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Interest deduction

In this edition

- Introduction
- Interest deduction in general
- Developments in the non-businesslike loan doctrine
- Limitation in ‘abusive’ situations – article 10a CITA
- Long-term low-yield related-party loans – article 10b CITA
- Dutch earningsstripping rule – article 15b CITA
- Abuse of law
- Hybrid mismatches
- Other European developments
- Conclusion

1. Introduction

Tax deductibility of financing expenses has been a focus point of national and EU legislators and non-governmental bodies like the OECD via the base erosion and profit shifting (**BEPS**) project. In recent years, several interest deduction limitation proposals were implemented in the Netherlands. Following the introduction of these measures, the focus has increasingly shifted to litigation, resulting in landmark decisions on interest deduction.

There is currently an important case referred to the Court of Justice of the European Union (**CJEU**) in which the Dutch Supreme Court inquires whether related-party loans that are at arm's length can or perhaps necessarily fall outside the scope of domestic anti-abuse provisions. Basically, this would allow for an escape for at arm's length related-party loans for the purpose of anti-abuse provisions. The outcome of this case could have a significant impact on Dutch taxpayers.

2. Interest deduction in general

Interest expenses are in principle deductible business expenses for Dutch corporate income tax purposes. The Netherlands follows the OECD guidelines regarding the pricing of interest, as laid down in article 8b Dutch Corporate Income Tax Act (**CITA**). Pursuant to article 8b CITA, transactions between related entities must take place under the same conditions as transaction between third parties (the at arm's length principle). In case the interest contractually due is higher than the at arm's length interest rate, the excess is non-deductible for Dutch tax purposes and is treated as a deemed dividend. In case the interest is lower than the at arm's length interest, the difference can in principle be deducted for tax purposes.

As of 2022, article 8bb CITA provides that a downward adjustment of profits in affiliated transactions, i.e., by claiming a higher interest deduction, may only be deducted insofar the taxpayer shows that a corresponding upward adjustment will be included in a tax levied on profits at the level of the recipient of the corresponding interest income. This rule intends to eliminate international transfer pricing mismatches.

A development in the Netherlands in this regard is that the tax authorities are increasingly challenging the arm's length nature of intra-group interest expenses based on the concept of "implicit support". The term implicit support refers to the notion that multinational enterprises will generally try to manage their financial affairs in such a way that subsidiaries will be able to meet their obligations towards third-party creditors. Such groups may have strategic and reputational reasons to provide support if one of its subsidiaries would threaten to be in default, even where there is no formal guarantee or similar contractual obligation. Creditors, so the theory goes, will recognise this and, as a consequence, attribute a higher creditworthiness to a subsidiary of a group than they would to the same company as a stand-alone entity and thus be prepared to lend at lower interest rates. That this concept of implicit support should be taken into account for tax purposes when determining the arm's length prices of intercompany loans, guarantees and other financial transactions is a relatively recent development. The challenge in a transfer pricing context is determining the extent to which implicit support should be taken into account when making an assessment of a borrower's creditworthiness.

3. Developments in the non-businesslike loan doctrine

In determining the at arm's length interest rate, the other conditions, terms and circumstances of the agreement remain unchanged (such as collateral and the maturity of the loan). This is different, however, if such adjusted fixed interest rate cannot be determined or would (in fact) be profit-sharing. In that case, it is assumed that the creditor runs a credit risk which independent parties would not have accepted under similar circumstances. Such a loan is considered a non-businesslike loan (onzakelijke lening). In this regard the Dutch rules differ from the OECD guidelines. The concept of the non-businesslike loan is derived solely from Dutch case law and although it has parallels with transfer pricing rules, it is not fully aligned.

The qualification as a non-businesslike loan has two consequences. Impairments on non-businesslike loans are not deductible for tax purposes and the deductible interest rate is reduced (which will be explained below).

Whether a loan should be regarded as a non-businesslike loan should generally be assessed at the time the loan is provided. However, during its term a businesslike loan can become a non-businesslike loan due to a non-businesslike act or omission of the creditor (e.g., not invoking collateral or not requesting (additional) collateral when the debtor's financial position deteriorates).

