Tackling tax avoidance and tax evasion

On 23 February, the government presented new plans to combat tax avoidance and evasion.

Impact in practice

The approach is strongly internationally oriented and in some areas goes beyond the minimum requirements. Consequently, the practical effects are expected to be considerable, partly because of the additional restrictions on interest deduction, tightening the participation exemption and the greater administrative burden that the measures involve. These will inevitably affect normal business. We set out the main points of the proposed measures below.

Base protection

1. Preventing Dutch tax base erosion

The first legislative proposals to implement the European Anti-Tax Avoidance Directive (ATAD1) are expected by mid-2018 and they will come into effect in 2019. In some areas, the Netherlands will go further than required by the Directive:

- Earnings stripping (further restrictions on interest deduction):

It is expected that net interest payable exceeding 30% of EBITDA (earnings before interest, tax, depreciation and amortisation) will no longer be deductible from 2019. Businesses may face this on

interest from €1 million (the EU permits €3 million). Furthermore, there will be no group exemption or grandfathering rules for existing loans.

- Controlled Foreign Companies ("CFC's"):

An entirely new measure against controlled foreign companies will be implemented strictly by alignment with Model A of ATAD1. This means more restricted application of the participation exemption for passive (undistributed) income from low-tax jurisdictions. There will be an exemption to this CFC levy if there is 'substantive economic activity', based on the same enhanced 'relevant substance' requirements currently applied to dividend tax.

For completeness, the government referred to the emergency remedial legislation on the fiscal unity regime (see our newsletter of 22 February 2018). This potentially complicated legislation is designed to undo the adverse effects for the Treasury of EU case law. This could have adverse consequences for Dutch businesses.

2. Tackling evasion by classification differences
These measures under the European Anti-Tax Avoidance Directive ATAD2 will come into force from 2020 and are directed towards constructions with hybrid mismatches relating to entities and financial instruments, such as 'double dip' constructions. In practice this will have an adverse impact on 'B.V.-C.V.' structures. The Netherlands has also opted to include a hybrid entity provision in new and existing double tax treaties under which treaty benefits can be disregarded.

3. Abolition of dividend tax and combatting abuse of the extensive Dutch international tax system
- The current dividend tax will be abolished from 2020 while a withholding tax on dividends will be introduced at the same time to combat abuse and payments to low-tax jurisdictions and/or countries on a blacklist.

- A royalty and interest tax will be introduced from

2021 that will apply in the same cases as those where a withholding tax will be levied on dividends in future. Through the Multilateral Treaty, the Netherlands will include more anti-abuse provisions in tax treaties than had been chosen by many treaty countries.

- Finally, the State Secretary wants to examine exclusion of the participation exemption where there is an entirely substance-free intermediate holding company in the Netherlands.

4. Transfer prices
The Transfer Pricing Decree (Besluit verrekenprijzen) will be brought into line with tighter OECD guidelines. The government wants to prevent companies using the pricing of transactions to shift profits to countries where value is not created. Consideration will also be given to whether the

arm's length principle needs to be changed in the context of tackling tax avoidance.

Transparency and integrity

To reinforce its information position, financial intermediaries (such as trust offices, legal firms, notaries and tax advisers) will be required to provide the Tax and Customs Administration with information on potentially aggressive cross-border tax structures. Any penalties imposed on them will be made public in the context of greater transparency. The State Secretary has also promised the deployment of substantial capacity to trace hidden foreign assets, additional conditions for advance rulings and implementation of a UBO register.

Finally

It may be important to examine what these measures will mean for your business, for example if you:

- have net interest expense of more than €1 million; or
- hold direct or indirect participating interests with investment income; or
- expect to pay dividends, interest or royalties to non-resident companies.

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