

2022 Decree on Profit Attribution to Permanent Establishments

On July 1, 2022 the new decree on profit attribution to permanent establishments was published. This decree replaces the old decree of January 15, 2011. The decree is intended to provide clarity on the manner in which the Dutch Tax and Customs Administration deals with profit attribution to permanent establishments. The most important changes are the incorporation of the results of the OECD's BEPS project and the source exemption that was introduced into the Corporate Income Tax Act 1969 ('CITA') in 2012. A number of editorial changes have also been made and references to other decrees/policy statements and documents have been updated.

The most important changes to the decree are summarized below.

1. Risk allocation, control over risk

The decree refers to the updated OECD Transfer Pricing Guidelines. Specifically, the new decree refers to the fact that control over risk comprises the following elements:

- 1) the authority to decide to take, postpone or reject a risky opportunity;
- 2) the ability to take decisions on whether and how such risky opportunities should be followed-up.

The decree also notes that it is important that both parties not only have the capacity to allocate risk, but that they can also implement it functionally.

2. Source exemption

As of January 1, 2012 the source exemption for (foreign) permanent establishments was introduced into CITA. This source exemption for foreign business profits means that both the positive and the negative results of the foreign permanent establishment are eliminated from the worldwide profit of the Dutch taxpayer. With regard to the attribution of profit to permanent establishments in treaty situations, the applicable Article in the treaty is relevant. With regard to the attribution of profit to permanent establishments in non-treaty situations, the most recent text of Article 7 of the OECD Model Convention must be used.

3. Double non-taxation

If and insofar as a taxpayer opts to attribute the profit differently in the relevant countries and this results in part of the permanent establishment's profit not being subject to a profit tax, the Dutch Tax and Customs Administration may deviate from the policy as described in the decree in order to arrive at an outcome that does not lead to double non-taxation.

KPMG Meijburg & Co comments

The decree explains how the Dutch Tax and Customs Administration deals with profit attribution to permanent establishments. The new decree only has a limited number of substantive changes compared to the old decree of January 15, 2011. The changes in

the decree consist, in particular, of new passages about the source exemption introduced on January 1, 2012 and a response to international developments, such as the amendments to the OECD Transfer Pricing Guidelines. However, most of the changes involve editorial changes and updated references to other decrees/policy statements and documents.

If you have any questions about the above, Meijburg's advisors would be pleased to use their expertise to help you.

KPMG Meijburg & Co
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