OTTERSPEER, HAASNOOT & PARTNERS
Dutch and International Tax Counsel

TAX NEWS BULLETIN
20 September 2011

BUDGET PLAN 2012 RELEASED

On September 20, the Budget Plan 2012 was officially published by the Dutch Ministry of Finance. The Budget Plan contains tax measures that should become effective from 1 January 2012. The tax measures which are most important to the international corporate tax practice are the corporate income tax and dividend withholding tax measures, which are summarized in this Tax News Bulletin.

CORPORATE INCOME TAX

1 (Non-)deductibility of Interest (deferral) for debt financed acquisitions of Dutch target companies ("Acquisition Interest Provision")

In case a foreign or domestic acquirer uses a debt-financed Dutch acquisition company ("Acquisition Company") to acquire a Dutch target company and includes such target company into a fiscal unity with its Acquisition Company, or merges such target company with the Acquisition Company, the interest expense on the acquisition debt ("Acquisition Debt", and "Acquisition Interest") reduces the taxable profit of the fiscal unity. Following the proposed Acquisition Interest Provision, aimed at avoiding erosion of the Dutch taxable base, Acquisition Interest (including associated expenses and positive and negative fx results) will be deductible only against the stand alone profit of the Acquiring Company (or, in case the Acquisition Company forms part of a fiscal unity, and under certain conditions, Acquisition Interest will be deductible against the fiscal unity profit excluding the profit of the acquired target(s)). However, this restriction only applies to the lower of:

(i) Acquisition Interest in excess of € 1 million ("First Limitation")
(ii) Interest on the excessive part of Acquisition Debt (i.e. interest on debt which exceeds two times the amount of equity; "Second Limitation").

The value of participations, held by any of the fiscal unity companies, that qualify for the participation exemption, reduces the amount of equity for purposes of the Acquisition Interest Provision. Goodwill or bad will related to the acquisition of a target (i.e. the difference between the price paid for the shares of the target and the net asset value of the target) reduces the equity of the fiscal unity upon consolidation of the target. To mitigate this affect, an amount equal to the goodwill or bad will is added to, respectively deducted from, the equity of the fiscal unity and depreciated over a ten year term.

2 Deduction of permanent establishment ("PE's") losses repealed

Under current law, PE losses are immediately deductible from the Dutch taxable base (i.e. can be used to offset head office profits), subject to a later recapture. Under the proposed Object Exemption, PE losses will no longer be deductible against head office profits. The Object Exemption will not apply to low taxed passive PE's. In stead of an Object Exemption, profits from low taxed passive PE's are eligible for a fixed 5% credit. PE losses which have become permanent due to the fact that the PE activities have been terminated, and which have not been subject to local loss relief in the PE country, are deductible from the Dutch taxable base in the year in which the PE activities are terminated. Finally, under the proposed Object Exemption, the "subject-to-tax" requirement (mostly in non-treaty situations) will no longer be a condition for relief from double taxation.

3 Non-resident corporate income tax liability ("substantial interest tax")

Non-resident taxpayers are subject to 25% corporate income tax on dividends and capital gains in relation to 5% or larger shareholdings in Dutch companies ("substantial interest tax") if such shareholdings are not attributable to the capital of a business enterprise (i.e. if such shareholdings are held as a passive investment).

Under the 2012 Budget Plan, and following scrutiny from the European Commission, it is proposed to narrow the scope of this non-resident tax liability. The substantial interest tax will apply only if the main purpose or one of the main purposes for holding the substantial interest is to avoid Dutch income tax or Dutch dividend withholding tax being levied from another taxpayer (i.e. from the (ultimate) beneficial owner of the Dutch company).

4 R&D investment deduction

In the Budget Plan 2012, a deduction for capital expenditures (e.g. research facilities and technical installations) associated with innovation and R&D is proposed. It is currently expected that the deduction for R&D capital expenditures will be shaped in the form of a levy discount. An amount equal to 25% (equal to the applicable CIT rate) of the amortization/depreciation of R&D capital expenditures and of the R&D operating expenses will become deductible from the annual (corporate) income tax liability.

5 Deduction of interest on debt used to finance acquisition of participations ("Bosal interest")

The Budget Plan does not mention the previously announced proposal to restrict deduction of interest on loans used to finance the acquisition of participations that qualify for the participation exemption (so called "Bosal interest". The Ministry of Finance is still considering this proposed measure. A proposal may be issued later this year.

DIVIDEND WITHHOLDING TAX

1 The Dutch Cooperative

In the past, Dutch Cooperative Associations ("Coops") have become a popular alternative Dutch holding company, as they are not subject to Dutch dividend withholding tax, while being eligible for participation exemption and treaty benefits. The Budget Plan 2012 intends to curb the abuse of Coops for purposes of avoiding Dutch dividend withholding tax. The general rule will remain that members in a Coop are not subject to Dutch dividend withholding tax, and that a Coop is not subject to a withholding obligation. However, in abusive situations, members of a Coop will become liable to Dutch dividend withholding tax. Abusive situations may exist where a foreign company owning a participation in a Dutch company interposes a Coop in order to avoid Dutch dividend withholding tax, or where a foreign company owning a foreign participation interposes a Coop to avoid the foreign withholding tax, without the Coop having real (economic) meaning.

2 Refund of Dutch dividend withholding tax on portfolio investments for tax-exempt investors in non-EU member states

Dutch resident tax-exempt investors, such as pension funds, are eligible for a refund of Dutch dividend withholding tax on dividends from their investment in Dutch shares. As of 1 January 2007, such refund was made available also to EU member state resident tax-exempt investors. Pursuant to the Budget Plan 2012, refund of Dutch dividend withholding tax will also be available to tax-exempt investors established outside the EU, but in relation to dividends *from portfolio investments only,* and provided that such tax-exempt investor:

1. Would not have been subject to Dutch corporate income tax, if they had been resident in the Netherlands (e.g. pension funds, Sovereign Wealth Funds, and exempt government bodies),
2. Is resident in a designated country with which the Netherlands has concluded adequate arrangements for the exchange of information (designated countries yet to be appointed by Ministerial Decree).

Refund claims can be submitted up to three years after the end of the year in which the Dutch divided withholding tax has been levied. Non-EU tax-exempt investors who have incurred Dutch dividend withholding tax on Dutch portfolio investments in the last three years are recommended to file refund claims from 2008 onwards, on the basis that denying such refunds is an unjustifiable violation of the EU freedom of capital.

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