Netherlands

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General

1. What are recent tax developments in your country which are relevant for M&A deals?

Most recent tax developments in the Netherlands are based on the OECD (BEPS) and EU actions (see further below under question 2). Nevertheless, the Netherlands remains a suitable and beneficial jurisdiction to facilitate (foreign) investments, following the stable political climate, extensive treaty network and the exemption of income from shares under the participation exemption. It was stated by the Dutch Ministry of Finance that the goal is to maintain the attractiveness of the Netherlands for multinationals with real economic presence in the Netherlands in a world after BEPS by inter alia defending and empowering the Dutch tax system.

The Dutch Ministry of Finance announced that they will propose new measures in order to tackle the perceived excesses of private equity acquisitions in the Netherlands. One of these measures concerns the tax deductibility of interest (see further below under question 6). Furthermore, a bill was introduced to extend the Dutch fiscal unity regime to EU situations. Developments within the EU may furthermore impact Dutch tax law significantly.

2. What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (action Plan 6 specifically) and, if applicable, the amendments to the EU Parent-Subsidiary Directive?

OECD BEPS

As other OECD member states, the Netherlands has committed to the OECD minimum standard concerning treaty abuse. The Dutch State Secretary has announced that the proposed anti-abuse rules will be part of treaty negotiations. On-going efforts to renegotiate tax treaties with developing countries in order to include an anti-abuse rule will continue.

Pro-active adjustments to Dutch tax law relate to county-by-country reporting for groups with a turnover exceeding EUR 750 million that is in force as per 1 January 2016. In addition, groups with a turnover that exceeds EUR 50 million are obliged to draft a master- and local file. The Netherlands will furthermore actively participate in the exchange of information on rulings. It was furthermore stated that the Netherlands will commit to the minimum standards for the existence permanent establishments (Action Plan 7) and the overall adjustments to the OECD transfer pricing guidelines.

Up to now, no countermeasures are proposed in the Netherlands regarding hybrid structures (Action Plan 2), CFC-regulations (Action Plan 3) or interest deduction (Action Plan 4), as the Dutch Ministry of Finance stated that it will await EU coordinated measures. In that regard, the EU anti-tax avoidance directive as published on 28 January 2016 will be of influence.

Amendments EU Parent-Subsidiary Directive

a. Anti-abuse rules for non-resident corporate shareholders

As a result of the amendments to the EU Parent-Subsidiary Directive, new anti-abuse rules for foreign companies investing in Dutch corporate structures were introduced as per 1 January 2016. Non-resident corporate shareholders that fall under the scope of the anti-abuse rules can be faced with Dutch corporate income tax (max. 25%) on income (dividend, capital gain, interest from a shareholder loan) derived from share interests (5% or more) in a Dutch company or membership rights in a Dutch Coop (a so called substantial interest).

The current tax legislation stipulates that foreign shareholders/members will be taxed with Dutch corporate income tax in the Netherlands if (i) the primary objective, or one of the primary objectives, for holding the substantial interest or the membership rights in the Coop is to evade dividend withholding tax or personal income tax and (ii) this involves an artificial arrangement.

Arrangements are artificial to the extent that they are not put in place for valid commercial reasons which reflect economic reality. This definition is rather subjective and vague and is not further clarified in the legislation. The explanatory notes to the legislative proposal state however the following safe harbour situations in which an arrangement is not considered artificial:

i. The shareholder/member conducts operational business activities and the shares/membership rights are attributable to that business;

ii. The shareholder/member is the top holding company of the group and as such is performing substantial managerial, strategic or financial functions for the group; or

iii. The shareholder/member provides a “link” between the Dutch company/Coop and a company as mentioned in the first two bullets, and the shareholder/member has sufficient substance in its home jurisdiction. The existing substance rules applicable to Dutch holding companies will play a critical role in determining the substance at the level of the shareholder/member in the jurisdiction of residence. Please refer to question 17 for an overview of the minimum Dutch substance requirements.

In addition, a Dutch Coop is not considered artificial if the Coop runs an active business with its own office(s) and staff on the payroll.

The anti-abuse rules should not impact private equity investments (structured in line with the safe harbour rules as described above).

b. Hybrid mismatches

Following the amendment to the EU Parent-Subsidiary Directive, the Dutch participation exemption will no longer apply to income (dividend and other payments), insofar as this includes remunerations or payments from subsidiaries if such payments can be directly or indirectly deducted from the tax base for profit tax purposes.

The aforementioned also extends to any remuneration for the loss of such income or a write-off in this regard. It will be sufficient if the income is deductible from the taxable base, regardless of whether a restriction to interest deduction (such as thin capitalisation or earnings stripping) applies. This may result in double taxation. A review of the tax treatment of the income at the level of the subsidiary by the Dutch parent company will be necessary, leading to an increased administrative burden for the taxpayer.

