Hamelink & Van den Tooren
Tax Lawyers

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newsletter

This newsletter summarizes the main changes as per 1 January 2016 in Dutch corporate income tax and dividend tax legislation relevant for the international tax practice. Furthermore, we describe the most recent Dutch tax treaty developments. This newsletter does not cover the Anti Tax Avoidance Package issued by the European Commission on 28 January 2016. We will inform you on this matter in a separate newsletter.

Implementation amendments EU Parent-Subsidiary Directive

As per 1 January 2016, new anti-abuse rules in the Dutch Corporate Income Tax ("CIT") Act and Dividend Tax Act entered into force, implementing amendments to the EU Parent-Subsidiary Directive. Amendments have been introduced to (i) the Dutch participation exemption/participation credit system; (ii) the Dutch CIT rules for non-Dutch resident corporate shareholders of Dutch companies; and (iii) the dividend withholding tax exemption for cooperatives ("Coops"). The new rules are not limited to EU and EEA (European Economic Area) situations.

(i) Dutch participation exemption/participation credit system

The Dutch participation exemption and participation credit system no longer applies to remunerations and payments from qualifying participations insofar these remunerations and payments can directly or indirectly, legally or in fact, be deducted from the participations' profit tax base. This means that even in situations where the remuneration or payment is non-deductible at the level of the participation (e.g. under application of a rule limiting an interest deduction), the remuneration or payment can be taxable in the Netherlands. Taxpayers making use of hybrid financing arrangements should consider restructuring these arrangements to avoid double taxation. Remunerations and payments received after 1 January 2016 fall within the scope of these new rules irrespective the year to which the remuneration or payment relates.

(ii) Dutch CIT rules for non-Dutch resident corporate shareholders

One of the two conditions under which a non-Dutch resident corporate shareholder, holding an interest of at least 5% (a "Substantial Interest") in a Dutch resident company, may be subject to Dutch CIT on any benefits derived from such interest (e.g. dividends and capital gains) has been amended. This is an anti-abuse rule. Under this rule applicable up to and including 31 December 2015, a non-Dutch resident corporate shareholder may become subject to Dutch CIT if:

1. The non-Dutch resident corporate shareholder owns the Substantial Interest with the primary or one of the primary reasons to avoid personal income or dividend tax from another party; and
2. The Substantial Interest cannot be allocated to a business enterprise of the non-Dutch resident corporate shareholder.

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Effective 1 January 2016, the second condition has been replaced by:

It concerns an artificial construction or series of constructions. A construction is considered artificial when it is not established for valid business reasons which reflect economic reality.

From the explanatory notes, it can be derived that above legislative change does not have a material impact except for situations in which an active group holds a Substantial Interest in a Dutch company via a passive intermediate holding company. In order to avoid application of the amended anti-abuse rule for non-Dutch resident corporate shareholders, the passive intermediate holding company should now meet certain minimum substance requirements.

(iii) Dividend withholding tax exemption for Coops

As a principal rule, distributions of profits by a Dutch Coop are not subject to Dutch dividend withholding tax unless the structure of which the Coop is part, is considered abusive. Whether or not this is the case is determined following the same principles as under (ii) above. Therefore, the amendments with respect to the dividend withholding tax exemption for Coops are in line with the amended anti-abuse rule for non-Dutch resident corporate shareholders.

STEP-UP FOR DIVIDEND TAX PURPOSES FOR CROSS-BORDER (DE)MERGERS

A new provision is added to the Dividend Tax Act based on which a step-up is provided in case of a cross border (de)merger into a Dutch company. This implies that the paid-up capital of the Dutch company will be increased by an amount equal to the fair market value of the transferred equity (i.e. net assets with an exception for shares in a Dutch company). No step-up is provided if the (de)merger is aimed at avoiding or deferring taxation.

COUNTRY-BY-COUNTRY-REPORTING AND INCREASED TRANSFER PRICING DOCUMENTATION OBLIGATIONS FOR (LARGE) MULTINATIONALS

In line with model legislation issued by the OECD, as per 1 January 2016, increased information obligations for (large) multinationals entered into force. Based on the new rules, certain companies have to prepare and file a "country-by-country report" and a "master file" together with a "local file". The country-by-country report should be prepared by (i) Dutch top holding companies of a multinational group with a consolidated turnover of at least € 750 million; or (ii) Dutch companies or permanent establishments which are part of such group if the Netherlands did not receive the report from the jurisdiction in which the top holding company of the group is resident. The master file and the local file should be prepared by Dutch companies which are part of an international group with a consolidated turnover of at least € 50 million.

More Strict Loss Compensation Regime for Holding and Financing Companies

Dutch tax law includes restrictions on the possibility to carry back and carry forward losses incurred by Dutch companies which are for 90% or more engaged in holding and/or intra-group financing activities during the entire of almost entire year (so-called holding and financing losses). Such losses can only be set off with profits of years during which the company's activities also consisted for 90% or more of holding and/or intra-group financing activities. The purpose of this restriction is to prevent the compensation of holding and financing losses with profits from operational activities. As per 1 January 2016, the loss compensation regime for holding and financing companies has become more strict. As of this date, if a company performs holding and/or financing activities during a year, the start-up and closing down of such activities and periods during which no activity takes place in a year also qualify as holding- and/or intra-group financing activities.

Amended Decree for Dutch Tax Treatment of Partnerships

On 15 December 2015, the State Secretary of Finance published an amended decree on the Dutch tax treatment of (foreign) partnerships. The main change regards a relaxation of the so-called unanimous consent requirement in multi-tier partnership structures (i.e. stacking of partnerships). For Dutch tax purposes, a partnership qualifies as a tax transparent entity if the admission and substitution of a limited partner requires the unanimous consent of all partners (i.e. of both general and limited partners). This unanimous consent requirement applied to all tiers in multi-tier partnership structures in order to ascertain the tax transparency of the lower tier partnership. As of 1 January 2016, only the consent of the direct partners of the relevant partnership is required. In order to benefit from this relaxation, the simplified consent requirement should be included in the partnership agreement or, in case of existing partnerships, the Dutch tax authorities should be notified in writing of the wish to apply the simplified consent requirement.

Tax treaty developments

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

- In 2015, the Netherlands agreed to amend the tax treaties with Kenia, Malawi and Zambia. It is expected that these tax treaties will be ratified in the course of 2016. Furthermore, the Netherlands agreed to amend the protocols to the tax treaties with Indonesia and Ethiopia;
- As per 1 January 2016, the Tax Arrangement between the Netherlands and Curacao and the new tax treaty between the Netherlands and Germany and the protocol thereto entered into force; and
- On 1 March 2016, the Tax Arrangement between the Netherlands and Sint Maarten ("TANS") will enter into force. The TANS will replace the present Tax Arrangement of the Kingdom and will apply to income received on or after 1 January 2017.

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