UPDATE

2020 Tax Budget

On 17 September 2019 the Dutch government published its Tax Budget for 2020. This Budget contained no fewer than six legislative bills and a large number of legislative amendments, some of which had already been announced.

Over the coming period the BDO tax experts will start to work on all these proposed changes and looking to see what their specific implications are for entrepreneurs, individuals, government bodies, non-profit organisations and national and international enterprises. Almost every taxpayer will be affected by the changes and in many cases, it will be advisable to review your tax position with your advisor, given the opportunities it might be necessary to anticipate on the proposed changes.

In this newsletter BDO has set out details of the most important tax changes in the fields of corporate income tax, dividend withholding tax, withholding tax on interest and royalties and VAT.

BDO Tax Advisors

Corporate income tax and dividend withholding tax

Corporate income tax rates

The current corporate income tax rates are as follows:

2019		
Taxable profit or a taxable amount in the Netherlands of above	But not more than	Corporate income tax rate
-	€200,000	19%
€200,000		25%

Over the next two years these rates will be reduced in phases as follows:

2020		
Taxable profit or a taxable amount in the Netherlands of above	But not more than	Corporate income tax rate
-	€200,000	16.5%
€200,000		25%

2021		
Taxable profit or a taxable amount in the Netherlands of above	But not more than	Corporate income tax rate
-	€200,000	15%
€200,000		21.7%

Comments by BDO

Last year the government announced that the corporate income tax rate for taxable profits of more than €200,000 would be reduced in phases from 25% to 22.55% in 2020 and from 22.55% to 20.50% in 2021. The government has now, therefore, reversed its earlier decision.

Change in the definition of a permanent establishment for corporate income tax, personal income tax and payroll tax purposes

The presence of a permanent establishment is one of the connecting factors used by states for taxing a non-resident individual or company. In the case of the Dutch payroll tax, the presence of a permanent establishment is a connecting factor for requiring an employer with such a permanent establishment to withhold payroll tax. Given the opportunities for artificially circumventing the determination of a permanent establishment (in order to avoid tax), the government is proposing that the definition of the permanent establishment for personal income tax, payroll tax and corporate income tax purposes should be aligned as of 1 January 2020 with the definition used in the applicable tax treaty. In non-treaty situations, this change will bring the definition of the permanent establishment for personal income tax, payroll tax and corporate income tax purposes in line with the most recent version of the OECD Model Tax Convention. The proposed changes also include changes in the definition of the permanent representative.

Comments by BDO

The above changes in treaty and non-treaty situations are expected to result in more cases of activities being classified as a permanent establishment for personal income tax, payroll tax and corporate income tax purposes. The tax ultimately raised as a result of these changes is nevertheless likely to be modest.

Change in tonnage tax regime

Since 1996, the Dutch personal income tax and corporate income tax have included a tonnage regime for the maritime shipping sector. Essentially, this regime allows a taxpayer, under certain conditions, to opt for profits from maritime shipping activities to be calculated on the net tonnage operated rather than on the actual profits for at least ten years. Around ten years ago, this tonnage tax regime was extended to include various supplementary arrangements. The European Commission (EC) has designated these arrangements as being compatible with the internal market. In June 2018 the Netherlands asked the EC to prolong its approval of these supplementary arrangements. The EC stated that approval for these arrangements could be prolonged only if the Netherlands tightened the rules applying to its tonnage tax regime from 1 January 2020 in three respects. The changes

demanded relate to (1) ships used on time or voyage charters, (2) flagging requirements, and (3) activities considered ancillary to maritime transport. The government proposes changing the tonnage tax regime from 1 January 2020 in these respects so as to keep it 'EU-proof'.

Increase effective tax rate for innovation box

Under the Dutch corporate income tax system, profits generated from innovations are, under certain conditions, taxed at a reduced rate (the 'innovation box'). If a taxpayer's activities qualify for the innovation box, the attributable profits in 2019 will be taxed at an effective corporate income tax rate of 7%. The government has announced that this effective tax rate will increase to 9% as of 2021. Details will be provided in a legislative proposal at a later date.

