

Deputy Minister answers questions about emergency repair of fiscal unity

On June 4, 2018, the bill on the Fiscal Unity Emergency Repair Act (*Wet spoedreparatie fiscale eenheid*) ('the bill') was presented to the Lower House (see [our previous memorandum](#)). The emergency repair measures mean that for a number of legal provisions the approach to be taken is as if a fiscal unity for corporate income tax purposes does not exist. On November 2, 2018, the Deputy Minister of Finance, in a Memorandum in response to the Report ('memorandum'), answered the questions raised by the Lower House. Some of the points in the Memorandum are addressed below.

General

1. The bill stated that the emergency repair measures would, in principle, have retroactive effect to 11:00 a.m. on October 25, 2017. As part of the reconsideration of the business climate package, it has now been proposed to restrict the **retroactive effect** through to January 1, 2018 (see for example [this memorandum](#)). For taxpayers with a financial year corresponding to a calendar year, this means that the emergency repair measures do not have to be taken into account in the 2017 corporate income tax return. If a tax return based on these measures has already been filed for 2017, a revised tax return may be filed (in order to avoid notices of objection).
It is not considered desirable to further restrict the retroactive effect.
2. The Deputy Minister reiterated that he believes that the consequences can be avoided or limited in many cases, for example by way of a **legal merger** between the creditor and the debtor, or by means of the repayment or conversion of debt.
3. The Deputy Minister indicated that an **alternative group regime** is still being sought as a follow-up to the measures in question, and that an options document is expected to be released for public internet consultation in the first half of 2019, followed by a framework letter, a draft bill (if possible open for public consultation in mid-2020) and the actual bill (aim: before the end of the present government's term of office). In this respect the Deputy Minister still regards the cross-border fiscal unity as an unrealistic option. According to the government, it is logical to align with existing group regimes in other (European) countries.
4. The government will inform the Lower House before the end of 2018 about the manner in which the Dutch **investment climate** can be developed further.
5. It can be concluded from the memorandum that the Deputy Minister currently sees no reason to expand the scope of the emergency repair measures.
6. Partly in connection with the restriction of the retroactive effect, the government does not consider it necessary to take specific measures in respect of **interest on tax due**. The Deputy Minister indicated in this respect that – to avoid interest on tax due – the preference is to prepare estimates (for a provisional assessment) with due regard for the emergency repair measures.

Section 10a Corporate Income Tax Act 1969 (CITA) (interest deduction limitation to avoid profit shifting)

7. According to the Deputy Minister, a **10a debt** cannot become **untainted** by reversing the tainted transaction. In his opinion it is important to eliminate the tainted debt. In the 10a Decree, an exception is made for a specific case (concession policy). The memorandum further states that if the debtor and the

- creditor are brought together in one company by way of a **legal merger**, this usually entails a tax-neutral merger, whereby it is quite likely that this can take place with retroactive effect to the beginning of the financial year.
8. According to the Deputy Minister, only in exceptional cases will there be a situation with a very old **loan within the fiscal unity**, of which it is no longer possible to determine why it was entered into (business motivation test Section 10a CITA) and the **compensatory tax test** will usually be met. The Deputy Minister has, however, given an undertaking that the tax inspector will exercise restraint when requesting additional information in existing cases (provided there is no indication that Section 10a CITA could apply). In the context of the **(double) business motivation test** it is stated that the fact that loans and interest within the fiscal unity would be disregarded, as such, without the measures, is insufficient. With regard to these **internal loans**, the government has opted for certainty (i.e. to avoid EU law issues).
 9. The Explanatory Memorandum already included an example of a loan within the fiscal unity, whereby the creditor had pre-fiscal unity losses and the compensatory tax test was not met. The memorandum contains an example where the same creditor incurs losses in the fiscal unity period, *not* preceding the year in which the debt was contracted. In principle, there is then sufficient compensatory tax, unless the tax inspector succeeds in his rebuttal evidence (where the foreseeability of the losses plays a role).
 10. To accommodate small and medium-sized enterprises, the bill already contains **transitional rules** for the period through to December 31, 2018, which means that the emergency repair in respect of Section 10a CITA does not apply subject to certain conditions (including a cap of EUR 100,000 per 12 months and per fiscal unity). The memorandum notes that it is not readily apparent that these rules should become permanent. Nor does the government consider it necessary to extend the period. The aforementioned cap will be determined on a pro rata basis for financial years not coinciding with calendar years, i.e. depending on the days in the financial year that fall within the 2018 calendar year.
 11. The memorandum confirms that the **fiscal unity's profit will be adjusted** with the 10a interest that would have been subject to a deduction limitation if there had not been a fiscal unity. Subsequently, loss set-off within the fiscal unity can take place.

