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Ashley Peeters

Michael Molenaars

Ashley Peeters is a senior associate with Stibbe London, and Michael Molenaars is a partner with Stibbe in Amsterdam.

In this installment of In Step With Stibbe, Peeters and Molenaars examine aspects of Dutch tax law that are relevant to debt restructuring when Dutch debtors or guarantors are involved, including certain novel pillar 2 issues.



In the past two years, several large debt restructurings involving multinational companies have taken place. If Dutch debtors or guarantors are involved, the Dutch tax aspects typically play an important role. In this installment we address certain Dutch tax considerations that should be taken into account when dealing with restructurings, including some pillar 2 rules.[1] First we examine the different options to restructure debt and provide information on pillar 2. Then we address debt waivers and debt-for-equity swaps. We also examine key issues regarding enforcement and debt reorganization.

## Background

How debt is restructured depends on the facts and circumstances of the relevant creditor and debtor group. During a restructuring, parties should take into account what is commercially possible and the parties' preferences.

It is not uncommon for a restructuring to involve the (partial) waiver of the outstanding debt. If (a part of the) debt is waived, this could result in tax payable at the level of the Dutch debtor. In most cases the domestic debt waiver exemption could be applicable and would not lead to a taxable freefall of the debt (subject to certain conditions, which we discuss below). When the debtor and creditor are related, it may be more difficult to substantiate that the debt waiver exemption would be applicable, and parties could consider waiving the debt based on shareholder motives because this may, if structured correctly, also lead to a nontaxable freefall of debt.

A creditor may want to receive equity and swap its debt for shares. This could, for example, be more appealing for a creditor because it would still be able to receive a return on its investment in the form of dividends or the value of the shares increasing. Again, this depends on the commercial possibilities and whether it would indeed be beneficial to actually hold equity in the debtor. A group of unrelated creditors could also choose to take full control by enforcing their share pledge in the debtors group. Obtaining control has certain Dutch tax consequences that we discuss below.

Regarding the aforementioned options, consequences of pillar 2 — as implemented in Dutch tax law — should also be taken into

[1] See the EU minimum tax directive (Council Directive (EU) 2022/2523 of December 14, 2022), which was implemented in the Netherlands in 2024 (*Wet minimumbelasting 2024*).

account. Pillar 2 aims to target both worldwide and EU groups whose consolidated group revenue exceeds €750 million in at least two of four previous consecutive years, and it introduces a minimum effective tax rate of 15 percent.[2] Although the United States is not a party to pillar 2 and U.S. entities would therefore not be in scope, non-U.S. group members of a U.S. group could still fall within scope.

The basic pillar 2 mechanism is that if an in-scope group is subject to an ETR that does not meet the minimum standard in a country where the group carries out activities, participating states will collect a top-up tax by means of (1) the income inclusion rule (the minimum ETR is paid at the level of the ultimate parent entity in proportion to its ownership rights in subsidiaries that are taxed at the low ETR), (2) a qualified domestic minimum top-up tax (whereby any top-up tax to be paid by domestic entities with an ETR of less than 15 percent that are part of an in-scope group will be collected by their own government, instead of by the ultimate parent entity in another jurisdiction), or (3) the UTPR (formerly known as the undertaxed payments rule, which functions as a backstop in addition to the IIR and results in a top-up tax at the level of the parent entity if not captured under the IIR or a qualified domestic minimum top-up tax).

## Debt Waiver Exemption

As mentioned above, there are different options to waive a debt. If the debt is waived, this could lead to taxable profits at the level of the debtor. However, in the Netherlands there is a domestic debt waiver exemption that may be applicable.

Dutch tax law provides for an exemption for a businesslike debt waiver, provided that specific conditions are met. The key conditions are that the receivable is not realistically collectable from a creditor's perspective and that the creditor expressly waives the receivable. Before 2025 the Dutch debt waiver exemption in principle applied only to the taxable income exceeding the in-year loss and the past-year tax losses available for compensation (that is, all tax losses were to be used first).