Comments by BDO

Despite the increase in the effective tax rate, profits qualifying for the innovation box will still be taxed at a much lower rate than normal business profits. It may therefore still be worthwhile to check whether your business activities are eligible.

Earnings stripping rule (generic restriction on interest deductibility)

As a general rule, interest expenses are deductible from a taxpayers taxable profit. Various interest deduction limitation rules to prevent unwanted taxable base erosion can apply; one of which is the so-called earnings stripping rule. This generic rule was introduced on 1 January 2019 and, under certain circumstances, limits the deductibility of net interest on intragroup and third-party loans. The remaining net interest in a year which is not deductible based on the earnings stripping rule, can be carried forward indefinitely. In effect, the net interest is 'parked'. The next year, the earnings stripping rule has to be applied again to determine how much the net interest relating to that year and the parked net amount are deductible that year. In other words, the parked net amount represents a value.

Formal aspects

Under the legislation, the Dutch Tax Authorities has to determine the amount that is eligible for deduction in next years and the taxpayer may object to the decision of the Dutch Tax Authorities. The government has firstly proposed a series of supplementary rules for reviewing such decisions in the event of a new fact, bad will or an error that is reasonably manifest to the taxpayer. The period within which such decisions can be reviewed is the same as the period available to the Dutch Tax Authorities for issuing a supplementary demand in the event of too little tax having been paid. Generally this means five years from the end of the relevant tax year, but a period of twelve years may apply in certain 'foreign situations'. If the decision is incorrect as a result of a manifest error, the period is two years from the date of the incorrect decision. Secondly, the government has proposed that a decision should also be issued if the interest from a previous year (that has been carried forward) has been deducted from the taxable profit in a subsequent year. The measures proposed would also apply to decisions issued before these measures come into force.

Provision against trade in 'net interest enterprises'

As mentioned above, interest that is non-deductible by virtue of the earnings stripping rule can be carried forward indefinitely. If in a subsequent year there is any room to deduct carried forward interest, this carried forward interest may be deducted. As a result, an accompanying measure will be applicable as of 1 January 2020 in order to prevent a 'trade' arising in taxpayers with interest 'parked' in this way. If the ultimate interest in such a taxpayer changes by 30% or more, the 'parked' amount from before the change in ownership is in principle no longer eligible to be included when calculating the profit from after the change. This means, in concrete terms, that the parked net amount is no longer eligible for deduction. There are, however, exceptions to this primary rule and these may allow the parked net amount to be carried forward to future years. Whether the parked net amount actually can be carried forward will depend on how the earnings stripping rule applies in that future year.

Implementation of second EU anti-tax avoidance directive (ATAD2)

The government's legislative bill for implementing the second EU anti-tax avoidance directive (ATAD2) in the Dutch corporate tax law had already been submitted before Budget Day. Essentially, this bill is intended to put an end to arrangements in which internationally operating businesses make use of hybrid mismatches. The bill will enter into force on 1 January 2020. This legislative proposal is outlined below.

Hybrid mismatches

Hybrid mismatches are situations where tax benefits are obtained by making use of differences between countries' corporate income tax systems, and particularly differences in the way that countries classify entities, permanent establishments and financial instruments. These differences may result in a payment being deductible in the state in which the payer is resident and not being taxable in the state in which the recipient is resident (i.e. deduction no inclusion). Another variant is where fees and expenses are deductible in more than one state (i.e. double deduction).

Neutralisation rules

The legislative proposal includes neutralisation rules so that either the deduction of fees and expenses by the payer is disallowed or the remuneration or payment obtained by the recipient is taxed. These rules apply only in the event of a hybrid mismatch involving affiliates (with an interest of at least 25%) or in the event of 'structured arrangements'. The latter are arrangements where non-affiliated entities create

a hybrid mismatch in which the benefits are discounted in the conditions applying to the arrangements or where the arrangements are structured specifically to result in a hybrid mismatch.

