LOYENS LOEFF

INVESTMENT MANAGEMENT

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Investment management news update:
year-end developments and attention points

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As we're nearing the end of the year, we are pleased to offer you an overview of relevant developments and year-end attention points*. The Netherlands is currently governed by a caretaker government and as such, the Tax Plan for 2022 predominantly contains amendments that were already announced prior to Budget Day 2021 (see our **Tax Flash** and **website post**). However, there are still several changes and developments that apply to the Investment Management Industry and thus will need to be considered. Further developments on different tax topics may be expected before year-end 2021 and should be monitored accordingly. With respect to the envisaged amendments taking effect in 2022, we are happy to discuss the potential impact and possible next steps with you. Please feel free to reach out to your trusted Loyens & Loeff contact.

1. New Dutch tax rates

1.1 Corporate income tax (CIT)

	2021	2022
15% rate	Profits up to EUR 245,000	Profits up to EUR 395,000 [1]
25% rate	Profits exceeding EUR 245,000	-
25.8% rate [2]	-	Profits exceeding EUR 395,000
Innovation box rate	9%	9%

Ad 1) The lower 15% rate can be applied per taxpayer, meaning that consolidated entities for CIT purposes in a so-called 'fiscal unity' (*fiscale eenheid*) can only make use of the lower rate once.

Ad 2) On 15 October 2021, a bill of amendment was released to increase the headline corporate income tax rate to 25.8%, following the political agreement reached in the days after Budget Day 2021. As such, it is almost certain that the headline CIT rate will be increased to 25.8% per 1 January 2022. See our website post for more information.

Takeaway

Consolidated entities for CIT purposes (in a fiscal unity) should (re)consider both advantages and disadvantages of the use of a fiscal unity before year-end 2021.

* Please note that this news update includes developments insofar published before 1 November 2021.

1.2 Real estate transfer tax (RETT) and related taxes

	2021	2022
Default RETT rate	8%	8%
Residential real estate (investment and other purposes)	8%	8%
Residential real estate (owner occupied)	2%	2%
First-time homebuyers [1]	0%	0%
Landlord levy	0.526%	0.485% [2]

Ad 1) Several criteria need to be met. For instance, the homebuyer is aged between 18 – 35, the value of the home cannot exceed EUR 400,000 and there is a self-occupancy obligation for the owner for a substantial period after acquisition.

Ad 2) Based on the current 2022 Tax Plan. However, a further lowering of the landlord levy in 2022 has been agreed upon by Parliament.

Takeaway

We see no substantial changes in 2022 (apart from the somewhat overheated housing market).

1.3 Personal income tax (PIT)

	2021	2022
Box 1 (ordinary / employment income)	37.10% - 49.50%	37.07% - 49.50%
Box 2 (substantial interest)	26.90%	26.90%
Box 3 (savings and investments) effective rate applied to net wealth [1]	0.5883% - 1.7639%	0.5642% - 1.7143%
Tax-free wealth for Box 3 (per individual)	EUR 50,000	EUR 50,650

Ad 1) The Box 3 regime is under (public) scrutiny. The new Dutch government may consider overhauling this regime.

Takeaway

We see no substantial changes in 2022.

2. Dutch CIT – changes per 1 January 2022

Development	Timing	Relevant for?	Note	Action
Tax losses	1 January 2022	Holding & portfolio companies	Annual loss compensation for Dutch corporate taxpayers will be limited to 50% of their taxable profit to the extent such profits exceed a threshold of EUR 1 million. This amendment applies to both carry-back and carry-forward of losses. To compensate for this new limitation on offsetting tax losses, losses can be carried forward indefinitely. This development can have material impact for taxpayers that have profits and losses exceeding EUR 1 million.	Analyse potential loss utilisation opportunities before year-end 2021.
Arm's length / transfer pricing mismatches	1 January 2022	Holding & portfolio companies	From 1 January 2022, application of the at arm's length principle will be amended. Deduction of imputed costs will be restricted if the foreign (related) counterparty to the transaction does not recognise a corresponding (upwards) adjustment as income. These rules will also apply to transferred assets and liabilities between related parties for which the agreed or imposed price was not in line with the at arm's length principle. Furthermore, a limitation on deductible depreciation for Dutch taxpayers is introduced for assets acquired from a related party before 1 January 2022, if that transfer would have been targeted, had the legislative proposal been in force at the time. The retrospective period covers tax book years starting on or after 1 July 2019.	Check transfer pricing adjustments made in investment structures, in particular for intra-group loans.
Earnings stripping	1 January 2022	Holding & portfolio companies	During the general political considerations debate (Algemene Politieke Beschouwingen) in the days after Budget Day 2021, the intention to amend the earnings stripping rules was announced. Following political agreement, a bill of amendment has been released on 15 October 2021 to decrease the maximum percentage of deductible interest from 30% to 20%. These changes will expectedly apply as of 1 January 2022. See our website post for more information. Currently, the earnings stripping rules limit the deduction of a taxpayer's net 'borrowing costs' to the highest of: (i) 30% (20%) of the EBITDA (for tax purposes); and (ii) a threshold of EUR 1 million. Technically, activities can be divided into different entities (i.e., taxpayers) to make use of the EUR 1 million threshold per separate entity. The caretaker government currently considers whether anti-splitting measures are desirable to combat (artificial) splitting of activities (aimed at making use of the EUR 1 million threshold multiple times).	Monitor to mitigate possible tax impact before year-end 2021.

