

Deputy Minister outlines main features of updated ruling practice – stricter requirements for rulings with an international character

In a letter sent to the Lower House on November 22, 2018, the Deputy Minister of Finance outlined the main features of the revision of the ruling practice. The revision is aimed at further safeguarding the quality of the ruling practice for businesses with activities of substance as well as enhancing its robustness. There will be more stringent requirements for issuing rulings with an international character and the rules on the issuing of these rulings will also be more transparent. The revision of the ruling practice stems from the Tax Policy Agenda, in which measures on transparency and integrity form an important pillar. The Deputy Minister hopes to have the new measures take effect on July 1, 2019.

The proposed measures cover the elements transparency, process and content in the context of the issuing of all rulings with an international character.

Transparency and process

The process of issuing rulings by the Dutch tax authorities will become more transparent and less ambiguous. All rulings with an international character that are applied for will from now on in any case also be assessed by one central team, the new International Tax Certainty Executive (*College Internationale Fiscale Zekerheid*). Currently, a central team approach with a 'second signatory' is only used for certain types of rulings (Advance Pricing Agreements, APAs and/or Advance Tax Rulings, ATRs).

Measures that meet the need to make more information public about rulings with an international character will also be taken. For example, the Dutch tax authorities will publish an anonymous summary of such rulings immediately after they are issued and the annual report of the Dutch tax authorities will from now on cover all rulings with an international character (and not only APAs and ATRs). In addition to this, the periodic examination by independent experts will be continued and will also cover all rulings with an international character.

Content

Economic nexus

An important measure is the tightening of the substance requirements. The current list of substance requirements will be replaced with a requirement for an economic nexus with the Netherlands. This must involve commercial operating activities that are actually performed in the Netherlands by a sufficient number of relevant personnel in the Netherlands. The amount of the operating costs incurred must also be in proportion to what the business does in the Netherlands. Moreover, the content of the work must be in keeping with the cashflows circulating in a business.

Motive

The Dutch tax authorities will henceforth look more critically at the purpose of the specific arrangement for which the ruling is requested. Rulings will no longer be issued

for arrangements that have Dutch and/or international tax savings (the latter is new) as their decisive motive.

In addition to this, rulings will also no longer be issued in the future for transactions with entities established in countries appearing on the EU list of non-cooperative jurisdictions. Currently, the following jurisdictions appear on this list: American Samoa, Guam, Samoa, Trinidad and Tobago, and the US Virgin Islands. The same applies to transactions with entities established in low-taxed countries. These are countries without a profit tax or with a statutory tax rate that is less than 9%.

Examples of economic nexus and motive

The letter includes four explicit examples where a ruling is currently issued, but for which no ruling will be issued in the future:

1. an interest-free loan with an arm's length interest deduction in the Netherlands (based on the informal capital doctrine), but which is not taxed outside the Netherlands (motive);
2. an operating entity that also has an interest/royalties conduit function without there being an economic nexus with the Netherlands for the latter function;
3. a multinational with a large finance department outside the Netherlands and two financial FTEs in the Netherlands, whose main task in the Netherlands is obviously a conduit function so that foreign tax can be reduced (motive and possible economic nexus);
4. a holding company without active management activities in respect of participations, which is insufficient economic nexus.

Where a ruling with an international context is applied for, it is up to the Dutch tax authorities to assess the economic nexus and taxpayer's motive – in relation to one another – based on the specific circumstances of each case. Based on these measures, the Dutch tax authorities will also assess where the cash flows originate, which activities are performed in the Netherlands and the destination of the cash flows.

Term and format

In future, all international rulings will in principle have a maximum term of five years. Only in exceptional cases (long-term contracts for example) can this be extended to 10 years, as is currently the case for APAs.

The format of rulings with an international character will become more rigid, because a fixed format will be used. All we know about the format at present is that it will be in the form of a settlement agreement.

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The measures in any case mean that taxpayers that only establish themselves in the Netherlands for tax reasons and have no economic nexus with the Netherlands will no longer obtain a ruling from the Dutch tax authorities. The 'economic nexus' concept is

expected to raise the threshold for obtaining advance certainty in all cases above that which applies on the basis of the current substance requirements.

Existing rulings and rulings issued up to the time that the updated ruling practice is implemented, will not be affected by the new policy. In his letter the Deputy Minister further confirms that no longer issuing a ruling for certain structures does not mean that these structures will disappear, since the law will not change because rulings are no longer issued.

On January 30, 2019, the Lower House will meet with the Deputy Minister of Finance to discuss tax avoidance. During this meeting, the letter about the updated ruling practice will also be discussed. The Deputy Minister has in any case expressed his wish to implement the amendments as of July 1, 2019 and to have them take effect at the same time. The half-yearly report for April 2019 will provide more clarity about the progress of the implementation.

Meijburg & Co
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