

LOYENS  LOEFF
Law & Tax

Weil

Tax in Distressed Situations

NETHERLANDS

DEBT RESTRUCTURINGS

GENERAL

1. Does debt have a specific meaning for tax purposes?

There is no specific definition of debt for Dutch tax purposes. The Dutch civil law form is in principle decisive in this regard. There are three limitative exceptions where the loan is to be regarded as equity for Dutch tax purposes, being (i) the sham loan, (ii) the bottomless pit loan, and (iii) the profit participating loan. If one of these three exceptions does not apply, the loan is considered debt for Dutch tax purposes. Unless specifically mentioned otherwise, the remainder of this commentary assumes that the debt is also treated as debt for Dutch corporate income tax purposes.

Next to the recharacterization of certain debt as equity for Dutch tax purposes, it must be considered whether a loan is considered businesslike or non-businesslike. A loan is considered non-businesslike, if an independent third party would not, under the same conditions and circumstances, have provided the loan and it is not possible to make the loan businesslike with an adjusted fixed interest rate (which in fact is not profit sharing). Non-businesslike loans are treated as debt for Dutch corporate income tax purposes. However, specific rules apply inter alia to interest deductibility, write offs and impairments.

2. Do derivatives have a specific meaning for tax purposes?

Derivatives do not have a specific meaning for Dutch tax purposes. The Dutch corporate income tax treatment of derivatives should be determined on a case-by-case basis, considering the classification for Dutch tax purposes on the basis of the set of rules as set out hereinabove.

3. Generally, are intra-group debts treated differently to external debt for tax purposes?

In principle, intra-group debts and external debts are both treated the same. However, when dealing with intra-group debts, some aspects are different and require additional attention (e.g., the arm's length principle if it concerns intra-group debt, specific interest deduction limitation rules and the conditional withholding tax on intragroup interest payments).

4. Does it make a difference if debt is owed by a partnership or other pass through entity in distress to third parties versus to its partners?

There are no specific rules (and so no essential differences by nature) if debt is owed by a partnership or other pass-through entity in distress to either third parties or to partners under Dutch tax law. Dependent on the structure and relevant facts and circumstances (including which of the parties has a Dutch taxable nexus), there may be certain attention points from a Dutch tax law perspective and hence tax consequences may be different.

DEBT IMPAIRMENT

1. What are the key tax considerations on a debt impairment for the creditor?

For Dutch tax purposes, receivables are in principle valued at nominal value at the level of the creditor. An impairment to fair market value can for Dutch tax purposes be taken into account in three cases: (i) if the position of debtor has worsened (based on a subjective and reasonable judgment of the creditor considering the relevant information available at that time); (ii) in case of a foreign currency receivable, if the relevant foreign exchange rate has dropped; or (iii) in case of a fixed interest rate, if the market interest rate has increased and it is the creditor's intention not to retain the receivable until maturity date.

No deductible tax loss as a result of a foreign currency loss or increased market interest can be taken into account if there is a hedged position. In case of non-businesslike loans, no deductible tax loss can be taken into account (except for any liquidation losses). There are specific anti-abuse rules in case impaired debt is disposed of or converted into equity if the impairment was taken as a deduction for Dutch corporate income tax purposes.

2. What are the key tax considerations on a debt impairment for the debtor?

The impairment of debt by the creditor should have no adverse Dutch corporate income tax consequences for a debtor.

In case of procured services on which VAT has been charged by a supplier, debt impairment may result in an obligation for the debtor to repay any amounts of VAT deducted by the debtor to the tax authorities.

DEBT AMENDMENT, REFINANCING AND NOVATION

1. What are the key tax considerations on a debt amendment?

Where an amendment to an existing debt results in a new debt for commercial accounting purposes this could trigger taxable results. If the debt amendment results in the formal or economic waiver of debt, this may give rise to taxable debt waiver income at the level of the debtor. This may be different if the amendment only changes terms in a way that is more favourable for the borrower with the result that there is no formal or economic waiver of the existing debt. In addition, Dutch debtors may need to consider whether the amendment affects interest deductibility under the Dutch tax interest deduction limitation rules.