Development	Timing	Relevant for?	Note	Action
Reverse hybrid entities and hybrid mismatch extended to individuals (EU ATAD2)	1 January 2022	Fund entities	As of 1 January 2022, a partnership which is considered tax transparent in the Netherlands will qualify as a reverse hybrid entity and subsequently become subject to CIT in the Netherlands, when at least 50% of shares and/or similar rights is *directly or indirectly* held by a related entity who, for tax purposes, resides in a jurisdiction that qualifies the partnership as opaque. With the hybrid entity becoming subject to CIT, it may also be obligated to withhold dividend tax and conditional withholding tax on distributions and/or payments made to its participants (dependent on whether these participants are eligible for a withholding exemption). Further to the abovementioned change, a broadening of the scope of hybrid mismatch rules will also take effect per 1 January 2022. From that moment, hybrid mismatch rules will also apply to mismatches between Dutch tax resident entities and related *individuals* (whereas previously, only mismatches between related entities were targeted), potentially resulting in a denial of deduction or inclusion of income for the Dutch entity involved.	Structures with potential (reverse) hybrid entities, hereby also considering indirectly held interests, should be revisited before year-end 2021. Current structures that involve hybrids and related individuals to be analysed before year-end 2021.
Limitation of credit against CIT	1 January 2022	Holding companies	Following EU case law (*Sofina*), Dutch CIT law will restrict the crediting of Dutch dividend withholding tax incurred on profits distributed by portfolio investment companies. The annual credit can no longer exceed the CIT due over that year, thus a refund of Dutch dividend withholding tax for Dutch corporate income taxpayers is no longer available. See our website post for more information.	Determine whether new legislation will impact organisation.
Restricting ring-fence losses	1 January 2022, retroactively to pre-2019 ring-fenced losses	Holding companies	Holding and financing losses incurred prior to 1 January 2019 (*ring-fenced losses*) could, under circumstances, be offset against 'ordinary' profits by using a consolidated tax group (*fiscale eenheid*). Per 1 January 2022, further restrictions will be introduced to limit these (unintended) compensation opportunities of pre-2019 ring-fenced losses.	Analyse potential impact before year-end 2021.
Increase of the environmental investment deduction (MIA)	1 January 2022	Portfolio companies	The MIA offers an additional deduction possibility for CIT purposes for qualifying investments (eco-friendly and innovative business assets). The additional investment deduction percentages of the MIA will be increased substantially per 1 January 2022 from 13.5%, 27% and 36% to 27%, 36% and 45% respectively, to provide an extra incentive to make such qualifying investments.	Anticipated qualifying investments by portfolio companies should be made after 1 January 2022 to make use of the MIA.

Takeaway

Amendments to offsetting tax losses, hybrid mismatch- and earnings stripping rules may have significant impact on the Investment Management industry. As such, this should already be analysed before year-end 2021.

3. Dutch CIT – further developments

Development	Timing	Relevant for?	Note	Action
Amendments to the classification of (foreign) partnerships	Legislative proposal expected this winter 2021/2022, with changes to take effect per 1 January 2023	Partnerships (fund entities)	The Dutch Ministry of Finance announced that a legislative proposal on new Dutch entity classification rules will be published this winter (2021/2022). Currently, unlike international standards, limited partnerships in the Netherlands may qualify as opaque or transparent based on certain consent requirements for admissions and transfers (see our Tax Flash for more background information). This system creates unintended hybrid mismatches in international (fund) structures (i.e., ATAD2 and withholding tax issues). The proposal will introduce new classification rules in line with international standards, most likely resulting in the abolishment of the unanimous consent requirement for closed (transparent) limited partnerships, meaning that (Dutch and foreign) limited partnerships will likely become tax transparent from a Dutch perspective by default.	Impact of legislative proposal on international structures with a Dutch or foreign limited partnership to be analysed. New classification rules expected to take effect per 1 January 2023.
Classification of Dutch fund for joint account (FGR)	Q1 2022 (initial results evaluation)	Fund entities	Separate to the classification of (foreign) partnerships, the Dutch Ministry of Finance is also looking at changing the classification rules for Dutch funds for joint account (*FGRs*). Originally, the classification of FGRs was part of the overhaul of the classification of partnerships. However, by letter dated 1 July 2021, the Dutch State Secretary of Finance announced that changes to the FGR tax classification rules will be reviewed as part of the (intended) evaluation of the FBI- and VBI-regimes (see development below), as various concerns were raised during the initial public consultation. See our website post for more information.	Monitor developments.
Changes in the Dutch investment institution regime (FBI)	Q1 2022 (initial results evaluation)	Entities applying the FBI regime	The government is currently evaluating the investment institution regime (*fiscale beleggingsinstelling* or *FBI*), which provides for a 0% CIT rate. Findings from this evaluation are expected in the first quarter of 2022.	Monitor developments.

