

## **Legislative proposals on tightening the CIT loss set-off and on the Job-related Investment Allowance presented to Lower House of Parliament**

On October 5, 2020 the government presented two Memorandums of Amendment to the bill on the 2021 Tax Plan to the Lower House of Parliament. These memorandums had been announced on Budget Day (see [our previous memorandum](#)). These proposals are discussed in more detail below.

### **1. Tightening of loss set-off**

The first Memorandum of Amendment contains the government's proposal to limit the loss set-off for corporate income tax purposes as of January 1, 2022. This proposal comes directly from the report by the Advisory Committee on the taxation of Multinationals, also referred to as the Ter Haar Committee (see [our previous memorandum](#)).

The limitation of the loss set-off is aimed at preventing companies with profitable activities in the Netherlands not paying any corporate income tax for years in a row due to, for example, large losses incurred in the past. For this reason and for the purposes of a more gradual loss set-off and thus more stable tax revenues, the government is proposing to limit the size of the losses that can be taken into account in a profitable year. Losses will only be *fully* available for carry-forward and carry-back set off up to an amount of EUR 1 million of taxable profit per year. Up to an amount of EUR 1 million, losses will thus always be able to be set off against a profitable year. In the case of an annual profit higher than EUR 1 million, any remaining loss can only be set off against 50% of the higher taxable profit for that year.

This rescheduling of the loss set-off is proposed in combination with an in time unlimited carry-forward loss set-off, where now a carry-forward period of six years applies. The carry-back loss set-off period is and will remain one year.

The rescheduling means that highly profitable companies will have to start paying corporate income tax again as soon as they return to profitability after a loss-making period. It will also contribute to a lower limit for corporate income tax purposes. Such a regime is also used in various other countries, including Germany and France.

The combined measure only applies to (resident and non-resident) corporate income taxpayers and expressly not to businesses in Box 1 (personal income tax) and substantial interest holders in Box 2 (personal income tax).

#### *Transitional rules*

Of crucial importance is that the proposed changes with regard to the unlimited carry-forward loss set-off will apply to all offsettable losses incurred as of January 1, 2022 or that are still available for carry-forward loss set-off at year-end 2021. The government considers this justified, because these changes are both beneficial and restrictive for taxpayers. The transitional rules mean that losses incurred in financial years commencing on or after January 1, 2013 and that had not yet been set-off at the end of the financial year commencing on or after January 1, 2021, will be carried forward indefinitely and will not expire. These old losses may be set off against taxable profits for financial years commencing on or after January 1, 2022. However, the new

methodology also applies to this loss set-off, thus for a loss set-off against taxable profits for 2022 and subsequent years the maximum amount that can be set off per year is EUR 1 million and half of the taxable profit for that year, insofar as it exceeds EUR 1 million.

It was only as of 2019 that the carry-forward loss set-off period for corporate income tax purposes was reduced from nine to six years. In that respect, transitional rules still apply with regard to the *order* in which losses for 2019 and 2020 can be set off. The proposed unlimited carry-forward loss set-off means that these transitional rules will be canceled.

#### *No distinction between type of losses*

The proposed measure does not distinguish between the type of losses. The easing and tightening will thus, for example, also apply to holding company and financing losses that fall under the transitional rules for the holding company loss set-off, which was abolished as of January 1, 2019. However, the proposed limitation will not affect the Mining Act. For the record, we would like to point out that the new methodology is no different if and insofar as losses are caused by claimed liquidation losses.

#### *Accompanying measures*

The memorandum contains a number of accompanying measures. For example, the changes also have implications for setting off deferred liquidation losses in situations where a company that is included in a fiscal unity holds a participation that has incurred such a loss. Also in that respect both the easing and the tightening will be implemented.

## **2. Job-related Investment Allowance**

The second Memorandum of Amendment covers the Job-related Investment Allowance (*Baangerelateerde Investeringskorting*; BIK). The government wishes to use the BIK to encourage companies to make investments and to retain jobs. If companies make an investment, for example through purchasing new equipment, they will receive a credit that they can set off via their payroll tax and social security contributions as a remittance reduction.

The BIK remittance reduction amounts to 3% per calendar year for investment amounts up to and including EUR 5,000,000 and 2.44% for amounts in excess thereof. The BIK scheme applies for two years, 2021 and 2022. The total budget for this scheme is EUR 2 billion per year. If it turns out that the available budget of EUR 2 billion for 2021 is (significantly) overspent or underspent, this can be cause to adjust the parameters of the BIK for the year 2022 accordingly (upward or downward). A change to the parameters for the year 2022 will be announced no later than December 15, 2021.