*Section 13 CITA (participation exemption – **subject-to-tax test**)*

12. In the case of a fiscal unity comprising fiscal investment institutions (*fiscale beleggingsinstellingen*; **FBIs**) the subsidiaries are *insufficiently* subject-to-tax.
13. When determining the tax base, account must also be taken of the results of **transactions within the fiscal unity** (in other words: these will no longer be disregarded and must be assessed).
14. If an investment participation, which is also a subsidiary, receives **passive income** in any year – such as fees for making a ship available – an assessment must be made as to whether this income is subject to a fair tax according to Dutch standards.
15. The memorandum shows that, in any case, the following measures do not stand in the way of a **sufficient** tax liability:
 - a) differences in tax consolidation, etc., unless as a result of a regime deviation no or insufficient tax would be levied. According to the memorandum, **regime**

deviations are not an issue in domestic situations that fall under the emergency repair measures. This also applies if the fiscal unity's profit is determined at the consolidated level on the basis of the **tonnage regime**;

- b) horizontal and vertical **loss set-off** in a fiscal unity;
- c) the circumstance where the corporate income tax payable by a subsidiary is **levied at the parent company**;
- d) the fact that a **capital gain** realized by a subsidiary/participation on an asset transferred within the fiscal unity is not recognized in the fiscal unity's profit.

Section 13I CITA (interest deduction limitation excessive participation interest)

- 16. With reference to a recent District Court judgment in which the invocation of the per element approach for Section 13I was upheld, the government indicated that not including this provision in the emergency repair would lead to an undesirable erosion of the tax base. The fact that the provision will be canceled on January 1, 2019, does not alter this. An appeal has been filed against this judgment.
- 17. The **tax-exempt amount** of EUR 750,000 must be applied to each company.
- 18. The starting point for applying Section 13I CITA as if there is no fiscal unity is the original **acquisition cost** of the participation. The fact that participation relationships will no longer be disregarded can lead to higher **equity** for the purposes of Section 13I CITA and thus to a lower deduction limitation.
- 19. The Deputy Minister confirmed that in the case of a **legal merger** between a subsidiary and a parent company with retroactive effect through to the beginning of the financial year, there is not a participation or mutual loan in that year for the purposes of Section 13I CITA.
- 20. In the case of a **split 2017/2018 financial year**, a calculation of the non-deductible 13I interest will be made with and without the fiscal unity, after which a proportionate allocation will take place.
- 21. In the case of an **overlap** with the acquisition interest provision of Section 15ad CITA, a reduction rule for the acquisition interest will apply (similar to the current rules).
- 22. The emergency repair measure for Section 13I CITA also covers **internal loans**.
- 23. **Preliminary consultation** about the application of Section 13I CITA in situations that are not the result of the emergency repair measures remains possible.

Section 20a CITA (loss set-off in the case of a change of control)

- 24. The government has given an undertaking that the emergency repair measure for Section 20a CITA will only cover qualifying **changes of control after 11:00 a.m. on October 25, 2017**.
- 25. The limitation of the loss set-off pursuant to Section 20a CITA may cover **losses** still available for set off relating to the period **before January 1, 2018**.
- 26. The fiscal unity result for the split 2017/2018 financial year does **not** have to be **split up** (it does not cover changes of control after January 1, 2018).
- 27. As part of the **loss allocation**, the calculation of the result *within* the fiction of the fiscal unity must be as independent as possible, with 'on-year' (*binnenjaars*) (horizontal) loss set-off taking precedence over 'off-year' (*buitenjaars*) (vertical) loss set-off. Section 20a CITA can thus no longer impact independently incurred losses that are set off against the profits of other companies included in the fiscal unity.

The emergency repair measures will only be applied if there are still losses available for set off at the level of the fiscal unity.

28. If a loss incurred by the fiscal unity in any year is only partly set off, the **partial loss** of a company, to which, as a result of the emergency repair measures, the limitation of Section 20a CITA applies, must be determined as much as possible historically. Such an allocated loss is neither offsettable against the future profit of the fiscal unity allocable to that company, nor against the profits of other companies included in the fiscal unity.
29. In practice, the emergency repair measure will usually cover **changes** in control of the **parent company**, but may, for example, also cover a change in control at the top company of a sister fiscal unity.

Miscellaneous

30. The Deputy Minister indicated that acting as if there is no fiscal unity implies that the relevant provisions must be applied as if there had *never* been a fiscal unity (**no temporal limitation**). There is also **no** deemed **degroupping** of the fiscal unity.
31. The memorandum shows *inter alia* that for the purposes of applying Section 10a and Section 13I CITA, the interest may first have to be made '**business-motivated**' (pursuant to Section 8b CITA). This also applies to a (non-business motivated) **interest-free loan**.
32. In anticipation of the amendment of legislation, the Deputy Minister has approved that in the case of **FBI**s the amount of the distribution obligation may be calculated *without* application of the emergency repair measures.
33. If, due to the emergency repair measures, interest is non-deductible (the memorandum refers here to Section 10a CITA), then in certain circumstances this will also increase the profit for the purposes of the **exemption** for foreign business profits.

In conclusion

We will, of course, keep you informed of developments. Please feel free to contact your advisor at Meijburg & Co if you have any 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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