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Dutch Budget Day 2023: expected changes for the years 2024 and 2025

20 September 2023

On 19 September 2023 (Budget Day 2023), the Dutch Ministry of Finance submitted the 2024 Dutch Budget to parliament. This Budget contains various tax proposals for the years 2024 and 2025 (Tax Plans 2024).

The most relevant proposals for corporate taxpayers include the earlier announced changes in the classification rules for Dutch limited partnerships (*commanditaire vennootschappen*), comparable foreign entities and Dutch funds of joint account (*fondsen voor gemene rekening*). These changes would enter into force per 1 January 2025 and the relevant proposals include transitional measures allowing for tax-friendly reorganisations in 2024.

Below these and some other measures are described in more detail. The other measures will, if adopted by parliament, enter into force per 1 January 2024, unless indicated otherwise below. Finally, we also discuss certain measures that were already adopted but will enter into force on 1 January 2024 as well as some other expected changes.

Corporate income taxes / Withholding taxes

Entity classification rules for Dutch and foreign entities

The current Dutch tax classification rules for Dutch and foreign entities (such as partnerships) are quite unique and deviate from international standards. In particular, this has caused 'hybrid entity mismatches' in an international context. It is now proposed to overhaul the Dutch tax classification rules for Dutch and foreign entities to bring them more in line with international standards.

Current entity classification rules

Currently, the Netherlands applies very specific entity classification rules to determine whether a limited partnership (either Dutch or foreign) is considered transparent or non-transparent for Dutch tax purposes. The decisive criterion is whether accession or substitution of a limited partner requires unanimous consent of all (general and limited) partners (the 'consent requirement'). Only if such unanimous consent is required (and in practice obtained), a limited partnership is classified as transparent for Dutch tax purposes. In practice, this means that foreign limited partnerships are often treated as non-transparent from a Dutch tax perspective. Since foreign limited partnerships are considered transparent in many countries, but non-transparent from a Dutch tax perspective, this results in 'hybrid' entities.

New rules for Dutch partnerships

As of 1 January 2025, it will be codified in Dutch tax law that all Dutch partnership are transparent for Dutch tax purposes. Non-transparent Dutch limited partnerships (CVs) and other types of non-transparent Dutch partnerships cease to exist.

Foreign entities

The Netherlands currently applies the 'similarity approach' to classify foreign entities. In short, this approach means that one looks at the most similar Dutch equivalent of the foreign entity ('corporate resemblance') to determine the Dutch tax position thereof.

Under the proposal, the similarity approach would remain in force as primary classification rule and would be codified in Dutch tax law. However, due to the revised rules for the Dutch partnership, which would become per se transparent (without consent requirement), many hybrid mismatches will disappear as the Netherlands (in line with most other jurisdictions) would then also regard a foreign partnership as transparent for tax purposes.

For certain situations where the similarity approach does not provide a solution, there would be two new rules:

- For entities with no clear Dutch equivalent, the 'symmetry approach' would apply. This means that the foreign entity would for Dutch tax purposes be classified as non-transparent if in the jurisdiction that treats the foreign entity as tax resident, the assets and liabilities as well as income and expenses are attributed to the foreign entity.
- For foreign entities with no clear Dutch equivalent and which are based in the Netherlands, the 'fixed approach' would apply. This means that the foreign entity based in the Netherlands would always be classified as non-transparent entity for Dutch tax purposes, thus becoming a Dutch domestic taxpayer.

Entity classification rules for funds for joint account

In addition, it is proposed to change the tax classification rules applicable to Dutch funds for joint account (FGR) as of 1 January 2025.

To date, an FGR can be classified as tax transparent or tax non-transparent. There are currently three types of FGRs, in short: (i) an FGR in which participations are only transferable to other participants with unanimous consent (transparent), (ii) an FGR in which the participations can only be repurchased by the FGR or transferred to certain close-related family members (transparent) and (iii) an FGR with transferable participations (non-transparent).

