Tax News Bulletin
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Proposed changes to Netherlands Tax law for 2021, subsequent and previous years

Introduction

Following the publication of the 2021 Budget Proposals in September 2020, below the most important proposed (and contemplated) amendments to the Dutch tax legislation are described. Most measures should enter into force in 2021, some will enter into force later, but some have retro-active effect to the benefit of the taxpayer (the covid-19 provision).

1. Legal basis

Pending proposals to the Dutch tax legislation include the following proposals and intentions:

- The 2021 Tax Plan (*Belastingplan 2021* (BP 2021), # 35 572) and intended future amendments thereof published in a letter of September 2020
- Other Tax Measures (*Overige Fiscale Maatregelen 2021* (OFM 2021), # 35 372)
- Personal Income Tax Box 3 (*Wet aanpassing box 3*)
- Real Estate Transfer Tax Differentiation (*Wet differentiatie overdrachtsbelasting*, RETTD, #)
- Industrial CO2 levy (*Wet CO2-heffing industrie*)
- Amendment storage sustainable energy and climate transition (*Wet aanpassing opslag voor duurzame energie- en klimaattransitie*, SSEC, # 35 026)
- Amendments CIT Act preventing long term deferrals of losses under the liquidation loss regulations and the and the deduction of losses upon termination of a foreign permanent establishment/real estate (# 35 568)
- Law introducing conditional withholding taxes on interest and royalties payments to certain low tax jurisdictions and non-cooperative jurisdictions (“Wet bronbelastingen 2021”)
- Proposals of 4 August 2020, initiated by members of Parliament for an ‘exit’ dividend withholding tax on companies moving to jurisdictions where no DWT is levied (# 35 523), and amendment proposed on 18 September 2020.

2. Corporate income tax (CIT)

2.1. In 2021, the lower band CIT rate for SME's will be 15% - instead of 16.5% - of the first € 245,000 annual taxable profits and 25% of the rest of annual taxable profits.
In 2022, the CIT rate will be 15% of the first € 395,000 annual taxable profits and 25% of the rest of annual taxable profits.

2.2. The Government announces that as from 2022, carry forward loss deduction will not be limited in time any longer.
As from 2022, tax losses up to € 1 million can be carried forward indefinitely. If the taxable profit of that year is higher than € 1 million, the remaining losses can be carried back one year and carried forward indefinitely, with a maximum of 50% of the taxable profits of that year exceeding € 1 million. The measure has been suggested by the Task Force Taxation of MNE's.

2.3. As from 1 January 2022, the possibility to credit dividend withholding tax (DWT) and lottery tax against CIT shall be restructured
On 22 November 2018, the ECJ decided the French Sofina case (C-575/17). The French DWT legislation was considered a violation of EU law, because DWT is levied from dividends received by non-resident companies, whilst dividends received by French resident companies are taxed only if the resident company was profitable in that year. The case related to Belgian resident shareholders who had incurred losses and received dividends from France. Although the system of the Dutch legislation deviates from the French system, the Government cannot rule out that the ECJ would arrive at a similar conclusion as in the French case.
The credit for DWT and lottery tax shall be limited to the CIT liability of the relevant financial year, whereby it will be permitted to carry forward the DWT which was not offset.
Anticipating this amendment, a policy will be published under which the Tax Inspector will be permitted to refund DWT to nonresident corporate shareholders, if certain requirements are met.

2.4. Early in 2021, draft legislation will be proposed to amend the arm's length principle. The proposal limits lowering Dutch taxable profits under the arm's length principle if the corresponding compensation is not taxed (entirely) in the other jurisdiction. The proposals will be aimed at abuse by way of informal capital. The measure has been suggested by the Task Force Taxation of MNE's.

2.5. Interest on certain tainted loans is non-deductible under article 10a CIT Act. In a period of negative interest, this would result in an exemption of profits. A new § 8 is added to article 10a under which application of article 10a CIT Act cannot result in a lower taxable base. This must be applied separately to each tainted debt; the following example is given to illustrate this:

Tainted debt I: capital gain upon repayment 300, positive interest expense 75 cost
Tainted debt II: positive interest expense 100 cost

Outcome under current law: 125 lower tax base (+300 -/- 100 -/- 75)
Outcome under new provision: tainted debt I: 225 included in taxable base; tainted debt II: 100 interest non-deductible; balance 100 increased tax base.

