THE NETHERLANDS

THE NETHERLANDS

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 signed the Multilateral Instrument (MLI) in 2017 (some observations were made, please refer to question 2).

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) are expected to be implemented as per 2019 and 2020 respectively. It is yet unknown when the legislative proposal will be published for public comments. 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.

Moreover, the Dutch Government amended the Dutch dividend withholding tax regime as per January 2018 to equalize the Dutch dividend withholding tax treatment of cooperatives and NV / BV's. The changes broadened the scope of the Dutch dividend withholding tax exemption and are therefore a welcome improvement of the Dutch investment climate. NVs and BVs are now treated similarly as cooperatives and are in principal not subject to Dutch dividend withholding tax unless anti-abuse rules apply. Furthermore, non-operational cooperatives are now in principle subject to Dutch dividend withholding tax. Additionally, the scope of the dividend withholding exemption in Dutch tax legislation is 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 changes will be. Mainly private equity investment structures with the use of entities in non-treaty jurisdictions, intermediary holding companies with insufficient substance and Dutch holding cooperatives will be impacted.

The Dutch Government has also proposed some additional amendments in the near future: 1) the potential abolishment of the dividend withholding tax as per 1 January 2020; 2) the potential implementation of a conditional withholding tax on dividends (1 January 2020), interest (2021) and royalties (2021); 3) further restrictions may be implemented to the fiscal unity regime (please refer to question 17).

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 MLI. There are furthermore on-going efforts to renegotiate tax treaties with developing countries in order to include an anti-abuse rule.

The MLI is signed, but not ratified, by the Dutch Government in June 2017. After ratification by the Netherlands, the earliest moment for the entry into force of the MLI for the Netherlands is 1 January 2019 for the withholding taxes and 1 January 2020 for all other taxes due to the required transition period of the MLI. Furthermore, both treaty partners in a bilateral treaty have to ratify the MLI and have to get through the transition period before the MLI will apply on that particular treaty.

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). Please refer to question 6 for more information on the implementation of the earning stripping rule. As indicated in paragraph 1 the EU Anti-Tax Avoidance Directive II is expected to be implemented as per 2020. It is expected that a legislative proposal will be published for public comments early 2018.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND 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 AMORTIZATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS 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 capitalized and can therefore not be amortized. Other (intangible) assets can be amortized in at least 5 years (at an annual rate of 5%).

6. WHAT ARE THE LIMITATIONS ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS 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 summary of 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 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
- 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 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 is about to implement additional anti-abuse rules (earning stripping rule) following the EU Anti-Tax Avoidance Directive I. Other than the current rules on interest deductibility, the earning stripping rule is of a more general nature. The earning stripping rule will limit the deductibility of the net interest expenses to 30% of a company's EBITDA with a threshold of EUR 1 million. The earning stripping rule will apply for financial years starting on 1 January 2019 or later. ATAD 1 provides grandfathering for loans contracted before 17 June 2016. The Netherlands, however, does not makes use of this possibility. Once the earning stripping rule is implemented, the Dutch Government intends to abolish some of the existing interest deduction limitations, except for the general anti-base erosion provision.

Acquisition of assets

There are no specific rules on interest limitations for the acquisition of assets, besides the general concept of abuse of law and the earning stripping rule as of 2019. Please note that the implementation of the earning stripping rule may impact the acquisition of assets.

7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN 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 may still be effectuated e.g. in case of third party financing. 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.

9. ARE LOSSES OF A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?

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.

Costs related to the financing of the acquisition are in principle deductible.

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 OF A DOMESTIC COMPANY BY A FOREIGN COMPANY?

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.

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 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 harbor 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 intermediary shareholder/member in the jurisdiction of residence. Please refer to question 20 for an overview of the minimum Dutch substance requirements. In addition, as per April 1, 2018 the following substance criteria are also applicable to intermediary holding companies:

- The company incurs annual payroll costs of at least EUR 100,000
- The company has an office space at its disposal for at least 24 months

Similar anti-abuse rules have been introduced with respect to the current domestic dividend withholding tax exemption. In case (i) the primary objective, or one of the primary objectives, for holding the participation is to evade dividend withholding tax or personal income tax at the level of the shareholder and (ii) this involves an artificial arrangement, the domestic dividend withholding tax exemption will not be applicable. The same safe harbor situations apply as with the foreign substantial shareholder regime. Please note that existing tax treaties may prohibit the Netherlands from (partly) applying dividend withholding tax. The implementation of the MLI and the Principal Purpose Test may change this position.

