

# 2018 DUTCH TAX PLAN

## HLB International Tax Update

### Why is the Netherlands commonly used for investments?

#### The Netherlands — general benefits

- Excellent infrastructure and easily accessible via Schiphol Amsterdam Airport.
- Logistics hub for Europe through the Rotterdam port (Europe's largest).
- Highly educated, productive and multilingual workforce.
- Stable political and economic climate.
- Extensive tax treaty network.
- Extensive network of Dutch bilateral investment treaties (BITs) for protection of investor rights (around 90 BITs in force).
- Open and constructive approach of Dutch tax authorities to discussing (uncertain) tax positions in advance.

#### Dutch holding structure

- Dividends or capital gains from qualifying participations are fully covered by the Dutch participation exemption regime.
  - An advance tax ruling may be obtained re application of the participation exemption (if DutchCo meets certain minimum substance requirements).
- Tax treaties and/or the Dutch dividend withholding tax exemption (implementation EU Parent Subsidiary Directive) may often be invoked to reduce or eliminate foreign dividend withholding tax on dividend distributions by OpCo's to DutchCo.
- The Netherlands (at this moment still) levies a 15% Dutch dividend withholding tax, which is often mitigated or eliminated on the basis of tax treaties or the Dutch dividend withholding tax exemption (depending on foreign shareholder company jurisdiction).
- Dividends or capital gains should only be subject to the Dutch non-resident taxation rules in specific cases in which a structure is deemed to be 'artificial' or 'abusive'.

#### Dutch financing / licensing structure

- Tax treaties and/or the EU Interest & Royalty Directive may often be invoked to reduce or eliminate withholding tax on interest or royalty payments by OpCo's to DutchCo.
- The Netherlands does not levy withholding tax on interest / royalty's payments.
- DutchCo should report a taxable spread on its (intra-group) financing or licensing activities. It should also have sufficient equity at risk in relation to its back-to-back intra-group financing and/or licensing activity.
- DutchCo may be subject to minimum substance requirements in the Netherlands.

#### Dutch based fund structure

- A Dutch based fund structure may be considered if sufficient substance can be maintained in the Netherlands.
- Recommended to obtain an Advance Tax Ruling on this structure from the Dutch tax authorities.
- The Dutch based fund structure should allow making use of the Dutch tax treaty network.
- The Dutch based fund structure should mitigate any exposure to the Dutch non-resident taxation rules and Dutch dividend withholding tax rules, allowing for a tax-efficient repatriation of funds to the level of the foreign shareholder.
- Centralizing the substance of the fund in the Netherlands is likely to also post-BEPS provide a sustainable tax structure.

#### Import and distribution: Optimizing import VAT position

- Postponed accounting system (so-called 'article 23 deferment license') for Dutch import VAT to be paid.
- Import VAT not already due upon the moment of importation, but payment postponed to the moment of filing the Dutch VAT return (in which same VAT return simultaneously a refund of that import VAT may be claimed).
- Significant cash-flow benefits.

## Import and distribution:

### Customs bonded warehouse regime

- The Netherlands allows making use of the so-called 'customs bonded warehouse' regime.
- For the import of goods into the EU and bringing these goods into free circulation in the EU, in principle, import duties are due by the company that imports the goods.
- In case the goods are supplied cross border to non-EU destinations after the import, it might be worthwhile to place the goods in a 'customs bonded warehouse'.
- By placing the goods in a customs bonded warehouse, payment of import duties can be postponed until the moment that it is clear that the goods will actually be supplied within the EU. As a result, no import duties are due for the goods that will be supplied outside the EU.
- Benefit is saving import duties on (re)exported goods to non-EU countries.

## 2018 Dutch Tax Plan: Dutch dividend withholding tax proposals

### Dutch 'holding' Coops

- Dutch Coop often used to mitigate Dutch dividend withholding tax.
- Legislative proposal to make Dutch 'holding' Coops subject to Dutch dividend withholding tax in respect of profit distributions to (affiliated) members holding a 5% or more interest in the Dutch Coop.
- A top-holding company actively managing its participations, employing personnel and performing other head office functions may not need to be qualified as a Dutch holding Coop. Under similar circumstances also Coops used in private equity structures may not need to be qualified as a holding Coop.

