The Most Important Changes in International Tax Law

CROP

Moving ahead together

Accountancy
Tax services
Corporate finance
HR services
IT audit & services
Legal

- Implementation of Mandatory Disclosure Directive
- Becoming Effective of MLI
- Introduction of Withholding Tax on Interest and Royalties
- Restriction of Liquidation Loss Deduction

CONTENT

Introduction of County-by-Country Reporting 3.

Expansion of Transfer Pricing Documentation Obligation 3.

Changes in the Fiscal Unity Regime 4.

Changes in the Dividend Withholding Tax 4.

Implementation of Mandatory Disclosure Directive 5.

Implementation of ATAD 1 5.

Introduction of New Ruling Policy 7.

Implementation of ATAD 2 7.

Becoming Effective of MLI 8.

Introduction of Withholding Tax on Interest and Royalties 9.

Restriction of Liquidation Loss Deduction 9.

In recent years there has been a strong focus from the OECD and the EU on combating tax avoidance. The consequence of this is that a large number of changes have been made in Dutch tax rules. These changes to a greater or lesser extent affect all companies that do cross-border business, but also entrepreneurs who are only active in the Netherlands may be confronted with some of these legislative changes.

The expectation is that an additional number of major changes will also take place in the coming years. Below we have provided an overview of the major changes that have already been implemented or for which concrete legislative proposals have been submitted, with the date after which the relevant change has become or will become effective.

- Introduction of country-by-country reporting 01-01-2016
- Expansion of transfer pricing documentation obligation 01-01-2016
- Fiscal unity changes 01-01-2018
- Changes in dividend tax 01-01-2018
- Implementation of Mandatory Disclosure Directive 25-06-2018
- Implementation of ATAD 1 01-01-2019
- Introduction of new ruling policy 01-07-2019
- Implementation of ATAD 2 01-01-2020
- Becoming effective of MLI 01-01-2020
- Introduction of withholding tax on interest and royalties 01-01-2021
- Restriction of liquidation loss arrangement 01-01-2021

Please note that the contents of this memorandum can be used for discussion purposes only. For more detailed and accurate information, please contact one of our tax experts.

Introduction of Country-by-Country Reporting (01-01-2016)

Companies established in the Netherlands and Dutch permanent establishments that prepare annual accounts and that are part of a multinational group with a turnover of at least € 750 million, annually have to submit a country-by-country report. In principle, this has to be done by the head company of the group within 12 months after the end of its financial year.

In addition, the Dutch entity or permanent establishment annually has to notify the Tax Authorities before the end of the financial year of by whom and where the report is submitted. If this report is not submitted somewhere abroad, this yet has to be done in the Netherlands. Please note that for financial years ending on 31 December 2019, this notification has to take place in 2019. The financial year of the head company of the group is decisive for this, not the financial year of the Dutch entity. For financial years of the head of the group that have ended on 31 December 2018, the report must be also submitted in 2019.

Expansion of Transfer Pricing Documentation Obligation (01-01-2016)

Taxpayers for corporate income tax in the Netherlands that are part of a multinational group with a turnover of at least € 50 million, annually have to prepare a local file and a master file.

The local file and master files do not have to be submitted to the Tax Authorities, but they must be present in the administration. There is a list of information that according to the Dutch State Secretary has to be processed in the local file and in the master file.

The essence of these two documents is that they describe what the group and the Dutch companies are doing, and how the pricing with regard to intercompany transactions is determined.

This documentation has to be available before the deadline for filing the corporate income tax return. Absence thereof can lead to reversal of the burden of proof and to fines.

Changes in the Fiscal Unity Regime (01-01-2018)

The fiscal unity regime was changed with retroactive effect to 1 January 2018, following the ruling of the European Court of Justice of 22 February 2018 in which the so called "per-element approach" was approved. From that moment on, the existence of the fiscal unity is ignored for the application of the following rules:

- Article 10a of the Corporation Tax Act (anti-profit drainage – limitation on interest deduction);
- Article 13 paragraphs 9 to 15 of the Corporation Tax Act and Article 13a of the Corporation Tax Act (the investment participation scheme);
- Article 13, paragraph 17 of the Corporation Tax Act (the anti-hybrid measure in the participation exemption);
- Article 13l of the Corporation Tax Act (the interest deduction limit for excessive participation interest);
- Article 20a of the Corporation Tax Act (combating trade in loss and profit companies);
- Article 11 (4) of the Dividend Tax Act (the remittance deduction for redistributions).