2. Does the deferral of any payments of interest or repayments of principal trigger tax consequences?

For Dutch corporate income tax purposes, interest income and expenses are generally accounted for on an accrual (rather than cash paid) basis. Therefore, the deferral of any interest accrual may have an impact on the timing of recognition of any interest income and expense.

For interest payments and expenses which are subject to the Dutch conditional withholding tax (pursuant to the Dutch Withholding Tax Act 2021), accrued interest that has not been paid during the calendar year will be deemed to have been paid on 31 December of that year. If subsequently an actual payment is made, any interest accrued in a previous year can be deducted from the payment to the extent it is made plausible that the accrued interest has already been taken into account for purposes of this withholding tax.

Unless the deferral has the effect of giving rise to accounting adjustments (see above), the deferral of any repayment of principal should in principle not trigger adverse Dutch corporate income tax consequences for the debtor.

Assuming the debt was not discounted and has not been impaired by the creditor, repayment of principal should not give rise to any adverse Dutch corporate income tax consequences for a Dutch debtor or creditor. Where a debt was issued at a discount or has been impaired by the creditor, any repayment of the principal amount which exceeds the impaired amount of debt recorded in the accounts of the creditor or which constitutes repayment of the discount element, would be taxable in the hands of the creditor for Dutch tax purposes.

The granting of credit does not attract VAT. As such, no VAT is levied on (deferred) interest and repayments of principal amounts.

3. What are the key tax considerations on a debt refinancing?

Similar to a debt amendment, if a debt refinancing results in a formal or economic waiver of debt, this may give rise to taxable debt waiver income at the level of the debtor. Moreover, Dutch debtors may need to consider (i) the applicability of the conditional withholding tax on interest payments, and (ii) interest deductibility.

- i. **Conditional withholding tax:** The Netherlands has a conditional withholding tax on intragroup interest payments. The withholding tax is levied on interest payments to jurisdictions with a statutory profit tax rate of less than 9% or to jurisdictions that are EU blacklisted, to certain hybrid entities and in abusive situations.
- ii. **Interest deductibility:** Interest is generally a deductible expense for Dutch corporate income tax purposes on an accruals basis. However, there are a number of detailed rules which can apply to restrict deductibility of interest for Dutch corporate income tax purposes. This includes interest deduction limitations on: long term low-yield related party loans, the general earnings stripping rule, 'abusive' situations.

When debt is refinanced in intra-group situations the arm's length character of the debt refinancing (and the terms and conditions of the debt itself) should be taken into account.

4. Does rolling up interest or satisfying interest through issuing “payment in kind” notes give rise to any tax consequences?

For Dutch corporate income tax purposes, interest income and expenses are generally accounted for on an accrual (rather than cash paid) basis. Therefore, the rolling up of interest and satisfying interest through issuing “payment in kind” notes as such should not have adverse Dutch corporate tax consequences for either a Dutch creditor or a Dutch debtor.

Based on commentary to the OECD Model Convention, the term “paid” has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom. The same holds true for the Netherlands, where interest is considered paid at the moment at which the interest is paid or offset, made available, becomes interest-bearing or has become due and payable. As a result of the roll-up, addition to the loan principal and becoming interest bearing, the interest is therefore considered to have been paid.

From a VAT perspective it is noted that the payment in kind can be subject to VAT. This depends on the nature of the payment in kind.

■ **Roll-up of interest**

- For interest payments and expenses which are subject to the Dutch conditional withholding tax (pursuant to the Dutch Withholding Tax Act 2021), accrued interest that has not been paid during the calendar year will be deemed to have been paid on 31 December of that year.
- Any rolled-up interest that becomes part of the principal amount could become subject to accruing interest. As a result, the interest deduction limitations should be considered.

5. Does the novation of debt by a debtor to another group company trigger any adverse tax consequences?

As long as the transfer of the debt in intra-group situations takes place on arm's length terms there should be no Dutch corporate tax issues of the debt novation itself. Upon the novation of debt, the original debtor will ordinarily owe the new debtor an amount equal to the debt assumed by the new debtor. Generally, this will take the form of a new intercompany balance between the two entities. With respect to the new intercompany balance and the new debtor, the general points to consider in respect of intercompany debt would be equally applicable (e.g., (i) the applicability of the conditional withholding tax on interest payments and (ii) interest deductibility).

