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News Update

2012 Tax Bill

Proposed amendments to corporate income tax and dividend tax

On 15 September 2011, the Dutch Ministry of Finance presented the 2012 Tax Bill (*Belastingplan 2012*). This newsletter briefly addresses the most important proposals from an international perspective. The Tax Bill is subject to change during the legislative process. If accepted, the proposed amendments discussed below will enter into force on 1 January 2012.

Non-deductible interest of acquisition debt within the fiscal unity

Interest on debt, whether third party debt or group debt, used to acquire a Dutch company may partly not be tax deductible if (i) the target company is included in a fiscal unity (*fiscale eenheid*) with the acquiring company or if (ii) the target company and the acquiring company enter into a legal merger or a legal demerger.

The overall aim of this proposal is to limit highly leveraged acquisitions that cause the erosion of the Dutch tax base of a target company. This specific limitation will only be applicable if the acquiring company itself (including any other members of the fiscal unity, but excluding the target company) does not generate sufficient taxable profits.

In the calculation of the amount of non-deductible interest, a threshold will apply to interest up to the amount of EUR 1,000,000 and a debt-to-equity ratio of 2:1 will be applied. Non-deductible interest may be carried forward to future years. This interest carried forward can be offset against the stand-alone profits of the acquiring company or of any other members of the fiscal unity except the target company itself.

Specific rules will apply to avoid the situation of the consolidated equity being reduced by the amount of goodwill related to the acquisition of the target company.

The new rules will only apply to acquisitions on and after 1 January 2012. Specific grandfather rules will be introduced for transactions taking place before the end of this year.

Limits on taxation of non-resident entities with a substantial interest in Dutch entity

Under the current rules, a non-resident entity is subject to Dutch corporate income tax if this entity (i) generally has an interest of at least 5% in a Dutch entity and (ii) this interest cannot be allocated to the business enterprise of the non-resident entity ("*business test*").

Under the proposal, a non-resident entity will be subject to CIT only if it (i) meets the business test and (ii) the substantial interest is being held mainly to avoid the Dutch individual income tax or Dutch dividend tax of another person. If the substantial interest is being held only to avoid dividend withholding tax, an effective tax rate of 15% will apply to dividend distributions.

Dividend tax refund for non-EU or non-EEA tax-exempt portfolio investors

Dutch-based tax-exempt entities (such as pension funds), as well as other qualifying EU or EEA tax-exempt entities, are entitled to receive, on request, a full refund of Dutch dividend withholding tax. The Tax Bill aims to extend the availability of the dividend tax refund to a qualifying non-EU or non-EEA resident tax-exempt entity if (i) the Netherlands has concluded a bilateral or multilateral tax treaty with the entity's country and (ii) this tax treaty contains an exchange of information provision.

Anti-abuse provision for specific distributions by a Dutch cooperative

As a general rule, profit distributions by a Dutch cooperative ("**Coop**") are not subject to Dutch dividend withholding tax. Under the Tax Bill, Dutch dividend withholding tax will be payable

on profit distributions by a Coop to a member if (i) the member is mainly using the Coop to avoid Dutch dividend withholding tax or non-Dutch taxation of another person and (ii) the membership interest in the Coop cannot be allocated to the business enterprise of that member.

In addition, a rule will be introduced to target a transfer of interests in a Dutch resident entity to a Coop. These rules will preserve the existing Dutch dividend withholding tax claim on the amount of the Dutch entity's distributable profits at the time a Coop acquires shares in this entity. A member of a Coop will remain subject to dividend withholding tax to the amount of the existing claim.

New rules for permanent establishment losses

The Tax Bill proposes a new method of avoiding international double taxation of permanent establishments ("**PE**") of Dutch resident entities. For low-taxed passive PEs, a special regime providing a credit for foreign income in certain circumstances will be introduced.

The main purpose of the proposal is to disallow Dutch resident entities to offset PE losses against Dutch profits. Under the current rules, it is possible to take a PE's losses into account in the Netherlands at the moment they are realized, and to postpone offsetting the PE's profits against these losses, e.g. by converting the PE into a subsidiary.

Under the new rules, any overall losses realized during the existence of the PE may be taken into account in the Netherlands at the moment of closing the PE, but only if these losses cannot be offset against any other (future) foreign income in the country in which the PE was located. In addition the losses can only be taken into account if the business of the PE is not continued by a party related to the Dutch taxpayer.

The rules for calculating the PE results will remain unchanged.

Research and development facilities extended

The Dutch Government has proposed the introduction of a new generic research and development ("**R&D**") facility that would allow a deduction for R&D expenses. This will reduce direct R&D costs and therefore stimulate R&D activity in the Netherlands. Employment costs are not included in this proposal because there is already a specific wage tax facility in place. The details of this new facility will be made public later this year.

New rules for applying the 30% rule

Certain non-resident individuals starting employment activities in the Netherlands under a genuine employment agreement with a Dutch resident company may benefit from the favourable 30% tax rule. The most important requirement is that an employee have specific expertise that is scarce in the Netherlands.

Under the new rules, an employee would have to earn a minimum gross income of €50,619 per year (excluding the 30% reimbursement for extraterritorial expenses). Under the proposed Tax Bill, there will be a new reference period of 25 years, which will prevent the rule from being applied more than once to the same person.

Employees residing within 150 kilometers of any border with the Netherlands can no longer apply for the 30% ruling. For young non-resident employees performing doctoral research in the Netherlands specific rules will apply.

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