taxnotes® international

Volume 108, Number 12 ■ December 19, 2022

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Reprinted from *Tax Notes International*, December 19, 2022, p. 1569

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by Charlotte Tolman and Michael Molenaars

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In this installment of In Step With Stibbe, Tolman and Molenaars explain major Dutch tax plans and developments expected in 2023 and how they may affect international business.

Over the past year, several changes have been made in Dutch tax law. We have discussed the most notable in our previous articles: the introduction of rules denying transfer pricing adjustments for international mismatches,[1] and the implementation of the reverse hybrid rule as a final part of the implementation of the EU anti-tax-avoidance directive (ATAD 2, or Directive 2017/952/EU) as of January 1.[2]

The new year is just around the corner, and a number of changes in Dutch tax law are due to be implemented on January 1, 2023, or expected to be submitted in the course of 2023. In this article, we provide an overview of the most important Dutch tax developments for international businesses and some other relevant changes we can expect in 2023.[3]

The 2023 Tax Package

On September 20, Budget Day, the Dutch government published its 2023 Tax Package, including the 2023 Tax Plan. These legislative proposals were adopted by the lower house (Tweede Kamer) on November 10 and are expected to be adopted by the Senate (Eerste Kamer) before year-end. Once adopted, these rules will enter into force on January 1, 2023.

Corporate Income Tax Rates

For 2023 the general corporate income tax rate will remain 25.8 percent. The step-up rate of 15 percent will be increased to 19 percent for the first profit bracket, which will be lowered from €395,000 to €200,000.

Real Estate Transfer Tax Rate

The general real estate transfer tax rate will be increased from 8 percent to 10.4 percent. This rate applies to acquisitions of nonresidential buildings and residential properties by legal entities and natural persons who do not themselves (other than temporarily) use these properties as their main residence. Real estate transfer taxes are borne by the buyer, so the increase is expected to put pressure on real estate prices.

End of Real Estate FII Regime as of 2025

In the 2023 Tax Package, the Dutch government announced the introduction of a "real estate measure" to be included in the Dutch

[1] *See* Charlotte Tolman and Michael Molenaars, "Combating Non-Arm's-Length Transfer Pricing in the Netherlands," *Tax Notes Int'l*, Mar. 29, 2021, p. 1697.

[2] *See* Tolman and Molenaars, "Tackling Reverse-Hybrid and Entity Classification Mismatches in the Netherlands," *Tax Notes Int'l*, May 17, 2021, p. 909.

[3] State of the legislative process as of December 13, 2022.

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Corporate Income Tax Act 1969 from 2024. On December 9 it was announced that the real estate measure will be postponed until 2025. Based on this rule, fiscal investment institutions (FIIs, or *fiscale beleggingsinstelling*) will no longer be allowed to directly invest in real estate. Consequently, the profits of real estate FIIs will, in principle, be taxed at the general corporate income tax rates (see above) instead of 0 percent. The abolishment of the real estate FII regime (*vastgoed fbi-regime*) was proposed in 2018 together with the abolishment of the Dutch dividend withholding tax.

The Dutch government then, however, opted not to abolish the real estate FII regime, because it was decided — after heavy criticism — that the dividend withholding tax would be maintained. The fact that the dividend withholding tax remains is now not a barrier to abolishing the FII regime. Under the new measure, an investment institution may no longer invest in real estate to qualify for the FII regime. No distinction will be made between real estate located in the Netherlands or abroad. The "financing requirement," which says that financing of the investments with debt may not exceed 60 percent of the book value of the real estate, will also be abolished.

The Dutch government foresees that, before the real estate measure enters into effect in 2025, some (unlisted) real estate FIIs (such as investment vehicles or pension funds) are likely to restructure their investments to mitigate corporate income tax liability for some of their investments. In response, the Dutch government announced it would investigate whether additional (antiabuse) measures should be introduced.

