KPMG Meijburg & Co Tax Lawyers

Consultation on draft bill against excessive borrowing from own company

On March 4, 2019 an internet consultation on the draft bill on the Excessive Borrowing from Own Companies Act was launched. This bill had been announced in September last year on Budget Day (see section 3.1 of our previous memorandum). It has been proposed to have a deemed benefit be taken into account as income from a substantial interest in respect of holders of a substantial interest who borrow more than EUR 500,000 from their company, insofar as the total amount of these loans, with the exception of home acquisition debt, exceeds EUR 500,000. The measure will apply for the first time to the 2022 calendar year. Each substantial interest holder who borrows more than EUR 500,000 will have to review their position before then.

The draft bill

The government intends to use the measure to combat the deferral of tax for personal income tax purposes in Box 2 and to bring taxation more in line with the time at which the substantial interest holder, or any person related to them, actually has the funds at their disposal. The taxation of the substantial interest will be brought forward. If more than EUR 500,000 is borrowed from the own company, the excess will be taxed as an ordinary benefit at the end of the calendar year ('excessive part of the debt') in Box 2 in the hands of the substantial interest holder and their partner. Debt is defined as all civil-law indebtedness and commitments at the end of the calendar year on the basis of nominal value. The maximum amount of EUR 500,000 applies in this respect to the substantial interest holder and their partner. Loans from multiple companies in which a substantial interest is held are added together. The amount of debt that is exempted (EUR 500,000) will be increased by the amounts taxed as deemed benefit in previous years.

The scope of the measure will be limited to the substantial interest rules. This means that the measure will not affect Box 1 and Box 3 as regards personal income tax, dividend withholding tax and corporate income tax. This is intended to keep enforcement costs as low as possible, but it is doubtful whether the desired effect will also be achieved. The measure has no civil law significance. The loan will generate deemed income in Box 2, but will continue to exist for civil-law purposes so that interest must still be paid and the debt repaid. For the company (the creditor) this means that the value of the receivable from the shareholder (the debtor) as it appears on the balance sheet for tax purposes will not change as a result of this measure and that the company will also regularly receive interest on the substantial interest holder's excessive part of the loan and must account for this in its income statement. If the debt falls in Box 3, it will reduce the capital yield tax base for income from savings and investment.

The Explanatory Memorandum underlines that current case law on loans and home acquisition debt will continue to apply in full. In short, this means that if it is established that the debt will not be repaid, a deemed dividend distribution will be assumed and the tax on the substantial interest will have to be paid. This applies to both debt in excess of and below EUR 500,000. It is not the intention to have double taxation arise: if there is a deemed dividend distribution that can also be regarded as excessive debt, tax will only be levied once.

Which loans qualify?

All debt qualifies with the exception of home acquisition debt. Home acquisition debt does not fall under the proposed measure insofar as a mortgage right is established on that debt. The latter mortgage condition does not apply to home acquisition debt existing on December 31, 2021.

It is irrelevant whether the debt was entered into for consumer expenditure (i.e. 'current account overdrafts') or that it was entered into to finance the acquisition of (property) investments. Receivables and rights to the company will not be set off against the debt to the company to arrive at a net figure. All types of loans count toward determining the total amount of debt. Accrued interest and guarantees given by the company are not excluded, nor is the onlending of funds to the substantial interest holder that were borrowed from the company by other people. When a person related to the substantial interest holder, who does not hold a substantial interest themselves, borrows excessively from the company, the excessive amount is taxed at the substantial interest holder (and their partner). An example of this is children who borrow from their parent's company.

Transitional rules

Limited transitional rules have been proposed. As stated above, home acquisition debt in place on December 31, 2021 will be disregarded, also if no mortgage right has been established. In addition, if a deemed profit distribution is taken into account in 2022 (the first year), a concession ('disposal credit') will be granted if the shares are later sold. However, this cannot lead to a loss on the substantial interest and the disposal credit can only be used once. For the time being, there are no rules for the avoidance of double taxation in respect of deemed profit distributions in subsequent years.

Existing agreements

As a rule, existing agreements with the Dutch tax authorities are canceled as a result of legislative amendments. However, settlement agreements covering total debt of less than EUR 500,000 will not be canceled. According to the Explanatory Memorandum, this is less clear with regard to settlement agreements covering total debt in excess of EUR 500,000 and depends on the agreements made.

Immigration, emigration and remigration

Protective assessments for the profit from a substantial interest will be imposed on substantial interest holders who emigrate. A deferral of payment for this will, in principle, be granted in the usual manner. If the emigrated shareholder subsequently receives an ordinary or disposal benefit, the deferral of payment can be withdrawn in this respect. Insofar as debt to the own company increases to more than the maximum amount after the emigration of the substantial interest holder, a deemed profit distribution will be presumed. This will, as such, result in the tax on the protective assessment being collected. Whether the deemed dividend can still be taxed depends on the applicable tax treaties.

A step-up will be granted in the event of immigration resulting in domestic taxpayer status: the maximum amount will be set at the amount of qualifying debt at the time of immigration, but will be at least EUR 500,000. This will avoid debt that arose in the period outside the Netherlands falling under the measure. If a person who was a foreign taxpayer immigrates and thus becomes a domestic taxpayer, no step-up will in principle be granted. Nor will a step-up be granted in the case of remigration. The maximum amount applying to the taxpayer upon emigration will again count as the maximum upon remigration.

Additional rules will be drawn up to determine the maximum debt upon immigration and remigration.

Meijburg & Co comments

The proposal under consultation combats excessive borrowing from the own company. The above shows that the proposal is rather sketchy, still contains ambiguities and that complex situations may arise. The consultation process may provide input for changes and clarification. What is certain is that each substantial interest holder who, alone or together with their partner, has borrowed more than EUR 500,000 from their own company will have to review their position. Substantial interest holders who have emigrated will also have to re-examine whether the proposal will result in tax; this also applies to situations where the children or grandchildren of the substantial interest holder have borrowed from the company.

Steps will need to be taken by year-end 2022 at the latest. However, in connection with the increase in the substantial interest tax rate, it would be advisable to already begin this year to identify the implications of this proposal. Prompt action may avoid the substantial interest having to be settled straightaway. Please consult your advisor at Meijburg & Co.

Meijburg & Co
March 2019