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TAX NEWS BULLETIN

Topics in this Tax News Bulletin:

- **Relaxation of the conditions for carrying back tax losses incurred in 2008**
One of the Dutch measures intended to mitigate the consequences of the financial crisis is support of the cash flow position of companies by a one-off relaxation of the normally very strict conditions for carrying back tax losses incurred in 2008.

- **Legislative proposal to amend the inheritance and gift tax act**
The Dutch State Secretary of Finance has submitted a proposal to amend the inheritance tax and gift tax act ("IGTA"). If approved by Dutch Parliament, the revised regulations are expected to become effective on 1 January 2010.

- **Recent developments in ECJ case law**
 - *Cartesio (ECJ 16 December 2008, C-210/06)*
 - *Papillon (ECJ 27 November 2008, C-418/07)*

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May 2009

Relaxation of the conditions for carrying back tax losses incurred in 2008

One of the Dutch measures intended to mitigate the consequences of the financial crisis is the supporting of the cash flow position of companies by a one-off relaxation of the normally very strict formal conditions for carrying back tax losses incurred in 2008. Under the temporary relaxation, issued in a Decree from the State Secretary of Finance, 80% of tax losses incurred in 2008 are available for carry back even if:

1. the (2008) tax return from which the loss follows has not been filed yet, and
2. if the prior years to which the tax loss is carried back have not become final yet through a final assessment.

The taxpayer is still required to provide documentation supporting the expected loss. The Decree has become effective retroactively as of 8 April 2009, and expires on 1 July 2010.



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Legislative proposal to amend the inheritance and gift tax act

The Dutch State Secretary of Finance has submitted a proposal to amend (“the Amendment”) the inheritance tax and gift tax act (“IGTA”). If approved by Dutch Parliament, the Amendment is expected to become effective on 1 January 2010.

The most significant material changes proposed in the Amendment are:

- Simplification of the business succession facility
- Tax transparency of trusts and trust-like entities
- Combating abuse of law

Other changes include:

- ❖ Simplification of the IGTA through significant reduction of both the level and number of tax rates and increase of exempt threshold amounts
- ❖ Simplification of tax compliance

Business succession facility

The business succession facility was formed by several provisions in different tax acts, and decrees. These provisions will now be incorporated as much as possible in the IGTA.

The most important changes are as follows:

- The exemption from inheritance and gift tax is increased from 75% to 90% of the going-concern value of the business.
- Portfolio investments of the business are only eligible for the facility for an amount equivalent to 5% of the net equity value of the business (in stead of the current 15% of the value of the shares of the company comprising the business).
- In order to be eligible for the facility, the donor need not have reached the age of 55 or be disabled for at least 45%.
- The deceased must have owned the business for at least one year prior to his or her death. For gifts, under current and proposed law the donor is required to have owned the business for 5 years prior to the gift.

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Tax transparency of trusts

In recent years, there has been a significant increase in the use of Dutch and foreign trust and trust-like entities to avoid income tax, inheritance tax, and gift tax. Commonly used trusts are the Anglo-American trust, the Dutch foundation, the “Stiftung”, the “Anstalt”, the Dutch Antilles “Individual Fund Foundation” (“Stichting Particulier Fonds”), the “Treuhand”, etc. In the typical case the beneficiaries to the trust capital are the descendants of the settlor. The beneficiaries have no ownership of the trust capital, and no legally enforceable right to distributions or other payments out of the trust capital. The trust has no shares or other ownership certificates, and the trustee has no right or legal entitlement to the trust capital. The result is that the trust capital is not taxable in the hands of any person. Distributions or other payments out of the trust capital are taxable only with the beneficiaries if and when they are actually made.

In order to counter abuse of trusts for tax evasion and tax avoidance purposes, the State Secretary of Finance proposes to treat trusts and trust-like entities as transparent for Dutch income tax and inheritance and gift tax purposes. The capital of the trust is attributed to, and taxed with, the settlor of the trust. Contributions of capital to the trust are not subject to tax. Payments made to the beneficiaries are treated as payments made by the settlor. The beneficiaries are subject to gift tax upon obtaining any legally enforceable right to the capital of the trust, and subject to inheritance tax upon the death of the settlor. The settlor and beneficiaries can elect at any time to have the trust capital attributed to the beneficiaries, rather than to the settlor.

Abuse of law

In recent years, several legal structures had been invented to reduce or avoid inheritance and gift tax, such as the sale of assets with a deferred ownership transfer (to avoid tax on the increase in value in the interim), the conditional gift or non-interest bearing loan (whereby the benefits for the usufruct were not taxable). The IGTA already contains certain broad substance over form provisions, but these were proven insufficient in recent Supreme Court case law. The IGTA is now proposed to be amended so as to include clear and detailed legal provisions that subject these legal structures to tax.