Personal Income Tax

The Dutch Personal Income Tax Act 2001 (Wet op de inkomstenbelasting 2001) divides income into three sources, known as boxes:

- income from employment (Box 1);
- income from a substantial interest (Box 2); and
- income from savings and investments (Box 3).

An individual is subject to personal income tax on Box 3 income at a 31 percent rate based on a deemed return, regardless of any actual income or capital gain deriving from savings and investments. This deemed return is calculated by applying the applicable deemed return percentage(s) (from 1.82 to 5.53 percent) to the individual's deemed yield basis determined on January 1 of the relevant tax year (*rendementsgrondslag*), insofar as this exceeds a specific threshold (*heffingvrij vermogen*). The Dutch Supreme Court has ruled[4] that the Box 3 income tax levy violates the European Convention on Human Rights and its first protocol. In response, the Box 3 Recovery Act (Wet rechtsherstel box 3) and the Box 3 Bridging Act (Overbruggingswet) were submitted, proposing a calculation method for the deemed return based on the actual composition of the yield basis (with separate deemed return percentages applying for savings, debts, and investments) for the years 2023, 2024, and 2025.

If the deemed return calculation based on the actual composition of the yield basis is lower than the deemed return based on the current system, the lower deemed return will be used to determine the taxable Box 3 income. Also, it is intended that as of January 1, 2026, tax rates on income from savings and investments will be calculated based on actual (instead of deemed) returns. The exact features of the revised regime are expected in the coming years. This may affect some (international) employee remuneration plans that qualify as Box 3 income.

The 30 Percent Payroll Tax Facility

Under the 30 percent payroll tax facility — or the so-called 30 percent ruling — employees with specific expertise coming from abroad to (temporarily) work in the Netherlands may have up to 30 percent of their wages exempted from taxation, irrespective of the amount of wage. The 30 percent ruling is intended as compensation for additional costs incurred by foreign employees when coming to work in the Netherlands (such as housing and travel costs).

[4] Dutch Supreme Court, ECLI:HR:2021:1963 (2021).

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As an alternative to the 30 percent ruling, employers and employees can opt for untaxed reimbursement of the extraterritorial costs actually incurred (often chosen if this amount is higher than the amount of wage of that particular year). As of January 1, 2023, this choice must be made in the first salary period by the employer to avoid cherry-picking during the year.

Also, the scope of the 30 percent payroll tax facility will be limited as of January 1, 2024, to the standard salary (also known as the *Balkenende Norm*) that follows from the Senior Executives in the Public and Semi-Public Sector (Standards for Remuneration) Act (Wet normering topinkomens), which has been set at €216,000 per year (for 2022). This means that an employer may exempt a maximum of €64,800 (that is, 30 percent of €216,000, which is expected to be higher in 2024 because of inflation) of an incoming employee's wage from taxation per year. Based on a transitional scheme, the 30 percent payroll tax facility will not be capped until January 1, 2026, for employees already applying the facility over the last wage period of 2022.

Hybrid Entities and New Classification Rules

We discussed in one of our previous articles that in March 2021 the Dutch government started a public internet consultation to amend its classification rules for specific domestic and foreign legal entities.[5] The proposal aims to tackle the cause of hybrid entity mismatches and to bring the Dutch classification rules more in line with common international classification standards. On June 3 the Dutch State Secretary of Finance Van Rij presented the Fiscal Policy and Implementation Agenda for the coming years, in which he sets out the ambitions in taxation and implementation of Dutch tax authorities.[6] The agenda contains an update on the proposed amendment to the classification rules, which is in line with previously published information. The legislative proposal is expected to be submitted in the third quarter of 2023 (effective date January 1, 2024).