6. Are there any specific tax considerations to bear in mind where the security / guarantee package is amended as part of the debt amendment / refinancing?

In general, no adverse Dutch corporate income tax consequences are expected when amending the security / guarantee package. In intra-group situations, transfer pricing principles should be taken into account to determine whether the guarantor should be remunerated for providing that guarantee for the benefit of the borrower.

In related party situations, there is a difference between a guarantee to obtain a loan as such and a guarantee to loan funds under better circumstances.

In case a guarantee of a group entity leads to borrowing under better terms, the borrower then borrows on the basis of the credit rating of the guarantor. If this leads to lower costs for the borrower, it will be willing to pay a fee for the guarantee (the guarantee fee). In case the guarantee fee not only supports better terms, but also increases the borrowing capacity, the OECD guidelines prescribe that the increased borrowing capacity is actually classified as a loan to the guarantor (followed by a capital contribution into the borrowing entity). No guarantee fee can be charged for this as the transaction (the guarantee) is deemed to take place in the capital domain.

Guarantee fees received by a Dutch-based guarantor are VAT exempt and may result in an input VAT deduction limitation if the borrower/payor is based in the EU.

DEBT RELEASES

1. Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?

In principle, a businesslike waiver (i.e., if an unrelated party would also have decided to waive the loan in the same circumstances) triggers taxable debt waiver income at the level of the debtor. A non-businesslike debt waiver (i.e., pursued for shareholder motives) does not result in taxable income but, rather, in a deemed capital contribution or deemed dividend distribution (as applicable). Subject to certain conditions (inter alia that the receivable is non-recoverable and expressly waived (e.g., in case of bankruptcy, moratorium of payment or in the Dutch Scheme (i.e., WHOA)), debt waiver income may effectively be exempt at the level of the debtor to the extent it exceeds (i) current year losses (excluding debt waiver income) and (ii) available carried-forward tax losses (the **Dutch Debt Waiver Exemption**).

With the introduction of the adjusted Dutch loss compensation rules per 1 January 2022, loss relief is restricted to 50% of the current year profit exceeding EUR 1 million. This led to situations where despite the debt waiver, companies still had to pay corporate income tax because their losses could not be fully offset. This undesirable outcome has been solved per 1 January 2025. If the available carry-forward tax losses exceed EUR 1 million, the debt waiver income is still fully exempt from tax, provided that the debt waiver income exceeds the current year losses. The existing carry forward losses will be reduced by the amount of the exempt debt waiver income.

2. Does the release of debt trigger any withholding or indirect tax? If so are there any reliefs or exemptions?

A debt release as such should not give rise to any Dutch withholding or VAT exposure.

In case of procured services on which VAT has been charged by a supplier, debt impairment may result in an obligation for the debtor to repay any amounts of VAT deducted by the debtor to the tax authorities.

3. Can a creditor claim a deduction in respect of any debt that is released?

A businesslike waiver by the creditor is in principle tax deductible at the level of such creditor (as far as losses were not already previously taken into account as impairment). If the borrower is a related party and the loan was impaired by the creditor for Dutch tax purposes prior to or upon the waiver and such creditor waives the loan, said prior impairment has to be reversed. At the same time, the gain at level of the creditor can be added to a revaluation reserve. This is not applicable to the extent the gain from the waiver is sufficiently taxed at the level of the (related party) debtor.

4. Is the position different if the debt being released is a trade debt?

No, this is not different for Dutch corporate income tax purposes.

5. Does the release of an uncalled guarantee obligation trigger any adverse tax consequences? Is the position different if the guarantee has been called?

Assuming it is not recognized as a liability for accounting and Dutch tax purposes, the release of an uncalled guarantee obligation should not have any adverse Dutch tax consequences. If the borrower has defaulted and the guarantee has been called but no payment has been made under the guarantee, this would likely generally be treated as a liability for Dutch tax purposes. If so, the same principles set out above in "*Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?*" equally apply in that case.