Here lie both opportunities and risks. For the period up to 1 January 2018 and for rules not mentioned, advantages can be gained. In case a fiscal unity could have been formed with an EU group company if it would have been established in the Netherlands, advantages can be gained, by picking out one element of the fiscal unity. For example in case of non-deductible 10a interest in connection with dividend to the German parent company. It is not possible to transfer losses to the Netherland based on this per-element approach.

In addition, by ignoring the fiscal unity as of 1 January 2018, certain anti-abuse rules may be triggered, which may trigger negative Dutch adverse tax consequence with a need for restructuring.

The government is currently investigating whether the fiscal unity will be maintained in its current form or whether a new set of rules will be introduced to create a successor of the current fiscal unity.

Changes in the Dividend Withholding Tax (01-01-2018)

With effect as of 1 January 2018, a number of changes to the dividend tax have been introduced. Before 1 January 2018, the cooperative was exempt from dividend tax, unless. Now a distinction is made between holding cooperatives and non-holding cooperatives. Non-holding cooperatives are exempt from dividend tax and holding cooperatives are taxed, unless.

There is a holding cooperative if the actual activity of the cooperative in the previous year mainly consisted of holding participations or financing related parties. The explanatory notes state that a top holding company that holds more than 70% of participating interests on its balance sheet but that actively holds participating interests, employs staff and performs other head office functions, will not be regarded as a holding cooperative.

In principle, the same rules apply to the holding cooperative as to the BV and the NV. They do not have to withhold dividend tax if the shareholder or member is established in the EU or in an country with which the Netherlands has concluded a tax treaty for the avoidance of double taxation. For the BV and the NV also applies that the shareholder must hold an interest of at least 5%. This exemption applies regardless of the percentage that the Netherlands may levy on the basis of the treaty.

An anti-abuse test has been introduced. As a result, the exemption does not apply if the foreign parent company holds the interest in the Dutch entity with one of the main objectives to avoid the levy of dividend tax (subjective test) and if there is an 'artificial construction' (objective test).

This test is similar to the test in Article 17 (3) (b) of the Dutch Corporation Tax Act (substantial interest taxation), and partly because of that the avoidance of dividend tax is no longer included as a reason for levying corporate income tax at a foreign shareholder.

In addition, a notification must be made to the Tax Authorities within one month after the dividend payment that use has been made of the exemption.

Implementation of Mandatory Disclosure Directive (25-06-2018)

At the end of 2019, the Netherlands must have implemented the Mandatory Disclosure Directive in Dutch law, after which (aggressive) tax structures must be reported as from 1 July 2020. The proposal to implement the relevant bill is currently before the House of Representatives.

On the basis of this bill, intermediaries such as tax advisers, accountants, notaries, lawyers and financial advisers must report their advices on cross-border arrangements to the Dutch Tax Authorities. Not all cross-border arrangement advices need to be reported, only if certain characteristics are present. However, this is a broad list with a number of unclear characteristics, which means that a large number of advices will be reported to the Tax Authorities.

Although the Directive does not have to be implemented until the end of 2019, the advices must be recorded as from 25 June 2018 and reported in 2020. This means that it is already mandatory to keep track of which advices are potentially covered.

Implementation of ATAD 1 (01-01-2019)

The anti-abuse measures from the Anti-Tax Avoidance Directive 1 (ATAD 1) were implemented on 1 January 2019. These are a number of measures that the Netherlands mandatorily had to introduce on instigation of the EU to prevent tax avoidance.

Earnings Stripping Arrangement
The interest deduction is limited to 30% of the fiscal EBITDA with a franchise of € 1 million. Because of this franchise, most SME companies will not be confronted with limitation. No use has been made by the Netherlands of the allowances offered by ATAD 1, such as transitional arrangements for existing loans or group exceptions.

It has been stipulated that the arrangement must be applied per fiscal unity, and the fiscal unity is not ignored for this rule. As a result, it may be beneficial in certain cases to let the fiscal unity cease to exist, which makes it possible to use the franchise multiple times.

In conjunction with the introduction of this arrangement, other interest deduction limitation rules, such as Article 13l, 15ad and 20 paragraphs 4-6 of the Corporation Tax Act are abolished. For the holding and finance losses, the regime remains applicable to losses realised before 1 January 2019.