It is now proposed that as of 1 January 2025, an FGR may only be non-transparent, if it is (i) regulated following the Dutch Financial Supervision Act (*Wet op het financieel toezicht*) and (ii) the participations in the FGR are tradeable. In case the participations in an FGR can solely be repurchased by the FGR, the participations would be deemed to be non-tradeable and thus such FGR will be classified tax transparent, even when it is regulated.

Transitional rules

The aforementioned changes mean that non-transparent partnerships and FGRs would be deemed to realise any capital gains in their assets (i.e., a tax triggering moment) when becoming transparent. Similarly, the partners/members in non-transparent partnerships and FGRs are deemed to realise their investment. In practice, this could result in tax becoming due without cash being generated. Therefore, several facilities are proposed to apply as from 1 January 2024: (i) rollover facilities, (ii) a share-for-share merger facility (including a real estate transfer tax (RETT) exemption), or (iii) a deferred payment obligation (spread out over ten years). Any restructurings using those facilities can be carried out during the year 2024 to avoid the tax triggering moment on 1 January 2025. The RETT exemption however only applies in the case of CVs and FGRs that were already in existence on 19 September 2023 at 15:15.

Changes to VBI-regime

Subject to certain strict conditions, certain investment entities can apply the VBI-regime which results in a tax-exempt position for corporation tax and dividend tax. In line with the proposed changes to the FGR classification rules, the VBI-regime will be amended in such a way that only entities regulated pursuant to the Dutch Financial Supervision Act can apply for the VBI-status. Generally, this means that the VBI-regime will no longer be available to family-owned investment vehicles as of 1 January 2025.

Abolishment of direct real estate as qualified investment for fiscal investment institutions

A company can, under conditions, qualify for the fiscal investment institution regime (FBI-regime) resulting in a 0% corporate income tax rate and a mandatory annual distribution of profits subject to generally 15% Dutch dividend withholding tax. As of 1 January 2025, a fiscal investment institution may no longer hold *direct* investments in Dutch real estate. Consequently a *direct* investment in Dutch real estate would result in the loss of the fiscal investment institution status. A fiscal investment institution could still hold *direct* investments in non-Dutch real estate and *indirect* investments in (Dutch) real estate owned by a regular taxpayer. Under the proposed rules, an FBI would be allowed to hold and manage a regularly taxed subsidiary company engaged in real estate development of non-Dutch real estate or Dutch real estate held by an affiliated entity that is a regular taxpayer (i.e. an *indirect* investment in Dutch real estate). A similar provision is proposed for ancillary services. The current 60% financing limit for (non-Dutch or *indirect*) real estate investments will remain in place. In order to enable FBIs to restructure in anticipation of the new rules, the proposed measures include a temporary real estate transfer tax exemption applicable in the year 2024 that can be applied to restructurings carried out in anticipation of the entry into force of the above measure.

Additional measures to prevent dividend stripping

In the Tax Plan 2024, new measures to prevent dividend stripping are introduced. These are relevant for taxpayers who want to credit withholding tax, apply for a refund or get a dividend withholding tax exemption. To be able to get these types of relief, a taxpayer must be the beneficial owner of the dividend.

The first measure relates to the burden of proof. A taxpayer who claims a credit for withholding tax or a refund of withholding tax amounting to more than EUR 1,000 per calendar year, will have the burden of proof that they are the beneficial owner. For corporate taxpayers applying a dividend withholding tax exemption (in general: for intragroup dividends) the threshold of EUR 1,000 per year does not apply. This means that the burden of proof is always on the taxpayer claiming such exemption. For the interpretation of the term ‘beneficial owner’ the explanatory notes refer to guidance from the OECD Commentary and to case law of the Court of Justice of the EU.

Additionally, changes are proposed to a currently existing rule under which a taxpayer by fiction is not regarded as the beneficial owner if he was involved in certain dividend stripping transactions described in law. It is proposed that also transactions by related entities and individuals need to be taken into account to determine whether transactions qualify as dividend stripping. This measure aims to avoid that transactions are carried out by related persons to circumvent the dividend stripping rules.

Finally, it is proposed to lay down in the law the so-called dividend record date for shares that are traded on a stock exchange to determine who is entitled to the dividend. In a Decree the Ministry of Finance already takes the position that also for tax purposes this date should be followed to determine who is entitled to the dividend. This will now be codified in Dutch tax law.