### *Conditions*

A number of conditions must be met in order to be eligible for the BIK remittance reduction:

- There must be a BIK withholding agent. This is a natural person who, or an entity that has a withholding obligation for payroll tax and social security contributions and is also subject to personal or corporate income tax. Foundations that do not carry on a business (*stichtingen zonder onderneming*), exempt (healthcare) institutions, fiscal investment institutions and businesses without personnel do not qualify for the BIK.
- There must be one or more job-related investments. In short, that is the case if commitments were entered into for the purchase of an asset not previously used by anyone. The investment obligation must also be at the expense of the BIK withholding agent or the fiscal unity for corporate income tax purposes (see below). Production and improvement costs do not qualify for the BIK.
- Because a link is made to the term 'investment' as it applies for the purposes of the small projects investment credit (*kleinschaligheidsinvesteringsaftrek; KIA*), certain investments are excluded. For example, investments:
  - in residential dwellings, land and animals;
  - in cars not intended for business transport;
  - in operating assets intended for leasing;
  - for which commitments were entered into toward persons belonging to the same household and certain blood relatives or relatives by marriage.
- Operating assets for which the amount invested is less than EUR 1,500 per operating asset are also excluded.
- The commitment in respect of the investment should have been entered into on or after October 1, 2020 but before December 31, 2022. The taxpayer must be able to convincingly demonstrate this (for example by means of a signed contract).
- The investments must be fully paid with a final payment in 2021 or 2022, and must have been put into use within six months of the full payment.
- The BIK withholding agent must file an electronic application for the issue of a BIK statement. The BIK statement will be issued by The Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland; RVO*) on behalf of the Minister of Economic Affairs and Climate Policy. The application must be filed no later than within three months of the end of the calendar year in which the final payment for the job-related investment was made. Applications could be filed for the first time on September 1, 2021.
- Each application should include at least EUR 20,000 of BIK investments (efficiency threshold).
- No more than one application can be made per quarter, with a maximum of four per calendar year. On the basis of the issued BIK statement, the credit can be applied to the payroll tax and social security contributions to be remitted in that calendar year.

*Incorporation into the payroll tax and social security contributions return*

As of the start of the tax return period in which the BIK statement is dated, the BIK remittance reduction can be credited against the payroll tax and social security contributions to be remitted, but no further than nil. If an amount of BIK remittance reduction remains, it can be credited in the following month during the calendar year in which the BIK statement was issued.

If, at the end of the calendar year, there is still an amount of uncredited BIK remittance reduction, it can be credited – via a correction notification – against the payroll tax and social security contributions for a tax return period that ended earlier in the calendar year in which the BIK statement is dated.

As of 2022, withholding agents can use the ‘BIK remittance reduction’ section in the payroll tax and social security contributions return. Until then, withholding agents should use the ‘remittance reduction maritime shipping’ section to apply the BIK remittance reduction.

The BIK withholding agent to whom a BIK statement was issued must keep accounts and records about the job-related investments that were entered into in this respect. If it turns out that the BIK remittance reduction was wrongly issued or applied for, or the wrong amount was issued or applied for, a correction BIK statement may be issued. In addition, administrative penalties may be imposed for a maximum of EUR 100,000 or, if higher, 20% of the amount set as the remittance reduction in the BIK statement.

*Fiscal unity*

If various withholding agents are members of a fiscal unity for corporate income tax purposes, only one of these withholding agents may apply for a BIK statement (the designated BIK withholding agent). The job-related investments of all the companies within the fiscal unity can be included in the application. The designated BIK withholding agent allocates the amount of BIK remittance reduction applied for in the application to the other withholding agents that are members of the fiscal unity. If the designated BIK withholding agent does not indicate an allocation, the amount of the BIK remittance reduction will be fully allocated to the designated BIK withholding agent.

*Depreciation and other investment tax relief not affected by the BIK*

The BIK remittance reduction is a supplement to existing incentive schemes, such as the energy investment allowance (*energie-investeringsaftrek*; EIA), the environmental investment allowance (*milieu-investeringsaftrek*; MIA), the KIA and the free depreciation of environmental investments (*willekeurige afschrijving milieu-investeringen*; VAMIL), and can coincide with these schemes. It is also explicitly stated that the amount of the BIK is not part of the acquisition costs, so that depreciation and investment tax relief can be used as if no BIK had been received. Without such a provision, the BIK may have to be regarded as an item-related subsidy.

#### *State aid?*

The Council of State has advised the government to report the scheme to the European Commission in order to rule out that there is prohibited State aid. According to this advisory body, the stipulated conditions may mean that certain companies are given a selective advantage. However, according to the government, the BIK is a generic tax measure and there is thus no prohibited State aid. Therefore, the government will not report it in Brussels.

### **3. Meijburg & Co comments**

For many personal and corporate income taxpaying businesses the BIK will provide a welcome contribution to their investments. What is striking, is that some of the businesses cannot or can hardly benefit from this incentive scheme, because the measure only applies to investments in operating assets, and moreover not all types of operating assets qualify for the scheme. The BIK also raises many technical questions. It is also noteworthy that an application for a remittance reduction under the BIK can only be made as of September 1, 2021. It is also far from clear what the consequences will be in the case of inclusion in (or removal from) a fiscal unity, or in the case of a legal merger or division.

In many cases loss set-off will be more complex and the new rules create more differences between carrying on a business as a sole proprietor or as a private limited liability company. Roughly speaking, this may also lead to more differences between large and small businesses. Add to that the fact that due to the corona crisis many losses are being incurred earlier and that larger businesses are also facing a limitation of the liquidation and cessation loss schemes (see [our earlier memorandum](#)), then it is clear that loss set-off for corporate income tax purposes will (have to) be high on the agenda in the coming period.

#### *Next steps*

Today, October 6, 2020, the Finance Standing Committee of the Lower House of Parliament will discuss the BIK. Firstly via a technical briefing, followed later in the day by a hearing/round table discussion.

Should you have any questions about the above, Meijburg's advisors would be pleased to use their expertise to help you minimize the tax and financial consequences of the corona crisis. We will, of course, keep you informed of developments.

Meijburg & Co  
October 6, 2020

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