6. Do any adverse tax consequences arise on the release of liabilities owed under a derivative contract?

If the release of liabilities owed under a derivative contract would give rise to debt release like income for accounting purposes, this would in principle result in taxable income for a Dutch debtor. In that case the same principles set out above in "*Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?*" equally apply in that case.

7. Are there any Pillar 2 considerations to take into account specifically in distressed situations?

The Netherlands introduced the Pillar 2 rules for financial years starting on or after December 31, 2023 via the Dutch Minimum Tax Act 2024 (in Dutch: *Wet Minimumbelasting 2024*). It hereby introduced the (Qualified) Domestic Top-up Tax and Income Inclusion Rule as of such date with the Undertaxed Payments Rule being introduced for financial years starting on or after December 31, 2024. The Dutch Minimum Tax Act 2024 is based on EU Directive 2022/2523 which generally is in line with the OECD GloBE Model Rules. A detailed understanding of the Dutch Minimum Tax Act 2024 is not in scope of this paper.

It is however important to consider that the Pillar 2 rules require an effective tax rate of at least 15% based on adjusted financial *accounting* income and adjusted income tax expenses as recorded for accounting purposes.

From a Pillar 2 perspective, attention should be paid to distressed debt situations particularly when a debt waiver takes place whereby such income is not subject to tax at the level of the debtor (for example if the Dutch Debt Waiver Exemption is available). This is since in such situations, typically financial accounting income is reported by the debtor without a corresponding increase in adjusted income tax expenses. This could distort the effective tax rate under the Pillar 2 rules, potentially resulting in additional tax (so-called Top-up Tax) due under the Pillar 2 rules.

This issue has been recognized by the OECD / Inclusive Framework. Therefore, an election may be made by the so-called Filing Constituent Entity resulting in the fact that under circumstances, all or part of the income recognized as a result of the debt release is excluded for Pillar 2 purposes (**Debt Release Election**). However, it is important to recognize that the Debt Release Election typically is only available if – in any case – third party debt is waived. This is different for purposes of the Dutch Debt Waiver Exemption. This mismatch can still result in a distortion of the effective tax rate under the Pillar 2 rules.

The situations in which the Debt Release Election can be made are as follows:

- The debt release is undertaken under statutorily provided insolvency or bankruptcy proceedings, that are supervised by a court or other judicial body in the relevant jurisdiction where an independent insolvency administrator is appointed. Where this is the case, both third-party and intra-group debt released as part of the same arrangement will be excluded from the computation of the GloBE income or loss (**Option A**);
- The debt release arises pursuant to an arrangement where one or more creditors is a person not connected with the debtor (i.e., third-party debt) and it is reasonable to conclude that the debtor would be insolvent within 12 months but for the release of the third-party debts released under the arrangement. Where this is the case, both third-party and intra-group debts released as part of the same arrangement will be excluded from the computation of GloBE income or loss (**Option B**); or
- The debt release occurs when the debtor's liabilities are in excess of the fair market value of its assets determined immediately before the debt release. An amount will only be excluded with respect to debts owed to a creditor that is a person that is not connected with the debtor and only to the extent of the lesser of: (i) the excess of the debtor's liabilities of the fair market value of its assets determined immediately before the debt release, or (ii) the reduction in the debtor's attributes under the tax laws of the debtor's jurisdiction resulting from the debt release (**Option C**). Option C only applies where Option A or Option B do not apply.

The Debt Release Election is not available for Transitional CbCR Safe Harbour purposes, meaning that the applicability of the Transitional CbCR Safe Harbour can be impacted by debt release income recognized by the debtor.

Aside from the above-mentioned, it is highly recommended to verify if other elements that are relevant in case of distressed debt, such as an adjustment to the terms and conditions of a debt or an impairment of the debt, results in accounting income / loss being recognized by either the debtor or creditor. If so, it is important to assess if such income / loss is also (at the same time) recognized for tax purposes. Should this not (yet) be the case, it should be reviewed if this is a temporary difference for which a deferred tax expense may (need to) be considered and what the impact thereof is on the effective tax rate under the Pillar 2 rules.

