INTERNATIONAL ASPECTS OF BUDGET DAY - TAX PLAN 2024

On 19 September 2023, the Dutch government published the budget for the year 2024, including several legislative tax proposals for the years 2024 and 2025 ("the Tax Plan"). In this newsletter we highlight the most relevant tax measures from an international perspective.

INTRODUCTION

From an international perspective, the most relevant tax measures include changes to the classification rules for Dutch limited partnerships, foreign legal entities comparable to Dutch legal entities and Dutch FGR's. These changes should enter into force per 1 January 2025. Furthermore, the conditional withholding tax on dividends will enter into force per 1 January 2024.

CURRENT CLASSIFICATION LIMITED PARTNERSHIPS

Under current Dutch classification rules, a limited partnership is generally considered to be transparent for Dutch tax purposes if for the accession or substitution of a limited partner, unanimous consent of all limited partners and the general partner is required. Therefore, to qualify as transparent for Dutch tax purposes, the limited partnership agreement ("LPA") should include a specific clause that prescribes such unanimous consent from all partners. As the LPA's of foreign limited partnerships generally do not contain such clause, foreign limited partnerships are often considered non-transparent for Dutch tax purposes while considered transparent in other countries. Hence, this results in so-called hybrid mismatches.

NEW CLASSIFICATION LIMITED PARTNERSHIPS

From 1 January 2025, all Dutch limited partnerships (i.e. CV's) are deemed to be transparent for Dutch corporate income tax ("CIT") purposes, regardless of what is stipulated in the LPA regarding the entry and replacement of limited partners. Therefore, the distinction between the open CV (subject to corporate income tax) and the closed CV (transparent for tax purposes) will disappear. Open CV's will therefore no longer be subject to CIT as of 1 January 2025. The proposal also introduces a so-called allocation provision for income tax purposes, on the basis of which the assets and liabilities as well as the income and expenses, are allocated to the partners of the CV. The allocation provision applies mutatis mutandis to partners who are liable for CIT. This ensures that the income of a CV can be taxed directly with the partners.

Since the open CV as a legal form does not cease to exist upon termination of its CIT liability, the proposed transitional law regulates (by fiction) that - for CIT purposes - an existing open CV (non-transparent), at the moment immediately prior to the termination of its tax liability, i.e. on 1 January 2025, is deemed to have transferred all of its assets to its partners at fair market value. At that moment, the open CV is also deemed to have ceased to make taxable profits in the Netherlands. As a consequence, such open CV should file a mandatory final CIT settlement.

Transitional law

To postpone direct taxation as a result of the above measures, the proposal contains transitional law that will apply from 1 January 2024. The transitional law consists of a number of facilities, including:

- A pass-through facility for the tax claim on the hidden reserves, tax reserves and goodwill present in the open limited partnership, provided the limited partners are corporate taxpayers;
- A share merger facility whereby limited partners can pass on the tax claim on their share in the open limited partnership to a (new or existing) holding company;
- A temporary transfer tax exemption regarding the share merger facility.

CLASSIFICATION FOREIGN LEGAL ENTITIES

Currently, under Dutch law the "legal form comparison" is applied to qualify foreign legal entities. This qualification

policy for (foreign) legal forms differs from other countries, which can lead to qualification mismatches. Please note, due to the proposed rules that amend the qualification of Dutch partnerships as described above (i.e. these will become transparent), many of the current qualification differences following from the legal form comparison will disappear.

Current qualification

Under the legal form comparison, the most similar Dutch equivalent of a foreign legal entity is used to determine the qualification of the foreign entity for Dutch tax purposes.

Additional new qualification methods

In case the legal form comparison does not provide an outcome, the proposal introduces the following two additional methods:

- The so-called fixed method: If a foreign legal entity is effectively located in the Netherlands and there is no Dutch equivalent, the entity will be considered non-transparent for Dutch tax purposes and therefore subject to Dutch corporate tax.
- The so-called symmetrical method: If a foreign legal entity is effectively located outside the Netherlands and there is no Dutch equivalent, the classification will follow the qualification of the jurisdiction where the entity is located.