### Expansion scope Dutch dividend withholding tax exemption

- Dutch dividend withholding tax exemption currently only applicable to dividend distributions to EU/EER corporate shareholders (subject to conditions).
- Legislative proposal to expand the scope of the Dutch dividend withholding tax exemption to dividends distributed to corporate shareholders in countries with which the Netherlands has concluded a tax treaty including a dividend article (subject to specific anti-abuse provisions).

## Coalition Agreement

- On 10 October 2017 the new Dutch government presented its coalition agreement which intends to ensure a competitive Dutch investment climate for (foreign) investors and corporations. The proposed measures (not legislative proposals yet) include the following:
  - Gradual reduction of Dutch corporate tax rates from 2019 to 2021 from the current 20% rate (first bracket) and 25% rate (second bracket) to 16% (first bracket) and 21% (second bracket).
  - Introduction earnings stripping measure, i.e. (net) interest expenses shall be deductible only up to 30 percent of a taxpayer's EBITDA (€ 1 million threshold will apply, no 'group escape').
  - Abolition of certain existing interest limitation rules (except for the Dutch anti-base erosion regulations).
  - Abolition of the Dutch dividend withholding tax as of 2020 (except for dividend distributions to 'low tax jurisdictions' and in structures that are considered 'abusive').
  - Introduction of a withholding tax on interest and royalty payments to 'low tax jurisdictions'.
  - Reduction of the tax loss carry forward period from nine years to a maximum of six years.
  - Reduction of the term of the 30% ruling regime for expats from eight years to five years.

## Implementation ATAD / MLI

### Implementation MLI in Dutch tax treaties

- 82 of the 94 tax treaties concluded by the Netherlands to be covered by the MLI.
- The Netherlands has not notified tax treaties concluded with Belgium, Brazil, Bulgaria, Denmark, Ireland, Kosovo, Kyrgyzstan, Poland, Spain, Switzerland, Taiwan and Ukraine.
- With some minor exceptions, the Netherlands intends to implement the MLI measures in its tax treaties as broadly as possible with a strong preference for the inclusion of a PPT as anti-abuse provision.

### Implementation ATAD measures in Dutch tax law

- At this stage only a Consultation Document has been published.
  - **CFC-rules:** potential broadening of the existing Dutch CFC rule (current Dutch CFC rule only applicable in case of a 25% shareholding in a low-taxed company which assets consist for 90% or more of low-taxed free portfolio investment assets).
  - **Earnings-stripping measure:** (net) interest expenses shall be deductible only up to 30 percent of a taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA).
  - **GAAR:** The Dutch abuse of law doctrine is considered to in principle already sufficiently cover this item.
  - **Exit taxation:** The period for settling exit taxation in respect of corporate income tax will be reduced from 10 years to a maximum period of 5 years.
  - **Hybrid mismatches:** No specific proposals for implementation have been made yet.
- Consultation Document leaves main choices allowed under the ATAD for the new Dutch government to decide upon.

### Minimum substance requirements

- At least half of the aggregate number of statutory and decision-competent board members of the (intermediate) holding company live or effectively reside in the (intermediate) holding company jurisdiction.
- Board members living or residing in the (intermediate) holding company jurisdiction have professional knowledge and skills to properly conduct their duties. These duties include at least the decision-making with respect to the taxpayer's transactions and ensuring a proper implementation of those transactions.
- The (intermediate) holding company has qualified staff for the adequate implementation and administration of its transactions.
- The management decisions are made in the (intermediate) holding company jurisdiction.
- The most important bank accounts of the (intermediate) holding company are held in the (intermediate) holding company jurisdiction. Both the entitlement and decision-making authority with respect to the (main) bank account needs to reside with the (intermediate) holding company.
- The (intermediate) holding company's transactions need to be administered in the (intermediate) holding company jurisdiction and the bookkeeping needs to be physically present in the (intermediate) holding company jurisdiction.
- The (intermediate) holding company has complied with all of its tax return obligations.
- The (intermediate) holding company's registered address is in the (intermediate) holding company jurisdiction.
- To its knowledge the (intermediate) holding company is not deemed to be a tax resident in another jurisdiction.
- The (intermediate) holding company has financed the cost price of its participation for at least 15% with equity.

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