DEBT FOR EQUITY EXCHANGE

1. What are the key tax considerations on a debt-for-equity exchange for the creditor?

A debt for equity swap can take place either via: (i) the issuance of new shares by the debtor up to the nominal amount of the receivable and contribution of the receivable to fulfil the contribution obligation; or (ii) the contribution of a receivable by the creditor on (informal) share capital (newly) issued by the debtor, whereby debt is cancelled by operation of law in the hands of the debtor.

A debt-for-equity swap does in principle not result in profit for the creditor, but in a (deemed) capital (or share premium) contribution by the creditor in the debtor. Such debt for equity swap can take place at nominal value (including accrued interest).

There is a reversal of prior impairment of the receivable at the level of the creditor, resulting in a gain when debt is converted (i.e., similar to the consequences in case of debt waiver (see "*Can a creditor claim a deduction in respect of any debt that is released?*").

A debt for equity swap should not attract VAT.

2. What are the key tax considerations on a debt-for-equity exchange for the debtor?

A debt-for-equity swap of a non-recoverable/distressed loan does in principle not result in profits for the debtor, but in a (deemed) capital (or share premium) contribution by the creditor in the debtor.

Any latent foreign exchange gain or loss on the debt will be realized upon the debt-for-equity swap.

The existing tax losses are in principle not affected. However, loss compensation may be limited in case of a substantial change of ownership (see "*Are there any adverse tax consequences arising from a change of control or break of a tax group?*").

3. Where warrants or similar instruments are issued as part of a debt restructuring does this trigger any adverse tax consequences?

The issuance of warrants or similar instruments (such as contingent value rights) can result in different Dutch tax consequences depending on the specific facts and circumstances of the case at hand. This may in any case be relevant for (among others) the Dutch dividend withholding tax and Dutch conditional withholding tax positions, the Dutch participation exemption and the Dutch fiscal unity regime. This should be verified on a case-by-case basis also taking into account the accounting treatment of the relevant warrants or similar instruments.

4. What are the key tax consequences of capital contributions by a parent company into its subsidiary?

Capital contributions as such should not have any adverse Dutch corporate income tax consequences. However, capital contributions can influence various aspects, including:

- For the parent entity making the capital contribution, the capital contribution leads to an increase of the cost price of a participation by the fair market value of the receivable. For the subsidiary receiving a capital contribution the capital is increased by the nominal value of the debt.
- Capital contributions can influence the ownership structure. In case the ownership interest falls below 5%, this can for instance influence the application of the participation exemption and the dividend withholding tax exemption. If the ownership interest falls below 95% this can lead to the dissolution of the entity from the fiscal unity for Dutch corporate income tax purposes.
- In case of capital contributions into a Dutch entity, the tax base to be taken into account by the Dutch taxpayer will be at maximum (for assets) or at minimum (for liabilities) the value that is taken into account in the contributor's or distributor's or transferor's profit tax base.

FEES AND TRANSACTION COSTS

1. Is there any adverse tax impact in respect of common restructuring fees, for example, consent fees?

There is in principle no adverse Dutch corporate tax impact of restructuring fees themselves. We note that financing costs (banking fees, etc) may also qualify as 'interest' under the conditional withholding tax and earnings stripping rules which could require further attention.

The VAT deduction right for restructuring costs depends on the overall VAT position of the company that incurs the relevant costs (or the VAT fiscal unity to which such company belongs). For VAT deduction, it is required that the company that incurs the costs is considered the recipient of the services and also uses the acquired services for its own VAT taxable output transactions. That should be evaluated on a case-by-case basis. See also our answers to question 2 regarding acquisition and disposal costs.

2. Are transaction costs deductible for tax purposes and is any VAT recoverable?

Before the question should be answered as to whether costs are non-deductible acquisition or disposal costs, the costs must first be allocated to the appropriate entity. This allocation predominantly revolves around whether all costs related to a disposal (or in some cases an acquisition) should be borne by the shareholders entering into the transaction, or whether some part of the costs should be borne by the target. At the level of the target such costs would in principle be ordinary deductible costs.