Under Dutch tax law, a CV (*commanditaire vennootschap*, or limited partnership) is considered transparent (or "closed") if unanimous consent of the partners is required for admission or substitution of a limited partner. If a CV is not closed, it is treated as a taxable entity (an open CV). The proposal aims to abolish the consent requirement, leaving all Dutch CVs (open and closed) considered transparent for Dutch tax purposes. The tax transparency status of foreign legal partnerships is determined based on Dutch principles. This means that after the abolishment of the unanimous consent requirement, foreign limited partnerships not meeting the requirement may be considered transparent for Dutch tax purposes. Also, two supplementary methods for classifying legal entities will be introduced.[7]

A public consultation was also started on October 10 on the (civil law) legislative proposal for the modernization of partnerships.[8] Although it concerns a civil law proposal, one of the relevant features is that CVs will obtain legal personality (which they do not have now). In principle this has no tax effect, except for real estate transfer tax and the conditional withholding tax.

Lastly, the Dutch State Secretary of Finance on December 6 published a new policy decision on hybrid entity provisions.[9] We have previously discussed treatment of hybrid entities in regards to the Dutch Conditional Withholding Tax Act 2021 (Wet bronbelasting 2021).[10] The policy decision clarifies how dividend withholding tax and conditional withholding tax work for payments made to foreign hybrid entities that are treated as taxpayers from a Dutch tax perspective, but treated as transparent entities in their jurisdiction. The policy notes that in relation to U.S. structures, questions have been raised.

[5] *See* Tolman and Molenaars, *supra* note 2.

[6] Letter to the House of Representatives from the Dutch State Secretary of Finance, "Fiscal Policy and Implementation Agenda," No. 2022-0000132565 (June 3, 2022).

[7] The two supplementary classification methods proposed are the symmetrical method (the foreign jurisdiction's classification will be followed) and the fixed method (foreign entities resident in the Netherlands will be considered taxable entities for Dutch tax purposes).

[8] See public internet consultation on "the legislative proposal on the modernization of partnerships"; Dutch government, "Wetsvoorstellen modernisering personenvennootschappen" (in Dutch) (last accessed Dec. 8, 2022).

[9] Dutch State Secretary of Finance, "Policy Decree on Hybrid Entity Provisions," No. 32363 (Dec. 6, 2022).

[10] See Tolman and Molenaars, "The New Dutch Conditional Withholding Tax and Hybrid Entities," *Tax Notes Int'l*, Oct. 25, 2021, p. 427.

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The structure concerns a Dutch private limited company (*besloten vennootschap*, or BV), treated as a taxpayer for Dutch tax purposes and considered transparent from a U.S. tax perspective under the check-the-box regime. It pays dividends, interest, or royalties to its shareholder, a U.S. limited liability company, treated as a taxpayer for Dutch tax purposes and considered transparent from a U.S. tax perspective. The LLC is held by U.S. Inc., treated as a taxpayer for U.S. tax purposes. From a U.S. perspective, both the LLC and the BV are considered transparent, so U.S. Inc. does not recognize any dividend, interest, or royalty income. The question comes up over how to interpret this for Dutch withholding tax purposes.

The policy decision confirms that in this situation, U.S. Inc. will be treated as the recipient of the proceeds under the Dutch Dividend Withholding Tax Act 1969 (Wet dividendbelasting 1969) and the Conditional Withholding Tax Act 2021, and thus a domestic exemption may apply. The only condition is that the Dutch withholding agent (the BV) must prove that the income from which the dividend, interest, or royalty payments are made is taxed in the hands of the ultimate participants. This may, for example, follow from U.S. Inc.'s tax returns.

Stock Option Plans

We discussed previously that the Dutch government in May 2021 started an internet consultation to amend the tax treatment of stock option plans in the Netherlands.[11] A legislative proposal was submitted to parliament in 2021 but put on hold because of criticism. The aim is to make it more attractive for employers to grant stock to employees by shifting when the stock options become taxable.

Stock options are generally subject to Dutch wage taxes and social security contributions or personal income taxes on their exercise or sale. Under the new rules, the stock options would become taxable once the shares obtained are *tradable* by the holder. Despite the criticism, the text of the legislative proposal has not been amended and is under consideration by the Senate. Once adopted, the new rules for tax treatment of stock option plans will become effective January 1, 2023.

