

Dutch Supreme Court renders important judgment on costs related to the acquisition or disposal of participations

For Dutch corporate income tax purposes, the costs related to the acquisition or disposal of shares that are covered by the participation exemption are non-deductible. On December 7, 2018 the Dutch Supreme Court rendered judgment in a case specifically concerning the sale of a participation. In its judgment, the Supreme Court provided detailed guidelines on how to decide whether the costs incurred relate to the acquisition or disposal of participations. In addition, the judgment provides mandatory rules on how costs incurred during the process of acquiring or disposing of a participation should be accounted for. These guidelines are of major importance to all taxpayers. To a certain extent, the guidelines deviate from the approach that, until this judgment, was generally considered standard practice. As such, the judgment may also affect tax years that are still under consideration by the tax authorities.

1. Supreme Court judgment

According to the Supreme Court, the costs incurred should be classified as costs related to the acquisition or disposal of participations, if these costs would not have been incurred by the taxpayer had it not entered into the process of acquiring or disposing of a participation. The Supreme Court noted that 'costs' includes both external and internal costs.

As long as the acquisition or disposal process has not been completed, the costs incurred should be capitalized in the tax balance sheet.

Once the acquisition process is completed, the following rules apply:

- If the acquisition is successful, the capitalized cost should be written off, which results in non-deductible costs.
- If the acquisition is unsuccessful, the capitalized cost should be written off, which results in deductible costs.

With respect to a disposal process the following applies. In the event of a successful disposal, the capitalized cost should be written off, which results in non-deductible costs. In the event of an unsuccessful disposal, what needs to be confirmed is whether the taxpayer still intends to dispose of the participation. If that is not the case, the capitalized cost should be written off, which results in deductible costs. However, if the taxpayer still intends to sell the participation, the capitalized cost cannot yet be written off. Instead, the outcome of the next phase must be awaited and any further costs incurred during the next phase will have to be added to the capitalized cost. If the disposal occurs at the end of that next phase, the capitalized cost should be written off, which results in non-deductible costs. However, any costs incurred in the first phase of the disposal process, which would not have been incurred had the first phase not occurred, can be deducted at the end of the second phase.

2. Impact on practice

The guidelines provided by the Dutch Supreme Court deviate from what is considered standard practice. Consequently, the judgment is also likely to impact tax years for which tax returns still have to be filed or that are still under consideration by the tax authorities.

3. What are your options?

In light of the Supreme Court's judgment it is essential to re-examine any position taken in respect of costs related to the acquisition or disposal of participations in years that are still pending and to examine how the Supreme Court's guidelines may affect the positions taken in this respect. Close attention should especially be paid to internal costs.

Our specialists in the Direct Tax Group and the M&A Group would be happy to be of assistance.

Meijburg & Co
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