

Netherlands Budget Day Update 2022

On 21 September 2021, the Dutch government published its 2022 tax plans. They are largely as expected without any breaking news – in line with the current outgoing status of the cabinet.

Together with earlier announced proposals, the following key tax (corporate) tax items are now on the 2022 tax agenda:

- **CIT Brackets:** Regular CIT rate remains 25%, with an extension to EUR 395k (2021: EUR 245k) of the step-up bracket taxed against 15%.
- **Tax losses:** As of 1 January 2022, tax losses can be carried forward indefinitely. However losses may be offset in full against taxable profits up to EUR 1 million, the set-off will be limited to 50% for taxable profits in excess of the EUR 1 million.
- **Reverse hybrids:** Reverse hybrid entities will be treated as Dutch tax residents for corporate income tax purposes. Furthermore, they will become a withholding agent for the dividend WHT act and the conditional WHT act on interest and royalties. There are certain exemptions for investment funds.
- **ATAD 2 for individuals:** ATAD 2 rules will also apply if a hybrid mismatch arises between a Dutch taxpayer and a related individual.
- **Sofina:** No more dividend refund for Dutch taxpayers only credits.
- **Transfer pricing mismatches:** Proposal to avoid double-non-taxation arising from transfer pricing mismatches.
- **Conditional WHT:** Technical changes to the conditional interest and royalty withholding tax.
- **Employee stock options:** Amendments to the taxation of employee stock options.

Next to the 2022 legislative proposals, certain other proposals will be announced separately:

- **Dutch entity classification:** This winter will see a separate legislative proposal overhauling the Dutch entity classification rules for partnership entities. It is expected to apply to limited partnership entities only (CV and comparable foreign limited partnership entities), not addressing the classification rules of the Dutch mutual fund entity *fonds voor gemene rekening*.
- **Substance holding companies:** Whilst initially announced to apply per 1/1/2022, new substance rules for Dutch holding companies are now expected by the end of 2021 – in order to ensure alignment with the European Commission's ATAD 3 proposal against the use of letterbox companies.
- **Conditional WHT on dividends:** Per 2024, dividend payments will be added to the scope of the new conditional withholding tax on interest & royalty payments to selected low-tax and non-cooperative countries.
- **Equity-Debt bias:** in order to come to a more balanced approach to the Dutch tax treatment of equity versus debt financing, the government is still reviewing plans to come to a more equal tax treatment.

Details on legislative proposals

- **Tax losses:** Currently tax losses can be carried forward for 6 years and the carry-back period 1 year. In the 2021 Tax Plan it was already proposed that as of 1 January 2022, tax losses can be carried forward indefinitely. However losses may be offset in full against taxable profits up to EUR 1 million, the set-off will be limited to 50% for taxable profits in excess of the EUR 1 million.

***Taxand take:** it is important to take these new rules into account when valuing tax losses in the annual accounts.*

- **Reverse hybrids**

Reverse hybrid entities entered into under Dutch law or established in the Netherlands of which at least 50% of the participants consider the entity non-transparent will be treated as Dutch tax residents for corporate income tax purposes. Furthermore, they will become a withholding agent for the dividend WHT act and the conditional WHT act on interest and royalties. The measure does not apply to designated for UCITS and alternative investment funds.

***Taxand take:** carefully review existing reverse hybrid CV's as the Dutch entity classification is likely not amended per 1 January 2022.*

- **ATAD 2 for individuals**

Currently ATAD 2 rules only apply between Dutch taxpayers and related entities and not with related individuals. As of 2022 the implementation of the ATAD 2 rules will also apply if a hybrid mismatch arises between a Dutch taxpayer and a related individual. This can be a attention point for funds with many private individuals investing e.g. transparent investment structures for US private individuals.

- **Sofina: Amendments to refund dividend withholding tax**

Currently Dutch taxpayers in a loss position can still request for a full refund of dividend withholding tax. Foreign taxpayers, who are not subject to Dutch corporate income tax but otherwise in a similar position, could (up to the Sofina case) not request for such a refund. To limit the budget impact of the Sofina case and to comply with EU law, the Dutch government proposes to only credit dividend WHT (and up to the amount of corporate income tax payable) in a given tax year for Dutch taxpayers. Non-credited dividend withholding tax can be carried forward to following tax years.

