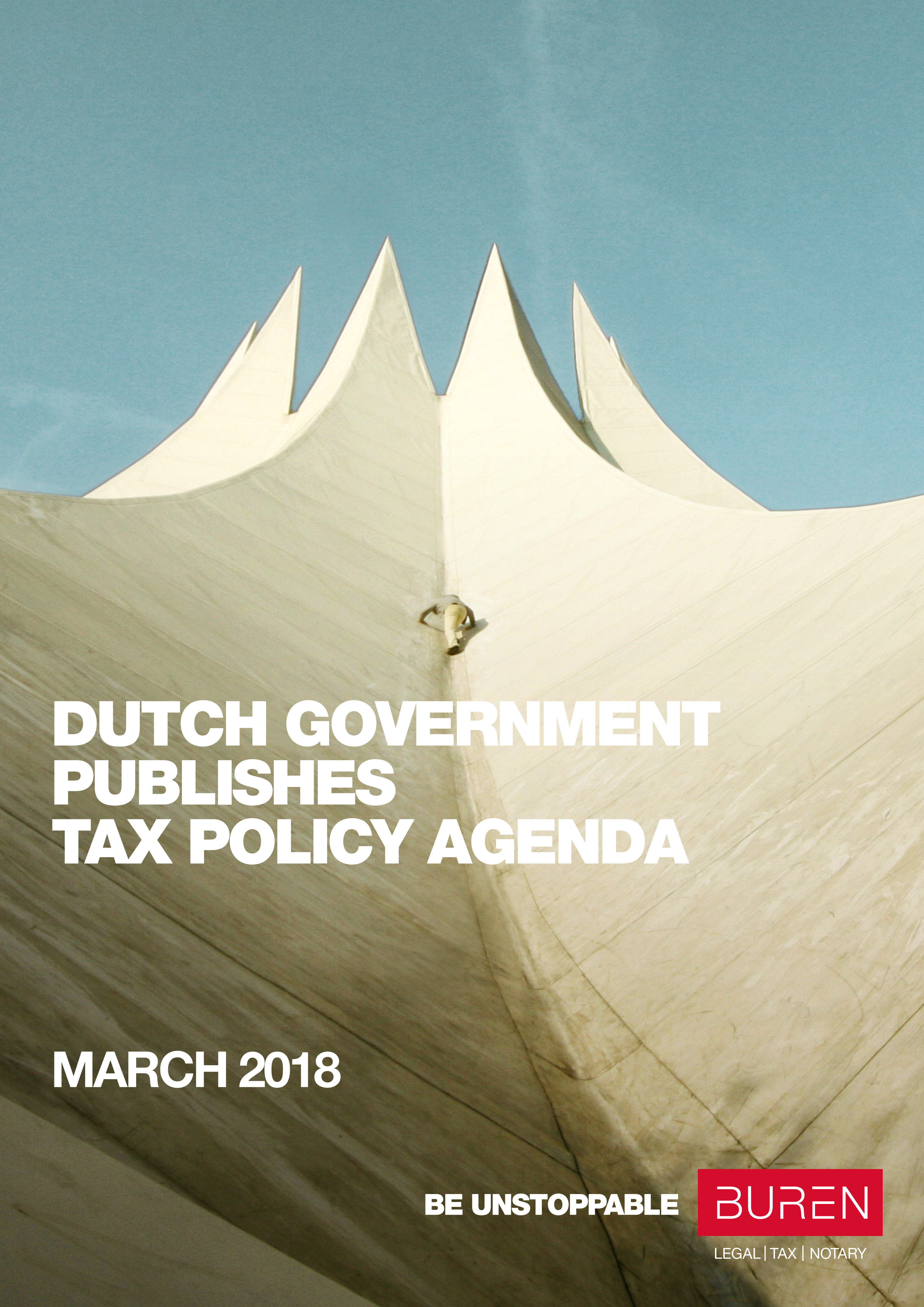

DUTCH GOVERNMENT PUBLISHES TAX POLICY AGENDA

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Following earlier announcements in last year's Tax Policy Paper by the new Dutch coalition government, the Dutch State Secretary of Finance released on 23 February 2018 its Tax Policy Agenda ("Agenda"). This Alert highlights several aspects of the Agenda.

Top priorities of the Dutch government are to maintain its competitive investment climate for genuine businesses and investment platforms and to implement the anti-tax avoidance framework as agreed at OECD and EU level in the BEPS Project and ATAD 1 and 2. The Agenda is only a blue print and sets out the various legislative changes and its anticipated timing. The proposals in the Agenda still need to go through the legislative process, which is partly scheduled in 2018 and beyond, depending on the specific proposal.

CFC

The Agenda clarifies the position of the Dutch government with respect to the implementation of the CFC rule of the ATAD effective as from 1 January 2019.

According to ATAD 1 a foreign entity (or permanent establishment) is considered a CFC if the Dutch corporate taxpayer has an interest of more than 50% in that foreign entity (control test) and the tax due in the foreign jurisdiction is less than 50% of the corporate income tax that would have been due in the Netherlands if the foreign entity was a resident of the Netherlands (low tax test). The Agenda confirms that the current standard Dutch corporate income tax rate will be reduced from 25% to 24% in 2019, to 22.5% in 2020 and to 21% as from 2021. Profits up to an amount of EUR 200,000 are currently taxed against a lower step-up rate of 20%. The Agenda also confirms that this step-up rate will be reduced from 20% to 19% in 2019, to 17.5% in 2020 and to 16% as from 2021.