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Recent developments in ECJ case law

Cartesio (ECJ 16 December 2008, C-210/06)

The Cartesio case

Cartesio, a limited partnership organized under the laws of Hungary and having its place of effective management in Hungary, wished to transfer its place of effective management to Italy, whilst retaining its status as a company governed by Hungarian law. This freedom does not, however, extend to allow the State of incorporation to impede a company when converting to a company constituted under the law of another Member State, when the domestic law of the other Member State allows for such conversion. Requiring a preceding dissolution and liquidation of the company in such case, as did Hungary in the Cartesio case, is in such case a non-justifiable impediment which is contrary to the freedom of establishment.

Possible impact on Dutch (tax) law

The Netherlands follow the incorporation principle, by which companies governed under the laws of the Netherlands are considered governed by Dutch law, irrespective of their place of effective management. For the Netherlands the Cartesio case means that it will have to allow Dutch companies to transfer their place of effective management to other Member States without requiring dissolution and liquidation of the company, if the law of the other Member State allows for a conversion into a company governed by its domestic law. Examples of such Member States are Belgium and Luxembourg. Whether or not, in the opposite situation, the Netherlands could be required by EU (case) law to allow a company of another Member State to convert to a Dutch company is yet uncertain. It would appear, however, that the Netherlands would in general have less interest in disallowing the importation of EU Member State companies.

The potential effect of the Cartesio case on the corporate exit charges (deemed sale of all assets and liabilities at fair market value on the moment just prior to leaving the Netherlands) in the Dutch corporate income tax act remains yet unclear. However, on the basis of Cartesio it can be said that the exit charges are open to challenge by the freedom of establishment. Furthermore, the Cartesio case contains an important indication that the deemed residence provisions in the Dutch corporate income tax act and Dutch dividend tax act are contrary to the freedom of establishment.

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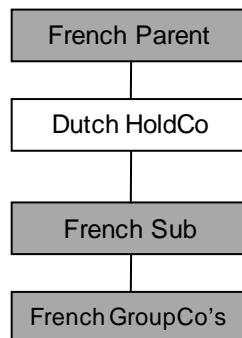
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Papillon (ECJ 27 November 2008, C-418/07)

The Papillon case

The Papillon case concerned the following situation:



Application of the French group consolidation regime to French parent company, the French subsidiary, and the French group companies was denied by the French tax authorities on the basis that the law required an 'uninterrupted chain of shareholdings' of French companies. The ECJ held that the restriction on cross border consolidation may be justified by the fiscal coherence principle, when this principle aims to avoid double use of losses (i.e. at the level of the consolidated group and at the level of the parent company through an impairment deduction on the shares in the non-resident (sub)holding company). However, it is disproportionate to disallow group consolidation altogether. Therefore, France should allow the group consolidation, but is entitled to take measures to avoid the double use of losses.

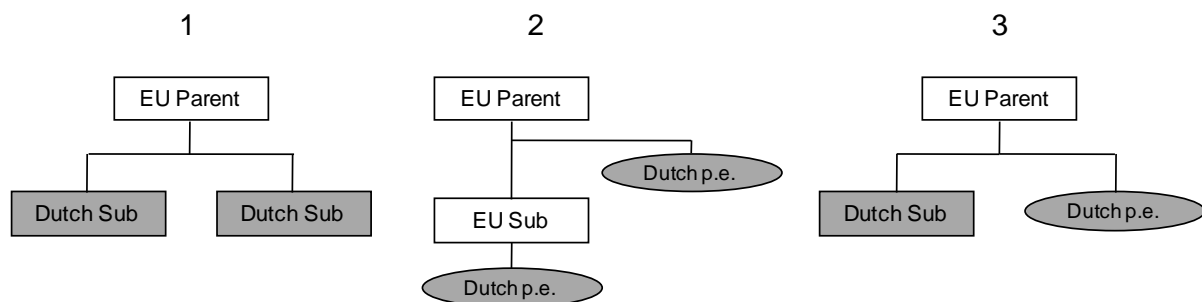
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Possible impact on Dutch law

The Dutch fiscal unity regime contains a similar ‘uninterrupted chain of shareholdings’ requirement, which is equally disproportionate and therefore disallowed under the Papillon ruling. Not only cases like the Papillon case may be affected. Also, for example, not permitting a Dutch fiscal unity in the following cases may be contrary to the freedom of establishment:



A pending ECJ case, “X Holding”, concerns a Netherlands resident company electing for the fiscal unity regime with a Belgian subsidiary. Given the Papillon ruling, the tax payer in X Holding has a fair chance of winning. Application of a cross border fiscal unity would effectively result in an application of the foreign permanent establishment (“p.e.”) regime to foreign subsidiaries. The foreign p.e. regime consolidates foreign p.e. results, both profits and losses, and contains a sophisticated mechanism for recapturing previously recognized foreign p.e. losses. Under this regime, the risk of double use of losses appears to be very remote.



Should you have any questions or require further information, please do not hesitate to contact one of the Tax Advisers mentioned below.

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