THE NETHERLANDS

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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

There are various relevant developments for M&A deals and private equity in the Netherlands. In line with the implementation of the actions under the BEPS Action Plan, the Netherlands recently agreed to sign the Multilateral Instrument (some observations were made, please refer to question 2). Furthermore, the innovation box regime has been changed to reflect the conditions set forth in BEPS Action 5. Changes include the "modified nexus approach" and a distinction between Small and Medium Sized Companies (SMEs) and Large companies, whereby Large Companies should consist of a patent or breeder right in addition to the R&D certificate (as sole requirement for SMEs).

The EU Anti-Tax Avoidance Directive I (including earning stripping, CFC-rules, exit taxes, GAAR and EU hybrid mismatches) and the EU Anti-Tax Avoidance Directive II (third country hybrid mismatches) need to be implemented. From a Dutch tax perspective the most relevant provisions included in both directives are the reverse hybrid mismatch rule, as this impacts current CV/BV situations, and the earnings stripping rule. The Anti-Tax Avoidance Directives I and II need to be implemented ultimately per 2019 (the earning stripping rule ultimately per 2024) and 2020 (the reverse hybrid mismatch rule per 2022) respectively. It is expected that a legislative proposal will be published for public comments in the course of 2017.

Moreover, the Dutch Ministry of Finance announced a potential amendment of the Dutch dividend withholding tax regime to equalise the Dutch dividend withholding tax treatment of cooperatives and NV / BV's. The proposed changes will broaden the scope of the Dutch dividend withholding tax exemption and are therefore a welcome improvement of the Dutch investment climate. Unlike NVs and BVs, cooperatives are in principal not subject to Dutch dividend withholding tax unless anti-abuse rules apply. Under this proposal, as per 1 January 2018, non-operational Cooperatives should in principle be subject to Dutch dividend withholding tax. Additionally, the scope of the dividend withholding exemption in Dutch tax legislation is likely to be expanded to shareholders/members of NV/BVs and Cooperatives situated in treaty countries. As a result, the investment structures of mainly non-Dutch private equity investments need to be reviewed in order to determine what the impact of the proposed changes will be. Mainly private equity investment structures with the use of entities in non-treaty jurisdictions such as Cayman Islands and investment structures with the use of Dutch holding cooperatives will be impacted.

In addition, further restrictions have been implemented with respect to interest deduction limitations. Changes have been made to (i) the general anti-base erosion interest deduction limitation and (ii) changes to the interest deduction limitation for leveraged acquisitions.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

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 and no reservations were made with regard to the anti-abuse rules in the Multilateral Instrument. An anti-abuse rule countering the use of intermediate entities in non-treaty jurisdictions or intermediate entities with insufficient substance in the structure is also likely to be implemented in Dutch tax law following the recent announcement. There are furthermore on-going efforts to renegotiate tax treaties with developing countries in order to include an anti-abuse rule.

The Ministry of Finance in the Netherlands endorses this Multilateral Instrument although some reservations were made respect to (i) hybrid entities, (ii) the so called "saving clause", (iii) with respect to splitting-up of contracts and (iv) mandatory binding arbitration. The Netherlands intends to implement at least the conclusions from BEPS

Actions 6 (treaty abuse), 7 (permanent establishments) and 14 (dispute resolution mechanisms) in its tax treaties via the Multilateral Instrument. As a result, the BEPS conclusions should be taken into account in the explanation of the double tax treaties concluded by the Netherlands with jurisdictions that also endorse the Multilateral Instrument.

The Multilateral Instrument is signed in June 2017 and will enter into force after the required ratification has taken place.

Following the EU Anti-Tax Avoidance Directive I the Netherlands is currently working on implementing the rules as set by the Directive in national law (i.e. a CFC and an earning stripping provision will be included). To what extent all rules will be implemented is not yet announced to date. It is however expected that all amendments will be implemented per 2019 (i.e. including the earning stripping rule). The EU Anti-Tax Avoidance Directive II needs to be implemented per 2020 (the hybrid mismatch rule per 2022). It is expected that a legislative proposal will be published for public comments in the course of 2017.

GENERAL

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.
- Better structuring possibilities are available to mitigate Dutch real estate transfer tax being due if the target company owns real estate.
- The seller may be able to apply the participation exemption, which exempts income (capital gains and dividends) derived from qualifying shareholdings.