CFC Arrangement
If a Dutch taxpayer has direct or indirect the control a company or permanent establishment in a low-tax country, the CFC rules may apply. It is assumed, in general, that a Dutch taxpayer has control if it owns combined with affiliated parties at least 50% of the shares in a company. If the CFC arrangement applies, then all profits that have not been distributed will be added to the Dutch taxable profit. No avoidance for double taxation is provided if this profit is already taxed elsewhere as CFC income. So if BV A holds the shares in BV B, which in its turn holds the shares in a company which is considered as a taxable CFC, then the profit of the latter company is fully taxed at the level of both BV A and BV B.

There is a foreign company with a low tax rate if the statutory tax rate is less than 9% or if the country is included on the EU list of non-cooperative tax jurisdictions. The Netherlands will annually draw up a list of jurisdictions where according to them the statutory tax rate is less than 9%.

The contaminated advantages are not taxed in the Netherlands if the CFC has (i) sufficient substance, for which the same requirements apply as for the intermediate holder substance, so among other things a wage cost criterion of - in short - 100,000 euros and the requirement of an office space that is available during at least 24 months. (ii) The CFC arrangement does not apply either if the CFC usually receives at least 70 percent other benefits than contaminated benefits, these are passive revenues such as interest, or (iii) if the CFC runs a financial enterprise and this CFC receives the contaminated advantages usually for at least 70 percent from third parties.

Exit Tax
If a company or its assets are moved abroad, any Dutch exit taxation must be paid in five annual instalments. The Dutch tax system already had rules regarding the payment of exit tax. However, these rules allowed this tax to be postponed for ten years subject to certain conditions. ATAD 1 is therefore stricter in this respect. In addition, the Netherlands may request security less often.

GAAR
ATAD 1 also contains a general anti-abuse rule ("GAAR"). This arrangement has not been laid down in Dutch domestic law, because according to the Dutch Ministry of Finance, the tax system already has a general anti-abuse arrangement with the doctrine of "fraus legis".

Despite the fact that the law is not amended, it does mean that as from 1 January 2019 Fraus legis must be interpreted in line with the GAAR, and that therefore the explanation of Fraus legis does change.

Introduction of New Ruling Policy (01-07-2019)
The ruling policy has been adjusted as per 1 July 2019. The changes are the following:

- No rulings are concluded for transactions with low-taxed countries and/or for transactions of which the sole or decisive reason is the saving of tax;
- A nexus test has been introduced. This inter alia includes looking at the number of employees in the Netherlands and the functions that are taken by those employees. No ruling will be issued without sufficient nexus;
- The rulings are published in anonymous form; and
- All rulings with an international character are requested from a special team, where previously this only applied for the APAs and the ATRs. The ruling will be always signed by two inspectors.

The result of these changes is that since 1 July 2019, significantly fewer rulings have been concluded.

Implementation of ATAD 2 (01-01-2020)
ATAD 2 and the bill to implement the Directive contain measures against undesirable tax effects of hybrid mismatches. In short, hybrid mismatches are differences in the qualification of bodies, (financial) instruments, permanent establishments or tax residency. The consequence of these different qualifications is that income can remain outside tax levy or that costs can be deducted twice. An example is a payment that is regarded as deductible interest in the paying country and is treated as exempt dividend in the receiving country.

The "anti-mismatch rules" affect hybrid mismatches in affiliated relationships, meaning interests of at least 25%. Also structured transactions between unaffiliated parties fall under the proposed new rules.

The bill combats these mismatches. A detailed description of the consequences in the Netherlands is given for each type of mismatch. This is often partly dependent on the tax treatment in the other country. The possible consequences are that the payments are no longer deductible because the income is not taxed elsewhere, or that receipts are taxed in the Netherlands because they are deductible elsewhere.

A common structure that will be effected is the CV/BV-structure. For example, a from Dutch perspective, transparent CV holds IP-rights and receives royalties from the non-transparent BV, the royalty payment is currently fully deductible in the Netherlands, regardless the taxation at the level of the CV. With this new rule the royalty payment will no longer be deductible for the BV, if the royalty income is not taxed somewhere else.

As of 1 January 2022, reverse hybrids, such as a CV in a CV/BV-structure, which is considered as transparent from a Dutch perspective and as non-transparent from a foreign perspective, will become taxable in the Netherlands as a non-transparent entity.

This means a major change for the Dutch tax law, because the regulations abroad determine how income and costs are treated in the Netherlands.