Documentation requirement
Along with the neutralisation rules, the government has decided to introduce a requirement for documentary evidence as of 1 January 2020. As a result, taxpayers stating in their tax returns that the neutralisation rules do not apply to them will have to retain documents in their records to evidence that this is the case. Meanwhile taxpayers that are required to apply the neutralisation rules, must also state in their records how these rules have been applied. As the neutralisation rules will generally apply only in international situations, groups operating purely nationally are excluded from this documentation requirement.

Comments by BDO
The timetable for dealing with this legislative proposal will align with the timetable for the package of measures in the Tax Budget for 2020. Most of the measures will take effect on 1 January 2020, while a few will not come into force until 1 January 2022. Businesses are advised to check the likely impact of these rules in good time.

Future group regime for corporate income tax purposes
The basic principle in corporate income tax is that each taxpayer (e.g. a NV/BV) is separately liable for corporate income tax. The exception to this principle is the fiscal unity regime, which allows a group of companies, under certain conditions, to be taxed as if they were a single entity. The European Court of Justice ruled in 2018, however, that certain aspects of the Dutch fiscal unity regime were incompatible with European law. In response, the government introduced various emergency measures to repair the most vulnerable aspects in the Dutch regime with retroactive effect to 1 January 2018. The question is whether this solution will be definitive, given the Ministry of Finance's publishing of a document in June 2019 that sets out four possible options for a future-proof group regime:

1. Abolishing the fiscal unity regime without replacing it by anything else.
2. Replacing the fiscal unity regime by a scheme in which (exclusively) profits or losses within a group of taxpayers can be transferred between entities.
3. Maintaining the fiscal unity regime and the emergency measures as the definitive solution.
4. Extending the fiscal unity regime to allow group companies resident in other EU member states or the European Economic Area (EEA) to join a fiscal unity (i.e. a cross-border fiscal unity).

The document published by the Ministry of Finance called on interested parties, businesses, academics and others to respond to the various options by 29 July 2019. These reactions will be taken into account in the decision-making. The Ministry is expected to write to Parliament in autumn 2019 outlining its proposals for the way forward in this respect.

Comments by BDO
As these developments will impact on any business operating in the Netherlands, we advise to keep a close eye on them in liaison with your BDO contact.

Tighter rules on liquidation and cessation losses
If a taxpayer (parent company) has a participation in another company (subsidiary), the general rule is that the participation exemption applies. In the case of companies (such as an NV or BV), the parent company has a participation if it holds at least 5% of the shares in the subsidiary. In essence, the participation exemption means that benefits arising from and associated to a sufficient degree with the participating interest, such as dividends received or capital gains, are not taxed at the level of the Dutch parent company. Losses on disposal of a participation are not deductible. There is, however, an important exception. This exception applies if the subsidiary is dissolved as a result of a liquidation or insolvency. In many cases, the parent company is then allowed to deduct a liquidation loss.

Tighter rules on liquidation losses
The government announced that the rules on liquidation losses will become less generous from 2021 onwards. Details will be provided in a legislative proposal at a later date. The change is likely to align in outline with a private members' draft bill previously submitted by three opposition parties. In that case, the following three restrictions are likely to be introduced:

- A territorial restriction so that, from 2021 onwards, liquidation losses on participating interests in resident companies de facto outside the EU and EEA will no longer be deductible.
- A material restriction resulting, from 2021 onwards, in liquidation losses on participating interests in companies resident de facto in the Netherlands or another EU or EEA member state being deductible only if the parent company has a qualifying interest in the subsidiary. An interest is regarded as qualifying if the parent company holds more than 25% of the subsidiary's nominal paid-up share capital or can determine the activities of the subsidiary.
- A restriction in time, so that liquidation losses will be deductible only if the liquidation of the participating interest's assets is completed by the third calendar year after the date on which the participating interest's activities cease or it is resolved to discontinue such activities. In the case of this restriction, evidence to the contrary can be produced if there are commercial reasons for allowing a longer liquidation.

The plan is for the territorial restriction (a) and the material restriction (b) to apply only insofar as the liquidation loss on the participating interest exceeds €1 million.