3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

a. Share deal

Tax advantages:

- The buyer may benefit from the target company’s carry forward losses (see section 8 below).
- There is a lower chance of transfer tax on Dutch real estate.
- The seller may be able to apply the participation exemption, which exempts capital gains and dividends (see section 13 below).

Tax disadvantages:

- There is no depreciation of assets at purchase price and no amortisation of goodwill.
- The buyer is in principle liable for the target company’s existing (tax) liabilities.
- The buyer may incur a potential dividend withholding tax liability on retained earnings.
- In principle, all costs relating to acquisitions as well as disposals of participations qualifying for the participation exemption are not tax - deductible.
- Limitation of interest deduction may apply at the level of the acquiring (Dutch) company.

b. Asset deal

Tax advantages:

- The acquired assets and goodwill can be depreciated/amortised for tax purposes at the purchase price (fair market value).
- In general, no (tax) liabilities are inherited.
- No limitation of interest deduction should apply at the level of the acquiring (Dutch) company and no need for debt push-down structuring.
- The Dutch loss-making companies of the acquirer's group (if any) can absorb profitable operations of the target company.
- In principle all acquisition costs are tax - deductible.

Tax disadvantages:

- Capital gains taxation arises at the level of the seller (reflected in the purchase price).
- Possible transfer taxes apply on Dutch real estate (6%).
- The potential benefit of the target company's carry forward losses is retained by the seller (if still available after a gain on the sale of the assets).

Buy-side

4. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Due to the application of the participation exemption there are very limited planning strategies to create a step up in share deals. A step up is in such situation however not considered beneficial.

5. What are the particular rules of depreciation of goodwill in your country?

Goodwill reported for financial purposes following a purchase price allocation of the shares acquired is ignored for tax purposes if the participation exemption applies. Acquired goodwill (in an asset deal) can in general be depreciated in at least 10 years (at an annual rate of 10%). Self-created goodwill can generally not be activated and is therefore not depreciable.

6. Are there any limitations to the deductibility of interest on borrowings?

Under Dutch case law restrictions apply to interest paid on loans that function as equity (hybrid financing) or are qualified as loss-financing or as a fictitious loan. The general abuse of law principle should also be taken into account.

The Dutch Corporate Income Tax Act also provides for numerous and complicated interest deduction restrictions. Therefore professional tax advice should be sought in this regard. Firstly the reported interest (and the other terms and conditions of the financing) has to be at arm's length. Secondly the interest deduction is denied if a loan with no fixed maturity (or a maturity of more than 10 years) is obtained from a related company and the loan bears either no interest or interest at a rate which is substantially lower than that which would have been agreed upon between unrelated parties.

In addition deduction is denied for interest incurred in respect of loans relating to:

- Profit distributions or repayment of capital to a related company or related individual.
- A capital contribution in a related company.
- The acquisition or increase of a participation in a company which becomes a related company after this acquisition or increase.

Exceptions may apply to transactions based on sound business reasons or if the interest is effectively taxed at a sufficient rate (10% in accordance with Dutch standards) at the creditor's level.

As of 1 January 2013 the Dutch thin capitalisation regime has been abolished and the participation interest regime has been enacted. A taxpayer may not deduct excessive participation interest expenses relating to loans taken out from both affiliated as well as third-party creditors. This is to the extent that as the average acquisition price of a (qualifying) participation exceeds the average fiscal equity of the Dutch company, the participation is deemed excessively leveraged. Interest expenses and related costs incurred on this excess financing are in principle not deductible insofar the interest exceeds €750,000. Exceptions may apply to loans taken out to finance expansions of operational activities of the group and detailed rules apply to reorganisations.

Finally, under the leveraged acquisition holding regime the deduction is denied for interest on the debt at acquisition company level, insofar as the acquisition vehicle's interest costs exceed the acquisition vehicle's profit on stand-alone basis (tainted interest). The limitation only applies to the extent that:

- The tainted interest exceeds €1,000,000
- The acquisition debt exceeds 60% of the acquisition price in the year of acquisition (this percentage subsequently declines by 5% over a 7-year period to 25%).

Interest will, therefore, be restricted if the acquisition company itself does not have sufficient taxable profit to set off the interest. In general the acquisition company will not have significant taxable profits and the interest deduction will, consequently, be restricted. Nevertheless the amount of interest, which is non-deductible following the proposed regime, may under certain conditions be carried forward and offset against the acquisition company's holding profits in subsequent years. The limitation of interest deductions will apply to both group and third party interest payments. It is expected that a legislative proposal will be introduced as per September 2016 that may further restrict the interest deductibility as a part of the legislative proposal to tackle the perceived excessive debt financing in private equity acquisitions.