In 2022 the Dutch tax loss compensation rules changed. As a result, only €1 million plus 50 percent of the taxpayer's taxable income (minus the €1 million threshold) can be set off against tax losses from previous years. The foregoing could have a negative effect on the application of the debt waiver exemption because all tax losses (including those above the threshold) would be taken into account and the taxpayer could end up in a taxpaying position (that is, for the amount of available tax loss that could not be compensated in the year of the debt waiver).

For example, if there is a Dutch debtor that received a loan valued at €300 million and has tax loss carryforwards for an amount of €200 million, the following will apply. There is a waiver profit of €300 and a tax loss carryforward of €200 million. The debt waiver exemption will exempt only €100 million — that is, €300 million of waiver profit minus €200 million of available tax losses. As a result of the new rules, only €101 million of tax losses may be set off against the remainder of the waiver profit (that is, €1 million plus 50 percent of €200 million). The taxable amount in this example would be €99 million.

Tax practitioners (including the Dutch Order of Tax Advisers[3]) highlighted to the Dutch government that the loss setoff rules applicable as of January 1, 2022, were hampering debt restructurings. Therefore, as of January 1, 2025, the requirement to first use past-year tax losses was removed if those tax losses exceed €1 million; if so, only in-year losses are taken into account. This is a welcome change that ensures that in a distressed position a debtor will not end up in a taxpaying situation. However, note that the available loss carryforward will still be reduced by the amount of the debt waiver exemption. Also, if a Dutch debtor is included in fiscal unity, additional antiabuse rules may be applicable that determine whether the debtor in a stand-alone situation would be able to use fewer tax losses. If

[2] The ETR is calculated by dividing the payable corporate tax by the net qualifying income.

[3] See, for example, a Dutch Order of Tax Advisers blog post on this issue. "Knelpunt Samenloop Kwijtscheldingswinstvrijstelling en Verliesverrekeningsregels," de Nederlandse Orde van Belastingadviseurs (July 21, 2023).

that is the case, only the lower amount of those losses can be taken into account.

When applying the debt waiver exemption, no Dutch corporate income tax will be due on the income as a result of the waiver. The exempted amount will, based on national law, not be included in the net qualifying income to calculate the ETR for pillar 2 purposes. The potential loss of available loss carryforwards (which would be a deferred tax asset) will also not be included in calculating the ETR. However, the conditions for debt release under pillar 2 differ from the domestic debt waiver exemption. For the debt release to be exempt under pillar 2, (1) the release needs to happen under legal or bankruptcy proceedings; (2) there should be a third-party debtor, and it should be substantiated that the debtor would not be able to fulfill its obligations under the debt in the coming 12 months; or (3) third-party debtors can get a release to the extent that the debtor's liabilities exceed the fair market value of its assets determined immediately before the debt release. As a result, a waiver of debt may be exempt from a domestic perspective but may not be exempt from a pillar 2 perspective, and a top-up tax may be applicable.

In practice it is not always possible to apply the domestic debt waiver exemption on an intragroup basis. The waiver might not be based on business reasons (*zakelijke overwegingen*) because it is not a third-party situation, and it might not be seen as a distressed situation in which the debt cannot be paid in the short term. Alternatively, regarding intragroup debt waivers, the debt could be waived based on shareholder motives (*onzakelijke kwijtschelding*), which would result in an informal capital contribution if the shareholder waives its subsidiary's debt. An informal capital contribution should, in principle, not lead to Dutch tax consequences. A debt waiver is based on shareholder motives if (1) there is a shareholder-driven basis for the waiver, (2) the waiver is properly documented, and (3) both parties are aware and accept the benefit granted under the waiver. Again, this may be different from a pillar 2 perspective.

When waiving debt within the group it is therefore important to analyze in what capacity that waiver is granted and whether the debt waiver exemption might be applicable. When applying the debt waiver exemption it is important to also take into account any losses and the effect of the waiver on those losses. If the group falls under the scope of pillar 2, it should be further reviewed whether the debt waiver is also exempt for pillar 2 purposes. If it is uncertain whether the domestic debt waiver exemption may be applicable within a group (because it may be more difficult to substantiate that there is a business reason to do so), it may be advisable to structure it as a debt waiver based on shareholder motives to ensure that it is seen as an informal capital contribution that should, in principle, have no Dutch tax consequences.