FUND FOR JOINT ACCOUNT AND EXEMPT INVESTMENT VEHICLE

Under current law, a fund for joint account ("FGR") qualifies as open (non-transparent and subject to Dutch CIT) if the participations are transferable without the consent of the other beneficiaries (consent requirement). However, if such consent is required the FGR qualifies as closed (transparent and not subject to CIT). In case of a closed FGR, the results are allocated directly to the ultimate beneficiaries.

From 1 January 2025, the rules to qualify FGR's for Dutch tax purposes (i.e. transparent or non-transparent) will be changed. The proposed amendment of the FGR definition removes the current consent requirement as the decisive criterion for the (non-) transparency of the FGR. This amendment is intended to bring the FGR-regime more in line with the objective for the CIT liability of the FGR. Under the proposed measure, a FGR is subject to CIT if two cumulative requirements are met:

- The fund is classified as an investment institution or an undertaking for collective investment in transferable securities ("UCITS"); and
- A participation in the fund is evidenced by negotiable certificates of participation.

Consistent with the proposed transitional law for open CV's, the proposed transitional law provides (by fiction) that a FGR that no longer qualifies as open (i.e. non-transparent), will be deemed - for Dutch CIT purposes - to have disposed of all of its assets to its beneficiaries at the time the proposed qualification rules enter into force.

To defer direct taxation as a result of these measures, the proposal contains similar facilities c.q. transitional law, as described above regarding the amendment of the qualification of open CV's.

Exempt investment vehicles

The Dutch exempt investment vehicle regime ("VBI-regime") aims to facilitate collective investments by removing an additional layer of tax when individuals invest collectively through an investment institution. The VBI-regime only applies if certain conditions are met. An investment institution that meets the statutory requirements of the VBI- regime is subjectively exempt from CIT and therefore does not have to file a CIT return.

Under the proposal, the VBI-regime will from 1 January 2025 only be available to investment institutions or undertakings for collective investment in securities ("UCITS ") as referred to in the Financial Supervision Act ("Wft"). This does not necessarily mean that the VBI must be subject to supervision. The amendment to the VBI-regime aims to limit access to the VBI-regime to investment institutions and UCITS offering units to a broad public or institutional investors. Thus, families or households should no longer be able to apply the VBI-regime (and thus be subject to the ordinary CIT-regime as of 1 January 2025).

THE END OF THE REAL ESTATE FBI

Like the VBI-regime, the FBI-regime aims to facilitate collective investments by removing an additional layer of tax when individuals invest collectively through an investment institution. A FBI is subject to Dutch CIT but taxed at a rate of 0%. However, in order to retain its status, a FBI must distribute all its profits within 8 months after the end of the relevant fiscal year.

From 1 January 2025, a real estate FBI is no longer allowed to directly invest in real estate located in the Netherlands. A FBI will however still be allowed to invest in foreign real estate.

Furthermore, a FBI may still invest indirectly in real estate located in the Netherlands by holding shares in a regularly taxed subsidiary, also known as a real estate entity.

A FBI may still finance up to 60% of the book value of its foreign or indirectly held real estate with debts.
From 1 January 2024 until 31 December 2024, there will be a conditional and temporary exemption from transfer tax to allow FBI's to restructure their real estate holdings in order to maintain the tax exemption provided by the FBI. For this exemption to apply, the acquisition must occur no later than 31 December 2024.

DIVIDEND TAX

Adjustment of the Burden of Proof

The budget contains a number of measures to strengthen the Dutch Tax Administration's approach to dividend stripping. It proposes to adjust the Burden of Proof of the beneficial owner in a way that it will improve the tax inspector's position of proof.

The proposed new Burden of Proof does not apply to all situations. In order not to impose an unnecessary burden on investors with small investment portfolios in particular, an efficiency margin is introduced under the Burden of Proof for certain situations. It is also proposed that the concept of "combination of transactions" will be further defined.

Finally, it is proposed to legislate the so-called record date. This record date is used to determine who is entitled to the proceeds of shares that are publicly traded and - by extension - entitled to credit, exemption, refund or reduction of DWT. The proposed amendments affect income tax, CIT and DWT and aim to strengthen the approach to dividend stripping. Failure to pass these measures would mean that the (evidence) position of the tax inspector in the fight against dividend stripping will not be improved.