A loan being characterised as a non-businesslike loan affects the interest rate that can be taken into account for tax purposes. The interest rate on a non-businesslike loan is set at the rate that the debtor would have been due if it had attracted the loan from an independent third party with a guarantee of the actual creditor. To the extent the interest exceeds or is lower than this 'guarantee interest', a deemed dividend distribution or an informal capital contribution has to be taken into account.

From the same case law it follows that also the deductibility of an impairment on a non-businesslike guarantee can be restricted. This can occur, for example, in case of a direct guarantee, which is generally perceived to be granted for group reasons. It can also apply to a third-party loan under which a group of companies is jointly and severally liable, and this third-party lender would claim from one of the borrowers.[1]

Finally, it follows from case law that in case the fair market value of interest to be received on a non-businesslike loan, at the due date of this interest, is below the nominal value of the interest (taking into account the non-businesslike nature of the loan), only such lower fair market value should be included in the taxable profit of the creditor. On 15 July 2022, the Supreme Court ruled that the borrower can nevertheless deduct the nominal amount of the interest, unless it is certain or almost certain that the interest will not need to be paid or will not be paid.[2] A subsequent decrease in fair market value of the interest is not tax-deductible in the hands of the creditor, nor taxable at the level of the debtor.

4. Limitation in 'abusive' situations – article 10a CITA

4.1 General

The Netherlands has a more general interest deduction limitation that restricts the deduction of intra-group financing costs, including interest and foreign exchange results in 'abusive' situations. This rule is aimed at situations in which interest on a related-party loan would be deductible in the Netherlands, but the loan is related to certain 'tainted' transactions, on which no (taxable) income will arise in the Netherlands. Article 10a CITA provides that the interest expenses on debt from a related entity are not deductible if the debt is by fact or by law, directly or indirectly, connected with one of the following 'tainted' transactions:

a. a distribution of profit or a repayment of capital to a related entity;
b. a contribution to the capital of a related entity; or
c. the acquisition or expansion of an interest in a company which after the acquisition or expansion is related to the taxpayer.

The aforementioned 'tainted' transactions can also be performed by a related entity or by a related individual. Article 10a CITA also applies to transactions or loans within a Dutch tax consolidated group (fiscal unity), even though this is generally a full consolidation regime.

Two entities are related if one entity has an interest of at least a third in the other entity or a third entity has an interest of at least a third in both entities. Interests held by entities that are considered (part of) a 'cooperating group' need to be considered on an aggregated basis. Whether a group of entities is regarded as a 'cooperating group' depends on all facts and circumstances of the case at hand. A mere joint investment does not establish a 'cooperating group'. The concept of the 'cooperating group' predates the concept of 'acting together' as referred to in the OECD BEPS project in relation to the hybrid mismatch rules and these two concepts do not fully align.

In the past, article 10a CITA could result in a lower taxable amount. This could for example occur due to currency exchange gains or negative interest on a loan not included in the taxable profit pursuant to article 10a CITA. However, as of 2021, the rule has been amended in such a way that the limitation does not apply to a debt insofar the application of article 10a CITA with respect to that debt would result in a lower profit.

4.2 Exceptions

If the main criteria of article 10a CITA are met, interest is in principle not deductible. However, there are two exceptions pursuant to which interest on a debt relating to a 'tainted' transaction is still deductible.

1 Supreme Court 1 March 2013, no. 11/01985, ECLI:NL:HR:2013:BW6520.

2 Supreme Court 15 July 2022, no. 20/02096, ECLI:NL:HR:2022:1086.

This is the case if the taxpayer can demonstrate that:
- the debt and the connected 'tainted' transaction are predominantly entered into for valid business reasons; or
- the interest is on balance subject to a (corporate) income tax in the hands of the recipient which is reasonable by Dutch standards.

