KPMG Meijburg & Co Tax Lawyers

Bill with emergency remedial measures for fiscal unity presented to Parliament

On February 22, 2018, the Court of Justice of the European Union ('CJEU') rendered judgment on the per element approach in the context of the Dutch fiscal unity regime for corporate income tax purposes (see our previous memorandum). In response to this, the previously announced bill on the Fiscal Unity Emergency Repair Act (*Wet spoedreparatie fiscale eenheid*) ('the bill') was presented to the Lower House on June 4, 2018, with its content being made known on June 6, 2018. As previously announced, most of the elements of the bill have retroactive effect to 11:00 a.m. on October 25, 2017.

Main features of the bill

The measures in the bill mean that some Sections of the Corporate Income Tax Act ('CITA') and the Dividend Withholding Tax Act ('DWTA') (having consideration for all associated rules) will have to be applied as if there is no fiscal unity. This specifically involves the following Sections:

- Section 10a CITA (anti-profit shifting);
- Section 13(9) through (15) CITA and Section 13a CITA (the rules on investment participations);
- Section 13(17) CITA (the anti-hybrid measure in the participation exemption);
- Section 13l CITA (the interest deduction limitation for excessive participation interest);
- Section 20a CITA (combating the trade in loss-making and profitable companies);
- Section 11(4) DWTA (the remittance reduction in the case of redistributions; this provision will be canceled).

With regard to Section 10a CITA, it was indicated that ignoring the fiscal unity applies, for example, to the situation where the tainted transaction takes place within the fiscal unity and the debt was entered into with a related party outside the fiscal unity. Situations in which a '10a loan' was provided within the fiscal unity also fall within the scope of the emergency remedial measures. This, despite the fact that the fiscal unity itself does not claim an interest deduction in these situations, because the interest expense and the interest income cancel each other out and, as such, are not visible for tax purposes in the consolidation. If the interest without the fiscal unity would have been non-deductible, this will lead to an addition to the fiscal unity's profit under the emergency remedial measures. Of course, what must also be assessed here is whether one of the rebuttal provisions of Section 10a CITA would have applied. The Explanatory Notes to the bill state in this respect that in the case of mutual indebtedness between fiscal unity companies, the rebuttal provision ('compensatory tax test') will usually be met, provided that the creditor has no pre-fiscal unity losses or – if the debt was entered into during the fiscal unity period – there are no fiscal unity losses (or other types of claims).

According to the Explanatory Notes to the bill, applying the loss set-off provision in the case of a qualifying change in the ultimate beneficial ownership (Section 20a CITA) as if there is no fiscal unity, may lead to the losses incurred before the change in

shareholders, which losses were attributable to a company, not being able to be carried forward and set off against the taxable profit of that company.

Retroactive effect and transitional rules

It has been proposed giving the legislation retroactive effect to 11:00 a.m. on October 25, 2017 (with the exception of Section 13a CITA, see below). With regard to Sections 10a and 13l CITA, only the interest that is attributable to the period after 11:00 a.m. on October 25, 2017, can be subject to the emergency remedial measures. To accommodate small and medium-sized enterprises, transitional rules will apply for the period from 11:00 a.m. on October 25, 2017, through to December 31, 2018. The transitional rules mean that the emergency repair of Section 10a CITA will not apply if the following cumulative conditions are met:

- There is a '10a loan' in place at 11:00 a.m. on October 25, 2017.
- The tainted transaction took place before that date and time.
- The total interest on the aforementioned loan per 12 months does not exceed EUR 100,000 per fiscal unity.
- The tax inspector does not convincingly demonstrate that the debt or the transaction was not primarily business-motivated.

Dutch companies that hold at least a 95% interest in a foreign subsidiary established in the EU/EEA can, in principle, also take advantage of the transitional rules.

As the press release on October 25, 2017, did not refer to the proposed emergency remedial measures applying to the revaluation obligation for non-qualifying investment participations (Section 13a CITA), no retroactive effect will apply here. This amendment will first apply as of January 1, 2019.

Future developments

The government reiterated that the emergency remedial measures will be followed in the near future by group rules that are future-proof. To ensure a good tax business climate, the structure and introduction date of the new group rules will also be discussed with the business sector, interest groups and academics. The Deputy Minister previously indicated that the various steps to arrive at a draft bill for a new group regime that can be opened for internet consultation, is expected to be completed by mid-2020 (see our previous memorandum on this).

Until then taxpayers will have to make do with the current fiscal unity regime, including the repair of the above elements. For other elements for which a fiscal unity can yield a benefit, the CJEU judgment of February 22, 2018, can still be invoked in cross-border EU situations, so that the benefits can also be claimed in those foreign situations. Ultimately it will have to be assessed 'per element' whether there is a justification ground.

The Explanatory Notes to the bill state moreover that additional remedial measures will be taken if practical developments give cause for this and that the introduction of other measures will take account of the aforementioned CJEU judgment. This appears to refer to, among others, the announced earnings stripping measure.

The feasibility test accompanying the bill notes that the emergency remedial measures are problematic for Section 13l CITA and are only feasible if Section 13l CITA is abolished as of January 1, 2019 (and if until that time selective monitoring and (much) less preliminary consultation is opted for). This makes it increasingly clear that not only Section 15ad CITA will disappear as of January 1, 2019, but also Section 13l CITA.

Rectification omission Innovation Box transitional rules

The bill also contains a measure with regard to the Innovation Box. This measure ensures that the effective 7% tax rate will also apply with retroactive effect to March 1, 2018, to benefits derived from intangible assets that fall under specific transitional rules.

In conclusion

We will, of course, keep you informed of developments. Please feel free to contact your advisor at Meijburg & Co if you have questions or wish to discuss, for example, whether an existing fiscal unity, acquisition or financing structure should be left in place under the emergency remedial measures.

Meijburg & Co
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