DUTCH GOVERNMENT PUBLISHES 2022 TAX PACKAGE

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On 21 September 2021 for the occasion of Budget Day the Dutch government presented its 2022 Tax Package. After the general elections in March 2021, and no agreement being reached by the political parties to form a new government, the current government is a constitutionally restricted caretaker government, which is why this year's envisaged changes and plans are not controversial, but continue consistent policy to improve the business climate for companies with operational activities in the Netherlands and prevent the use of artificial structures and arrangements and combat tax avoidance. Please find below the main highlights of the proposed tax measures that are relevant for corporate income tax (CIT) payers doing business in or with the Netherlands.

Changes in at arm's length principle

Based on the current Dutch tax rules, the same terms and conditions must be applied to transactions between affiliated entities, as would be applied between non-affiliated entities under similar circumstances. (the so-called "arm's length principle"). The at arm's length principle inter alia implies that in case the terms and conditions of an affiliated party transaction are not at arm's length, same terms and conditions will be re-qualified for Dutch tax purposes into terms and conditions that meet the at arm's length principle.

The 2022 Tax Package includes a legislative proposal based on which hybrid mismatches which arise under the application of the at arm's length principle will be neutralized from 1 January 2022 onwards. Under the proposed new rules, downwards fiscal profit adjustments, recognition of losses and value increases of assets acquired from affiliated parties (the value increases are also referred to as 'informal capital contributions') under the application of the at arm's length principle will be denied, in short, if the taxpayer cannot reasonably prove that a corresponding upwards adjustment will be included in the tax base in the jurisdiction of the affiliate party.

The legislative proposal is more or less in line with the earlier version which was published for consultation (for more information: see the tax alert 'Consultation on legislative changes of the arm's length principle rules and introduction of reverse hybrid rules (ATAD2)' of 18 march 2021 on our website **burenlegal.com**).

Tax liability rules for reverse hybrids (ATAD2)

Reverse hybrid situations concern entities which are treated as transparent in the jurisdiction of incorporation or registration (and therefore not subject to tax) and as opaque in the jurisdiction(s) of their participants. Typically, a Dutch CV may be part of a reverse hybrid situation.

The 2022 Tax Package includes a legislative proposal implementing the last part of ATAD2 requiring EU Member States to include certain provisions combatting hybrid structures and payments. Under the application of the proposed reverse hybrid rules, tax transparent entities will under certain conditions be treated as opaque entities for Dutch tax purposes. As a consequence, such entities will become subject to CIT and its distributions subject to withholding taxes.

The reverse hybrid rules apply to entities incorporated or registered under Dutch law or residing in the Netherlands insofar at least 50% of its voting rights, capital interests or rights to a share profit of such entity is directly or indirectly held by an 'associated entity' and if the jurisdiction of the 'associated entity' qualifies the entity as opaque.

In line with the ATAD2, the reverse hybrid rules will not apply under the application of an escape rule for regulated collective investment vehicles.

The legislative proposal is in line with the earlier version which was published for consultation (for more information: see the tax alert 'Consultation on legislative changes of the arm's length principle rules and introduction of reverse hybrid rules (ATAD2)' of 18 march 2021 on our website **www.burenlegal.com**).

Changes to taxation of employee stock option plans

With a view to a further increasing of the appeal of the Dutch tax system (especially for start-ups and scaleups), new rules are introduced related to the levy of wage tax and personal income tax in case of employee stock option plans. Based on the legislative proposal, the moment of taxation of share options may be shifted – at the option of the employee - from the moment of exercise to the moment when the acquired stock on exercise is (deemed to be) available for trade, subject to certain conditions.

The government intends that the entry into force of the above-mentioned legislative proposals will be 1 January 2022. Please note that the proposed legislation still has to be adopted by the House of Representatives and the Senate. Since the current government is a care taker cabinet it may be that the legislative proposals would be subject to change.

Other relevant developments

Reduction of CIT rate for SME

In 2021, the Dutch CIT rate is 15% for taxable profits up to and including EUR 245,000 and 25% for taxable profits exceeding this amount. To enhance the Dutch tax climate, the threshold for the 15% rate will be increased to EUR 395,000 on 1 January 2022. The CIT rate for taxable profits exceeding this amount will remain 25%.

Loss carry forward rules

The term of the loss carry forward facility will be expanded from 6 years to unlimited future years as per 1 January 2022. However, the loss carry forward and backward facility would only will be fully applicable for profits up to an amount of EUR 1,000,000. For profits exceeding this amount, only 50% of the profit can be set off against tax losses.

Dutch participation exemption – possible information exchange for substance lacking intermediary holding companies

Earlier it was announced that it will be further investigated whether legislation will be introduced in 2022 which enables the automatic exchange of information to relevant source countries for substance lacking intermediary holding companies. The 2022 Tax Package does not include any legislative proposal on this matter. It is noted that introduction of this measure does not require a legislative proposal, but an amendment of an existing policy decree.

Dutch entity tax qualification rules

On 25 March 2021, highly criticized draft legislation was published for consultation changing Dutch entity tax qualification rules of Dutch CVs whereby the difference between transparent and opaque CV's shall no longer exist for Dutch tax purposes. Another part of the proposal contains an adjustment of the foreign entity classification rules by accepting a symmetrical or a fixed classification approach for foreign entities with a legal form that is not comparable with a Dutch equivalent legal form. It is now expected that the new legislation will be published in December 2021 and will apply from 1 January 2023 onwards.

Take away

In the past years significant legislative changes have taken place in Dutch tax laws aimed at preventing the use of artificial structures and arrangements and to combat tax avoidance. At the same time, the Dutch government tries to improve the business climate for companies with operational activities in the Netherlands for instance by reducing the tax rates in order to benefit companies. The tax measures as described above are in line with these international developments.

The changes in Dutch domestic tax rules as from 2022 are relevant, but even more relevant are the expected ground-breaking changes which will follow from the OECD Inclusive Framework and EC legislative initiatives (see the alert 'Alert | Global tax deal in the making' of 5 July 2021 on our website **burenlegal.com**). These are likely to lead to significant changes in the overall international corporate and tax architecture of taxpayers operating internationally and should be carefully monitored.

We recommend assessing whether your structure meets the current and future requirements. If you have any questions regarding the above, please do not hesitate to contact us.

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