KPMG Meijburg & Co Tax & Legal

Lower House of Parliament passes bill on the Excessive Borrowing from Own Companies Act unchanged

On September 13, 2022, the Lower House of Parliament passed the bill on the Excessive Borrowing from Own Companies Act unchanged. The proposed motions and amendments were rejected. The bill means that holders of a substantial interest who borrow more than EUR 700,000 from their own company will be taxed on the excess as income from a substantial interest. Home acquisition debt is excluded. The measure will apply for the first time to the 2023 calendar year and will take into account the level of debt as at December 31, 2023. Each holder of a substantial interest who has borrowed more than EUR 700,000 from their own company, will have to reconsider their position. The fact that a lot of tax legislation is in flux makes this problematic, for example, the changes to Box 3 and to the personal and corporate income tax rates. It may therefore be prudent to start preparing an analysis this year rather than waiting until December 31, 2023.

What does the bill entail?

The government intends to use the measure to combat the deferral of tax for personal income tax purposes in Box 2 and to bring taxation more in line with the time at which the substantial interest holder, or any person related to them, actually has the funds at their disposal. The taxation of the substantial interest will be brought forward. If, at the end of the calendar year, more was borrowed from the own company than EUR 700,000 ('the threshold'), the excess will be taxed as a deemed ordinary benefit ('the excessive part of the debt) in Box 2 in the tax return for the substantial interest holder and their partner. Debt is defined as all civil-law indebtedness and commitments at the end of the calendar year on the basis of nominal value. The maximum amount of EUR 700,000 applies to the substantial interest holder and their partner jointly and not to each of them individually, as is the case with the tax-free amount in Box 3. Loans from multiple companies in which a substantial interest is directly or indirectly held, are added together.

The scope of the measure will be limited to the substantial interest rules. This means that the measure will not affect Box 1 and Box 3 as regards personal income tax, or dividend tax and corporate income tax. Therefore, no dividend tax has to be withheld on the deemed ordinary benefit.

The interest payable on the excessive part of the debt will continue to be subject to corporate income tax at the company. This is intended to keep enforcement costs as low as possible, but it is doubtful whether the desired effect will also be achieved. The measure has no civil-law significance. The loan will generate deemed income in Box 2 but will continue to exist for civil-law purposes, so interest still has to be taken into account and the repayment of the debt is required at some point. For the company (the creditor) this means that the value of the receivable from the shareholder (the debtor) as it appears on the balance sheet for tax purposes will not change as a result of this measure and that the creditor will also regularly take into account the interest on the substantial interest holder's excessive part of the loan and must account for this in its income statement. If the debt falls in Box 3, it will reduce the income in that Box. The announced changes to Box 3 as of January 1, 2023 mean that the tax benefit derived from a debt is expected to be smaller than is currently the case. It has been reported

that the bill with its proposal for how Box 3 will be structured as of 2023, will be announced on Budget Day, next Tuesday (September 20).

The Explanatory Memorandum underlines that current case law on loans and home acquisition debt will continue to apply in full. In short, this means that if it is established that the debt cannot or will not be repaid, a deemed dividend distribution will be assumed and the tax on the substantial interest will have to be paid. This applies both to debt that is in excess of or less than EUR 700,000. It is not the intention for double taxation to arise: if there is a deemed dividend distribution that can also be regarded as excessive debt, tax will only be levied once, i.e. on the deemed 'real' dividend distribution.

Recovery upon repayment

If the threshold has been exceeded at the end of the calendar year, the excess will, as stated above, be taxed as a deemed ordinary benefit and the threshold will be increased by the same amount. By repaying the debt in a later year, it can again fall below the higher threshold. In that case, a negative deemed ordinary benefit in the year of repayment can be taken into account. If, as a result of this, a loss from the substantial interest arises in the year of repayment, this can be set off in accordance with the rules for setting off a loss from a substantial interest. The threshold will subsequently be reduced by the same amount. If the entire substantial interest is disposed of, a negative deemed ordinary benefit can also be taken into account. In situations where there is no longer a substantial interest at the end of the year, the debt is deemed to have been repaid in full. However, the total negative deemed ordinary benefit may never exceed the total positive deemed ordinary benefit that was previously taken into account.

Which loans qualify?