4.3 Business reasons

The application of the business reasons exception requires a double test: the debt and the related 'tainted' transaction should both be entered into for valid business reasons. A third-party acquisition should generally be considered a transaction entered into for valid business reasons. With respect to businesslike transactions, it is assumed that the debt is also businesslike, unless the funds have been re-routed in a non-businesslike manner. Such rerouting would occur, for example, if the parent company of a group first deposits the funds into a low-taxed entity by means of a capital contribution and that company then lends the funds to the Dutch company.

Until 2018, both the debt and the related 'tainted' transaction were considered to have been incurred for valid business reasons if the debt to a related entity was in fact funded with a "parallel" third party debt. Parallel debt funding generally requires equal terms and conditions, in particular with respect to the repayments scheme and the duration of the loan. However, as of 1 January 2018, article 10a CITA was amended such that also in case of such parallel, externally funded loans, both the debt and the related 'tainted' transactions must be entered into for valid business reasons. Therefore, parallel debt funding currently only demonstrates the business nature of the debt.

In practice, if unrelated investors invest jointly in a fund via an equity investment, and part of the equity contribution is used to provide a loan, the tax authorities take the position that this 'conversion' of equity into debt at the level of the fund constitutes a rerouting of funds. In July 2022, the Supreme Court ruled that such a rerouting can only occur within a group as defined within article 10a CITA.[3] Therefore, if the entities are not related, there can be no non-businesslike rerouting between these entities. It is important to note that this judgement was rendered with respect to a taxable period before the concept of 'cooperating group' was implemented in law in 2017 (see §4.1). Consequently, under current law, these entities might have been considered related.

On 3 March 2023, the Supreme Court ruled that valid business reasons for a loan are in principle given if the creditor performs a pivotal treasury function within the group.[4] However, a loan can still be considered non-businesslike if the creditor acts as 'conduit' in the granting of loans. Further, the Dutch Supreme Court also clarified that the absence of non-businesslike rerouting of funds does not only safeguard interest deduction in case of an external acquisition, but also in case of intragroup transactions, contributions and distributions that are motived by business reasons.

4.4 Reasonable taxation

In respect of the exception of the reasonable taxation, a levy on a tax base that is calculated according to Dutch standards at an effective tax rate of 10% or more is considered as a reasonable taxation. Loss offset from years before the loan was entered into precludes a reasonable taxation. The reasonable taxation exception furthermore does not apply, if the tax authorities can demonstrate (i) that the debt was incurred with the purpose of offsetting losses or other claims that arose in the current financial year or that may arise in the near future, or (ii) that the debt or the connected 'tainted' transactions were not predominantly entered into for valid business reasons.

The Decree of the State Secretary of Finance on article 10a CITA contains an approval for situations in which the recipient of the interest can partially offset the interest through partial loss compensation.[5] In that case, the interest may also be partially deducted.

4.5 Third-party debt and guarantees

Article 10a CITA in principle does not apply in respect of third-party debt. However, under certain circumstances, a debt owed to third-party lenders can be considered related-party debt in case guarantees are provided by related parties. If guarantees are provided, it needs to be verified whether the third-party lenders would have been willing to lend the same amount to the borrowing entity

3 Supreme Court 15 July 2022, no. 20/03946, ECLI:NL:HR:2022:1085.
4 Supreme Court 3 March 2023, no. 21/00299, ECLI:NL:HR:2023:330.
5 The Decree of the State Secretary of Finance of 25 March 2013, no. BLKB2013/110M, as amended by Decree of 10 March 2022.

without any guarantee by a related party. The loan remains outside the scope of article 10a CITA if the guarantees merely provide for better terms and conditions for the taxpayer and do not as such result in an increase of the borrowing capacity of the taxpayer. In this respect, comfort letters or term sheets from third-party lenders, stating that in the absence of any such guarantees, these third-party lenders would have lent without guarantees but against at a higher rate, may be helpful in substantiating and demonstrating the above to the Dutch tax authorities.