Development	Timing	Relevant for?	Note	Action
Equal treatment debt versus equity	Unknown	Holding & portfolio companies	The Dutch Ministry of Finance recently published a research paper on the more equal treatment of debt and equity (see our website post for more background information). The preliminary conclusion of the study is that an amendment to the tax treatment of equity and/or debt is preferably achieved within an international context. The unilateral amendment to the earnings stripping rules (see above under 2) is not consistent with the preliminary conclusion of this study. However, this amendment is predominantly budget driven. Further developments on the treatment of debt and equity are expected in the coming years, as also the European commission intends to publish an EU Directive proposal (early 2022) which may contain an allowance system for equity financing of (new) investments, to mitigate the debt-equity bias. Currently, it is still unclear how such an allowance system would take shape.	Monitor developments.
New Dutch tax consolidation regime	Unknown	Holding & portfolio companies	The current fiscal unity regime generally provides for a full tax consolidation. Following EU case law, whether the current regime will be replaced by a group relief / result pooling system is currently under consideration. In view of the complexity of the transition to a new regime, any changes are not expected to become effective before 2026.	Monitor developments.
Recent court cases and interest deduction		Holding & portfolio companies	During 2021, the Supreme Court ruled in several different cases on the deductibility of interest expenses in investment and private equity structures (especially in the context of shareholder debt).	Monitor developments.

Takeaway

A number of developments for the Dutch CIT regime are currently in the works and/or being investigated. These developments, especially the changes to the entity classification rules and the FBI-regime, may have a significant impact on investment structures. These developments should be monitored closely.

4. Dutch withholding tax – change per 1 January 2022

Development	Timing	Relevant for?	Note	Action
Conditional withholding tax	1 January 2022	Fund & financing structures	Per 1 January 2021, a conditional withholding tax at a rate of 25% on Dutch source interest and royalty payments to related parties in: (i) low-taxing jurisdictions; (ii) blacklisted jurisdictions; and (iii) in abusive structures (e.g., hybrid entities) was introduced (see our Tax Flash). On Budget Day, two changes to the current Dutch withholding tax regime were announced: - Payments (expenses) allocable to Dutch real estate investments – that do not necessarily qualify as a permanent establishment – will become subject to the conditional withholding tax, if they also fulfil the other requirements (see our Quoted for more information); - A clarification that payments made to a hybrid entity will not be subject to the conditional withholding tax in case: (i) all participants with a qualifying (i.e., controlling) interest in that hybrid entity classify the hybrid entity as transparent and would not be confronted with withholding tax in case of a direct payment; or (ii) the hybrid entity has no participants with a qualifying interest. Should the CIT rate be increased to 25.8% per 1 January 2022, the tax rate of the conditional withholding tax will also be increased accordingly, as the rate for the conditional withholding tax is interlinked with the maximum CIT rate. Per 1 January 2024, the scope of this conditional withholding tax will (expectedly) be extended to (dividend) distributions.	Structures with Dutch real estate should be reviewed. Conditional withholding tax is a hot topic at the moment and should be continuously monitored within existing and future structures.

Takeaway

Impact of the conditional withholding tax on interest and royalties should be continuously monitored with respect to existing as well as envisaged investment structures. Furthermore, structures that may be impacted by the conditional withholding tax on dividends per (expectedly) 1 January 2024 should be revisited within the next two years to mitigate adverse consequences.

5. Dutch withholding tax – developments

Development	Timing	Relevant for?	Note	Action
Consultation new dividend stripping measures	Q4 2021	Holding & portfolio companies	Currently, the Dutch Ministry of Finance is working on a consultation document that will outline several potential measures to combat 'dividend stripping'. The consultation is expected to start in Q4 2021, whereby interested parties can provide their input on the potential measures. Following the consultation, we will most likely see (additional) dividend stripping measures introduced in the coming year(s).	Monitor developments.
'Exit tax' for dividend tax purposes on certain reorganisations	Unknown	Holding & portfolio companies	In 2020, an opposition party submitted a legislative proposal to create an 'exit tax' for Dutch dividend tax purposes in case of certain cross-border mergers, demergers, migrations and share for share exchanges (see our Tax Flash) in relation to 'disqualifying' states. An amended version of the proposal, filed on 12 March 2021, has not yet been voted on by the Dutch Parliament due to the current caretaker government situation. However, on 26 October 2021, the retroactive effect that was initially included in the legislative proposal was removed (see our website post).	Monitor developments.