Common costs in a transaction relate to financing, acquisition costs and "basic operating costs". Below the deductibility of each of these categories is discussed:

- **Financing costs:** Financing related costs (i.e. costs that are made to obtain the financing) should generally be tax deductible, assuming that the interest expenses on the debt itself are tax deductible. Financing costs may be deductible at once or capitalized and amortized over the term of the loan to which the financing costs relate. In case of a one-time payment which actually is a prepayment of interest, these costs should be capitalized and amortized over the term of the loan. We note that financing costs (banking fees, etc) may also qualify as 'interest' under the conditional withholding tax and Dutch earnings stripping rules which could require further attention.
- **Acquisition / disposal costs:** Costs in connection with an acquisition or disposal of a participation which qualifies under the Dutch participation exemption are non-deductible. Such acquisition or disposal costs must have a direct causal link with the acquisition or sale.
- **Basic operating costs:** Basic operating costs are costs inherently linked to the legal form of the taxpayer. These costs are primarily related to the existence of the taxpayer as a legal entity and depend on the amount of capital and not on how the capital will be used. They should not be defined as non-deductible costs in relation to acquisitions or disposal.

VAT ASPECTS ACQUISITION / DISPOSAL COSTS

From a VAT perspective, the acquiring, holding and selling of shares in subsidiaries in principle do not qualify as economic activities. This means that the VAT on costs related to such non-economic share-related activities in principle cannot be deducted as input tax.

The VAT deduction right of a VAT taxable person is not limited by its activity of acquiring, holding or selling shares if the shareholder:

- i. supplies goods or services for remuneration to the company in which it holds shares; or
- ii. holds the shares with the aim to reorganize, support or expand its own economic activities.

A VAT taxable person that acquires shares in a subsidiary can, if the shares held fall within the above situations, treat the acquisition costs as general costs. In that case, the VAT on the acquisition costs is eligible for deduction based on the overall VAT position of the company that incurs the acquisition costs (or the VAT fiscal unity to which such company belongs).

The following applies with regard to share disposal costs. A VAT taxable person that sells shares in a subsidiary which is held in the above two situations, or who sells the shares to use the proceeds for its own economic activities, must allocate the transaction costs as follows:

- i. Direct costs: The input VAT on costs directly used for the share sale is non-deductible if the buyer of the shares is in the EU and are deductible if the buyer is outside the EU.
- ii. General transaction costs: The input VAT can be deducted based on the overall VAT deduction right of the company (or the VAT fiscal unity to which such company belongs).

The proceeds obtained from the share disposal may be excluded from the so-called pro rata calculation if the sale is an incidental financial activity. According to the applicable guidelines, such an incidental activity is not present, if the seller is (affiliated to) a private equity company.

VAT ASPECTS FINANCING COSTS

The VAT deduction right for the financing costs depends on the usage of the financing costs for output transactions. For example, if the financing costs are used for rendering an interest-bearing loan to a party established in the EU, the VAT on these costs cannot be reclaimed. On the other hand, if the financing costs are used for the own business activities of the VAT taxable person, the VAT on the financing costs may be deducted based on the overall VAT deduction right of the company (or the VAT fiscal unity to which such company belongs).

TRANSACTION COSTS THAT DO NOT ATTRACT VAT

VAT exemptions may apply to services that are related to the granting and negotiating of credit, insurances and intermediary services in connection with share transactions (e.g., services provided by certain corporate finance firms and share brokers).

DEBT ENFORCEMENT

1. Aside from insolvency proceedings, what are the key methods of enforcement and their tax impact?

In order to force payment of a debt, a creditor can initiate court proceedings to obtain a court order for payment. Such an order is required for a creditor to be able to enforce over a debtor's assets, unless the claim has been laid down in a notarial deed. With a view to ensure recourse, a pre-judgment attachment can be levied over a debtor's assets before a claim has been established by a court.

To the extent a creditor's claim has been secured by its debtor (or a third party), such security can be enforced from the moment a payment default exists in respect of the secured obligations.