As mentioned in paragraph 1, the dividend withholding tax as such may be abolished as per 1 January 2020. As per the same date a conditional withholding tax on dividends may be introduced and as per 2021 a conditional withholding tax on interest and royalties may also be introduced. The conditional withholding taxes will only be levied in cases of abuse.

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).

15. CAN THE GROUP REORGANIZE AFTER THE ACQUISITION IN A TAX NEUTRAL MANNER THROUGH MERGERS OR A TAX GROUPING?

Dutch law provides several facilities to reorganize 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 unrealized 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, mostly, 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. Please refer to question 17 for more information on the recent changes regarding the Dutch fiscal unity regime.

16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?

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 reorganize in a tax neutral way, as transactions between companies belonging to the same fiscal unity are, mostly, 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.

Please note that due to a decision of the European Court of Justice the Dutch State Secretary announced emergency measures to ensure no further base erosion of the Dutch tax base occurs. When the new legislation is introduced the fiscal unity regime will be disregarded in certain situations. This may result in interest expenses no longer being deductible at the level of the fiscal unity. Furthermore, the loss compensation rule and dividend withholding tax rules may become applicable within the fiscal unity. These measurements will become retroactively effective from 25 October 2017. However, for the application of the interest deduction limitation rule under the scope of art.10a DCITA the Dutch State Secretary of Finance granted grandfathering for loans that already existed on the 25 October 2017 (11 am) until 31 December 2018. Small enterprises (turnover max. EUR100,000) are being exempt from the emergency measures. It is expected that a new group taxation regime will be implemented in the future.

18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?

The innovation box regulations in the Netherlands aims to stimulate technical innovation and allow companies to have profits derived from (qualifying) intellectual property taxed at an effective tax rate of 7% (before 1 January 2018 the effective rate was 5%).

Per January 2017 some changes have been implemented regarding the innovation box. These 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 whereas SMEs only need to have a R&D certificate.

19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?

The Netherlands levies an exit tax in case of a transfer from tangible and/or intangible assets out of the country. The exit tax as prescribed by ATAD1 will therefore not be included in the Dutch tax law. The exit tax as currently applicable in the Netherlands will be adjusted with respect to the provisions on the deferral of payment of exit taxes. The Tax Collection Act currently provides for a deferral spread over a 10-year period; according to ATAD1 this should not be more than 5 years. For corporate income tax purposes, it has therefore been proposed to shorten the deferral to five years. Another minor change is the term of payment. The deferred tax should now be paid within 5 equal yearly terms.

SELL-SIDE

20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?

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 intended to reduce the corporate income tax rate gradually with 4 percent. If it is agreed upon by the Dutch Parliament, the reduction of the rate will be respectively from 20-25%, to 19-24% in 2019, to 17.5-22.5% in 2020 and finally 16-21% in 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.

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

In general, the taxpayer may defer taxation of the capital gains realized 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 realized 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.

22. 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.

If these conditions are not met the financing/licensing/holding company risks that the Netherlands will spontaneously exchange information to the relevant tax treaty partner or EU Member State. This risk will also apply on existing companies and therefore they also will have to meet the (increased) substance requirements.

Please note that the additional substance requirements as mentioned in paragraph 14 may also become applicable to these so called "financial service companies" as well as to companies that request an Advance Pricing Arrangement or Advance Tax Ruling ("APA/ATR") from the Dutch tax authorities.

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

Dutch law provides several facilities to reorganize 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 reorganization 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 reorganization facilities may, under circumstances, also apply in cross border situations within the EU/EEA.

The reorganization 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 reorganization facility is only applicable under additional conditions and parties involved should file a request for the applicability of the reorganization facility to the Dutch tax authorities. Please note that a reorganization facility will not be granted if the reorganization is not based on business reasons, such as a valid restructuring or rationalization 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 reorganization is based on sound business reasons. A denial of such request is open to appeal.

As a result of the reorganization 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 reorganization (e.g. a claw back may arise if the acquiring entity is sold within three years after the reorganization 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 reorganizations (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

24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

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. Subordinated shares which constitute less than 10% of the total share capital or preference shares 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.

FOR MORE INFORMATION CONTACT:

Marc Sanders
Tel: +31 20 435 6400
E-mail: marc.sanders@taxand.nl