4.6 EU Treaty freedoms

For many years, there has been controversy in the Netherlands on the compatibility of article 10a CITA with the EU treaty's freedom of establishment and freedom of capital. The potential infringement with these treaty freedoms stems from the reasonable taxation exception. This test is interpreted according to Dutch standards. Therefore, taking up a loan from a Dutch creditor will enable the debtor, in general, to meet the test. This may not be the case if the loan is taken up from a foreign creditor. In previous case law, the Supreme Court once assumed that article 10a CITA infringed the treaty freedoms, but it concluded that this infringement was justified by the need to combat abuse of law, in particular tax avoidance.

However, the CJEU's Lexel judgement might cast doubt on this position of the Supreme Court.[6] The Lexel judgement might indicate that the deduction of interest cannot be considered abusive to the extent that the interest is priced at arm's length. In other words, if the loan is entered into at arm's length conditions, it cannot be considered abusive.

Under article 10a CITA, arm's length interest may be limited in deductibility. Also, the business reasons exception of article 10a CITA could infringe the treaty freedoms. The test under which both the debt and the related tainted transaction should both be entered into for business reasons seems much stricter than the test of the CJEU in Cadbury Schweppes under which there must not be a "wholly artificial arrangement which does not reflect economic reality".[7]

The Supreme Court also recognised the possible implications of the Lexel judgement for purposes of article 10a CITA. Recently, the Supreme Court referred a case on interest deduction to the CJEU to request clarification on whether article 10a CITA indeed constitutes a breach of the EU treaty freedoms.[8] In doing so, the Supreme Court for the first time explicitly acknowledged that it may be more difficult to apply the reasonable taxation exception in cross-border situations than in domestic situations and therefore article 10a CITA may infringe the EU treaty freedoms. However, the Supreme Court did not address the difference in the business reasons exception and the test of the CJEU in Cadbury Schweppes. Therefore, it is unclear whether the CJEU will also consider this potential breach.

In any case, in order to preserve rights, it may be considered to file an objection against assessments in which the deduction of interest is restricted under article 10a CITA.

5. Long-term low-yield related-party loans – article 10b CITA

Based on article 10b CITA, the interest and changes in value of loans received from a related entity without a fixed term or a term of more than 10 calendar years and without interest or with an interest that is substantially (i.e. 30% or more) lower than an at arm's length interest, are non-deductible at the level of the debtor. Neither the intention to repay the loan within 10 years, nor the actual repayment of the loan after 10 years changes this outcome.[9]

There has been a lot of criticism on article 10b CITA, mainly because its application can result in overkill. The main form of overkill arises from its application of not being limited to mismatches. A regular loan meeting the conditions for application of article 10b CITA is equally affected by this limitation of deduction, while the (arm's length) interest income is regularly taxable at the level of the creditor. The State Secretary for Finance indicated that the hardship clause could be invoked in

6 CJEU 20 January 2021, no. C-484/19 (Lexel), ECLI:EU:C:2021:34.

7 CJEU 12 September 2006, no. C-196/04 (Cadbury Schweppes), ECLI:EU:C:2006:544.

8 Supreme Court 2 September 2022, no. 20/03948, ECLI:NL:2022:1121.

9 See the Amsterdam Court of Appeal 8 June 2021, no. 19/01647, ECLI:NL:GHAMS:2021:1664.

domestic situations, which could counter the imbalance for domestic situations.[10]

As of 2022, the arm's length principle will no longer be applied if its application would result in a reduction of taxable profits in the Netherlands without a corresponding adjustment in the other state (see chapter 2). This seems to eliminate the relevance of this article. However, the State Secretary for Finance has indicated that article 10b CITA nevertheless remains applicable.[11]

In view of the potential harsh application of these rules, it is important to ensure that the at arm's length interest on long-term loans is at arm's length so that it stays within this 30% margin. A proper transfer pricing analysis can therefore act as a safeguard against article 10b CITA. In addition, as a second safeguard, the term of the loan should be contractually maintained below 10 calendar years, as the term is assessed on formal grounds. As such, it is irrelevant in this context if in practice the loan is always repaid earlier.