Similar tightening of rules on cessation losses
If a taxpayer performs business activities abroad other than through a separate entity (usually a legal person), those foreign activities are normally classified as a permanent establishment. If the business activities abroad are discontinued in a net loss position, the Dutch taxpayer (i.e. the head office) can normally deduct a cessation loss from its taxable profits in the Netherlands. The government has announced that it also plans to tighten the rules applying to such losses. The territorial restriction (a) and the restriction in time (c) discussed above are expected to apply in similar fashion to permanent establishments.

Comments by BDO
Taxpayers are recommended to establish whether the group has any participating interests or permanent establishments where the deductibility of losses may be reduced from 2021 onwards. Action in response to the bill due to be published by the government can then be taken in good time.

Anti-abuse provisions relating to corporate income tax, dividend withholding tax and withholding tax on interest and royalties
Anti-abuse provisions, under which certain benefits are not available, and certain unfavourable schemes are applicable, in the event of abuse, are included in the legislation on corporate income tax and dividend withholding tax as well as the proposed change in legislation introducing a withholding tax on interest and royalties (which is scheduled to come into force on 1 January 2021: see below). Under the existing legislation, these anti-abuse provisions are not applicable in certain situations if specific substance requirements have been satisfied. The proposal is to change this for corporate income tax and dividend withholding tax with effect from 2020. In future, if the substance requirements have been satisfied, this will lead to only an assumption that no abuse is taking place. The Dutch Tax Authorities will be able to provide evidence to the contrary. If that contrary evidence is allowed, the relevant benefit will not be available or the unfavourable scheme will be applicable. The substance requirements will therefore no longer provide a safe harbour. With effect from 2021, this approach will also be followed for the anti-abuse provision that has been proposed for withholding tax on interest and royalties.

Mandatory disclosure: reporting obligation for intermediaries
With effect from 1 July 2020, intermediaries (including auditors and tax advisers) will be required to submit information on specific arrangements with a cross-border nature to the tax authorities. In 2018, the European Commission adopted the Directive on Administrative Cooperation (DAC 6). The purpose of this European directive is to promote cooperation between Member States in the fight against undesirable forms of tax avoidance. The Netherlands must transpose this directive into national legislation by 31 December 2019. A bill on this was submitted to the House of Representatives of the Netherlands by Dutch Secretary of State for Finance Menno Snel on Friday 13 July 2019. For more information, please see our website. The timetable for dealing with this legislative proposal will align with the timetable for the package of measures in the Tax Budget for 2020.

Withholding tax on interest and royalties

Introduction of conditional withholding tax on interest and royalties
A conditional withholding tax on interest and royalties will be introduced on 1 January 2021 (Withholding Tax Act 2021). This withholding tax is being introduced because the Netherlands is increasingly being used as a 'conduit' to low-tax jurisdictions, due in part to the Dutch tax system's international orientation. This situation is ostensibly at odds with a key policy objective of the Dutch government, which is to counter tax avoidance. The withholding tax is applicable to interest and royalty payments made by companies resident in the Netherlands to affiliated companies resident in low-tax jurisdictions. An affiliated company will in any event exist if the interest held in that entity represents more than 50% of the voting rights under the Articles of Association. This means that the withholding tax will not apply to interest and royalties paid to individuals.

The withholding tax will not be limited to interest and royalty payments made by conduit companies resident in the Netherlands, as companies with a real business presence would also be able to use the Dutch tax system as a conduit to countries that do not levy enough tax on profits. The scope of the new withholding tax will be limited to (1) interest and royalties paid to affiliated companies resident in countries that do not levy 'enough' tax on profits, and (2) abusive situations.

1. *Profits subject to tax rate of less than 9% or EU list of non-cooperative jurisdictions*

A country that does not levy sufficient tax on profits is defined as follows: a jurisdiction where companies are not liable to profits tax or where companies are liable to profits tax at a rate of less than 9%, or a jurisdiction that is included in the EU list of non-cooperative tax jurisdictions. The bill shuts also the door on payments to hybrid entities. In the context of providing legal certainty, the Netherlands publishes annually an exhaustive list of countries that do not levy enough tax on profits and that are considered as non-cooperative. The most recent list is that of 31 December 2018.