Tax disadvantages:

- Shares can in principle not be depreciated as opposed to business assets 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, costs relating to acquisitions as well as disposals of participations qualifying for the participation exemption are not tax deductible at the level of the acquiring (Dutch) company.
- An interest deduction limitation 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 (which should be reflected in the purchase price).
- Possible 2%-6% Dutch real estate transfer tax is levied if the assets consist of Dutch real estate.
- The potential benefit of the target company's carry forward losses is retained by the seller (if still available after 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 Dutch participation exemption there are very limited planning strategies to create a step up in share deals. There are however possibilities to create a step up (by means of a voluntary revaluation of assets) in case losses forfeit due to a change of ownership under the anti-abuse rules. Furthermore, in specific situations a step up may be claimed in case a target company exits a Dutch fiscal unity upon the acquisition.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL IN YOUR COUNTRY?

Goodwill reported for financial purposes following a purchase price allocation of the shares acquired is ignored for tax purposes (goodwill is included in the cost price of the shares). Acquired goodwill (in an asset deal) can in general be depreciated in at least 10 years (at an annual rate of 10%). Self-developed goodwill can generally not be capitalised and can therefore not be depreciated.

6. WHAT ARE THE LIMITATIONS TO THE DEDUCTIBILITY OF INTEREST ON BORROWINGS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

- **General**

  The Dutch Corporate Income Tax Act provides for numerous and complicated interest deduction limitations. Therefore professional tax advice should be sought in this regard. The interest limitation rules as described below should be taken into account with regard to financing of the acquisition of shares or assets (assuming that the financing is already qualified as at arm's length debt financing under Dutch tax law and case law).

- **Acquisition of shares**

- Under the general anti-base erosion provision, interest deduction is denied for incurred in respect of intra-group loans relating to certain tainted transactions, among which the acquisition of a subsidiary (related party to be), a capital contribution or a dividend distribution. Exceptions may apply if the transaction and financing are both based on sound business reasons (e.g. if the debt financing is ultimately obtained from a third party) or if the interest is effectively taxed at a sufficient rate (10% in accordance with Dutch standards) at the creditor's level. Recently new legislation has been introduced to the question of when parties are considered "related";
- Based on the excessive debt financing provision, a taxpayer may not deduct interest expenses relating to excessively financed participations on loans taken out from both affiliated as well as third-party creditors. This to the extent and in line with the that the joint acquisition price of (qualifying) participations exceeds the fiscal equity of the Dutch company (the excessive debt). A franchise amounting to EUR 750,000 is provided. 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: (i) the tainted interest exceeds EUR 1 million or (ii) 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 and the acquisition debt exceeds the allowed ratio. The limitation of interest deductions will apply to both group and third party interest payments. As per 2017, new anti-abuse rules have been implemented that may further restrict the interest deductibility to tackle the perceived excessive debt financing in private equity acquisitions. These anti-abuse rules have been implemented for (i) the transfer of the target to another "acquisition vehicle" within the group and (ii) debt push down.

  Please note that the Netherlands has to implement additional anti-abuse rules (earning stripping rule) following the EU Anti-Tax Avoidance Directive I. Other that the current rules on interest deductibility, the earing stripping rule is of a more general nature. It is to date however uncertain how strict the Netherlands will implement this rule and whether any of the above mentioned anti-abuse rules will be abolished. A legislative proposal can be expected early 2018 (preceded by a public consultation at the end of 2017).

Acquisition of assets

There are no specific rules on interest limitations for the acquisition of assets, besides the general concept of abuse of law. Please note that the implementation of the earning stripping rule may impact the acquisition of assets.

7. WHAT ARE USUAL STRATEGIES TO PUSH-DOWN THE DEBT ON ACQUISITIONS?

Due to new anti-abuse legislation, various planning structures that were often used to achieve an interest deduction are no longer available following specific anti-abuse rules included in Dutch tax law. Debt push downs can still be effectuated e.g. in case of third party financing (that is used to finance a dividend distribution). Furthermore, a debt push down can be created to a certain extent by including the leveraged acquisition company and the target company in a fiscal unity. The interest deduction may be limited however based on the leveraged acquisition holding regime.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

In the Netherlands it is currently not possible to deduct costs related to equity. However, the Ministry of Finance is reviewing whether it is possible and beneficial to equalise the tax treatment of equity and debt.

9. ARE LOSSES OF THE TARGET COMPANY(IES) AVAILABLE AFTER AN ACQUISITION IS MADE?

Carry forward losses (at the level of the target company) may be restricted 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), compared to 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). A step-up for the amount of hidden reserves can be claimed however if the losses will forfeit due to application of these rules.

Upon a (de)merger, losses can be transferred at a joint request if certain conditions are met. Furthermore, the transfer of losses should be considered upon an exit from a fiscal unity. Losses in principle remain with the parent company, but so called pre fiscal unity losses and losses of the fiscal unity that are attributable to the target company can however be transferred to the target company upon its exit.

