

## **Clarification of anti-transfer pricing mismatch rule in the case of capital contributions**

On January 24, 2023 Deputy Minister of Finance Mr. Van Rij clarified in [a policy statement](#) the scope of one of the measures to combat transfer pricing mismatches (Section 8bd Corporate Income Tax Act 1969). Based on a literal reading of the text, an asset that is, for example, acquired by means of a capital contribution from an exempt affiliated entity or from an affiliated entity not subject to a profit tax, must be stated on the balance sheet at nil. However, that is not always the aim. This memorandum discusses the policy statement in more detail.

### **Background**

Since January 1, 2022 the Corporate Income Tax Act 1969 ('CITA 1969') contains measures to combat double non-taxation as a result of mismatches arising from the application of the arm's length principle. These are also known as informal capital structures or deemed dividend structures. One of those measures relates specifically to the situation where an asset is acquired from an affiliated entity by means of a capital contribution, profit distribution, repayment of paid-in capital, liquidation dividend or a similar transaction, and whereby the fair market value at the time of acquisition is higher than the value attributed to the transfer that is included in a profit tax at the affiliated entity (Section 8bd CITA 1969). This measure is primarily aimed at transfer pricing mismatches arising if the transfer is taxed at the transferring party at a lower amount. However, the measure also applies if the transferring party is not subject to tax: in that case nothing is subject to tax.

Up until Section 8bd CITA 1969 took effect, an entity subject to corporate income tax in the Netherlands (hereinafter: taxpayer) could, in a situation as described above, state the asset in full on its balance sheet for tax purposes at its fair market value. This resulted in double non-taxation: a deduction in the Netherlands via the depreciation/amortization on the asset and no taxation at the affiliated opposite party. Since the entry into force of Section 8bd CITA 1969, a taxpayer in such a situation may only state the asset on its balance sheet if and insofar as an amount is included in a profit tax at the affiliated entity and the taxpayer convincingly demonstrates that this is the case.

If Section 8bd CITA 1969 is taken literally, this means, practically speaking, that if a taxpayer acquires an asset via a capital contribution (or one of the other transactions mentioned above) from an affiliated entity that is not subject to a profit tax – either because it is institutionally exempt or because it is established in a state where it is not subject to a profit tax – the conditions of Section 8bd CITA 1969 have by definition been met. In that case, the fair market value of the asset is almost always higher than the amount that is included in a profit tax at an entity not subject to a profit tax (by definition: 0). As a result, the taxpayer must state the asset on its balance sheet for tax purposes at nil.

### **Clarification scope of Section 8bd CITA 1969**

In light of the spirit and intent of the measures to combat transfer pricing mismatches, the Deputy Minister does not find the outcome that follows from a literal interpretation

of the legislative text of Section 8bd CITA 1969 in a situation such as the above appropriate. That is why Section 8bd CITA 1969 is disregarded if a taxpayer acquires by means a capital contribution (or one of the other transactions referred to in Section 8bd CITA 1969) an asset from an affiliated entity that is not subject to a profit tax. This is subject to the condition that both the civil-law structure of the capital contribution and the financial statements of the transferring party and the taxpayer use the fair market value for the capital contribution. Financial statements are understood as: the financial statements prepared in accordance with Title 9, Book 2 of the Dutch Civil Code or the Provinces and Municipalities (Budgets and Accounts) Decree, or similar (foreign) statutory regulations.

The policy statement will take effect as of January 25, 2023.

### **KPMG Meijburg & Co comments**

In our view, the explanation of Section 8bd CITA 1969 given by the Deputy Minister of Finance best suits the spirit and intent of that Section. It is good that it is clearly explained again. It seems to us that, under this policy statement, cash deposits – insofar as these could even fall under the term ‘asset’ – performed by an institutionally exempt entity or an entity established in a state where it is not subject to a profit tax (states without profit tax) are no longer affected by the penalty contained in Section 8bd CITA 1969. Of course, the conditions of the policy statement must be met, i.e. that it is a formal deposit and is recognized as such in the financial statements.

If you would like more information about the policy statement and/or the measures to combat double non-taxation as a result of mismatches arising from the application of the arm’s length principle, your Meijburg advisor would be pleased to help you.

KPMG Meijburg & Co  
January 24, 2023

*The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.*