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Netherlands

by Anton Louwinger and Alexander Fortuin

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2012: The Year in Review

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2012: THE YEAR IN REVIEW

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Several important tax developments took place in the Netherlands in 2012. The financial crisis caused the Dutch government to take measures to increase tax revenues. The general VAT rate was increased from 19 percent to 21 percent on October 1. The same day, a new bank tax entered into force.

The Dutch lower house recently adopted the 2013 tax plan, providing for an increase in the insurance premium tax rate from 9.7 percent to 21 percent. If adopted by the Dutch upper house, the increase will take effect on January 1, 2013. Pending legislation for 2013 also would amend the tax deductibility of interest costs.

Corporate Income Tax

Consolidated Groups

Beginning on January 1, 2012, new restrictions applied to interest costs that relate to the acquisition of target companies that are joined in a tax group (fiscal unity), or are legally merged, with the acquiring vehicle. To avoid a highly leveraged acquisition that results in an erosion of the Dutch tax base of a Dutch target company, the related interest costs can be deducted from the target company's taxable profits only if the acquisition is not deemed to be excessively debt financed. If the acquisition financing costs don't exceed €1 million, the new rules do not apply.

Acquisitions will not be considered to be excessively debt financed if the acquisition loans do not amount to more than 60 percent of the acquisition price of the target company at the end of the year in which the target company is included in the fiscal unity or is legally merged. This 60 percent ratio is reduced by 5 percentage points per year in the subsequent seven years. This means that after seven years, debt in the amount of 25 percent of the acquisition price may remain outstanding, without such related or third debt being classified as excessive acquisition debt. The carryforward of nondeductible acquisition financing costs is available. The legislation applies only to acquisitions that occur from January 1, 2012. Existing structures are grandfathered in.

Qualifying Participations

Regarding book years starting on or after January 1, 2013, there is an additional restriction on the tax deductibility of financing costs connected with the acquisition of, and the investment in, qualifying participations in subsidiaries. In this respect, a participation is defined as an asset that falls within the scope of the participation exemption and also includes options over such qualifying shares and hybrid loans granted to a specific group of borrowers.

Under current corporate income tax rules, benefits (dividends and capital gains) obtained with respect to a qualifying participation are generally exempt, whereas the connected financing costs may be fully deductible. This is known as the *Bosal* gap, a budgetary gap that resulted from the European Court of Justice's *Bosal* judgment (C-168/01, Dec. 18, 2003) for the holder of the participation within the boundaries set by the thin capitalization, anti-base-erosion, and financing conduit rules.

Only the tax deductibility of interest and related costs corresponding to the excessive part of debt financing will be affected. Debt financing relating to participations will be considered excessive if the participation interest exceeds an annual threshold of €750,000. The allocation of interest costs to a participation takes place with a specific formula. Acquisition of, and further investment in, operational activities fall outside the scope of the deduction limitation.

Thin Capitalization Rules

The 2013 budget proposes to eliminate the Dutch thin cap rules beginning January 1, 2013.

Exit Taxes

Following a royal decree dated December 14, 2011, and issued after the important ECJ judgment in *National Grid Indus* (C-371/10), the Dutch legislator presented a law proposal regarding (company) exit taxes. The new rules will also apply to cross-border mergers and de-mergers.

The law proposal can be summarized as follows. On a shift of a company's place of effective management to another European Union or European Economic Area member state, an exit charge takes place with respect to the (deemed) capital gain. Concerning payment, the taxpayer has three options:

- immediate payment;
- deferral of payment until the actual realization of assets; or
- settlement of the exit charge in 10 annual installments.

Several conditions apply for the last two choices. Most importantly, collateral such as a bank guarantee must be provided, and an interest charge will take place. A subsequent exit to a third country leads to an immediate collection of the taxes due, without the possibility of deferral.

Nonresident Tax Liability

The 2013 budget proposes to broaden the scope of the Dutch nonresident taxation for corporate income tax purposes. Currently, the activities of a (corporate) member of the management board or supervisory board of an entity resident in the Netherlands result in a deemed permanent establishment for Dutch corporate income tax purposes.

Without a formal appointment as a member of the management board or supervisory board, corporate entities performing management activities can escape this tax liability. The legislative proposal aims to treat all entities that perform management activities and similar functions to a Dutch company as a nonresident taxpayer, irrespective of formal appointment. In practice, most Dutch tax treaties do not allow the exercise of this taxing right, except under the Belgium-Netherlands tax treaty.

Bank Tax

Beginning October 1, 2012, a bank tax applies to banks operating in the Netherlands. The main goal of the bank tax is to raise funds to protect banks and their clients in the event of a new crisis.

The taxpayers are (i) Dutch-licensed banking entities, (ii) EU or EEA-licensed banking entities that have a branch in the Netherlands, and (iii) non-EU- or non-EEA-licensed banking entities that have a branch in the Netherlands. In addition, a consolidated approach applies. This means that if the banking entities are part of a consolidated group of companies, the parent company of the consolidation will be the taxpayer for purposes of the bank tax. The tax is calculated based on the (adjusted) liabilities of the banking group. Banks with a (consolidated) taxable basis below €20 billion fall outside the scope of this tax. In general, a tax rate of 0.044 percent applies to short-term liabilities (less than one year), and a rate of 0.022 percent applies to long-term liabilities.

Because tax treaties entered into by the Netherlands do not yet cover this bank tax, the Unilateral Decree for the Avoidance of Double Taxation has been amended to provide relief for double taxation on the basis of reciprocity. There is a discussion pending on the introduction of an EU-wide financial transaction tax.

Flexible Company Law

The new flexible company law rules regarding Dutch limited companies (Flex BV) entered into force on October 1, 2012, with the goal of creating more flexible legislation for BVs. Highlights of the Flex BV include:

- there is no minimum paid-in capital;
- shares with no or limited profit rights can be issued;
- shares with no voting rights are allowed (but not combined with no profit rights);
- there are no financial assistance rules; and
- there is no obligatory restriction on transfer of shares.

Dutch tax laws have not been amended to reflect this new Flex BV legislation, with the exception of the fiscal unity rules. It is proposed that in addition to an economic and legal ownership of at least 95 percent of the shares in a subsidiary (in order to be eligible for tax grouping), these shares should also represent at least 95 percent of the statutory voting rights. In addition, the parent company must hold rights to at least 95 percent of the profits of the subsidiary.

Outlook and Conclusions

The proposed measures discussed above will likely be enacted. The increase of the VAT and insurance premium tax rates is no surprise given the financial crisis. The introduction of the Dutch bank tax follows the lead of other countries. On the corporate income tax side, no more tailor-made restrictions will replace the generic thin capitalization rules.

The Flex BV rules can be seen as a positive measure beneficial for the Dutch investment climate. ◆

♦ *Anton Louwinger and Alexander Fortuin are tax lawyers with Hogan Lovells International LLP.*