2.6. Increase of the effective rate of the innovation box regime from 7% to 9%.

2.7. *Limitation of interest deduction by banks*
As from 2021, banks cannot deduct interest to the extent that the amended leverage ratio is less than 9%. The amendment also reverses a decision of the Supreme Court of 15 May 2020, that additional tier-I capital qualifies as a debt, tier-I capital no longer can be included in the equity of the bank.

2.8. ATAD 2 measures regarding liability to taxation
Most of the measures of the EU ATAD 2 Directive have been introduced into the CIT Act effective 1 January 2020. The measures regarding liability to tax will enter into force on 1 January 2022.

2.9. *Interaction between ATAD 2 on the one hand and the earnings strippings regulations or interest limitation deductions for banks on the other hand (OFM)*
The aim of these measures is to avoid misunderstandings about the interaction between non-deductibility on the basis of hybrid mismatches and the earnings strippings regulations. The ATAD2 measures do permit a deduction of expenses to the extent the same income is taxed twice. The proposed rules deal with situations where (a) in an earlier year compensations or payments were non-deductible or (b) in an earlier year compensations or payments were added to profits. In either case the interest component of such amounts is determined on a pro rata basis (after which the earnings strippings regulations can be applied).

2.10. Further restrictions of deduction of interest in combination with deduction of a percentage of equity
The Government aim at a more neutral tax treatment of loan financing and equity financing by companies. They investigate further restrictions of deduction of interest in combination with deduction of a percentage of equity. Since this would be a major amendment to the Dutch CIT Act, both desirability and structure must be investigated.

2.11. *Measures reducing the scope of the regulations permitting deduction of liquidation losses of participations – that would otherwise be exempt under the participation exemption – and the deduction of losses upon termination of a foreign permanent establishment/real estate* (Proposal # 35 568)

In Autumn 2019 the Government announced that it would propose these restrictions, in line with proposals initiated by members of Parliament in April 2019.

Additional timing requirement

Under the additional timing requirement, liquidation losses are only taken into consideration if a liquidation (i.e. dissolution) takes place within three years after the calendar year in which it was decided to terminate the enterprise of the participation entirely or almost entirely.

The timing requirement applies as from 1 January 2021. Transitional law applies to cases where before 1 January 2021 the enterprise of the liquidated participation was (almost) entirely liquidated, or it was decided to do terminate the foreign activities. In such cases the dissolution or the foreign activities must be finalized before 31 December 2023. A counter-evidence facility exists for cases where the taxpayer can demonstrate that the delay is not aimed at avoidance or deferral of CIT.

Additional quantitative and territorial requirements

The possibility to deduct liquidation losses regarding participations is limited by adding a territorial requirement. To avoid that this violates the right of free establishment, also a quantitative requirement is added. The conditions only apply to the extent that a liquidation loss exceeds € 5 million (threshold). A liquidation loss exceeding this threshold is only (partially) deductible if on the *effective date*:

a. The parent company has decisive voting power in the liquidated participation (standalone or together with other companies in which the parent company has decisive voting power) (the quantitative requirement); and
b. The liquidated participation is resident within the Netherlands, in a EU Member State, in a state forming part of the European Economic Area, or in a state which has concluded a specific association agreement with the EU (territorial requirement).

Decisive voting power in principle implies a majority shareholding, but may also occur if not all shares have the right to vote, or if the voting power changed under an agreement. The association agreements meant in the territorial requirement must impact directly on corporate income tax matters. A list will be published in a royal decree. Currently only the association agreement with Turkey prevents the introduction of new limitations of the freedom of establishment. The association agreement between the EU and Switzerland covers only individuals and therefore does not meet the requirement. After the transitional period of the Brexit, participations resident in the United Kingdom do not meet the territorial requirement. Participations resident in the Kingdom of the Netherlands outside Europe (BES-Islands, Aruba, Curaçao and Sint Maarten) do not meet the territorial requirement either.

In principle, the *effective date* is the date immediately before the completion of the winding up of the assets and liabilities of the liquidated entity. However, the quantitive and the territorial requirement also must have been met in the five years (5 * 365 days) immediately before the effective date.

Anti-abuse provisions are aimed at preventing that the territorial requirement can be fulfilled by holding the third state participation via a holding company in a qualifying jurisdiction.

Additional territorial and timing requirements for foreign permanent establishments/real estate

Losses realized upon the termination of the enterprise of a foreign permanent establishment or real estate will also be subject to the above territorial requirement. To avoid violations of the right of free capital movement exceptions are made for (a) investments in real estate in third jurisdictions and (b) investments in partnerships in enterprises carried on in third jurisdictions.

