

NovioTax Dutch (Corporate Income) Tax Plan 2021

September 2020

On 15 September 2020 (*Prinsjesdag*), the Dutch government published the Tax Plan for 2021. Aside from proposals to amend the tax regime for 2021, investigations and consultations regarding further changes have been announced. The legislative proposals will be reviewed, first, by the Lower House of Parliament and then, by the Senate. If the proposals are accepted by both Houses of Parliament, the proposals will enter into effect on 1 January 2021.

This post is a short update on the changes to the laws relating to direct-taxes taking effect in 2021 (proposed in the Tax Plan 2021 as well as some already ratified in 2020) that may be relevant for companies doing business in the Netherlands. The post also throws light on some proposals and consultations (that have been announced along with the Tax Plan 2021) that could become relevant in 2022 and the subsequent years.

Changes in tax rates with respect to CIT and the Innovation Box

The top CIT rate will remain 25%, while the lower CIT rate (applicable to the first EUR 245,000 of taxable profits) will be reduced to 15% (from 16.5% in 2020). The first bracket has therefore been extended from EUR 200,000 in 2020 to EUR 245,000 in 2021, and to EUR 395,000 in 2022. Companies may consider splitting up fiscal groups in order to benefit from the 10% difference between the top and lower CIT rates applicable in 2021. In doing so, there could possibly be a benefit of EUR 24,500 (in 2021) per company.

The effective tax rate for the Innovation Box regime will be 9% (which is a 2% increase from 2020). Companies can consider preparing for this by, for example, accounting for the release of a guarantee provision (if possible) in 2020.

Amendments to the anti-base erosion rules and the alignment of the earnings stripping rules (ATAD I) and the anti-hybrid rules (ATAD II)

The proposed amendment to Article 10a CITA, which limits the deduction of interest (including related costs and currency results) on related-party loans that are used in connection with “tainted transactions”, will ensure that Article 10a does not (effectively) result in an exemption.

An amendment/clarification has also been proposed to address the overlap between the anti-hybrid rules (Article 12aa to Article 12ag CITA) and the earnings stripping rules (Article 15b to Article 15bh CITA). Since the overlap between the two measures can only occur in certain, specific circumstances, the proposed clarification will only be relevant for very few taxpayers.

Restriction on deduction of liquidation losses and discontinuation losses

According to the proposed amendments, liquidation losses (relating to the liquidation of subsidiaries) in excess of EUR 5 million will only be deductible for tax purposes if the taxpayer has a controlling interest in the dissolved subsidiary, and if the dissolved subsidiary is located in an EU/EEA Member State or certain other states that have concluded a specific association agreement with the EU (for instance, Turkey). We expect that the controlling interest requirements may lead to discussions with the tax authorities. Meeting this requirement will be subject to interpretation based on case law of the European Court of Justice.

Further, deductions for all liquidation losses (even those under or up to EUR 5 million) will be subject to a maximum time-period of 3 years from the calendar year in which the liquidation process is started or the decision to liquidate is taken. The liquidation loss will no longer be deductible after the lapse of this 3 year-period, unless the taxpayer is able to show sufficient cause for the delay. Therefore, the liquidations currently in process must be completed by December 31, 2023 at the latest in order for a liquidation loss to be taken into account. However, based on a grandfathering provision, the time-period restriction will not apply to liquidation losses wherein the liquidation process is started before 1 January 2021.

With respect to the deduction of discontinuation losses (relating to the cessation of permanent establishments), the proposed amendments impose a limit of EUR 5 million for non-EU/EEA permanent establishments and a time-period restriction of 3 years for all permanent establishments (same as that proposed for liquidation losses).

The amendments also comprise of other changes to the law to ensure that the new restrictions cannot be circumvented (for instance) by interposing an EU holding company or by increasing the controlled interest in advance of a liquidation.

Introduction of a conditional withholding tax (WHT) on interest and royalty payments made to related entities in certain jurisdictions

As of 1 January 2021, a conditional WHT, calculated at the top CIT rate (25% in 2021), will apply to interest and royalty payments made by Dutch companies (and Dutch permanent establishments of foreign companies) to affiliated companies in jurisdictions where the statutory CIT rate is less than 9% and/or in jurisdictions that are on the [EU's list of non-cooperative jurisdictions](#). The WHT will also apply in abusive situations where income is artificially diverted for tax-reasons. The conditional WHT will also apply if the interest/royalty payment is not deductible, for instance, under a rule for the limitation on deduction of interest expenses, the earnings stripping rules or the anti-hybrid rules. In addition, the law requires that the interest should be at arm's length.

Codification of the “Corona reserve”

The proposed amendment codifies the (already announced) measure allowing Dutch companies to recognize a “Corona reserve” for the full or partial Corona-related loss expected in 2020. As a consequence, there will be a drop in the reportable profits of 2019. Hence, some companies may receive a (full or partial) refund of the tax paid with respect to 2019 (if already paid). The reserve will have to be included in the “other tax reserves” section in the CIT return for 2019. The amount of the reserve will be added in the 2020 return (to avoid a double loss set-off).