Anti-earnings stripping regulations that are possibly proposed within the EU as a part of the Anti-Tax Avoidance Directive may limit interest deductibility in the future.

7. What are usual strategies to push-down the debt on acquisitions?

As discussed in section 6 above, in general debt push-down structures are limited due to the leveraged acquisition holding regime. Yet various planning structures may be available to achieve an interest deduction. Furthermore, asset transactions could constitute a tax efficient alternative to share transactions, especially if the transferring company has carry forward losses available.

8. Are losses of the target company(ies) available after an acquisition is made?

Carry forward losses may not be available as a result of the transfer of the shares in the target company. Under anti-abuse rules the carry forward losses are not available if the ultimate ownership in the target company has changed substantially (30% or more), with the oldest loss year, unless an exception applies (e.g. the target company is an active trading company which has not substantially decreased its activities or intends to decrease its activities substantially in the future). Separate rules apply to holding and/or finance companies.

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

The Netherlands does not levy capital tax, stamp duties or a minimum tax. If a company is considered as a real estate company, the transfer of shares in the company may trigger a 6% real estate transfer tax (see section 14).

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

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10. Are there any restrictions on the deductibility of acquisition costs?

Transaction costs will, from a transfer pricing perspective, solely be tax deductible if the party that incurred the costs benefited from the services provided. In practice, this rule may limit the possibilities to report these costs at the level of the target company.

Transaction costs (incurred by the acquiring holding company) related to the purchase of a subsidiary to which the participation exemption will apply post-closing will not be tax deductible for CIT purposes. However, costs incurred during the exploratory phase when it is uncertain whether the transaction will take place, or costs related to the financing of the acquisition, such as advisory fees, will be tax deductible. In this regard, it is important to carefully document the timing and nature of the costs.

11. Can VAT (if applicable) be recovered on acquisition costs?

As a general rule, an acquisition vehicle that solely acts as a holding company post-closing cannot recover any input VAT on acquisition costs related the purchase of shares. However, under the condition a holding company that purchases the shares in the light of future management or advisory services against remuneration, should be entitled to claim a VAT recovery.

12. Are there any particular issues to consider in the acquisition by foreign companies? *(for example non-resident taxation rules/substance rules and tax efficient exit routes)*

Anti-abuse rules apply with regards to non-resident corporate shareholders of Dutch entities (see question 2a). Furthermore, it is important to review the applicability of the Dutch participation exemption and proper implementation of substance at the level of the Dutch company (the latter is particularly important from the source jurisdiction's perspective).

13. Can the group reorganise after the acquisition in a tax neutral environment through mergers or a tax group?

a. (de-)mergers

The Dutch law provides several facilities to reorganise in a tax neutral environment at two levels (i.e. for the Dutch tax resident shareholders and for the (de)merging entities), in line with the EU Merger Directive. Taxpayers can in principle claim a reorganisation facility in case of a legal merger, a demerger (this can be a full legal demerger a partial legal demerger), a business merger and a share-for-share merger. These reorganisation facilities may, under circumstances, also apply in cross border situations within the EU/EEA

The reorganisation facilities can in principle be claimed by law. In certain situations however (e.g. if the entities involved report carry forward losses, claim a reduction to avoid double taxation or apply the innovation box regime), the reorganisation facility is only applicable under additional conditions and parties involved should file a request for the applicability of the reorganisation facility to the Dutch tax authorities. Please note that a reorganisation facility will not be granted if the reorganisation is not based on business reasons, such as a valid restructuring or rationalisation of the corporate structure, but is (mainly) aimed to avoid / postpone taxation. It is possible to request the Dutch tax authorities in advance for certainty that the reorganisation is based on sound business reasons. A denial of such request is open to appeal.

As a result of the reorganisation facility, the entity receiving the assets/shares will value these at the original book value as reported by the transferring entity. The tax claim is therefore postponed and possible claw back should be carefully monitored during future reorganisation (e.g. a claw back may arise if the acquiring entity is sold within three years after the reorganisation took place).

b. ax group (fiscal unity regime)

Dutch resident corporate tax payers can in principle form a fiscal unity (a tax group) when certain conditions are met (e.g. the parent company holds at least 95% of the shares and voting interest in its subsidiaries). In line with EU case law, a fiscal unity can also be formed between Dutch tax resident companies that have a mutual EU parent company.

Within a fiscal unity companies can reorganise in a tax neutral way, as transactions between companies belonging to the same fiscal unity are, generally, disregarded for corporate income tax purposes. Anti - abuse provisions may trigger a tax claw back however and should be carefully monitored in future restructuring. In case of a transfer outside the ordinary course of business between companies included in a fiscal unity of an asset that contains a hidden reserve, a claw-back may arise if the fiscal unity ceases to exist within six years after the transaction (three years in case of a transfer of an on-going business against shares).