The OECD Model Convention, its Commentary and the case law of the Court of Justice of the European Union are important for the interpretation of the term "beneficial owner".

OTHER LEGISLATION PER 1 JANUARY 2024 - ADDITIONAL WITHHOLDING TAX ON DIVIDENDS

From 1 January 2024, the conditional withholding tax on dividends ("CDWT") enters into force. The CDWT will be integrated in the Dutch Withholding Tax Act 2021 (DWT Act 2021). Hence, the CDWT will apply in addition to the existing Dutch dividend withholding tax (DWT).

The CDWT will be due on dividend payments made by Dutch resident corporate entities. The CDWT will only be due if the recipient of the dividend payments is:

- a corporate entity that is a related entity to the Dutch company; and
- residing in a low-tax jurisdiction.

The applicable tax rate will be equal to the highest CIT rate, which is currently 25,8%. Furthermore, the CDWT cannot be credited against Dutch CIT payable by non-resident Dutch corporate income taxpayers. Please note, the CDWT may also apply to dividend payments to entities which are considered transparent for Dutch CIT purposes.

Low-Tax Jurisdiction

The definition of a low-tax jurisdiction in the DWT Act 2021 is consistent with the definition included in the Dutch Controlled Foreign Company ("CFC") legislation that entered into force on 1 January 2019. This means that the CDWT applies to payments to entities established in countries which have a statutory CIT rate of less than 9%, and to payments to

countries which are on the European Union's list of non-cooperative jurisdictions.

There may be a tax treaty in place between the Netherlands and a low-taxed jurisdiction (currently Bahrain, Barbados, Panama and the UAE). The CDWT will only apply to payments to these jurisdictions once three years have passed following the qualification of these jurisdictions as low-tax jurisdictions. During this 3-year period the Netherlands intends to renegotiate the tax treaties in order to be able to effectively levy the CDWT.

Abuse

When the dividend is not paid to a low-tax jurisdiction, the CDWT also applies in cases of abuse. Abuse is defined as artificial constructions aimed at avoiding the CDWT.

Under the anti-abuse rules of the DWT Act 2021, CDWT will be levied if the following two conditions are met:

- The recipient entity is held with the main purpose, or one of the main purposes, to avoid the CDWT (subjective test); and
- The arrangement is considered to be artificial (objective test).
- The objective test should be assessed based on the substance of and the business reasons behind the arrangement. An example of such an artificial arrangement is having the dividend flow-through an entity located in a country which is not regarded as a low-tax or non-cooperative jurisdiction without having any valid business reasons.

Relation to DWT and impact

In case both CDWT and DWT are due on the same distribution, the latter can be credited against the CDWT. Furthermore, in line with the DWT Act 2021, repayments of share capital and share premium are not subject to CDWT provided certain criteria are met. It should also be noted that no CDWT should be due in case a Dutch

corporate entity is cross border merged into a foreign (other EU entity). This might provide for a tax efficient exit from the Netherlands in certain situations, (especially where Dutch (cashbox) entities are owned by foreign shareholders, such as investment funds that do not qualify for an exemption from Dutch DWT).

Please note, while only dividend distributions by so-called holding cooperatives are subject to DWT, dividend distributions by all cooperatives are subject to the CDWT. This means that investment structures that make use of non-holding cooperatives (i.e., that have sufficient substance in the Netherlands to qualify as an active cooperative as often confirmed in a ruling) can be impacted by the new Dutch CDWT, e.g. in case the membership rights of the cooperative are held directly or indirectly by investors that are residing in a low-tax jurisdiction (as often is the case in private equity structures). Under current legislation these cooperatives do not fall within the scope of the DWT.

Tax Collection

The CDWT must be withheld by the Dutch paying entity. Within 1 month after the ending of the calendar year, a tax return should be filed and the CDWT should be remitted to the Dutch tax authorities.

Should you have any questions or need more information regarding the topics discussed in this newsletter, please do not hesitate to reach out to us:

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