KPMG Meijburg & Co
Tax Lawyers

Deputy Minister answers parliamentary questions, including those about ATAD1 and the fiscal unity

1. Introduction

On February 23, 2018, the Deputy Minister of Finance presented his future tax plans (see our previous memorandum). On May 9, 2018, he sent letters to the Upper and Lower Houses, in which he answered their questions and explained these plans. Below we discuss the status of two important elements of the package: ATAD1 and the fiscal unity for corporate income tax purposes.

2. ATAD 1

The Deputy Minister intends to send the bill to implement the first European directive to combat tax avoidance (ATAD1, as of 2019) to the Lower House *before* the summer recess. In accordance with earlier reports, he indicated that the government has made the following choices with regard to the upcoming bill on the '**earnings stripping rules**':

- There will be no group exemption.
- This government also appears to regard grandfathering of loans already in place on June 17, 2016 to be undesirable. An opening may be offered by the comment that, in response to the presentation of the bill, there is sufficient opportunity to further discuss the 'whether or not provided for' in grandfathering. At the same time, the government's aim to reduce the corporate income tax rate, as evidenced in the coalition agreement, can also be taken into consideration. This message appears to imply that if transitional rules are put in place, they could be financed by a (temporary) more modest reduction of the corporate income tax rate.
- There will be a EUR 1 million threshold.

Contrary to earlier reports, there is no suggestion of not making an exemption for long-term infrastructure projects. Instead it is noted that in light of State aid and budgetary risks, a careful weighting must be made with its result forming part of the pending bill. The Deputy Minister reiterated that, in his opinion, housing associations do not carry out any public infrastructure projects.

Regarding the cancellation of the current interest deduction limitations, it is only noted that – as is already known – the acquisition holding provision of Section 15ad Corporate Income Tax Act 1969 will be canceled as of January 1, 2019, and that Section 10a Corporate Income Tax Act 1969 (aimed at profit shifting) will be maintained. It seems that it will only be announced on Budget Day 2018 which other specific interest deduction limitations will be canceled. A choice will also have to be made whether it is desirable to avoid a potential overlap between an interest deduction limitation and the conditional withholding tax that still has to be introduced.

ATAD1 requires the implementation of a measure combating the avoidance of tax via low-taxed controlled foreign companies (**CFCs**), where profits realized from mobile assets are transferred to these CFCs. In general, a choice will have to be made between Model A, through which a number of specific passive income categories are, in principle, included in the Dutch tax base, and Model B, in which the profit reported by the CFC is allocated to the Dutch functions on the basis of the arm's length principle. The Deputy Minister has opted for Model A where this concerns a CFC established in a low tax jurisdiction (i.e. a jurisdiction with a low statutory rate) or in a country that appears on the EU list of non-cooperative countries ('EU blacklist'), *unless* there is an economic activity of substance. The latter will occur if the CFC complies with the substance conditions that already apply for application of the dividend withholding tax exemption (see link). It is not yet known when there is a low statutory rate; this will only become clear once the bill is presented.

For other countries, 'only' Model B will be used. The Deputy Minister pointed out that the Netherlands has always applied Model B. This comment suggests that the bill will not contain any substantial legislative text to implement Model B and will possibly suffice with the comment that current legislation is already in accordance with Model B.

3. Fiscal unity

On May 9, 2018, the Deputy Minister shed more light on (the planning for) the future group regime, which will have to succeed the announced emergency remedial measures for the fiscal unity for corporate income tax purposes (see, for example, this memorandum).

The Deputy Minister firstly reiterated that a cross-border fiscal unity (with a source exemption) is not a realistic option for the government and that it lies within reason to align with existing group rules in other countries. Replacing the current fiscal unity regime with a new group regime is complex, because a large number of corporate income tax rules are related to the fiscal unity, which means the process will take time. The planning for this is presently as follows.

In the second half of 2018 meetings will be held with various parties to take stock of the present situation. This will result in an 'options document', for which an internet consultation will be opened in the first half of 2019. In response to the consultation, a letter outlining the response to the internet consultation and an outline of the new group regime will be published in mid-2019 and subsequently elaborated in a draft bill in the second half of 2019. In mid-2020 an internet consultation will be opened on this draft bill (in order to obtain more technical input), after which a final bill should be presented to the Lower House before the end of this government's term of office. The Deputy Minister has not yet commented about the entry into force and any transitional rules.

The above does however show that the process will take a few years. The current fiscal unity regime, after having been amended for the emergency remedial measures, will thus continue to be the regime that businesses must take into account for the coming years.

The bill with the emergency remedial measures is, moreover, still expected to be presented to the Lower House for debate in the second quarter of this year. Because of the bill's retroactive effect to 11:00 a.m. on October 25, 2017, and the fact that it is already being dealt with by the Council of State, it appears that its publication can indeed be expected before the summer.

4. Final remarks

The measures discussed here, but also the announced measures, will drastically change the Corporate Income Tax Act. Virtually all important elements (including the interest deduction, the participation exemption and the fiscal unity) will be affected. And because most of the measures are the result of European directives and OECD initiatives, much will change in other countries as well. Both multinationals and SMEs will have to take this into account. Planning well ahead will not be easy in the coming years.

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
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