Dutch tax payers that qualify as so called holding and financing companies can furthermore be restricted in the use of the carry forward losses if the activities change post-closing and as a result the qualification as holding and financing company alters.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

Items to be included in the scope of a tax due diligence for a Dutch tax payer (other than the standard market practice scope), include inter alia (i) the presence of a fiscal unity for corporate tax or VAT purposes, as these regimes include specific anti abuse rules that should be reviewed (e.g. interest deduction limitations, claw back provisions and joint and several tax liabilities) and (ii) the debt financing in place and whether any restrictions to the interest deduction applied historically or will apply going forward. Other items include specific wage tax related matters such as (iii) the presence and consequences of an equity incentive for management or employees and (iv) the historic wage tax treatment of freelancers / hired in staff (which may include a historic secondary liability) as well as benefits in kind. In case the transactions involves real estate located in the Netherlands, it should be reviewed whether the contemplated transaction can result in Dutch real estate transfer tax being due.

11. 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% (or 2% in case of owner-occupied housing) real estate transfer tax.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX 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 incur these costs at the level of the target company.

Transaction costs (incurred by the acquiring or selling holding company) related to the purchase or sale of a subsidiary to which the participation exemption applies will not be tax deductible for Dutch corporate income tax 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, can be tax deductible. In this regard it is important to carefully document the timing and nature of the costs.

13. 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 to the purchase of shares. However, under certain conditions a holding company that purchases the shares in the light of future taxable management or advisory services against a remuneration, should be entitled to claim a VAT recovery.

If assets are acquired instead and the holding company continues the enterprise that was carried out through these assets before their transfer, VAT on acquisition costs is only recoverable if it regards a business that performs activities subject to VAT.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION BY FOREIGN COMPANIES?

Non-resident corporate shareholders that fall under the scope of the foreign substantial shareholder regime can be faced with Dutch corporate income tax (max. 25%) on income (dividends, capital gains or interest from a shareholder loan) derived from interests (5% or more) of shares in a Dutch company or membership rights in a Dutch Cooperative (a so called substantial interest).

The current tax legislation stipulates that foreign shareholders/members will be subject to Dutch corporate income tax if (i) the primary objective, or one of the primary objectives, for holding the substantial interest 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. In the following safe harbour situations 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 minimum Dutch substance requirements 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 20 for an overview of the minimum Dutch substance requirements.

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).

These rules are heavily impacted by the expected amendments to the Dutch dividend withholding tax law as per 1 January 2018 and should be monitored.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL ENVIRONMENT THROUGH MERGERS OR A TAX GROUP?

Dutch law provides several facilities to reorganise after the acquisition in a tax neutral environment. Taxpayers can in principle claim a roll-over facility for a merger, a demerger (full or a partial), a business merger and a share-for-share merger. The effect of this roll-over facility is that taxation over any unrealised reserves is deferred because the tax book values are transferred to the acquirer. These facilities may, under circumstances, also apply in cross border situations within the EU/EEA.

Furthermore, Dutch resident corporate tax payers can in principle form a fiscal unity (a tax group) when certain conditions are met. In line with EU case law, a fiscal unity can also be formed between Dutch tax resident companies that have a mutual parent company resident in another Member State of the European Union or by a Dutch resident parent company and a Dutch resident sub-subsidiary that is held by an intermediate company from another Member State of the European Union. Transactions between companies belonging to the same fiscal unity are, generally, disregarded for corporate income tax purposes (i.e. assets can be transferred to other companies in the fiscal unity without taxation). Claw back provisions may be applicable if a company which has been party to intra-fiscal unity transactions leaves the fiscal unity.

16. IS THERE ANY PARTICULAR ISSUE TO CONSIDER IN CASE OF TARGET COMPANIES OF WHICH MAIN ASSETS ARE REAL ESTATE?

The transfer of shares in a real estate company can in principle trigger real estate transfer tax. The tax is levied from the purchaser of the real estate company. This means that the transfer of shares in a foreign company, the assets of which consist also of at least 30% Dutch real estate, may be subject to Dutch real estate transfer tax, even if the transferor and/or transferee are non-Dutch residents. The present rate for residential houses amounts to 2% of the sales price (or if applicable the higher fair market value of the real estate). For other real estate not being residential houses, the rate amounts to 6%. A number of exemptions may apply, amongst others in cases where a transfer is subject to VAT (see below) and in the case of restructurings of enterprises.

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 (including any shares already owned) an economic interest of more than 1/3 in the company, in case the acquirer is a company (7% in case the acquirer is an individual) or increases such economic interest.