The ATAD allows EU member states two options on how to subsequently determine the CFC's income. The Netherlands effectively is opting for Model B, which it views as already imbedded into the current rules, while Model A will only become applicable to a limited number of specific cases.

Model A results in an inclusion of non-distributed earnings resulting from certain categories of income, e.g., interest, royalties, dividends, capital gains and financial leasing, from foreign entities subject to a low statutory tax rate or entities that are tax resident in a jurisdiction listed on the EU list for non-cooperative countries ("EU blacklist"), which do not carry out genuine economic activities in the foreign jurisdiction.

The Agenda confirms that a foreign entity can in any case be considered to carry out genuine economic activities if it meets the substance requirements that also apply in relation as from 1 April 2018 to the domestic dividend withholding tax exemption (at least EUR 100,000 in employment expenses and office space requirement). This exception may significantly reduce the impact of the CFC rule.

Interest deduction limitation rules

Effective as of 1 January 2019 the Dutch government shall implement the ATAD earnings stripping rule such that the net borrowing costs of a corporate taxpayer will only be tax deductible up to either (i) 30% of a taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA) or (ii) a threshold of EUR 1,000,000. No group exception will be introduced. This measure will be effective immediately without any grandfathering for existing loans. Existing anti-base erosion rules in the Netherlands will most likely be abolished.

In addition an interest deduction limitation will be introduced for banks and insurers in the form of a minimum capital rule.

Transfer pricing

The OECD-guidelines for transfer pricing have been adjusted. The State Secretary of Finance has the intention to amend the existing Transfer Pricing Decree in 2018 in order to align it with these new OECD-guidelines. The State Secretary of Finance will examine if the arm's length principle needs to be adjusted.

Hybrid mismatches

By implementing ATAD 2, measures will be introduced against structures that use qualification differences between tax systems (hybrid mismatches). In practice this means Dutch law will neutralize tax benefits obtained through hybrid mismatches.

In addition to this domestic measure, it is intended that a measure against hybrid mismatches will be included in all Dutch bilateral tax treaties, for example via the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. This is done in order to ensure that if income is not taxed, treaty benefits will not be granted.

Substance requirements

The Dutch government is committed to support Dutch investment platforms of corporate taxpayers, provided that such taxpayer has sufficient substance in the Netherlands. Therefore the Agenda proposes to add to the existing Dutch substance requirements the EUR 100,000 employment expenses and the requirement of a taxpayer to have office space available for a period of at least 24 months.

The increased substance requirements will be applicable to a corporate taxpayer that (i) is seeking certainty in advance by means of an advance tax ruling, or (ii) predominantly engaged in holding activities or (iii) can be considered as a financial service company.

The Dutch State Secretary of Finance announced that he aims to introduce the increased substance requirements as soon as possible, but no further details are available. It is likely that there will be some sort of grandfathering until 1 January 2019.

Furthermore, the Dutch State Secretary of Finance will review whether the participation exemption can be changed in such way that the participation exemption will no longer be applicable when the investment platform in the Netherlands of the international group to which the tax payer belongs, does not meet the Dutch substance requirements. This review is scheduled for 2020.

Conditional withholding tax

The Agenda reconfirms the intention of the Dutch government to abolish Dutch dividend withholding tax as of January 1, 2020. Instead, a conditional withholding tax will be levied on outbound dividend, interest and royalty payments to low-taxed jurisdictions or jurisdictions named on the EU blacklist.

Anti-abuse measures will be implemented to discourage artificial arrangements frustrating the conditional withholding tax regime (for example by re-routing payments to low-taxed or EU blacklist jurisdictions). It is unclear what the withholding tax percentage would be, and no other details are available at this stage.

It is indicated that the conditional dividend withholding tax should be applicable as of 2020 (in parallel with the general abolishment of dividend withholding tax) and the conditional withholding tax on interest and royalty as of 2021.

Next steps

In terms of next steps, it was announced that:

- An internet consultation will be initiated as soon as possible in 2018 on the hybrid mismatch rule, whereby it is planned to publish draft legislation at the beginning of 2019.
- Draft legislation will be published within 2018 on the introduction of the earning stripping rule and the CFC rule.
- A draft bill introducing withholding tax on interest and royalties for payments to low-tax jurisdictions will be submitted to the Dutch Parliament in 2019.

Although no timing has been mentioned yet, a draft bill is expected in the upcoming period related to the abolishment of dividend withholding tax with the exception of payments to low-tax jurisdictions, as implementation has been announced from 1 January 2020.

Take away

The introduction of lower Dutch corporate income tax rates and the abolishment of the Dutch dividend withholding tax could be seen as an important step in further strengthening of the Dutch investment climate. At the same time, the Netherlands continues to support the initiatives around combatting international tax avoidance, while focusing on transactions that lack economic substance.

It is recommended that taxpayers review their existing structures, in particular in light of the announced changes that are expected to be introduced.

Key contacts

Peter van Dijk
Partner
p.vandijk@burenlegal.com
T +31 (0)70 318 4834

Cees-Frans Greeven
Partner
c.greeven@burenlegal.com
T +31 (0)20 333 8390