The Dutch 2018 Tax Policy Agenda ('Fiscale beleidsagenda 2018') and current status of the MLI

This spring, the Ministry of Finance released its fiscal policy agenda (the Agenda). As Cervus has been asked by various clients what the ramifications of this Agenda may be for their Dutch operations, we decided to publicize some highlights mentioned in this Agenda on our website in English (earlier a Dutch newsflash on the same subject was published by Cervus). Please find these highlights below.

The Agenda elaborates on the various changes in tax law that were already announced and the timing thereof. The Ministry states that two top priorities of the Agenda are to ensure that the Netherlands continues to offer a competitive tax investment climate for companies, while it also seeks to implement certain anti-tax avoidance measures in line with the Organisation for Economic Co-operation and Development (OECD) and European Union (EU) recommendations, which includes the Anti-Tax Avoidance Directive (ATAD) and the EU blacklist for non-cooperative countries. Below we will summarize the proposed changes to the Dutch Corporate Income Tax Act and Dividend Withholding Tax Act which are most likely to have an impact on various international operating companies, with activities in the Netherlands.

2019 – 2021 Corporate Income Tax (CIT) rate reduction

The Agenda confirms that the current standard Dutch CIT rate will be reduced from 25% to 24% in 2019, to 22.5% in 2020 and to 21% as from 2021. Profits up to an amount of € 200,000 are currently taxed against a lower step-up rate of 20%. The Agenda also confirms that this step-up rate will be reduced from 20% to 19% in 2019, to 17.5% in 2020 and to 16% as from 2021.

2019 – Interest deduction limitation rules

As anticipated, the Agenda confirms that the earnings stripping rule of the ATAD will be implemented as from 1 January 2019. Pursuant to the Dutch implementation of this rule, the net borrowing costs will only be tax-deductible up to either: (i) 30% of a taxpayers earnings before interest, tax, depreciation and amortization (EBITDA); or (ii) a threshold of € 1 million.
The earnings stripping rule will **not** include a group-ratio exception and will also apply to existing loans as of the introduction date (i.e., no grandfathering). Simultaneous with the introduction of this rule, the other existing interest deduction limitation rules in the Netherlands – with the exception of the anti-base erosion rule of article 10a of the Dutch Corporate Income Tax Act – will most likely be abolished. All these announcements, we at Cervus consider to have a big impact on Dutch operation of several companies. Not in the last place, because these measures are stricter than ATAD prescribes.

2019 – 2020 – Further focus on substance

The Agenda furthermore expresses the intention to further expand the Dutch substance requirements rules. It is the aim to expand the situations in which information is exchanged with a source country, if the Dutch taxpayer does not fulfil these substance requirements. This should be achieved by expanding the group of taxpayers of which information will be exchanged to include international holding companies.

In addition to the existing Dutch minimal substance requirements, it is envisaged that a Dutch taxpayer should also have at least € 100,000 in wage expenses and have an office at its disposal. The Agenda aims to introduce these amendments to the substance requirements on a short notice, but the exact timing is yet to be determined. So at Cervus we think that anticipation, is highly advised.

2020 – Elimination of Dutch dividend withholding tax

It was already announced that the current 15% Dutch withholding tax on dividend distributions will be abolished. Pursuant to the Agenda the Dutch dividend withholding tax will be abolished as of 1 January 2020. At the same time a conditional dividend withholding tax will be introduced that only applies to dividend distributions to related companies tax resident in a jurisdiction with a low tax rate, or a jurisdiction listed on the EU blacklist for non-cooperative countries. The term 'jurisdiction with a low tax rate' is yet to be defined. The tax rate of the conditional dividend withholding tax is also not yet determined, however, this rate could be reduced under applicable tax treaties or other arrangements.

After announcement of the Agenda in the Netherlands several political sensitive events took place on the basis of which at Cervus we are of the opinion that it is very difficult to anticipate upon these changes. Fact is, that nearly all international structures in which a Dutch (holding) company is used should be reviewed or – at least – should ask for proper tax advice whether current corporate structures can stay in place without amendments.

2021 – Introduction of a conditional withholding tax on interest and royalty payments

The introduction of a conditional withholding tax on intercompany interest and royalty payments from Dutch taxpayers to low-tax jurisdictions in abusive situations, was also already announced. For the Netherlands, a

withholding tax on interest and royalties is completely new. This all should be seen in the context of EU movements against tax avoidance as wel as the OECD Base Erosion and Profit Shifting (BEPS) project and the intention of the Netherlands to be on the forefront of these discussions and legislave actions.
According to the Agenda, the Government intends that these withholding taxes will be introduced as of 1 January 2021. Similar to the proposed withholding tax on dividends, the applicable jurisdictions and the applicable tax rates should still be determined.

Current status of the MLI

The Multilateral Instrument ('MLI') is one of the key outcomes of the OECD's so called 'BEPS' project. The purpose of the MLI is to implement wide-ranging double tax treaty (DTT) changes without requiring each individual treaty to be renegotiated. In 2017 68 countries already adopted the MLI. More followed shortly after. The MLI will implement minimum standards to counter DTT abuse and to improve dispute resolution, while providing optionality to implement additional specific tax treaty policies. Depending on when instruments of ratification are deposited, for some treaties the MLI could take effect from 2019. It is important for all international operating companies to identify which jurisdictions that are relevant for their operations have signed up for the MLI, which treaties will be affected and to what extent, as well as the relevant timelines for entry into force. Furthermore, we advise all international groups to clearly document all the business reasons (other than tax related matters) for and the background to the decision to set up their Dutch companies. E.g. what are commercial benefits, significant costs savings, access to skilled labour with relevant knowledge and experience, etc. Dutch activities and companies derived or were expected to derive.

Other measures

There are other measures proposed like a reduction of the tax loss carry forward period, amendment of the existing CFC-rules, and anti-hybrid measures. All these can have their effect on international tax structuring as well. Even though no actual legislative proposals have been published, we advise international operating companies to act and anticipate to avoid any adverse tax consequences.

Amsterdam/Zwolle, September 2018

Cervus Tax Lawyers
Maarten Jan Brouwer — Tel: +31 (0)6 14 93 27 73
Jan Pieter van Eck — Tel: +31 (0)6 26 16 48 80

Oudezijds Voorburgwal 217-D
1012 EX Amsterdam
Tel: 06 2616 4880

Wipstrikkerallee 95
8023 DW ZWOLLE
Tel: 038 45 30 371

www.cervusbelastingadvies.nl