In addition, the depreciation of real estate held by a Dutch corporate tax payer can be limited based on the specific activities of that company.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

Dutch resident corporate taxpayers can in principle form a fiscal unity 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 parent company resident in another Member State of the European Union or by a Dutch resident parent company and a Dutch resident sub-subsidiary that is held by an intermediate company from another Member State of the European Union.

The main benefit of a fiscal unity is that profits and losses can be offset by companies included in a fiscal unity. Furthermore, 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. Also only one single corporate income tax return has to be filed.

Anti-abuse provisions may trigger a tax claw back however and should be carefully monitored. In case of a transfer outside the ordinary course of business between companies included in a fiscal unity of an asset that contains a capital gain, 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 a stand-alone business for shares). Furthermore, companies included in the fiscal unity remain joint and severally liable to Dutch corporate income tax liabilities of the fiscal unity.

SELL-SIDE

18. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY?

In principle, capital gains derived from the sale of shares or a business 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%. Please note that it is proposed to gradually increase the lower bracket with the following steps: EUR 250,000 (2018), EUR 300,000 (2020) and EUR 350,000 (2021).

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 (including a company, mutual fund and cooperatives) and which is not held as portfolio investment.
The participation furthermore does not apply to hybrid mismatches (i.e. if the payment has been treated as tax deductible).

If a participation is (deemed) to be held as a portfolio investment, the Dutch participation exemption still applies if the capital interest can be considered a "qualifying" portfolio investment participation. Such a 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; 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).

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 in general not considered 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, but only if that the share interest was held for at least one year during which the participation exemption continuously applied.

19. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES ARE REINVESTED?

In general, the taxpayer may defer taxation of the capital gains realised upon disposal of a business asset by forming a reinvestment reserve. Shares may qualify as an asset to which the above described advantage is applicable, provided that the Dutch participation exemption is not applicable on the income derived from these shares (in that case no fiscal advantage is required as all income is tax exempt). If the proceeds realised upon disposal exceed the book value of the assets, 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.

20. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

In principle, corporate entities incorporated under Dutch law, such as a limited liability company (a BV), are considered a Dutch resident corporate taxpayers, regardless of the level of substance in the Netherlands. It is however key that the company's effective management takes place in the Netherlands, and not in another state, to avoid dual residency issues. It is advisable that a company is not only effectively managed from the Netherlands but that also the Dutch minimal substance requirements are met.

Substance requirements apply 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 request an Advance Pricing Arrangement or Advance Tax Ruling ("APA/ATR") from the Dutch tax authorities.

The current minimum Dutch substance requirements are as follows:

- 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.
- All key management decisions are taken 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.

Based on the envisaged amendments to Dutch tax law, it is expected that the current substance requirements for certain intermediate non-Dutch shareholders/members will be supplemented with two additional requirements: (i) a minimum amount (EUR 100k) of wages payable and (ii) having office space.

21. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

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 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).

In case a real estate company is merged (please refer to question 16 for this definition), this may lead to real estate transfer tax. However tax exemptions may be available for mergers / spin-offs provided that specific circumstances are met (e.g. requirement to retain the real estate for three years). If such requirements are not met a claw-back may apply. Certain intragroup reorganisations (e.g. another merger) are however permitted without triggering this claw back.

For VAT purposes, there are no formal facilities that can be claimed. It needs to be reviewed on a case-by-case basis whether a merger or spin-off can for example be considered outside the scope of VAT as the transfer of a totality of assets.

MANAGEMENT INCENTIVES

22. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES?

Tax consequences in the Netherlands in respect of management incentives differ depending on the characteristics of the incentive plan. The general rule is that income earned is subject to wage tax that is to be withheld by the employer. With respect to straight forward employee incentive plans (i.e. stock options, stock appreciation rights and restricted stock units) the taxable moment is the moment when the rights are exercised and the employee receives the shares or cash. Taxation may also incur at the moment the incentive is granted to the employee. However, this is for example only the case when the employee receives the full economic and legal

ownership at grant. In some cases, a discount can be applied for tax purposes if the shares are restricted in a certain manner.

For shareholdings of managers (carried interest structures), e.g. in private equity related structures, specific anti-abuse legislation is applicable in the Netherlands. Preference shares which constitute less than 10% of the total share capital with a preference of more than 15% are considered a lucrative interest. However, also other shareholdings, loans or any other rights, of which the valuation increase can be seen as remuneration for the managers' activities, can be considered lucrative under this legislation (i.e. shareholdings with multipliers, ratchets, etc.). Based on the anti-abuse legislation, any income derived from such lucrative interest are taxable as other income against the progressive tax rates of max. 52% (instead of being taxed as income from savings and investments). Upon setting up such structures it is recommendable to gain advice in order to reduce any unforeseen tax risks.

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