Becoming Effective of MLI (01-01-2020)

Anti-abuse measures are implemented through the treaties via the multilateral instrument ("MLI"). Most OECD countries have indicated that they will join, this means that the application of many of the Dutch tax treaties will change. Countries can make different choices for many provisions. In addition, the MLI only takes effect for a treaty for financial years starting 3 or 6 months (depending on the type of tax) after ratification by both countries. As a result, careful consideration must be given to when the MLI becomes applicable for a specific tax treaty and which provisions apply.

The Netherlands ratified the MLI in 2019. As a result, for companies whose financial year is the same as the calendar year, the MLI applies as from 1 January 2020. This subject to the condition that the other country has also already ratified the MLI in time.

The three most important changes in the application of tax treaties are:

- No longer applying the tie-breaker for place of residence. Currently for most treaties the place of effective management is decisive in case of dual residency. On the basis of the MLI, the two countries must consult with each other to determine the country where the company has its treaty domicile. Before a decision has been made on this, the company cannot invoke the advantage of the treaty;
- On the basis of the MLI, activities are considered more often as a permanent establishment or permanent representative. This is achieved through various provisions, in which countries have made many different choices. This creates many differences between the definition and size of the permanent establishment and permanent representative between the various treaties that the Netherlands has concluded. In line with this change, the Dutch definition of a permanent establishment will also become wider as of 1 January 2020;
- The Netherlands, like most other countries, have opted for the Principal Purpose Test ("PPT"). This denies treaty benefits if a construction or transaction has as its main purpose to obtain this advantage, unless the granting of this advantage is in accordance with the purpose of the relevant treaty provision. To date, treaty abuse has been assessed differently in each country; in the Netherlands, the Tax Authorities had to prove that there was a conflict with the purpose and scope of the treaty. This was often virtually impossible for the Tax Authorities. This burden of proof about the purpose and scope now shifts to the taxpayer. As a result, it will be ruled much more quickly that there is abuse and that the treaty offers no protection.

The Dutch State Secretary is of the opinion that the PPT in the MLI is equal to the Dutch test laid down in Article 17 (3) (b) and the anti-abuse test for the dividend tax. If this is indeed the case, applying this Dutch domestic test is sufficient when assessing whether a foreign company is liable to pay taxes on received interest, dividend or capital gains. As a result, this income is not taxed on the basis of Dutch law (as a result of which treaty application is not

required) or is taxed at the full corporate income tax rate (because both under Dutch law and under the treaty there is abuse). However, in the literature it is argued that the explanation of State Secretary of the Dutch anti-abuse test is too strict.

Introduction of Withholding Tax on Interest and Royalties (01-01-2021)

A bill has been submitted for the introduction of a withholding tax on interest and royalties. This will cover interest and royalty payments to companies in low-tax countries, the same definition as for the CFC rules, and in cases of abuse. For example, abuse can occur if a company has been inserted in a high-taxed country, but the royalty or interest ultimately ends up in a low-taxed country.

The taxpayer is the recipient of the interest or royalty, but the Dutch company that makes the payment must withhold and pay the tax. The rate is equal to the highest corporate income tax rate, which is expected to be 21.7% in 2021. The tax declaration must be submitted and the payment must be made within one month after the end of the financial year.

Restriction of Liquidation Loss Deduction (01-01-2021)

The current arrangement is that on interests to which the participation exemption applies, the advantages are exempt and a loss in case of liquidation is deductible. This loss is deductible once the settlement has been completed, making it easy to manage the moment of the loss.

A number of restrictions will be imposed on this. In the new proposed arrangement the loss can only be deducted if the liquidation of the participation is completed within three years of the closure of the company or the decision to do so. In addition, the following conditions will apply if the liquidation loss exceeds € 5 million:

- The interest in the subsidiary must be more than 50%; and
- The subsidiary must be domiciled in the EU/EEA.

The proposal includes transitional law for three years with regard to deferred liquidation losses dating prior to 1 January 2021.

Similar provisions have been proposed with regard to the limitation for offsetting the loss at the closure of a permanent establishment.

More information?

Do you want more information about what the changes mean for your company? Please contact our international tax advisors.

Guido van Aarle	gvanaarle@crop.nl	+31 88 4263092
Dick Tulp	dtulp@crop.nl	+31 88 4263288
Ton van Deijl	tvandeijl@crop.nl	+31 88 4263134
Robert Honing	rhoning@crop.nl	+31 88 4263283