***Taxand take:** Sofina refunds can still be claimed for years prior to 2022.*

- **Transfer Pricing Mismatches**

New Corporate Income Tax articles (8ba, 8bb, 8bc, 8bd and 35) are being proposed that relate to transfer pricing. Currently the arm's length principle is being applied in the Netherlands. The foreign treatment of transactions has been irrelevant for the Dutch position, although since mid-2019 it is no longer possible to obtain rulings when a tax benefit exists because of an international mismatch.

With the new articles it will no longer be possible to deduct additional costs or to incur additional depreciation on an asset in the Netherlands, if the actual commercial price was different and the tax adjustment is not followed and taxed in the foreign jurisdiction which is involved. It thus relates to commercial to tax differences that exist because of application of the arm's length principle in the Netherlands, with a different foreign application. The new legislation amongst others targets so called informal capital or deemed dividend structures. Three main examples have been provided which we will summarize below.

- I. A Dutch company obtains a loan from a foreign affiliated company with an agreed interest rate of 0%. An arm's length interest rate would be 5%. Based on the existing legislation the arm's length interest rate should be deducted for tax purposes. While with the proposed legislation this depends on whether the foreign legislation requires a corresponding adjustment, i.e. including the arm's length interest of 5% as taxable income which is taxed accordingly. If this is not the case the 5% interest may no longer be deducted in the Netherlands.
- II. A Dutch company provides a loan to a foreign affiliated company with an agreed interest rate of 8%. An arm's length interest rate would be 4%. Based on the existing legislation the arm's length interest rate should be reported as income for tax purposes. While with the proposed legislation this depends on whether the foreign legislation requires a corresponding adjustment, i.e. deducting an arm's length interest of 4% and not 8%. If instead 8% is deducted in the foreign country, the Netherlands will also tax the 8% interest rate, herewith deviating from the arm's length principle.
- III. A Dutch company acquires an asset (e.g. an intangible asset) for a price of 75 while an arm's length price would have been 200. Based on the existing legislation the asset should be booked on the tax balance sheet for an amount of 200 and depreciated accordingly. While with the proposed legislation this depends on whether the arm's length price is reported as taxable income and is taxed accordingly. If the foreign country only taxes 75 as income, the Dutch company should book the asset on its tax balance sheet for the same amount and may only depreciate the asset accordingly if appropriate.

It is expected that the proposed legislation will be introduced starting 1 January 2022. Regarding example 3, the legislation can also affect transactions that already took place in the past and impact that taxable income in the Netherlands in 2022 and onwards. This relates to assets that were acquired from affiliated companies since mid-2019, that are depreciated in 2022 and onwards, in this way matching the changes to the Dutch ruling practice.

- **Technical changes to the conditional interest withholding tax**

Per 2021, the Netherlands levy a 25% withholding tax on intra-group interest payments to companies in selected low-taxed or blacklisted jurisdictions, to certain hybrid entities and in certain abusive situations. The withholding tax not only applies to payments by Dutch resident companies, but also by non-resident entities – in situations where the payment is allocable to a Dutch permanent establishment.

The legislation now seeks to include payments by non-resident entities which are allocable to (passive) Dutch *real estate assets* – which by themselves do not necessarily qualify as a permanent establishment for Dutch tax purposes.

In addition, the conditional interest withholding tax act will see a technical clean-up to clarify that payments to hybrid entities are not in scope if all underlying participants (i) classify the hybrid entity as transparent and (ii) would not be in scope of the conditional interest withholding tax in the case of a direct payment.

Taxand take: *to the extent not already done, careful review should be undertaken on structures in which Dutch real estate assets are held by foreign (e.g. Luxembourg etc.) property companies.*

- **Employee stock options**

Currently stock options are subject to wage tax when the employees exercise the stock options. It is proposed that as of 2022, taxation can be deferred until the shares can be traded. This aims to avoid employees not having the cash available to pay the tax on the exercise of the stock options as they can then sell (part of) their shares. To avoid any overly long tax deferral, the term is maximized. The deferral is, in principle, a maximum of 5 years after the shares have been obtained for listed companies, or 5 years after the IPO for initially non-listed companies. The employee can opt to still have the tax imposed at the moment the share option rights are exercised.

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