The additional quantitative and territorial requirement shall apply as from 1 January 2021. No transitional regulations are proposed.

2.12. *Preliminary measures re Corona Provision enacted*

Aim of this measure is to improve the cash position of companies compared to a carry back of the 2020 losses. In determining 2019 taxable profits, a corona-provision can be created for the entire corona-related loss which is expected to occur in 2020, for example in situations where turnover decreases while fixed costs continue. The provision is maximized at the 2019 profit without the provision. In the next financial year (2020) the provision must be released, adding to taxable profits.
Entry into force: 1 January 2019

2.13. It is enacted that certain Covid-19 compensations will not be included in the taxable base in determining taxable profits in box 1.

3. Withholding taxes on dividends, interest and royalties

3.1. *Introduction conditional withholding taxes on interest and royalties*

As from 2021, the Netherlands will levy a conditional withholding tax on interest and royalties payments to companies in certain low tax jurisdictions and in abusive situations.

Exit DWT if companies are relocated to jurisdictions that do not levy DWT

At present, DWT is levied in the case of liquidation of a Dutch company, to the extent that the liquidation proceeds exceed the paid up capital. However, if a Dutch resident company moves its tax residence to another jurisdiction there is no DWT charge. And after the move the applicable tax treaty often prevents the Netherlands from levying DWT.
After a large multinational company had announced their plans to move their Dutch headquarters from the Netherlands to the UK – where no DWT is levied – a member of Parliament initiated proposals under which a conditional DWT assessment can be levied to preserve the possibility to levy DWT on retained earnings and to prevent restructurings aimed at eliminating a DWT claim.

Conditional means that payment will be due upon a taxable event later, see below. The *conditional* DWT assessment will be levied if one of the following circumstances applies:

a. A company becomes resident of a *qualifying state* and ceases to be a resident of the Netherlands for purposes of the tax treaty between the Netherlands and the *qualifying state* of destination. A qualifying state is defined as a state that at the time of the change in residence:
   - does not levy a DWT or similar tax;
   - does levy a DWT, but provides a step-up in that the retained earnings corresponding with the market value of the Dutch company at the time of the change can be distributed without DWT;
b. Within the framework of a cross-border merger, the assets and liabilities of a Dutch resident company pass under general title to an acquiring company, which is resident in a qualifying state;
c. Within the framework of a cross-border split-up, the assets and liabilities of a Dutch resident company pass under general title to an acquiring company, which is resident in a qualifying state (only in respect of the pro rata share of taxable retained earnings);
d. A non-resident company in an qualifying state issues shares and acquires in return shares in a Dutch resident company, in such a way that it can exercise more than half of the voting rights in the Dutch resident company. The provision applies to the extent that the non-resident company becomes entitled to the taxable retained earnings of the Dutch target company.

Once the conditional assessment has been issued, an extension of payment is granted. Broadly, the extension will be terminated when the company distributes profits and DWT would be due if the company still were resident in the Netherlands. However, if at the time of the distribution an exemption applies under the EU Parent-Subsidiary Directive or an exemption for shareholders who are not subject to CIT.
Where a company becomes a resident of the Netherlands – without being a resident of another state for purposes of a tax treaty – a “step up” is applied: the market value of its assets and liabilities or of its entire enterprise is treated as the paid-up capital for DWT purposes (which in principle can be repaid without DWT if certain requirements are met.

3.2. *Government intends to introduce conditional withholding tax on dividends in 2024*
As a further step to combat tax avoidance, the Government intends to introduce effective 2024 a new withholding tax on dividends paid to companies in certain low tax jurisdictions (effective CIT rate less than 9%) and in countries mentioned on the EU blacklist of non-cooperative jurisdictions. This will also be the case if these jurisdictions have concluded a tax treaty with the Netherlands. Thus, also treaty shopping via the Netherlands will be discouraged. It is intended that the measures will be drafted before the end of this Government term, March 2021. It is not clear yet whether the conditional withholding tax on dividends will co-incide with the levy of the ‘normal’ dividend withholding tax.

4. Blacklist low tax and non-cooperative jurisdictions

The blacklist for calendar year 2020 includes as low tax jurisdictions: Anguila, Bahamas, Bahrein, Barbados, Bermuda, British Virgin Islands (BVI), Guernsey, Isle of Man, Jersey, Cayman Islands, Kuwait, Quatar, Turkmenistan, Turks and Caicos Islands and Vanuatu (Belize and Saudi Arabia were on the 2019 list but have been removed.
An updated list for 2021 should be published before the end of 2020.