Consultation on Tax Avoidance Schemes

On November 29 the Dutch Ministry of Finance opened a public internet consultation on "remarkable tax avoidance schemes" (*opmerkelijke belastingconstructies*).[12] The consultation is part of a wider ministry project through which the country's entire tax regime will be reviewed and the introduction of additional antiabuse measures and legislation will be considered.

The first phase of the project concerns the identification of remarkable tax avoidance schemes. It is envisaged that the first measures to be used to combat some identified tax schemes will be presented in the second quarter of 2023. Moving forward, an annual publication of remarkable tax avoidance schemes is planned. The consultation document includes the following two examples of previously combatted tax avoidance schemes:

- the introduction of antiabuse rules on January 1, 2019, to prevent noncommercial sport accommodations from artificially creating a right to deduct input VAT; and
- the introduction of a dividend withholding tax obligation for what is known as "holding cooperatives" (*houdstercoöperaties*) on January 1, 2018.

Furthermore, antiabuse or other tax measures and new tax legislation will be introduced in 2023 (or subsequent years) because of the consultation.

Pillar 2

In the fall of 2021, 137 jurisdictions of the OECD/G-20 inclusive framework reached agreement on a two-pillar solution, followed by a set of model rules (the global anti-base-erosion (GLOBE) rules). The objective of pillar 2 is to guarantee a minimum level of taxation by introducing rules that grant jurisdictions

[11] *See* Tolman and Molenaars, "Proposed Amendments to the Dutch Tax Treatment of Stock Option Plans," *Tax Notes Int'l*, July 26, 2021, p. 481.

[12] See public internet consultation on "remarkable tax constructions" (*opmerkelijke belastingconstructies*); Dutch government, "Inventarisatie belastingconstructies" (in Dutch) (last accessed Dec. 8, 2022).

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additional taxation rights, and to limit tax competition between jurisdictions.

A minimum tax rate of 15 percent was agreed. The European Commission published a proposal for a directive (2021/0433 (CNS)) on December 22, 2021, which included the OECD GLOBE rules. The scope of the draft directive is extended by the inclusion of large-scale domestic groups, to ensure compliance with EU freedoms (especially the freedom of establishment). The aim is for the rules to be implemented in all 27 EU member states by 2023, effective January 1, 2024. It is therefore important for multinational and large-scale domestic groups to assess whether they would be within the scope of pillar 2 and its impact.

On October 24 the Dutch government published a draft bill and explanatory notes for public consultation on the implementation of pillar 2. On December 12 the EU Council announced that EU member states have reached an agreement on pillar 2. A procedure for the formal adoption will be launched, and it is expected to be finalized soon. It remains to be seen whether other countries will follow soon with their implementation legislation.

Temporary Oil and Gas Solidarity Charge

On November 1 the state secretary of finance submitted a new legislative proposal to impose a temporary solidarity charge on companies active in the oil and gas industry. The proposal follows from Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices. The aim of the proposal is to tax unforeseen windfall profits that are a result of circumstances such as the war in Ukraine and inflation. The intention is to introduce the new levy with retroactive effect for financial years that started in 2022. For the years 2023 and 2024, it is intended to increase the rates of the Mining Act (Mijnbouwwet).

The solidarity charge will be levied on Dutch resident or foreign Dutch corporate income tax payers that generate at least 75 percent of their turnover through exploration of hydrocarbons, mining, and refining of crude oil, among others, as referred to in Regulation (EC) 1893/2006 of the European Parliament and the council. The solidarity charge will be levied on a stand-alone company basis — that is, as if there were no fiscal unity for Dutch corporate tax purposes.

Profits will be considered "surplus profits" if the amounts exceed 120 percent of the average taxable income of a taxpayer over the four years preceding the financial year that started in 2022 (with a minimum of zero). The same applies to foreign Dutch corporate income tax payers, albeit taxable profits of a permanent establishment or permanent representative in the Netherlands will be taken into account. The rate of the solidarity charge will be 33 percent. ■

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