6. Dutch earningsstripping rule – article 15b CITA

The earningsstripping rule is a general interest deduction limitation rule that applies to third-party interest as well as related-party interest. The rule stems from the OECD's BEPS project and was adopted in the EU anti-tax avoidance directive. The Netherlands subsequently implemented this rule very strictly and recently restricted the interest deduction even further. Article 15b CITA limits the deductibility of the net financing expenses, i.e. the balance of financing costs and financing income on loans or agreements comparable thereto. The deduction of a taxpayer's net 'borrowing costs' is allowed up to the highest of (i) 20% of the EBITDA (as calculated for tax purposes), and (ii) EUR 1,000,000.

The ratio is applied at the individual taxpayer level, whereby a fiscal unity is considered as one taxpayer. The EBITDA is based on the taxable profit of a taxpayer as determined prior to the application of article 15b CITA. The relevant EBITDA is determined specifically for Dutch tax purposes and does not include income that is exempt in the Netherlands, such as dividend income exempt under the participation exemption or income allocable to a foreign permanent establishment. If computation of the EBITDA results in a negative amount, it is set at nil. In determining the EBITDA, the aforementioned taxable profit is increased with:

a. depreciation/amortisation of business assets as expensed for tax purposes during the financial year;
b. impairments of business assets to the lower going-concern value for tax purposes during the financial year and decreased in case of an upward revaluation with respect to business assets for which previously an impairment has been taken into account up until the amount for which the impairment has been reversed; and
c. net interest expenses.

Net interest expenses have been defined broadly as the balance of a taxpayer's interest expenses on debts and interest income on receivables, including other finance costs, foreign exchange results and hedging results in relation to loan agreements or agreements comparable thereto. Net interest expenses exclude any interest expenses that are non-deductible for Dutch CIT purposes by virtue of other interest deduction limitations. Specific provisions apply to interest that is not expensed for CIT purposes but capitalised as part of the cost price of an asset.

To the extent that the net interest expenses of a given financial year are non-deductible by virtue of article 15b CITA, such excess can be carried forward to subsequent financial years and be deducted if and to the extent that the amount of net interest expenses for that subsequent financial year is lower than the maximum 15b-deduction as computed for that financial year. The carry-forward might be limited in case of a change of control over the taxpayer.

The Dutch government has indicated that they will monitor structures in which interest expenses will be allocated to several taxpayers within a group (e.g., by using a tax transparent partnership to split income, by breaking up existing fiscal unities or by incorporating new companies), as a result of which each taxpayer would be entitled to the EUR 1,000,000 allowance. Such structures may already be challenged by invoking the abuse of law doctrine (see chapter 7).

10 *Parliamentary Papers II* 2005/2006, 30 572, no. 8, p. 84.
11 *Parliamentary Papers II* 2021/2022, 35 933, no. 3, p. 10.

7. Abuse of law

In addition to the interest deduction limitations set forth in the CITA, interest may also be denied under the abuse of law doctrine (*fraus legis*). Under the abuse of law doctrine, interest deduction is limited if (i) the essential motive for entering into a legal act or a set of legal acts is to avoid Dutch taxation (the subjective test) and (ii) the arrangement is contrary to the object and purpose of the CITA (the normative test).

The abuse of law doctrine has been applied several times by the Dutch courts in recent years. On 16 July 2021, the Supreme Court issued a landmark ruling in the so-called Hunkemöller case.[12] The case at hand concerned an international private equity structure which acquired a retail business headquartered in the Netherlands. Four French investment entities, managed by the same fund manager, jointly held all the shares of a Dutch BV which acquired all the shares of the Dutch retail group. To finance the acquisition, the French investment entities funded this Dutch BV with a mix of equity and shareholder loans. Post-closing, this BV formed a Dutch fiscal unity with the acquired group. As a result, interest expenses on the shareholder loans granted to BV could be offset against future profits realised by the acquired operational group.

The Supreme Court ruled that the deduction of interest expenses must be denied based on the abuse of law doctrine. It considered that (i) equity at the level of the funds was converted into debt funding of BV, (ii) the interest on that debt was offset against the profits of the acquired company, (iii) the interest that was due by BV was not (reasonably) taxed at the level of the funds and (iv) the conversion of equity into subordinate debt by providing a loan to BV did not result in any substantial change in the financial position of the funds other than the tax outcome. More specifically on the last point, the Supreme Court ruled that unnecessary legal acts were used with the predominant motive to realise the tax benefit of interest deduction in the Netherlands. The Supreme Court reached its conclusion based on the combination of these factors.