This list also includes five Middle East countries with which the Netherlands has concluded a double tax treaty, namely Bahrain, Kuwait, Qatar, Saudi Arabia and United Arab Emirates. For these countries, the withholding tax will be applied in light of the current list and the proposed bill at the earliest after the expiry of a three-year period after the entry into force of the bill, i.e. 1 January 2024. This three-year period gives the Netherlands room to renegotiate its treaties with these countries. Whether the Netherlands will actually be able to levy the withholding tax on interest and royalties depends in part on the tax treaty between the Netherlands and the relevant country that does not levy enough tax on profits, where the receiving company is resident.

2. *Abusive situations*

An abusive situation is a situation in which an artificial structure is used to circumvent the new withholding tax. The classic example is a situation where the shares in the Dutch company that pays the interest and royalties are not directly held by the affiliated entity that is based in a country that does not levy enough tax on profits, but are instead held through an intermediate holding company that is not registered in such a country. Whether a specific situation involves abuse need to be determined on an individual basis.

Conclusion

Once the new withholding tax on interest and royalties is applicable, the Dutch entity or permanent establishment that pays the interest or royalties will have to deduct the withholding tax and remit it by filing a tax return. The applicable rate will be the highest corporate income tax rate. This will be 21.7% as from 2021. An obligation to provide information will also be introduced. The Dutch entity that pays the interest or royalties (withholding agent) and the taxpayer, acting on their own initiative, will have to provide the Dutch Tax Authorities with correct and complete information or data that may be of relevance for the levying of the new withholding tax. Failure to comply with the obligation to provide information owing to wilful misconduct or gross negligence constitutes an offence that carries a fine.

Value added tax (VAT)

Bill implementing directive regarding the harmonisation and simplification in the value added tax system for the taxation of trade between EU trade

The following changes regarding the international trade in goods between traders in the EU will enter into force as from 1 January 2020.

1. Simplified rules call-off stock Based on these simplified rules, the vendor declares an intra-Community supply at the moment the purchaser removes the goods from the stock. The purchaser declares an intra-Community acquisition at the same time. Without these simplified rules, the vendor would have had to declare a deemed intra-Community supply and acquisition upon moving the stock. It must then register for VAT in the EU Member State to which the stock is moved and file a VAT return there. The simplified rules only apply if the purchaser's identity is known. The simplified rules are also subject to the following conditions:

- The trader transferring the goods is not established in the Member State of arrival of the goods;
- The trader for whom the goods are intended is registered for VAT in the Member State of arrival of the goods;
- The trader transferring the goods records the transfer in a specific register and lists the identity and VAT registration number of its customer in its Intra-Community Sales Listing.

The withdrawal from the stock must take place within one year after the transfer. Otherwise the trader is required to declare a fictitious intra-Community supply and acquisition. The customer may be replaced, provided that this is recorded in the register that the trader keeps and the conditions for the simplified rules are met. The simplified rules may also be applied in the case of multiple customers. If stocks are intended for multiple customers, the supplier is required to enter into an agreement with each separate customer. This agreement should set out the

arrangements agreed regarding the transfer of ownership of the goods to be delivered from the available stock. It should also concern customers known to the supplier and the aforementioned conditions must be met for all the customers. The Netherlands currently also apply similar simplified rules for consignment stock (when the purchaser's identity is not known). It is not known whether the Netherlands will retain these simplified rules, since they are wider in scope than the directive. Additional information on the simplified rules for call-off stock is available here.

2. Simplified rules on the basis of which the intra-Community transport is ascribed to one of the links in a chain transaction/ABC transaction. These simplified rules provide clarification regarding the ascribing of the transport. For the purpose of interpreting this rule, we assume a chain transaction with three parties (A, B and C), where B transports the goods, which are moved directly from A to customer C. For VAT purposes there are then two supplies (one supply from A to B and one supply from B to C), with only one of these supplies qualifying as an intra-Community supply. From 1 January 2020, in the aforementioned situation the general rule is that the intra-Community supply is the supply from A to B. The supply from B to C will be considered as the intra-Community supply only if B provides A with a VAT identification number of the Member State of departure. The new rules only apply if B arranges the transport. The simplified rules that will take effect from 1 January 2020 can also be applied in case of longer chains. The simplified rules otherwise have no consequences for the pre-existing simplified triangulation rule. This will remain in effect. Additional information is available here.