14. Is there any particular issue to consider in case of companies of which main assets are real estate?

Yes, there is an anti-abuse rule for companies that are considered real estate companies. The transfer of shares in such a company can trigger in principle a 6% real estate transfer tax. A 2% tax rate applies to the acquisition of owner-occupied housing. However various reorganisations exemptions may apply.

A company qualifies as a real estate company if:

i. 50% or more of the company's consolidated assets constitute real estate, and at least 30% of the assets constitute(d) Dutch real estate;

ii. at least 70% of the real estate is used for exploitation (i.e. sale / lease) and not for its own offices, production facilities, etc.; and

iii. the purchaser (in)directly acquires an economic interest of more than 1/3rd in the company.

Sell-side

15. How are capital gains taxed in your country? Is there any participation exemption regime available?

In principle, capital gains derived from the sale of shares are taxed at the Dutch corporate rate of 20-25%. The first EUR 200,000 of profits is taxed against 20%, the remainder up is taxed against 25%. Capital gains derived from qualifying participations are however fully exempt under the Dutch participation exemption.

The participation exemption is applicable to a share interest of at least 5% in a corporate entity that has an equity that is divided into shares (the so called "shares test") and which is not held as portfolio investment (the so-called "motive test").

A shareholding is considered to be held as a portfolio investment if the shareholding is not held in line with the business activities of the shareholder (because the shareholder and the subsidiary do not conduct a business enterprise) and no activities are performed to increase the return on investment in the shareholding (i.e. the shareholder is not involved in the management of the subsidiary).

If participation is however, (deemed) to be held as a portfolio investment, the Dutch participation exemption still applies if the share interest can be considered as a "qualifying" portfolio investment participation. Such participation is present if one of the following conditions is met:

(i) the participation is subject to a profits tax that results in an effective tax rate of at least 10% according to Dutch tax standards ("the reasonable levy test"); or

(ii) the directly and indirectly held assets of the participation generally consist for less than 50% of low taxed free portfolio investments (i.e. not subject to an effective tax rate of at least 10% according to Dutch tax standards). This is the so called "asset test".

Free portfolio investments are assets that are not required for the business of the owner of these assets. Real estate, as well as rights related directly or indirectly to real estate, are generally not considered a free portfolio investments.

In principle no minimum holding period applies for the participation exemption. Please note however that the participation exemption still applies to income from a shareholding that at a certain point drops below 5% for a period of three years, starting at the moment that the shareholding dropped below 5%, but only if that the share interest was held for at least one year during which the participation exemption continuously applied.

16. Is there any fiscal advantage if the proceeds from the sale are reinvested?

The taxpayer may defer taxation of the capital gain realised upon disposal of a business asset by forming a reinvestment reserve. If the proceeds realised upon disposal exceed the asset's book value, the taxpayer may form a reinvestment reserve for the excess if, and so long as, the company intends to reinvest this amount. The amount for which the investment has been formed must generally be reinvested no later than within three years after the year of disposal. Various anti-abuse rules apply with respect to this regime.

17. Are there any local substance requirements for holding/finance companies?

Dutch corporate entities, such as a limited liability company (a BV), are considered a Dutch resident corporate tax payer based on their incorporation under Dutch law, regardless of the level of substance in the Netherlands.

Minimum substance requirements apply however, to companies that qualify as so called "financial service companies' (i.e. its activities consist for at least 70% out of intra-group financing or licensing activities) as well as companies that requests an Advance Pricing Arrangement or Advance Tax Ruling ("APA/ATR") from the Dutch tax authorities. Please find an overview of the minimum Dutch substance requirements below. These minimum substance requirements are furthermore of importance for the non-Dutch corporate shareholders as mentioned in question 2.

The minimum Dutch substance requirements are the following:

- At least 50% of the board of the statutory (and competent) directors should be resident in the Netherlands.
- The directors of the company should be qualified, in order to be able to properly perform their duties.
- The company employs personnel that are qualified to properly manage and administrate the transactions of the company.
- All key management decisions are made in the Netherlands.
- The entities' principal bank accounts must be kept in the Netherlands.
- The bookkeeping / audit activities take place in the Netherlands.
- The company meets at any time its filing obligation for all tax returns (i.e. VAT, wage tax, and CIT).
- The business address and registered office of the company are located in the Netherlands.
- To its best knowledge, the company is not considered a tax resident in any other country.
- Companies carrying out finance, licensing or leasing activities should be exposed to a certain minimum risk (e.g. no full non-recourse provisions) and have sufficient equity to cover those risks.
- Subsidiaries held by holding companies are financed for at least 15% with equity.

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