A creditor can furthermore petition the court to declare its debtor bankrupt. To that end, the creditor will have to prima facie prove to the court that i) the debtor has at least two creditors (one of them being the filing creditor) and ii) that at least one of these two debts is currently due and payable.

2. If the enforcement results in the creditor taking ownership of equity or assets, what are the key tax considerations to bear in mind?

When a creditor obtains ownership of the asset via enforcement, the following key tax considerations should be kept in mind:

- Dutch corporate income tax would be due at the level of the debtor if and to the extent the fair market value of the assets acquired by the creditor would be higher than the tax book value of the relevant assets in the books of the debtor.
- When real estate (or shares in a real estate company) is acquired, real estate transfer tax will likely be due.

When shares are acquired, the following key tax considerations should be kept in mind:

- In case of a share transfer, the tax book values of the assets (and liabilities) at the level of the debtor in principle remain unchanged and as such, any difference between the fair market value and the tax book value of the assets (and liabilities) is not realised at the time of the transfer. A Supreme Court case is pending on the question whether upon a change of control of 30% or more, latent losses need to be taken into account (as deemed realized). A decision is expected in spring 2026.
- In case of a Dutch transferor, the transfer of the shares itself should in principle not result in any taxation due if the Dutch participation exemption applies at the level of the Dutch transferor.
- Change of control rules could be triggered and the fiscal unity could be (partly) deconsolidated as part of the transfer of the shares (see "*Are there any adverse tax consequences arising from a change of control or break of a tax group?*")

3. Are any specific tax considerations arising on payments or transferring security under guarantees as opposed to the debt?

When transferring a security under guarantee, it needs to be analysed whether the transaction is capital related or debt related.

In general, if the guarantor makes a payment to the counterparty, the question arises whether a recourse claim on the guaranteed entity may need to be booked, and if not, whether a deemed dividend or deemed capital contribution should be recognized.

4. Are there any adverse tax consequences arising from a change of control or break of a tax group?

The breakup of a fiscal unity may trigger several claw-back provisions potentially resulting in a taxable result, such as:

- In relation to assets/liabilities that have been transferred within the fiscal unity within the last 6 years (or 3 years in specific facts and circumstances) with a higher (in case of an asset) or lower (in case of a liability) fair market value than the tax book value at the moment of the transfer, such asset/ liability should be revalued at fair market value,

immediately prior to the moment of leaving the fiscal unity by the respective transferor or transferee;

- Receivables between fiscal unity members should be valued at nominal value or, if lower, the going-concern value, immediately prior to the moment of leaving the fiscal unity. At the same time, the debts should be valued at nominal value.
- Tax losses of the fiscal unity in principle remain with the parent. Subject to certain conditions, losses may be transferred to subsidiaries leaving the fiscal unity to the extent those losses are attributable to those subsidiaries. Similar rules apply in respect of carry-forward interest under the earnings stripping rule and other tax attributes.

Companies included in a fiscal unity are jointly and severally liable for the Dutch corporate tax debts of the entire fiscal unity for the period during which they were part of the fiscal unity. This liability will in principle only materialise if the parent fails to remit the CIT due to the Dutch tax authorities.

The break-up of a fiscal unity for Dutch VAT purposes should not trigger similar claw-backs as described above. However, note that members of a VAT fiscal unity may be held jointly and severally liable for VAT of other fiscal unity members for the period in which the subsidiary was assigned as part of such fiscal unity by the Dutch tax authorities. Moreover, transactions between members that were part of a fiscal unity for VAT purposes will in principle become subject to VAT again (unless the transaction is exempted from VAT). The breakup of a fiscal unity for VAT purposes will also affect the input VAT deduction right of the members. The members will have to establish their right to deduct input VAT on a stand-alone basis after termination of the fiscal unity for VAT purposes.

With respect to real estate transfer tax, it is noted that in case of claw-backs (e.g., operational and/or shareholding requirements resulting from the exemption for mergers, demergers and/or internal reorganizations), real estate transfer tax can become due (by an acquirer of real estate) in certain circumstances in case of a breakup of the existing company or operational structure. That would have to be further evaluated on a case-by-case basis.

