
Proposed 2017 Dutch tax package provisions would affect multinationals

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In brief

The Dutch Ministry of Finance on September 20, 2016, presented the 2017 Dutch tax package (the ‘Tax Package’) to the legislature, together with certain other tax measures and documents. The most relevant changes for multinational enterprises (MNEs) are as follows:

- alignment of the Dutch innovation box rules with the Organisation for Economic Co-operation and Development’s (OECD’s) modified nexus approach
- a gradual expansion of the corporate income tax bracket subject to the lower 20% rate and
- changes to two interest deduction limitations.

The documents include a letter in which the Dutch State Secretary of Finance again expressed the intention to lower the top corporate income tax rate in the near future. Another letter states that the State Secretary plans to release a bill in 2017 that will relax the Dutch dividend withholding tax rules.

In detail

A more competitive corporate income tax rate

While the current Dutch corporate income tax rate is 25%, a lower rate of 20% applies to taxable income up to 200,000 euros (EUR). The Tax Package includes a proposal to gradually increase the taxable amount to which the 20% rate applies to EUR 250,000 in 2018, EUR 300,000 in 2020, and EUR 350,000 in 2021.

In a separate letter, the Dutch State Secretary of Finance again announced the

intention to lower the top Dutch corporate income tax rate in the near future. The letter does not explicitly offer an alternative rate, but 17% has been mentioned by various sources. The letter also does not discuss a specific way to fund the reduction but refers to separate studies. The letter indicates that a decision to implement a rate reduction could be made next year after the Dutch elections.

Observation: The Netherlands has generally

had a competitive corporate income tax rate and an attractive investment climate. These should continue if the proposed and anticipated changes are enacted.

Broadened exemption from dividend withholding tax for Dutch cooperatives, BVs, and NVs

The Dutch State Secretary of Finance also sent a letter to the House of Representatives regarding the Dutch dividend withholding tax treatment of cooperatives, BVs, and NVs.

The State Secretary intends to draft a legislative proposal that broadens the exemption from dividend withholding tax when there is a participating ownership interest equal to or greater than five percent. It also would further align the Dutch dividend withholding tax treatment of cooperatives, BVs, and NVs.

The State Secretary also proposes in the letter that holding cooperatives be subject to Dutch dividend withholding tax. At the same time, the State Secretary proposes an exemption from dividend withholding tax for distributions from cooperatives, BVs, and NVs for a participating ownership interest held by a parent company resident in a jurisdiction that has a tax treaty with the Netherlands. The exemption would not apply in the context of abuse of law. Consequently, a Dutch dividend withholding tax exemption would apply to many entrepreneurial structures.

Observation: Broadening the exemption from dividend withholding tax when there is a participating ownership interest would be a positive development. However, the letter's wording seems to indicate that the broadened exemption would be limited to situations in which the parent company is resident in a country that has a tax treaty with the Netherlands. The question arises as to whether that is a necessary limitation, given that an entrepreneurial structure is already required. No clear policy has been offered for non-treaty situations, meaning that we will have to wait and see what effect a further legislative proposal would have.

Note that this is merely a letter and not a legislative proposal. Therefore, there is insufficient clarity regarding the exact proposed amendment to the Dutch dividend withholding tax.

Alignment of innovation box regime with OECD BEPS Action Item 5

The Dutch innovation box is a preferential regime for certain profits, including royalties, derived from a self-developed intangible asset. Provided that it meets certain conditions, a taxpayer may elect to apply a lower effective tax rate of five percent to profits derived from these intangible assets. In response to the recommendations included in the OECD report on Base Erosion and Profit Shifting (BEPS) Action Item 5, the Ministry of Finance has proposed to amend the Dutch innovation box regime. To a large extent, the existing regime would remain unchanged. The main changes relate to the access criteria for the innovation box and the nexus approach.

- Small taxpayers could make a research & development work declaration (so-called 'Speur- & Ontwikkelingswerk verklaring' or 'S&O declaration') in order to take advantage of the innovation box. Large taxpayers — taxpayers that, on average, measured over a period of five years, have a group net turnover greater than EUR 50 million per year or generate gross income from innovative activities of more than EUR 7.5 million per year — need an additional entrance ticket, such as a patent, breeder's right, user model, medicine, or software license. Brands, trademarks, and other similar assets are explicitly excluded from the Dutch innovation box as they are not the result of technical innovation.
- Implementation of the OECD BEPS nexus approach implies that stricter substance requirements would apply going forward. The

nexus approach prevents companies without substantial innovative activities in the Netherlands from benefitting from the innovation box. The income qualifying for the innovation box is determined based on a so-called 'nexus formula', whereby the R&D expenditures incurred by the taxpayer itself and not outsourced to related parties for the development of the intangible assets are considered a measure of substantial innovative activities in the Netherlands.

The proposed legislation would take effect January 1, 2017.

Observation: The innovation box continues to make the Netherlands an attractive location for MNEs planning to invest in R&D because they can benefit from a preferential tax regime. The proposed changes would strengthen the Netherlands' position as a responsible jurisdiction for R&D investments and make such investments more sustainable.

Amendments to interest deductibility provisions

Existing Dutch anti-base-erosion rules limit the deductibility of interest expenses on related-party debt used for certain 'tainted transactions' that result in Dutch tax base erosion. The Ministry of Finance has proposed changes to broaden the scope of these rules to apply to situations in which, when viewed strictly, the parties involved are not related but in reality are operating as a group and are related in appearance.

The Tax Package also includes a proposal to amend the existing acquisition debt rules to prevent certain undesirable outcomes. If an acquisition company and target company are included in a fiscal unity for Dutch corporate income tax

purposes, the acquisition debt rules prevent a company from deducting interest expense on the excessive acquisition debt against profits of the target company. The proposed changes would prevent companies from avoiding the acquisition debt rules by means of a debt push-down to the target company.

The proposals also would make the ‘financing escape’ – dictating the portion of debt that is considered excessive for purposes of the rules – more robust by disallowing internal share transfers to avoid the non-deductibility of interest expenses.

Finally, the new rules would restrict the grandfathering rules that were initially introduced. The proposed changes would take effect January 1, 2017.

Observation: Interest expense generally is deductible for Dutch corporate income tax purposes. The application of certain restrictions should be determined on a case-by-case basis. Further, in light of BEPS Action Item 4 and the recently adopted European Anti-Tax

Avoidance Directive, the Netherlands is expected to introduce an earnings-stripping interest limitation rule under which certain existing rules may be abolished.

Other proposed changes

The Ministry of Finance has also proposed changes in response to recent court cases in the Court of Justice of the European Union to prevent discrimination against non-resident shareholders in certain situations.

Under the proposals, a dividend withholding tax refund may apply to the extent the dividend withholding tax due is higher than the personal or corporate income tax that would be payable if the shareholder had been a Netherlands’ tax resident.

The takeaway

The tax environment is changing rapidly. The latest proposals would make the Netherlands tax system more robust and sustainable while further improving the country’s attractive investment climate. For MNEs, the key takeaways include:

- a gradual increase of taxable amount to which the lower corporate income tax rate applies and an expected reduction in the corporate income tax rate
- although mere holding cooperatives likely will become subject to Dutch dividend withholding tax, the general exemption potentially would make Dutch dividend withholding tax a non-factor for MNEs with a Dutch entrepreneurial structure
- the proposed changes to the Dutch innovation box regime would align the regime with recent international tax developments
- in general, interest expense is deductible in the Netherlands. The potential implications of the proposed changes to certain interest limitation rules would be largely limited to very specific circumstances.

Let’s talk

For a deeper discussion of how this might affect your business, please contact:

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