## Debt-for-Equity Swap

When the debt waiver exemption cannot be applied or a mere waiver of debt is commercially not the preferred route, another alternative could be the debt-for-equity swap. A debt waiver and a debt-for-equity swap should both have the same Dutch tax consequences (not taking into account losses and subject to the transaction being structured correctly), but it may be the creditor's preference to receive equity. This is also dependent on the economics of the deal and what commercially could be possible.

With a debt-for-equity swap, the Dutch debtor will issue shares to the creditor. The obligation to pay the nominal value of these shares is set off against the receivable that the creditor has on the debtor. In principle, a debt-for-equity swap should not result in a taxable gain in the Netherlands at the level of the debtor, provided that the face value of the swapped debt is equal to the total nominal value of the issued shares. This has been confirmed in Dutch Supreme Court case law[4] and by the Dutch tax authorities regarding that case law.[5]

However, a debt-for-equity swap could have pillar 2 consequences. In the OECD's February

[4]Dutch Supreme Court, 16/104, ECLI:NL:HR:1969:AX6850 (1969), and Dutch Supreme Court, 18/402, ECLI:NL:HR:1978:AX2941 (1978).

[5]Within the Dutch tax authorities, there are several so-called knowledge groups (Kennisgroepen) that specialize in different aspects of Dutch tax law. Tax inspectors may submit cases to these knowledge groups, which take a position (a knowledge group position). Two knowledge group positions confirm that a debt-for-equity swap should not result in a taxable gain subject to certain conditions. KG:011:2023:8 (Jun. 29, 2023); KG:011:2023:9 (July 4, 2023).

2023 administrative guidance on debt release,[6] a debt-for-equity swap is mentioned, but it is unclear whether and to what extent a debt-for-equity swap is actually in scope of pillar 2. The question is whether the commercial profit resulting from that swap could fall under the scope of an exempt debt release for pillar 2 purposes. A different treatment under the pillar 2 rules (whereby a profit may be recognized) and the Dutch tax rules (whereby no profit is recognized based on case law) may result in a top-up tax being applicable because the debt-for-equity swap could lead to a higher income and a lower ETR rate.

### Enforcement

Over the last two years creditors have been willing to exercise more authority over their investments. They have been increasingly enforcing their share pledges in the (distressed) debtors and taking control.

Several Dutch tax consequences can be triggered as a result. In general, analysis should be made regarding the application of the Dutch dividend withholding tax (DDWT) and Dutch conditional withholding tax (DCWT).

The payment of interest and dividends due from a paying entity that is (deemed) resident (or has a permanent establishment) in the Netherlands will be subject to DCWT if that entity is related to the entity entitled to the (deemed) payment and the related recipient entity is (deemed) resident in a low-tax jurisdiction or has a PE in the low-tax jurisdiction to which the interest is allocated.[7] The DCWT may also be applicable if payments are made to hybrid entities or in certain (deemed) abuse situations (similar rules apply as to antiabuse rules described below regarding the DDWT exemption). As a result, enforcement of a pledge may have consequences for interest and dividend payments to a shareholder that becomes related to the debtor.

It should also be reviewed whether dividends can be distributed free of withholding tax after enforcement. The DDWT exemption is applicable if (1) the shareholder of the Dutch entity is located in a treaty jurisdiction, provided that the tax treaty contains a dividend provision; and (2) the shareholder would have qualified for the Dutch participation exemption or participation credit if it had been located in the Netherlands (that is, it holds an indirect 5 percent interest in the nominal paid-in capital of the Dutch entity; separate classes of shares are irrelevant).[8] Furthermore, certain antiabuse rules apply, and either the subjective or objective test should not be met for the DDWT exemption to apply. Under the subjective test, it needs to be determined whether the substantial interest is held with a main purpose of avoiding DDWT. To determine whether a main purpose of the structure is to avoid DDWT, it has to be assessed whether the direct foreign shareholder of the Dutch entity has been interposed to improve the DDWT position of another person (the so-called look-through approach, or *wegdenkgedachte*).[9] Under the objective test, it must be determined whether there is an artificial structure, transaction, or series of artificial arrangements or transactions that have not been put in place for valid commercial reasons reflecting economic reality.[10]

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[6] OECD, "Tax Challenges Arising From the Digitalisation of the Economy — Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)" (Feb. 2023).

