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Recent Developments in International Taxation

The Netherlands

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Tax classification rules (for Dutch direct taxes)

The qualification of foreign entities for Dutch (direct) tax purposes (ie, as transparent or opaque) currently depends on their comparability with Dutch entities, whereby certain civil law characteristics are taken into consideration. For foreign partnerships, this means that their Dutch tax qualification depends on the transferability of their participations. For instance, a limited partnership only qualifies as transparent for Dutch tax purposes if the prior written consent from *all* its partners is required (and actually obtained, save for certain exceptions) for any change to the relative interests of the partners (the 'Consent Requirement').

These classification rules and mainly the Consent Requirement may result in certain complications. For instance, this framework typically results in the opaque qualification of foreign partnerships for Dutch tax purposes, thus creating a hybrid mismatch. After a long period of debate and criticism, the Dutch Government has now adopted new classification rules for foreign entities, while also revoking the Consent Requirement.

In essence, the new rules entail that a foreign entity is first compared with Dutch legal forms to potentially mirror the Dutch tax qualification. If no evident Dutch equivalent exists, two new rules apply: in respect of foreign tax resident entities, the Netherlands would follow the foreign tax qualification, while foreign entities based in the Netherlands are by default treated as opaque.

Regardless of these changes, it seems that the new Dutch framework may still result in hybrid mismatches. More specifically, a draft decree from the Dutch Ministry of Finance (recently published for consultation) includes a list of foreign entities that have already been classified. This, inter alia, includes United States limited liability companies (LLCs) that are considered opaque for Dutch tax purposes while generally being treated as partnerships for US federal income tax purposes. In addition, it seems that foreign transparent investment funds should by default be compared to a Dutch mutual fund, which only qualifies as transparent for Dutch tax purposes if it applies the Consent Requirement or, alternatively, its participation can: (1) be redeemed only by the fund (or its manager) itself; or (2) be transferred solely to certain family members. As these transfer restrictions are typically not applicable to participation in foreign investment funds, these may, for Dutch tax purposes, be treated as opaque while generally qualifying as transparent for local tax purposes.

The new rules were adopted by the Dutch Parliament in December 2023, but shall enter into force on 1 January 2025. In the meantime, it is to be seen whether the potential (and presumably unintended) hybrid mismatches discussed above shall be addressed.

Corporate income tax

Fiscal investment institutions and real estate

The 2024 Dutch Tax Plan introduces a new restriction for Dutch fiscal investment institutions (*fiscale beleggingsinstelling* or FBI), resulting in this regime no longer being available in case of direct investments in Dutch real estate. This is already the case for the exempt investment institution regime (*vrijgestelde beleggingsinstelling*), which may only invest in financial instruments and thus not (directly) in real estate.

FBIs that currently invest in Dutch real estate may benefit from the proposed transitional measures, including an exemption from Dutch real estate transfer tax that would be due on a restructuring.

Deduction of donations

Although the deductibility of donations by Dutch corporate taxpayers was expected to be abolished, these changes have ultimately been revoked. This means that the former framework remains intact, except for donations made for the personal reasons of shareholders. These donations no longer trigger a deemed (taxable) distribution for Dutch personal income tax and dividend tax purposes.

Dividend withholding tax

Share buy-backs

Under current Dutch tax law, share buy-backs by Dutch listed companies are, subject to certain conditions being satisfied, exempt from the levy of Dutch dividend withholding tax (DWT). This exemption shall no longer be available as of 1 January 2025, meaning that (currently qualifying) share buy-backs will as of then be regularly taxable at 15 per cent Dutch DWT.

Pending case law

In May 2023, Attorney-General Wattel (the 'A-G') issued his opinion in two court cases, both relating to the denial of the DWT exemption that was applied to dividends to a Belgian personal holding entity. The opinions are issued in anticipation of (final) rulings from the Dutch Supreme Court, who the A-G now advises to deny the application of the withholding exemption, in line with an earlier ruling from the Court of Appeal.

In the Netherlands, the DWT exemption can be applied (provided certain conditions are met) unless anti-abuse rules are triggered. This is the case if there is a tax avoidance motive (the direct shareholder is interposed to obtain a more favourable DWT position) *and* the structure should be considered artificial (not based on valid business reasons reflecting economic reality). According to the A-G, the relevant situation was properly assessed by the Court of Appeal, regardless of the fact that the Belgian shareholder of the Dutch distributing entity carried on a material enterprise. The Court of Appeal and A-G, inter alia, argued that such an enterprise was not functional with respect to the participation in the Dutch entity. The opinions have resulted in discussion and, to some extent, criticism, inter alia, given that a tax advantage appears to be a (deemed) tax motive, seemingly without the possibility of providing counter evidence, while there is also a clear difference in treatment between domestic cases (where the anti-abuse rules are not applied) and cross-border situations. In addition, it has been argued that the application of the Dutch domestic anti-abuse rules is not entirely aligned with that of the European Union anti-abuse rules.

The (final) verdict from the Dutch Supreme Court (including potential involvement by the Court of Justice of the EU) is highly anticipated because a ruling in line with the Court of Appeal and A-G would have substantial consequences, not only for personal holding entities but also for corporate structure and private equity (PE)/venture capital (VC) investment.

