifying participation (e.g. dividends and capital gains) in principle are exempt from Dutch taxation under application of the participation exemption. If such benefits both have been accumulated during a period in which the participation qualified for the participation exemption and during a period in which the participation did not qualify for the participation exemption, according to Dutch case law, a compartmentalisation of these benefits should take place. Based on a recent judgment of the Dutch Supreme Court, the compartmentalisation doctrine only applies if the application of the participation exemption changes due to a change of the underlying circumstances and not if this change is due to an amendment of the law. The legislative proposal seeks to overrule this judgment by introducing a full obligation to compartmentalise any benefits derived from qualifying participations. If the Bill is adopted by Dutch Parliament, it will become effective with retroactive effect from 14 June 2013.

### 4.2 Expected Amendment Dutch Fiscal Unity Regime

As mentioned above in paragraph 1.4, the Dutch Ministry of Finance recently announced an upcoming amendment of the Dutch fiscal unity regime.

### 4.3 Expected Amendment Innovation Box Regime

On 11 November 2014, the Dutch Ministry of Finance announced an upcoming amendment of the innovation box regime to prevent an international mismatch when intellectual property (IP) is transferred from a permanent establishment to the head office. In addition, parliamentary questions have been raised regarding the future of the innovation box regime. This relates to recent international developments regarding preferential IP regimes whereby the UK and Germany launched a joint proposal for the consideration of the G20 and OECD member countries in the OECD Forum on Harmful Tax Practices. In response thereto, the Dutch State Secretary of Finance indicated that the innovation box will not be abolished and that the Netherlands aims to maintain an attractive innovation box regime.

### 4.4 BEPS Action Plan

It is announced that the OECD will publish the following (draft) reports and discussion drafts relating to the combat of BEPS in 2015:

*(Draft) reports:*

1. Report on strengthening of Controlled Foreign Companies rules (action 3);
2. Report on the limitation of tax base erosion via interest deductions and other financial payments (action 4);
3. Report on the avoidance of artificial permanent establishment status (action 7);
4. Report on transfer pricing aspects of intangible assets (continuation), risk & equity, and other high-risk transactions (actions 8-10);
5. Report on data collection on BEPS and analysis thereof (action 11);
6. Report on disclosure requirements in respect of aggressive tax structures (action 12); and
7. Report on dispute resolution (action 14).

*Discussion drafts:*

1. Discussion draft on strengthening of Controlled Foreign Companies rules (action 3);
2. Discussion draft on transfer pricing aspects of intangible assets (continuation), risk & equity, and other high-risk transactions (actions 8-10);
3. Discussion draft on data collection on BEPS and analysis thereof (action 11);
4. Discussion draft on disclosure requirements in respect of aggressive tax structures (action 12); and
5. Discussion draft on transfer pricing documentation and country-by-country reporting (action 13).

### 4.5 Expected Tax Treaty Developments

The following developments are expected with respect to Dutch tax treaties:

- The ratification of the new tax treaty between the Netherlands with Germany is still pending. It is envisaged that the new tax treaty will be ratified in 2015 and will enter into force on 1 January 2016; and
- There are several tax treaties which are currently (re)negotiated by the Netherlands. Please find an overview of these tax treaties enclosed to this newsletter in annex 1.

Should you have any questions on the above please contact your advisor within Hamelink & Van den Tooren at + 31 70 310 50 70.

Amsterdam, The Hague, January 2015

Enclosure: Overview of all tax treaties currently (re)negotiated by the Netherlands

Annex 1: Overview of all tax treaties currently (re)negotiated by the Netherlands

| Europe | Asia and pacific | Africa | North/South America |
|---|---|---|---|
| Belgium | Australia | Algeria | Brazil |
| Bulgaria | Bangladesh | Egypt | Canada |
| Cyprus | Philippines | Ghana | Chili |
| Germany | Georgia | Kenia | Colombia |
| France | India | Malawi | Uruguay |
| Ireland | Indonesia | Morocco | |
| Moldova | Iraq | Mozambique | |
| Poland | Kirgizia | Nigeria | |
| Spain | Mongolia | Senegal | |
| The Russian Federation | New Zealand | Tanzania | |
| Ukraine | Pakistan | Uganda | |
| | Sri Lanka | Zambia | |
| | Tadzhikistan | Zimbabwe | |
| | Thailand | | |
| | Uzbekistan | | |
| | South Korea | | |
| | Vietnam | | |