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Transfer Pricing aspects of the 2016 Dutch Tax Plan (published on 15 September 2015)

The Dutch Government has proposed to introduce legislation on Country by Country (CbC) reporting, and more detailed transfer pricing documentation requirements. It is anticipated that the legislation will become applicable for fiscal years commencing on or after 1 January 2016.

By introducing these rules, the Dutch government wishes to implement the new standards as laid down in Action Plan 13 of the Base Erosion and Profit Shifting (BEPS) project (2014), as well as the CbC implementation package (2015) of the OECD. The outcome of these ongoing discussions has been adopted by the G20.

Although the BEPS discussion has not fully crystallized yet, the Dutch Government apparently wishes to be one of the first countries to adopt the new standards.

Country by Country (CbC) reporting

The implementation of the CbC reporting obligations in the Dutch domestic legislation is in line with the above mentioned reports of the OECD. According to the OECD reports, a Multinational Enterprise (MNE) which, on a consolidated base, reports a group revenue of at least € 750 million in a certain year will be required to prepare and file a CbC report in the subsequent year.

The OECD reports state that the Ultimate Parent Entity of an MNE is obliged to prepare and file the CbC report with the Tax Administration in its country of residence within twelve months after the last day of a fiscal year. Amongst others, the CbC report should include information regarding (detailed implementation rules will be published in a later stage):

- local income;
- local profit before tax;
- tax paid;
- tax reported;
- share capital of the group entity;
- accumulated profit;
- personnel employed;
- available assets (especially cash and cash equivalents).

The Dutch domestic legislation applies if the Ultimate Parent Entity is a resident of the Dutch for tax purposes. If this is the case, this entity is obliged to file a CbC report with the Dutch Tax Administration, which will (automatically) share this report with the local tax administrations dealing with other group companies, provided the relevant tax treaty permits (automatic) exchange of CbC reports.

Parts of the Dutch domestic legislation also apply in case the Dutch group entity is not the Ultimate Parent Entity. In that case, the Dutch group entity is obliged to notify the Dutch Tax Administration that it belongs to an MNE. The Dutch group entity should also provide information regarding the Ultimate Parent Entity (e.g. name and place of residence). In case the Dutch Tax Administration does not receive the CbC report from the tax administration of the country of which the Ultimate Parent Entity is a resident (e.g. because the treaty does not permit the foreign Tax Administration to do so), the Dutch group entity will be obliged to provide the CbC report to the Dutch Tax Administration (unless the Dutch Tax Administration received the CbC report from the foreign tax administration in which the 'Surrogate Parent Entity', as appointed by the Group, is located).

The Dutch Tax Administration may not use the information from the CbC report to make transfer pricing adjustments. It should however enable the Dutch Tax Administration to assess risks and allocate the capacity of tax audit staff more efficiently. The consequences of not complying with the above mentioned legislation can be twofold:

- potential shift in the burden of proof (which could mean that the taxpayer should prove that the transfer prices are at arm's length rather than simply demonstrate this);

- substantial penalties if the lack of documentation is due to mal intent or gross negligence from the side of the tax payer.

More detailed administration requirements: global master file and local file

MNE's which, on a consolidated base, report a group revenue of at least € 50 million, have to make sure that the following documents are available in the administration of the Dutch group entities (detailed implementation rules will be published in a later stage):

- a global master file (including a.o. an overview of the group, its activities, the overall transfer pricing policy and the worldwide allocation of income and economic activities).
- a local file (including a.o. a transfer pricing analysis of the related party transactions in which the Dutch group entity is involved).

Both files may be prepared in Dutch or English. Upon request, the files should be shared with the Dutch Tax Administration, which may also exchange the reports with the tax administrations in other countries (if the relevant tax treaty permits to do so).

The main consequence for not complying with this legislation can be a shift in the burden of proof (which could mean that the taxpayer should prove that the transfer prices are at arm's length rather than simply demonstrate this).

If you have any questions, please do not hesitate to contact Otterspeer, Haasnoot & Partners