Conditional withholding tax

On 1 January 2024, the scope of the Dutch Conditional Withholding Tax Act 2021 (Wet Bronbelasting 2021) was expanded to include dividend distributions (in addition to royalty and interest payments that were already in scope).

Dutch conditional withholding taxes (CWT) shall be levied – at the headline Dutch corporate income tax (CIT) rate of 25.8 per cent – over dividends distributed to affiliated entities (holding a controlling interest in the distributing Dutch entity) if these are based in designated low-tax jurisdictions (LTJ), in the case of certain hybrid mismatches or in certain abusive situations (eg, where the recipient is interposed between the Dutch distributing entity and a LTJ shareholder to circumvent the application of Dutch CWT).

Personal income tax

Box 1 adjustments

As of 1 January 2024, both Dutch personal income tax (PIT) rates and the brackets to which these rates apply were (slightly) changed. We refer to the table below for an overview.

	2023		2024	
Bracket	Limit (€)	Rate (%)	Limit (€)	Rate (%)
First	37,149	9.28	38,098	9.32
Second	73,031	36.93	75,518	36.97
Third	N/A	49.5	N/A	49.5

Box 2 adjustments

The applicable Dutch PIT rate for box 2 income (income from substantial interests) has been changed from 26.9 per cent (applicable to the entire box 2 income) to 24.5 per cent applying to the first €67,000 (per person, €134,000 in the case of fiscal partners) and 33 per cent to the excess.

As of 1 January 2023, individuals borrowing excessively from one or more companies in which they hold a substantial interest are taxed on the excess amount as if it was received as a dividend. As per 1 January 2024, the threshold for determining excessive debt was reduced from €700,000 to €500,000 (determined together with fiscal partners).

Box 3 adjustments

In anticipation of a new framework, Dutch taxation of income from savings and investments is currently still assessed based on a notional fixed return, although varying rates of return are applied to different types of assets. For 2024, the rates of return are 1.03 per cent for bank balances, savings and cash; 6.04 per cent for investments and other assets; and 2.46 per cent for debts. In addition, the Dutch PIT rate applicable to box 3 income was increased per 1 January 2024 to 36 per cent (from 32 per cent in 2023).

Abolition of the partial foreign tax regime

Dutch expatriate employees and board members that have obtained a 30 per cent ruling may also opt to be treated as a foreign tax resident for the purpose of non-Dutch substantial interests (box 2) and non-Dutch savings and investments (box 3).

This partial foreign tax residency shall be abolished per 1 January 2025. This means that individuals with a 30 per cent ruling shall be(come) regularly subject to Dutch PIT in respect of substantial interests, and savings and investments, regardless of where these are based. Individuals already benefitting from the partial foreign tax regime may avail of transitional rules under which the regime remains applicable until 31 December 2026.

Wage tax

Restriction of the 30 per cent facility

Dutch expatriate employees and board members may obtain a ruling under which 30 per cent of their gross remuneration is payable as a tax-free allowance. Earlier restrictions of this 30 per cent facility involved the introduction of a capped amount to which the ruling applies (€233,000 for 2024).

Following an amendment from the Dutch House of Representatives, the 30 per cent facility is further scaled-back by gradually reducing the tax-free allowance over the lifetime of the 30 per cent ruling (five years in total). As of 1 January 2024, the tax-free allowance amounts to 30 per cent of the salary during the first 20 months of the ruling, after which it is reduced to 20 per cent of the salary during the next 20 months, and eventually to ten per cent for the last 20 months.

Individuals already benefitting from the 30 per cent facility in 2023 may avail of transitional rules under which the former regime remains applicable (ie, without the gradual reduction of the tax-free allowance).

The Dutch Senate has meanwhile adopted a motion in which it requests the Dutch Government to expedite the contemplated evaluation of the 30 per cent facility (including recent changes), which may potentially result in an alternative proposal that is less harmful for the Dutch economy.

Requalification of self-employment

In principle, the use of independent contractors, and the distinction between self-employed individuals and employees is currently not audited by the Dutch tax authorities. Moreover, if an audit does take place, it should only result in a reassessment in the case of malice.

This enforcement moratorium, as it is referred to, has been extended several times in the past, but is now intended to be abolished as of 1 January 2025. This means that the Dutch tax authorities will re-initiate its supervision and enforcement in this context.

EU law

Minimum taxation (Pillar Two)

On 26 October 2023, the Dutch House of Representatives adopted the proposed Dutch Minimum Tax Act 2024 (Wet minimumbelasting 2024) to implement the EU Pillar Two Directive in Dutch domestic legislation as of 1 January 2024.

Misuse of shell entities (ATAD 3)

In January 2023, the European Parliament approved a draft of the Anti-Tax Avoidance Directive (‘ATAD 3’), an EU directive initially published by the European Commission to counter the misuse of so-called ‘shell companies’ for tax purposes.

Although ATAD 3 was initially set to be transposed into the domestic law of the EU Member States by 1 January 2024, there has been little development in that respect. Our understanding is that,

meanwhile, various alternatives have been explored, although none of these have resulted in an updated or alternative proposal, nor in next steps for the implementation of the initial draft directive.