How the now proposed changes to Dutch domestic law will interact with the proposal from the European Commission for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER proposal), which also includes measures to prevent abuse, is yet unclear.

Changes to thin capitalisation rules for banks and insurance companies

Banks and insurance companies are subject to a specific interest deduction limitation, a thin capitalisation rule. Under this rule, deduction of interest expenses (including intragroup interest) can be denied to the extent that the total amount of debt exceeds 91% of the balance sheet total.

It is proposed to exclude intragroup interest as from 1 January 2024, provided that certain conditions are met. An important condition is that the interest paid to a group company can not be linked to third party debt of that group company. To cover the costs of this relief for intragroup interest, the ratio will be tightened from 91% to 89.4% of the balance sheet total.

Abolishment of deduction for certain donations

Donations that do not serve business purposes of a company – generally not driven by business motives but rather by personal motives of shareholders – can currently still be deductible if certain conditions are met. It is proposed to abolish this deduction for corporate income tax purposes. Donations driven by personal motives of shareholders made by the company would, however, not be regarded a (hidden) distribution to its shareholders for income tax purposes based on the proposals.

The abolishment of the deduction should not affect deduction of sponsoring or gifts that are business driven.

Personal income taxes

Taxation of lucrative interests / repair measure following a Supreme Court case

The Income Tax Act 2001 contains a special regime for management participations that qualify as so-called lucrative interest. Most commonly, a lucrative interest consists of shares that can generate a high return on investment as a result of a high leverage. As a main rule, a class of shares qualifies as a lucrative interest if these shares constitute less than 10% of the total nominal issued share capital and are subordinated to the other class(es) of shares (typically fixed yield preference shares). Also, a shareholding that is 'economically comparable' to such shareholding qualifies as a lucrative interest.

On 14 April 2023, the Dutch Supreme Court issued an important ruling on the interpretation of 'economically comparable'. The Supreme Court ruled that shares that represent 10% or more of the total nominal share capital can qualify as a lucrative interest if they represent less than 10% of the total equity contribution, for instance as a result of contribution of share premium on the other classes of shares. However, the Supreme Court also ruled that in general leverage in the form of shareholder loans cannot by itself create a lucrative interest. Following that ruling, the State Secretary of Finance indicated in a letter dated 26 June 2023 that in his view also shareholder loans should be taken into account when assessing whether there is a lucrative interest. The now proposed measure would incorporate this view in law with retroactive effect to the date of letter, i.e. 26 June 2023.

Tax rates in Box 3

It is proposed to increase the tax rate in Box 3 (net wealth) from 32% (2023) to 34%.

Energy related tax measures

Extension of certain investment allowances

The Energy Investment Deduction (EIA), the Environmental Investment Deduction (MIA) and the Arbitrary depreciation of environmental investments (Vamil) are currently available until 31 December 2023. Following positive evaluations of these investment allowances, it is proposed to extend these measures to at least 31 December 2028. With respect to the EIA, the deduction percentage will be reduced from 45.5% to 40.5% as of 1 January 2024.

For more information on the energy related measures we refer to our website post of 20 September 2023.

Real estate transfer tax

Cancellation of the RETT concurrence exemption for certain share deals

Currently, newly built real estate can be acquired without VAT or RETT by acquiring all the shares in the relevant real estate company, as the transfer of such shares is out of scope of VAT and exempt from RETT. A direct transfer of newly built real estate is subject to VAT and benefits from the RETT concurrence exemption. The Dutch government considers the difference in taxation between asset deals and share deals a disturbance of the level playing field and intends to resolve it by levying RETT on certain share deals. To this end, the government proposes to abolish the RETT exemption for share deals of real estate companies owning building land or newly built real estate that is (partly) used for VAT exempt purposes. Thereto, a 4% RETT would become due on such share deals. A transitional regime will apply for certain ongoing development projects.

For more details on this measure, we refer to our website post of 19 September 2023: Budget Day 2023: Real Estate Update.

Wage taxation

Increase of travel allowance

The maximum of the tax-free travel allowance currently amounts to EUR 0.21 per kilometer. This maximum would increase to EUR 0.23 per 1 January 2024.

