

Bill on the Fiscal Unity Emergency Repair Act adopted by the Lower House

On February 12, 2019, the bill on the Fiscal Unity Emergency Repair Act (*Wet spoedreparatie fiscale eenheid*) was adopted by the Lower House. This bill was explained in our previous memoranda dated [June 7, 2018](#) and [November 6, 2018](#). 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. As previously reported, this bill – after amendments to the original bill – has retroactive effect on most points to January 1, 2018.

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 concerns the following Sections:

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

Section 10a CITA

It was indicated with regard to Section 10a CITA that ignoring the fiscal unity has implications for the situation in which the tainted transaction takes place within the fiscal unity and/or the debt is entered into by and with a company within the fiscal unity. If the interest payable to a company outside the fiscal unity would have been non-deductible without the fiscal unity, then under the emergency repair measures this will lead to a deduction limitation on the interest. Where this concerns interest payable within the fiscal unity, the measure will trigger a deemed addition to the fiscal unity's profit. Of course what also needs to be assessed is whether one of the rebuttal provisions of Section 10a CITA would have applied here. The Explanatory Notes to the bill state in this respect that in the case of mutual indebtedness between fiscal unity companies, the 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).

Section 20a CITA

The application of 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 mean that there is no carry-forward loss set-off for the losses incurred before the change of shareholders, which losses are attributable to a particular fiscal unity company. The plenary debate shows that the emergency repair measure for this provision does indeed cover qualifying changes of shareholders that took place after 11:00 a.m. on October 25, 2017 (and not to such changes after January 1, 2018). In order to answer

the question whether there is a qualifying change of shareholders, the Deputy Minister indicated that the benchmark is the beginning of the oldest loss year.

Retroactive effect and transitional rules

Based on the bill, the legislation will apply with retroactive effect to January 1, 2018 (with the exception of the rule for Section 13a CITA, which will apply as of January 1, 2019). Taxpayers with a financial year corresponding to a calendar year will thus in principle be confronted with the emergency repair as of the 2018 financial year. Taxpayers with a split financial year will have to apply a 'cut'. During the plenary debate the Deputy Minister did however indicate that he is open to the idea espoused by the VVD parliamentary party to further extend the retroactive effect in such cases – upon request – 'to the past'. In this way taxpayers with a split financial year could also avoid a 'cut'. We will have to wait and see whether this 'option' is considered feasible and if it will actually be offered.

To accommodate small and medium-sized enterprises, transitional rules will apply for the period through to December 31, 2018 for cases where the interest for a 12-month period does not exceed EUR 100,000 per fiscal unity and a number of additional conditions are met. 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.

Next steps and future developments

The bill now goes to the Upper House. If the debate there goes smoothly, the corporate income tax returns for 2018, where the financial year corresponds to the calendar year, in particular can be filed with due regard for the emergency repair measures.

It is also the government's intention to follow-up the emergency repair measures within a reasonable period with future-proof group rules. The structure and introduction date of the group rules will also be discussed with the business sector, interest groups and academics. A kick-off meeting about the new corporate income tax group rules will be held on February 14, 2019. The Deputy Minister has invited representatives of the business sector, interest groups and academics to present their views on the preferred new group rules. During the plenary debate it was indicated that the government will then prepare an options document, which will also list the parties from the business sector, interest groups and academic world that this was discussed with. The options document could possibly be presented to the Lower House before the summer recess, so that the business sector, interest groups and academics can respond to it during or after the summer. Further in-depth discussions will take place in response to that consultation. After the summer, the government will send a framework letter to the Lower House outlining the results achieved thus far.

We will, of course, keep you informed of developments. Please feel free to contact your Meijburg advisor if you have any questions or would like to discuss the above matters.

Meijburg & Co
February 2019

The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.