In July 2022, the Supreme Court provided more clarity on the scope of abuse of law. Until this ruling, it was unclear whether the abuse of law doctrine could be applied if interest deduction was not limited under article 10a CITA by the taxpayer invoking one of the rebuttal schemes. The Supreme Court ruled that a successful appeal on a rebuttal scheme does not preclude that the interest deduction can still be denied based on the abuse of law doctrine.[13]

Despite recent rulings regarding the abuse of law doctrine, the exact scope and interpretation of the doctrine remain unclear. Some caution is therefore required regarding the deduction of interest in new and existing investment structures, especially as the tax authorities are increasingly seeking to challenge investment structures based on the abuse of law doctrine. This appears especially relevant for structures where there is little to no tax due on the interest income in the hands of the creditor.

8. Hybrid mismatches

All EU member states, including the Netherlands, had to enact legislation to implement the second EU anti-tax avoidance directive (**ATAD2**) in their domestic law, and apply such legislation as of 2020. With regard to interest deduction, the Dutch ATAD2 rules deny a deduction of expenses (inter alia interest) if due to a hybrid mismatch the corresponding income is effectively not taxed or if the costs can be deducted twice.

The scope of the Dutch ATAD2 rules is limited to hybrid mismatches arising between related parties, a head office and a permanent establishment, or between two permanent establishments of the same entity, or in the context of a structured arrangement. The term related parties generally refers to a participation of at least 25% of the voting rights, profit entitlement or capital ownership, as well as certain other situations of control. Entities that that are part of a ‘cooperating group’ are also considered related parties.

12 Supreme Court 16 July 2021, no. 19/02596 (Hunkemöller), ECLI:NL:HR:2021:1152.

13 Supreme Court 15 July 2022, no. 20/03946, ECLI:NL:HR:2022:1085 and Supreme Court 15 July 2022, no. 20/02096, ECLI:NL:HR:2022:1086.

9. Other European developments

On 11 May 2022, the European Commission published a directive proposal to address the tax preference in favour of debt funding by introducing a 'debt-equity bias reduction allowance' (**DEBRA**). The proposal includes both a notional deduction in case of equity growth and an additional limitation on interest deduction for CIT purposes. This should encourage companies to finance more with equity. The DEBRA proposal will apply to all taxpayers subject to CIT in one or more member states. The proposed date of entry into effect was 1 January 2024. After a number of technical discussions, it was decided by the European Commission in December 2022 to freeze negotiations on the proposed directive pending other proposals in the area of direct taxation. It is yet unclear whether the proposal will be adopted at all, as the proposal must be unanimously agreed upon by all EU member states.

10. Conclusion

The deductibility of financing expenses received a substantial amount of (international) attention as it allowed for forms of profit shifting and arbitration between tax systems. The latter could result in double deductions or deduction without taxation in the hands of the creditor. Legislative changes have limited the deductibility of financing expenses in many of those cases and developments in Dutch case law appear to further target loans that result in a deduction in the Netherlands without sufficient corresponding taxation at the level of the creditor.

The Dutch tax authorities successfully litigated a number of cases in which they denied interest deductibility on loans where the interest income was not taxed at the level of the creditor and the interest expenses were offset against Dutch taxable profits (of an acquired group). Taxpayers should expect that the Dutch tax authorities continue to take a more critical look at international structures that result in a tax deduction in the Netherlands without a corresponding taxation of the interest income, even in cases that are not within the scope of anti-hybrid rules.

The Dutch Supreme Court referred a case to the CJEU that should answer two important questions: (i) is there an at arm's length escape from the interest deduction limitation of article 10a CITA and (ii) does article 10a CITA involve discrimination that can't be justified on grounds of prevention of tax avoidance? The outcome of this case can affect a large number of taxpayers and it may be prudent to already take a position in CIT returns based on this pending court case.

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