The Netherlands

September/2011

Budget 2012

On Tuesday 20 September 2010 the Dutch Budget for 2011 was introduced to Parliament. Below we summarize the most notable items of the legislative proposals with respect to Dutch taxation which we believe are of interest for (corporate) businesses.

Changes in the corporate income tax

- **Introduction of an exemption for branch profits and losses**. Current legislation provides that foreign branch losses are part of the taxable income of corporate resident tax payers and can be deducted from Dutch profits. It is now proposed to change that by introducing an exemption for branch profits and losses by eliminating them from the world-wide profit of the tax payer. This measure brings the treatment of branch profits more in line with the treatment of subsidiaries. Similar to the treatment of low-taxed, passive subsidiaries, the branch exemption will not apply to branches with such a profile unless a double tax treaty prescribes the application of the exemption method. In certain cases, branch losses resulting from ceasing operations in the branch can be deducted from the tax payer's world-wide income.

- **Additional limitation of interest deduction with respect to excessive debt financing of acquisitions.** Dutch corporate tax law provides that interest in excess of a debt to equity ratio of 3:1 is in principle not deductible. It is now proposed to add another thin-cap measure with respect to debt financing that is related to acquisition of fiscal unity subsidiaries. The new provision targets structures where a Dutch holding acquires a company with which it joins in fiscal unity. If the acquisition has been financed with debt, a 2:1 debt to equity cap applies which limits the deduction of the interest on the acquisition financing in the fiscal unity. Any non-deductible interest may be carried forward. The limitation on deductibility only applies on the interest exceeding EUR 1 million. Foreign exchange results and other financing costs are also limited along with the interest on the acquisition loans. The measure will become effective at the beginning of the tax payer's tax book year that starts on or after 1 January 2012. Acquisition structures of an earlier date are grandfathered.

- **Changes for corporate tax payers with a substantial interest in a Dutch company.** Companies that are located outside the Netherlands and hold an interest of at least 5% in a Dutch company (a "substantial interest") and cannot allocate their substantial interest to an active business activity, are subject to Dutch corporate income tax as a foreign tax payer with respect to capital gains, dividends and interest derived from this substantial interest. This provision will remain largely intact, but will only apply in cases where the substantial interest is held with the main purpose or one of the main purposes to avoid Dutch income tax or Dutch dividend withholding tax at the level of other persons (e.g. the shareholders of the corporate foreign tax payer). The change in legislation should improve the alignment with EU law.

- **Alignment of corporate income taxation for foundations and associations existing under foreign law with similar Dutch entities.** Dutch foundations ("*stichtingen*") and associations ("*verenigingen*") are only subject to corporate income tax to the extent that they have an active business in the Netherlands. For comparable entities that exist under foreign law, and reside outside the Netherlands, their liability to Dutch taxation was not limited to Dutch active business activities. It is now proposed to introduce such limitation for such foreign entities.

Changes regarding dividend withholding tax

- **Changes with respect to distributions by Dutch *"coöperaties"* ("co-ops").** Distributions made by Dutch co-ops are as a rule not subject to Dutch dividend withholding tax. It is now proposed to subject distributions from co-ops to dividend withholding tax in certain cases where the co-op is interposed to avoid Dutch income tax or foreign taxation at the level of other persons. Situations that are targeted are those where the co-op (directly or indirectly) holds shares, profit-sharing certificates or receivables that are regarded as equity for tax purposes in a Dutch entity that is in principle obliged to withhold dividend

withholding tax on its distributions. Members that cannot allocate their membership rights in the co-op to an active business activity will be fully taxed with dividend withholding tax on distributions from the co-op. In case the membership rights can be allocated to an active business, taxation is limited to dividend withholding tax on the amount of profits for Dutch withholding tax purposes that was already present in the structure before the co-op was interposed.

- **Reclaiming withholding tax on portfolio dividends extended to certain non-EU/EER entities.** Currently, Dutch resident entities (e.g. pension funds) that are not subject to corporate income tax and are not qualifying collective investment funds, can reclaim any Dutch dividend withholding tax that has been withheld on dividends received. The same applies for entities in the EU, Norway, Iceland or Liechtenstein that are not subject to profit tax in their country of residence and would not be subject to Dutch corporate income tax if they would be a Dutch resident. It is now proposed to extend this possibility for refund of Dutch withholding tax on dividends from Dutch companies to other (similar) entities outside the EU/EER, provided there is sufficient exchange of information possible with the countries of residence of such entities. The proposal concerns only dividends that are eligible for protection under the EU freedom of free movement of capital.