Takeaway

We expect additional changes and measures to be introduced in the Dutch withholding tax regime in the coming year(s).

6. Miscellaneous

Development	Timing	Relevant for?	Note	Action
Minimum substance requirements and exchange of information	1 January 2021	Financing and holding companies within fund structures	Dutch intra-group licensing and/or financing companies who claim the benefits of a tax treaty or EU Directive need to meet certain minimum substance requirements. If they don't, the Dutch authorities may exchange information with the competent authorities of the relevant source countries. Per 1 January 2021, these substance requirements have been supplemented with: (i) the requirement to incur annual salary costs of at least EUR 100,000; and (ii) the requirement to avail of an own office space. Similar rules were expected to be announced for international holding companies on Budget Day. However, in the Tax Plan 2022, no reference was made to this topic. An update to the above may however still be expected before year-end 2021, making clear how and when substance requirements will be introduced for certain holding companies.	Meeting the Dutch substance requirements is of more and more importance and compliance is key. Monitor developments for international holding companies.
DAC 6	Cross-border arrangements of which the first step is implemented after 25 June 2018	Investment managers	Based on the EU Mandatory Disclosure Directive, intermediaries need to report certain cross-border arrangements to their local tax authorities (see our Quoted). If no intermediary is involved or if it is exempt from reporting, the taxpayer must file a report. Filings should be made on reportable arrangements within 30 days after the arrangement: (i) is made available for implementation; (ii) is ready for implementation; or (iii) when the first step of implementation occurs (whichever is earliest).	Investment managers should take control and coordinate their DAC 6 obligations, especially where no or multiple intermediaries are involved (to avoid non-reporting or double reporting).
UBO	27 September 2020	Investment managers	Corporate and other legal entities have the obligation to obtain and hold information on their ultimate beneficial owners (UBOs), which needs to be registered in the Dutch UBO-register. For newly incorporated entities, the UBO-information needs to be submitted within one week of incorporation (see also our Quoted). Existing companies have until 27 March 2022 to register their UBOs. If no UBO can be identified based on ownership or control, senior management officials qualify (board members / general partners).	Investment managers should start assessing which persons qualify as UBO for the entities they have under management.

Development	Timing	Relevant for?	Note	Action
Employee stock options	1 January 2022	Companies looking to reward and/or have employees rewarded with stock options	Under the current tax regime for employee stock options, the moment of exercise of an employee stock option is the moment on which (wage) tax and, if applicable, social security contributions are due (over the fair market value of the shares minus the exercise price). However, in the 2022 Tax Plan, it is proposed to shift this moment of taxation to the moment the shares become transferable. Wage tax and, if applicable, social security contributions will be due over the fair market value of the shares on the moment the shares are transferable. Under the legislative proposal, the employee will still have the option to deviate from this new main rule and opt for taxation upon exercise of the stock option (as is currently the case). These new rules will also apply to employee stock options that have already been granted to employees but have not yet been exercised and should result in more flexibility with respect to the moment of taxation of employee stock options, compared to the current legislation	(Re)assessment of employee stock option plans to analyse potential impact and/or possibilities.
ATAD2 documentation requirement	Ongoing	Holding & portfolio companies	The Dutch ATAD2 implementation law applies to Dutch corporate taxpayers' tax years starting on or after 1 January 2020, including a requirement for taxpayers to include in their administration documentation that enables the Dutch tax authorities to assess whether the anti-hybrid mismatch provisions are correctly applied and reflected in the annual CIT return. Dutch corporate taxpayers should continuously comply with this documentation requirement, as non-compliance could result in an increased burden of proof to demonstrate that the ATAD2 rules do not apply.	Up to date ATAD2 analysis on file for tax years 2020 and going forward.
Pillar One and Pillar Two global tax reform	Expected per 2023	Portfolio companies	On 8 October 2021, 136 members of the OECD/G20 agreed on certain key parameters to reallocate some taxing rights to market jurisdictions (Pillar One) and introduce a global minimum effective taxation (Pillar Two). Technical details will be released over the next 14 months, starting with Pillar Two rules. The rules will gradually entry into force as from 2023. See our website post for more information. The envisaged rules will (most likely) not impact investment funds directly but may apply at portfolio company level. As such, developments and technical details released should be monitored accordingly.	Monitor developments.

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