

Tax News Bulletin

20 January 2014

Explanatory Notes to the minimum substance requirements published

On 30 August 2013, the Dutch government proposed measures to Parliament to curb international tax evasion. Amongst others, the proposed measures comprise an increased emphasis on the (existing) minimum substance requirements and tax transparency for “intermediary companies” (financing, licensing and holding companies). For more information on how the emphasis on substance has been increased, we refer to our Tax News Bulletin of 3 September 2013 on our website (www.ohp.nl).

Substance requirements

As per 1 January 2014, the minimum substance requirements, which apply to companies “mainly” (*hoofdzakelijk*) performing intercompany financing (including leasing) and/or licensing activities in a certain book year and to holding companies applying for an ATR, have been laid down in the Executive Decree to the Act on International Assistance in the Levy of Tax (Uitvoeringsbesluit Wet Internationale Bijstandsverlening bij de heffing van belastingen, “WIB”).

In the Explanatory Notes to the abovementioned Executive Decree, the following items were clarified and/or confirmed:

First, in determining whether the company is mainly performing intercompany financing and/or leasing activities, factors

as the type of assets and liabilities on the balance sheet, the composition of the turnover, the activities performed and the time spent by employees should be taken into account.

Second, regarding requirement c (qualified personnel), it was confirmed that this test should be applied at the level of the company and that qualified personnel hired from third parties (i.e. personnel from a trust office) can also qualify.

And **third**, it was clarified that, if companies did not (our could not) apply for application of a measure for the avoidance of double taxation (e.g. a Double Tax Treaty or the Interest and Royalty Directive), they will not be required to report in their tax return whether or not they meet the minimum substance requirements.

Remaining uncertainties

Unfortunately, some uncertainties as to the interpretation of meeting the substance requirements still remain, for example:

- The determination of an “adequate amount of equity” (*passend eigen vermogen*) remains unclear.
- Also, intermediary financing companies or holding companies which do meet the minimum substance requirements and which apply for an APA and/or ATR may still face exchange of information if they do not have “sufficient activities” in the Netherlands. Intermediary companies which meet the minimum substance requirements have no way of knowing when they will be considered to have sufficient activities in the Netherlands, which may be a real discouragement them to apply for an APA or ATR.

The Dutch State Secretary of Finance has promised that more detail and clarity will be provided in tax policy which is yet to be developed by the Dutch Tax Administration. The Dutch Order of Tax Advisors has urged the State Secretary to address uncertainties such as the ones mentioned above in the promised tax policy.