Changes regarding VAT

- **Dutch simplified triangulation scheme more simplified.** In case of a chain transaction between three parties located in three different EU countries (A-B-C) where the goods are shipped directly from the first country (A) to the last (C), it is possible to apply the simplified triangulation scheme. By applying this scheme none of the parties have to register for VAT purposes in the other country regarding this supply. In this scheme the chain supply is deemed to be two separate supplies (A to B and B to C). In case the first buyer is located in the Netherlands, it has to account for a deemed Intra-community acquisition of the goods from A and a deemed Intra-community supply of those goods to C. As a result of the ECJ case Facet (C-536/08 and C-539/08) the Dutch VAT due regarding the deemed Intra-community acquisition of the goods in this simplified triangulation scheme, can only be reclaimed by filing a separate request (so not by just including it in the VAT return). As from 2012 the procedure regarding the simplified triangulation scheme will be less strict. There will be no VAT due regarding the deemed Intra-community acquisition and therefore it is no longer necessary to reclaim the VAT by filing a separate request. The first buyer (B) must be able to prove that he purchased the goods from the first supplier (A) in order to deliver them to the end customer in the country where the goods arrived (C). Furthermore, the first buyer must also file an EC Sales listing regarding the supply to the end customer.

- **Mandatory additional VAT return.** At this moment there is no obligation for an entrepreneur to contact the Tax Authorities in case he discovers that an already filed VAT return is incorrect (e.g. because an invoice was not included). As from 2012 there will be a legal obligation to contact the tax authorities and file the additional VAT return to correct the incorrect VAT return. As a result of this new legislation the tax authorities can impose a penalty in case the entrepreneur knows that a VAT return is incorrect but fails to correct it. The tax inspector must deliver the proof that the entrepreneur knew that the VAT return was incorrect. How and in what time the correction should be made, is not yet specified. The Ministry of Finance will issue a decree with the guidelines thereto.

Other changes

- **Changes regarding late-payment interest.** Late-payment interest is due on tax payable (by the tax payer) or tax refundable (by the tax authorities) after the tax year has ended. With respect to corporate income tax and personal income tax payments it is now proposed to start accounting for late-payment interest not directly after the tax year has ended, but 6 months later. The period on which interest is paid can vary, depending on various factors like the filing date of the tax return or a request for amending the preliminary assessment. Late payment interest can be avoided altogether if the tax return is filed within 3 months after the tax year has ended or if a request for a provisional assessment has been filed within 4

months past the end of the tax year. The applicable interest rate will be the rate that applies on non-business transactions as defined in the Dutch Civil Code.

- **It will be possible to get fined again for the same offense if new information comes to light.** Currently, a tax payer cannot be fined twice for the same offense. It is now proposed to change this in cases where new information comes to light after a tax payer has been fined with a light administrative fine ("*verzuimboete*") that does not require gross negligence or (criminal) intent to be proven by the tax authorities. In such cases a heavier fine ("*vergrijpboete*") can be imposed, but the tax authorities need to prove gross negligence or (criminal) intent to impose such a fine.

- **The regulation for 30%-rulings will be amended.** The special scheme for foreign employees that work in the Netherlands, will change as from 1 January 2012. The special skills which the employee must possess to apply the 30%-regulation, will be measured by the taxable gross salary he will receive in the Netherlands. Furthermore, employees who live within 150 km from the Dutch border will no longer be able to apply for the 30%-regulation. Employees who lived or worked in the Netherlands in the past (until 25 years back), will have less possibilities to apply for the special scheme as the period they lived or worked here will be deducted from the period they can apply for the special scheme. With respect to employees to which the 30%-regulation already applies before 1 January 2012, their existing ruling will be grandfathered if it is older than 5 years. Newer rulings will remain applicable until the Dutch tax authorities re-evaluate the situation based on the new regulation, i.e. the moment 5 years have passed from first applying a particular 30%-ruling.

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