[7] Entities are related if (1) the recipient entity (alone or together with other entities forming a qualifying unity) has a qualifying interest in the interest- or guarantee-paying entity; (2) the paying entity (alone or together with other entities forming a qualifying unity) has a qualifying interest in the recipient entity; or (3) a third party (alone or together with other entities forming a qualifying unity) has a qualifying interest in both the recipient entity and the interest- or guarantee-paying entity. The concept of a qualifying unity was introduced as of January 1 and involves companies acting together with a main purpose of avoiding the imposition of DCWT at the level of one (or more) of those entities.

[8] If a creditor holds an interest of at least 5 percent in shares (or a separate class of shares) in the Dutch debtor, it should also be determined whether the creditor would fall within the scope of the Dutch nonresident corporate income tax rules (i.e. the foreign substantial interest rules). Similar antiabuse rules apply regarding the DDWT exemption. These rules should, in principle, not apply if (1) there are no individuals up the corporate chain indirectly holding an interest of at least 5 percent in the shares (or a separate class of shares) of the Dutch debtor or (2) there are individuals up the corporate chain holding a 5 percent interest, but would be properly protected by an applicable tax treaty if they had held the 5 percent interest directly.

[9] Regarding active business structures, the look-through approach should be applied at the level of the first active business enterprise in the structure above (the direct foreign shareholder of) the Dutch entity. Consequently, the subjective test would be met if the direct foreign shareholder of the Dutch entity conducted an active business enterprise itself or if the first active business enterprise in the structure above the direct foreign shareholder of the Dutch entity would not have been in scope of the DDWT rules if that enterprise would have held the shares in the Dutch entity directly.

[10] An arrangement may comprise more than one step. Valid commercial reasons (reflecting economic reality) are generally present if the direct shareholder conducts an active business enterprise to which the interest in the Dutch entity is attributable.

The domestic DDWT exemption might not be applicable to dividends that are distributed to those shareholders because the subjective or objective test may be met. Therefore, it is important to analyze the group structure of the creditors before enforcing a pledge and determine whether dividends can be distributed free from withholding tax.

Besides the general Dutch tax consequences, the debtor group could be subject to pillar 2 because of that enforcement. The new shareholder(s) could drive the consolidated group revenue above €750 million.[11] It would therefore be important to identify which entities of the group after enforcement are in scope of pillar 2 (which may also lead to an increased administrative burden for the group). Apart from domestic interest deduction limitation rules, interest for intragroup financing might be nondeductible for purposes of pillar 2 if (1) the payment is made by an entity located in a low-tax jurisdiction, (2) there is no corresponding taxation at the level of the recipient, or (3) the recipient is located in a low-tax jurisdiction.

Apart from the general Dutch tax consequences, it is important to take into account the potential pillar 2 effects when an enforcement action is being contemplated. It could be that because of that action, the group all of a sudden meets the pillar 2 threshold and therefore must meet the pillar 2 requirements.

## Conclusion

There may be several alternatives in the Netherlands to consider for debt restructurings. Each alternative may be applied in such a way that it should have no material Dutch tax consequences, but this would also depend on what parties envisage and prefer economically.

Apart from the general Dutch tax consequences, pillar 2 can also affect these debt restructurings when entities fall within its scope, which makes it even more complex. It is therefore even more important to take pillar 2 into account when restructuring within a group because the outcome under national law and under pillar 2 may be different. ■

[11] In some cases it might be that at the moment of enforcing the pledge the new group (i.e. the creditor and debtor) meets the €750 million threshold from that point in time. For pillar 2 to apply, the group revenue should exceed €750 million in at least two of four consecutive years. Therefore, the potential pillar 2 consequences might apply only after the group has met the threshold for two years. It can also be as of day 1 if the shareholder or the debtor group was already subject to pillar 2.