All debt qualifies, with the exception of home acquisition debt. That debt does not fall under the proposed measure insofar as a mortgage right has been established on it. This mortgage condition does not apply to home acquisition debt existing on December 31, 2022.

It is irrelevant whether the debt was entered into for consumer expenditure (i.e. 'current account overdrafts') or that it was, for example, entered into to finance the acquisition of (property) investments. Receivables and rights to the company will not be set off against the debt to the company to arrive at a net figure. All types of loans count toward determining the total amount of debt. Accrued interest and guarantees given by the company are not excluded, nor is the onlending of funds to the substantial interest holder that were borrowed from the company by other people. If a person related to the substantial interest holder, who does not hold a substantial interest themselves, borrows excessively from the company (more than EUR 700,000), the excessive part of that debt is allocated to the substantial interest holder (and their partner) and will be taxed in their hands (and those of their partner) insofar as that excessive amount is higher than the substantial interest holder's threshold. Examples of this are children who borrow from their parent's company or parents who borrow from their children's companies.

Transitional rules

Transitional rules have been proposed, but these are confined in scope. As stated above, home acquisition debt in place on December 31, 2022 will also be disregarded if no mortgage right has been established.

Existing agreements

As a rule, existing agreements with the Dutch tax authorities are canceled as a result of legislative amendments. However, settlement agreements covering total debt of less than EUR 700,000 will not be canceled. With regard to settlement agreements covering total debt in excess of EUR 700,000, this will depend on the agreements made.

Immigration, emigration and remigration

Protective assessments for the profit from a substantial interest will be imposed on substantial interest holders who emigrate. A deferral of payment for this will, in principle, be granted in the usual manner. If the emigrated shareholder subsequently receives an ordinary or disposal benefit, the deferral of payment can be withdrawn in this respect. Insofar as debt to the own company increases to more than the maximum amount after the emigration of the substantial interest holder, a deemed ordinary benefit will be presumed. This will result in the tax on the protective assessment being collected in this respect. Whether the deemed ordinary benefit can still be taxed depends on the applicable tax treaties. However, that is unlikely to often be the case. The same comment can be made about the situation where the substantial interest holder is a non-resident taxpayer. In that case, the protections offered under a tax treaty will usually prevent the Netherlands from being able to tax the benefit.

A step-up will be granted in the event of immigration resulting in domestic taxpayer status: the maximum amount will be set at the amount of qualifying debt at the time of immigration but will be at least EUR 700,000. This was expressly reconfirmed on September 12, 2022 in a separate letter sent in answer to questions from Lower House Member of Parliament Mulder. This will avoid debt that arose in the period outside the Netherlands falling under the measure. If a person who was a non-resident taxpayer immigrates and thus becomes a domestic taxpayer, no step-up will in principle be granted. Nor will a step-up be granted in the case of remigration. The maximum amount applying to the taxpayer upon emigration will again count as the maximum upon remigration.

Further rules may be drawn up to determine the maximum amount of debt upon immigration and remigration.

KPMG Meijburg & Co comments

As of December 31, 2023 borrowing from the own company or from the companies of relatives, such as parents, will involve an additional tax dimension. If and insofar as more than EUR 700,000 in total is borrowed, the substantial interest will be taxed. Nevertheless, continuing with the debt can sometimes be the best option, although it is usually better to avoid a tax bill if at all possible. For example, repaying the debt (via

dividends or the contribution of assets) or refinancing the debt at banks or at other third parties. What is best for you, depends on your situation.

Making it even more difficult to identify what the impact of the bill will be, is the fact that a lot of tax changes have been announced, for example, changes to Box 3, potential changes to the substantial interest tax rate and the corporate income tax rate. What will happen to interest rates in the near future will also play a role.

It should also be noted that real estate transfer tax is not going to include any tax relief for property investments financed by the own company. Transferring this property to the company for the repayment of the debt is therefore not possible without real estate transfer tax.

Finally, the proposed changes will also affect loans that Dutch companies have provided to foreign companies with a substantial interest and which are non-resident taxpayers for corporate income tax purposes. This may be different in treaty situations.

If you would like more information on any of the topics discussed here, your Meijburg advisor will naturally be happy to be of assistance.

KPMG Meijburg & Co
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