The Dutch government has also announced further measures that can be expected to be proposed and implemented in 2022. The following are the announcements relating to direct taxes that may be relevant for companies doing business in the Netherlands.

Amendments to the loss set-off regime

It can be expected that, from 1 January 2022, losses can be carried forward indefinitely (as opposed to only 6 years under the current rules and regulations). However, an annual quantitative limitation on the deduction of losses can be expected - up to an amount of EUR 1 million in taxable profits. In case the taxable profits are in excess of EUR 1 million, the deductible losses will be limited to 50% of that higher taxable profit. The remainder can be carried forward (indefinitely).

Amendments to the application of the arm's length principle

With the aim of tackling “informal capital structures”(i.e. structures which allow a reduction in the taxable profits in the Netherlands without a corresponding inclusion in another jurisdiction), an amendment to the application of the arm's-length principle can be expected to apply from 1 January 2022 whereby the downward adjustment of the Dutch tax base will be limited to the extent that the corresponding amount is taxed in another jurisdiction.

The amendment aims to limit the application of the arm's length principle in case of (potentially) abusive situations. If, for instance, too little or no tax has been paid for the transfer of intangible assets to the Netherlands and a Dutch entity is entitled to a tax depreciation over the fair value of the transferred assets, the tax depreciation may be disregarded in the Netherlands as from 1 January 2022. The same could apply (for instance) if the arm's length interest rate exceeds the stipulated interest rate in a loan or in relation to corporate guarantee. This could be especially relevant, given that the taxation of guarantees is the subject of many discussions with tax authorities.

Limitation on settlement of dividend withholding taxes with corporation tax

In order to remove possible conflicts with the decision of the Court of Justice of the European Union in *Sofina and Others (C-575/17)*, a limitation on offsetting of dividend withholding taxes (among others) with corporate income tax, can be expected to apply from 1 January 2022. The netting of taxes will be limited to the corporation tax due before such settlement, and therefore, cannot lead to a refund. The remainder of losses may be transferred to future years. The limitation relates typically to portfolio investments.

Alternative to the current Fiscal-Unity regime

In order for the Fiscal-Unity regime (or “the Dutch group taxation regime”) to be compatible with the EU law, and based on the input received from an internet consultation, it has been proposed that the provisions relating to the Dutch group taxation regime in the CITA be applied on a stand-alone basis. For now, the Dutch government has announced that investigations/consultations will take place (sometime in the near future) in order to determine the best way forward in this regard. Based on the parliamentary proceedings, it is desired that the requirements relating to legal form, place of business, duration of financial years and the like, will continue without changes or with limited changes to the current regime in this regard.

Amendments to the Dutch participation exemption for holding companies (as from 2022?)

Based on a letter of the Ministry of Finance, it is expected that, from 1 January 2022, Dutch holding companies that intend to exempt dividends and capital gains by virtue of the participation exemption, will be required to satisfy substance requirements. Failure to meet these requirements may result in the spontaneous exchange of information with the tax authorities of countries from which payments have been made (“source states”). This amendment is not part of the Dutch Tax Plan 2021 but it may take effect in 2022. Currently, similar provisions apply for Dutch group finance and license companies.

The following table is an overview of the key legislative proposals and announcements relevant for companies doing business in the Netherlands.

| Key legislative proposals and announcements | | | |
|---|------------------------|---|------------------|
| Description | Submission of proposal | Announced for (or under investigation/consultation) | Entry into force |
| Already in force | | | |
| <ul style="list-style-type: none"> ATAD I (example: earnings stripping measures - Article 15b to Article 15bh CITA) | - | - | 2019 |
| <ul style="list-style-type: none"> ATAD II (hybrid mismatch provisions - Article 12aa to Article 12ag CITA) | - | - | 2020 |
| Still to be implemented | | | |
| <ul style="list-style-type: none"> Introduction of conditional WHT on interest and royalty payments | 2019/2020 | - | 2021 |
| <ul style="list-style-type: none"> Alteration of the arm's length principle to tackle “informal capital structures” | 2021 | - | 2022 |
| <ul style="list-style-type: none"> Amendments to the loss set-off regime (comparable to the existing German legislation – indefinite carry-forward with annual limit on amount of deduction) | 2020 | - | 2022 |
| <ul style="list-style-type: none"> Introduction of conditional WHT on dividends | 2021 | - | 2024 |
| Announced (ongoing investigations/consultations) | | | |
| <ul style="list-style-type: none"> Alternative to the Fiscal-Unity regime (or “the Dutch group taxation regime”) | - | Expected: 2020 | - |
| <ul style="list-style-type: none"> Alteration to the Participation Exemption for “substance-less” (intermediate) holding companies – likely, exchange of information with source countries in accordance with Art. 3a of the Implementing Decree on International Assistance with the Levying of Taxes | - | 2021 | Expected: 2022 |
| <ul style="list-style-type: none"> Limitation on deduction of shareholder costs and royalties to a maximum percentage of taxable profits | - | 2021 | - |
| <ul style="list-style-type: none"> Further limitations on deduction of interest expenses | - | 2021 | - |

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