3. Simplified rules for the proof of application of VAT zero rating in the case of intra-Community transactions. This enables taxpayers to rely on the same VAT rules in all EU Member States to prove their entitlement to application of the zero rate. The documents that can be used for this purpose are limited, however. This means that taxpayers may have to prove their entitlement to the zero rate in another manner. They are dependent in this regard on the rules applicable in the Member State concerned. This rule is not included in the legislative proposal, but rather in an EU Regulation. This has direct effect in the Netherlands. Additional information is available here.

4. If the supplier does not have a VAT identification number of its customer or if it has not correctly filled in its Intra-Community Sales Listing, it will have no entitlement to apply zero-rated VAT for intra-Community supplies from 1 January 2020. At the moment these are not conditions for applying the zero rate. Member States may not refuse the zero rate if these conditions are not met. They can only impose penalties and fines. From 1 January 2020, however, Member States will refuse the entitlement to the zero rate if these conditions have not been met. This new rule will be included in an Implementation Decree that is yet to be published and is not part of the 2020 Tax Plan. Additional information is available here.

Comments by BDO

These changes come as no surprise, since they are based on an EU directive that was approved by the Member States last year. Three of the measures referred to above entail simplified rules: the measures for call-off stock, ABC transactions and the rules concerning proof. The other measure may possibly increase administrative burdens and result in heightened risk.

It is important that you check in good time what your VAT position will be as from 1 January 2020. The advantage of the harmonised simplified rules for call-off-stock is that they apply in the same way in all EU Member States. You therefore no longer need to worry about whether the simplified rules apply in a particular EU Member State and what the conditions for application are. We are also positive regarding the entry into force of the simplified rules for ABC transactions. The rules are essentially very practical in their application and bring greater legal certainty. If you engage in ABC transactions, it is important to examine the implications of the new rules in the light of your current practice. If you have VAT numbers for different countries, you can check whether it is more beneficial to use a certain VAT number for ABC transactions. Finally, the changes make it even more important for traders to check the VAT numbers of their customers before applying the zero rate and to make a record thereof in their register and/or other records, since VAT numbers are deleted from the register with retroactive effect by some Member States. Traders that have certain evidence, or proof, may rely on the new provision for proving correct application of the zero rate. Because this simplified rule can be rebutted by the Tax and Customs Administration, we believe it remains advisable for traders to continue to keep other evidence or examples of proof they may have. We therefore do not advise amending the current practice.

Reduced VAT rate for e-publications

As from 1 January 2020, the reduced VAT rate will also apply to electronic publications. This new rule applies to all consumers purchasing e-publications and to all traders supplying e-publications. This involves more specifically the electronic supply or lending of books, daily newspapers, weekly periodicals, magazines or other publications that are issued periodically at least three times a year. These e-publications are not provided on a physical medium, but rather are streamed or downloaded. The reduced VAT rate may not be applied to publications that have wholly or

predominantly music or video content or that are wholly or predominantly intended for the purpose of advertising. The reduced VAT rate will also apply to the grant of access to news websites of daily newspapers, weekly periodicals and magazines, for example. This is subject to the condition that the news websites may not consist solely or mainly of advertising material or of video content or listenable music. The purpose of this change is to eliminate the current difference in the VAT treatment of physical and electronic publications and to prevent any new differences.

Comments by BDO

This legislative proposal was previously presented for internet consultation. Therefore, its content is to a large extent no surprise. It strikes us that news sites are now also to be covered by the reduced rate. We consider this to be a positive development, given the fact that news sites may also potentially supersede paper newspapers.

We advise you to examine carefully what implications the VAT rate reduction has in your situation. You should note that the reduced rate does not apply to all digital publications. This underlines the importance of ensuring you keep proper records. Finally, we also draw your attention to the fact that the delivery and installation of the software program that is needed to display the e-publication, for instance, does not fall under the reduced rate, even if the reduced rate applies to the e-publication itself.

new perspectives

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