For more information on the proposed changes of the wage taxes we refer to our website post of 19 September 2023: Dutch Budget Day 2023: amendments with respect to employment taxes.

Other legislation to come into effect as per 2024

In addition to the proposals noted above, the following legislative proposals were already fully adopted and will come into effect as per 2024.

Tax rates in Box 2

On Budget Day 2022 it was proposed to introduce two rates in Box 2 personal income tax (substantial interest). This proposal was adopted and as from 1 January 2024, the first EUR 67,000 of substantial interest income (Box 2 income) will be taxed at a rate of 24.5% and the excess at a rate of 31%.

Expatriate regime

The basis for the calculation of the 30%-allowance will be reduced per 1 January 2024 to a maximum amount of EUR 216,000. A transitional regime applies for employees who already applied the 30%-ruling in 2022. These employees will be affected by this new rule only as of 1 January 2026.

Conditional withholding tax on dividends

As per 1 January 2024, legislation to introduce a conditional withholding tax on dividend payments (and other types of profit distributions) enters into force. The conditional withholding tax will apply to dividends made to low-taxed jurisdictions and/or jurisdictions included on the EU-blacklist (jointly **LTJ**s), to certain hybrid entities and in certain situations that are considered abusive. The rate is set at the headline corporate income tax rate, 25.8% in 2024, which may result in an increase of Dutch withholding tax exposure on dividends from 0% or 15% to 25.8%. Important elements of the conditional withholding tax on dividends include:

- Conditional withholding tax will apply in addition to the existing Dutch dividend withholding tax. In case conditional withholding tax is due, dividend withholding tax levied on the same distribution is credited.
- As far as Dutch cooperatives are concerned, contrary to the existing Dutch dividend withholding tax, intra-group dividend payments made by all Dutch cooperatives (not only by so-called holding cooperatives) are in scope of the conditional withholding tax on dividends.
- Repayments of share capital and share premium are, subject to certain conditions, not subject to conditional withholding tax.
- Capital gains are not covered by the conditional withholding tax.

Conditional withholding tax due should be paid to the Dutch tax authorities within one month following the end of the calendar year in which the profit distribution is (deemed to be) made available.

Special attention may be required for structures in which currently no dividend withholding tax applies but in which future distributions will or might become subject to the conditional withholding tax. Furthermore, structures with distributions to hybrid entities require special attention as well. The latter because, the new entity classification rules, as set out above, enter into force one year later (on 1 January 2025) than the conditional withholding tax on dividends, which may lead to complications in 2024.

Other relevant tax developments

Tightening of the earning stripping rule for certain real estate companies

Under the earnings stripping rule the deductibility of net interest expenses, i.e. the balance of interest costs and interest income (including foreign exchange results on the loans) is limited to the highest of: (i) 20% of the fiscal EBITDA and (ii) a threshold of EUR 1,000,000. The ratio is applied at taxpayer level and no distinction is made between intra-group and third-party interest and costs. It is announced that on Budget Day 2024 a measure will be proposed entailing that the deductibility of interest under the earnings stripping rule will be tightened by eliminating the EUR 1,000,000 threshold for real estate companies. This means that such taxpayers could only rely on the 20% EBITDA threshold.

If proposed and adopted in 2024, this measure would apply as of 1 January 2025.

Announced changes to interest on late payment and recovery interest as of 1 January 2024

The State Secretary for Finance submitted in a separate letter envisaged changes to the tax interest on late payments as well as the recovery interest. The various interest rates are strongly connected to the ECB interest rate, which increased substantially since summer 2022. With respect to the recovery interest, it is therefore announced that this rate will be fixed at 4% as of 1 January 2024. According to the current ECB interest rate, the interest on late payment of corporate income tax, conditional withholding tax or solidarity contribution is expected to be increased from 8% to 10% as of 1 January 2024, and for late payment of other taxes the interest rate is expected to be increased from 4% to 7.5% as of 1 January 2024.

We will keep you informed on further developments. Should you have any questions with respect to the above, please contact your trusted adviser.

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