5. Bank Tax

Only for the year 2021 a temporary 50%-increase of the bank tax rates shall apply. The 0.044% rate is replaced by 0.066%. As from 2022 the rate will be 0.044% again. Only in 2021 the 0.022% rate is replaced by 0.033%. As from 2022 the rate will be 0.022% again.

6. Wage Tax (*Loonbelasting*)

6.1. The Government announced a Jobs Related Investment Reduction ("Baangerelateerde Investeringskorting", BIK)
Enterprises will be allowed to deduct a percentage of their investments from their wage tax liability. The impact on the Budget is estimated at € 2 billion. This reduction will apply in 2021. Next, this BIK shall be replaced by another measure with the same objective, reducing employer's costs.

6.2. *Increase of exemption for education and training expenses*
This is relevant in cases where an employer reimburses such expenses as part of for example a social plan, whereby the existing exemption is not sufficient. Such expenses should also reduce the transition allowance which an employer may have to pay upon a future termination of the employment.

6.3. As from 1 January 2021, the free space of the employer amounts to 1.7% of the first €400,000 total wages plus 1.2% of other wages.
The percentage of 1.2% will be reduced (permanently) to 1.18% (BP 2021). Covid-19 measures for the year 2020, include a one-time free space of 3% of the first € 400,000 are now enacted.
Entry into force: 1 January 2020.

6.4. Stock-options granted by start-ups
Start-up and scale-up enterprises often grant stock options in order to be able to attract talented entrepreneurial, technical and ICT staff. Currently, broadly the benefit from stock options is taxed at the time when the options are exercised. It was contemplated to postpone this to the time when the relevant shares can be traded. Based on feedback from the sector (Techleap.nl), this proposal will be reconsidered; possibly the date of sale of the shares will be decisive.

7. Personal income tax (PIT)

7.1. *Deemed savings income (box 3)*
Proposed amendments are to the benefit of individuals with low savings and investments. The tax free amount will be increased from € 30,846 (2020) to € 50,000 (€ 100,000 for couples who are partners for PIT purposes).
The flat rate in box 3 is increased from 30% (2020) to 31%.

*7.2. Taxation of excessive loans to shareholders with a substantial interest (box 2)*2024
Before the covid 19-crisis, it was intended to introduce measures against shareholders borrowing excessive amounts from the company in which they hold a substantial interest in 2022. Under the proposals borrowings – other than those to finance a principal residence – are taxed as dividends to the extent that they exceed a certain threshold (starting point € 500,000). Introduction of these measures will be postponed to 2023, so that the shareholders will have more time to repay their debt. Borrowings as per 31 December 2023 will be decisive.

7.3. Decrease self-employed persons' deduction
In determining the taxable profits of self-employed persons, the self-employed persons' deduction ("zelfstandigenaftrek") is an important item, € 7,030 currently. As from 2020 this deduction will decrease eight times by € 360 per annum and once € 280 in 2028; next by € 110 each year, until it will be €3,240 in 2036.

7.4. It is enacted that certain Covid-19 compensations will not be included in the taxable base in determining taxable profits in box 1.
Entry into force: 1 January 2020.

8. Environment Taxes (*Milieuheffingen*)

8.1. Proposals introduce an industrial carbon dioxide tax (CO2-tax), a tax on greenhouse gas emmissions relating to industrial production and waste incineration.

8.2. In the proposal Storage for sustainable energy and climate transition (*Wet aanpassing opslag voor duurzame energie- en klimaattransitie,* ODE) the ODE-rates are amended in line with the Coalition Agreement and the Climate Agreement. The ODE is a levy on elektricity en natural gas to finance the expenses of certain incentives for sustainable energy transition (*Subsidieregeling Stimulering Duurzame energietransitie* (SDE++). The SDE++ stimulates also CO2 reduction.

9. **Real estate transfer tax**

9.1. It is proposed to introduce a one-time exemption for purchases of houses by individuals of age and younger than 35 years.

9.2. Increase scope of starters' exemption

9.3. Measures are introduced to achieve that the lower RETT rate (2%) can only be applied by purchases who will use the house as their principal residence. All other taxable purchases will be taxed at the high rate.

9.4. As from 1 January 2021, the high RETT rate will be increased to 8%.

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