In addition, change of control rules are relevant in respect of carry forward losses and carry forward interest for Dutch corporate income tax purposes.

The change of control rules stipulate that if the ultimate ownership interest in the taxpayer has changed substantially (i.e., 30% or more) compared to the ultimate ownership at the start of the oldest year of which the losses can be carried forward, losses incurred before the moment of the change in the ultimate ownership occurred can no longer be offset against future profits of the taxpayer. Losses will however remain available for offset if the following cumulative conditions are met:

- A. in both the loss-making year and the year in which a profit is made, the assets of the taxpayer do not consist mostly (for more than 50%) during at least nine months of passive, portfolio type of investments;
- B. the total size of the taxpayer's activities directly preceding the change in ultimate ownership interest has not been reduced to less than 30% of the total activities at the beginning of the oldest financial year in which losses are incurred which are available for offset; and
- C. at the time of the change in ultimate ownership interest, there is no intention to reduce the total size of the activities within three years to less than 30% of the activities at the beginning of the oldest financial year in which losses are incurred which are available for offset.

Currently a court case is pending on the question whether upon a change of control of 30% or more, latent losses need to be taken into account (as deemed realized).

The earnings stripping rules stipulate that if the ultimate ownership in the taxpayer has changed substantially (i.e. 30% or more) compared to the ultimate ownership at the start of the oldest year of which interest can be carried forward, the amount of interest carry forward before the moment of the change in the ultimate ownership occurred can no longer be offset against future profits of the taxpayer. Interest will remain available for offset if the earlier mentioned cumulative criteria under A. – C. are met.

5. Where equity / assets are indirectly transferred as part of an enforcement, does that trigger adverse tax consequences?

There are no specific Dutch tax considerations in case of indirectly transferred assets as part of an enforcement, the Dutch tax consequences ultimately depend on the specific facts and circumstances. The principles set out above in "*If the enforcement results in the creditor taking ownership of equity or assets, what are the key tax considerations to bear in mind?*" may especially be relevant in that case.

6. Is any claw back permissible where a distressed company pays taxes for which a solvent shareholder is liable?

Under Dutch tax law, there are no such clawbacks.



ACQUISITION OF DEBT

1. Does the acquisition of a creditor's interest in distressed debt trigger any adverse direct tax consequences for the debtor?

The transfer of a receivable by a creditor does in principle not have any adverse Dutch tax consequences for the debtor. If the receivable is transferred to the debtor itself this may result in debt waiver income at level of the debtor, for example, if the receivable is transferred for an amount below nominal value. In that case, the same principles set out above in *"Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?"* equally apply.

2. Does the acquisition of distressed debt trigger any adverse withholding or indirect tax consequences for the debtor?

Dutch debtors may need to consider the conditional withholding tax position (in case of a new creditor). However, acquisition of distressed debt does not trigger any adverse VAT consequences for the debtor

3. What are the key tax considerations for the purchaser of a creditor's interest on the acquisition of distressed debt?

There is in principle no specific adverse Dutch corporate tax consequences for the purchaser of a creditor's interest on the acquisition of distressed debt. However, in related party situations the purchase price should be at arm's length to avoid tax adjustments, including deemed dividends or deemed capital contributions.

If the acquisition of distressed debt is considered an investment in the underlying asset, this could trigger real estate transfer tax in case of the financing of real estate assets.

4. Are there any particular beneficial regimes accessible to a purchaser of a distressed debt portfolio?

There is no specific regime for Dutch tax purposes that applies for purchasers of a distressed debt portfolio.

INSOLVENCY PROCEEDINGS

1. What are the key insolvency procedures?

Dutch companies can become subject to three different types of insolvency or restructuring proceedings in the Netherlands that are governed by the rules of the Dutch Bankruptcy Code (*Faillissementswet*):

- i. Bankruptcy (*faillissement*) – a process aimed at liquidation, where the debtor's assets are liquidated and the proceeds are distributed to its creditors. Bankruptcy can be filed for by one or more of the creditors of the debtor (involuntary filing), or by the debtor itself (voluntary filing). The basis for a bankruptcy adjudication is that the debtor has at least two creditors (one of them being the filing creditor if the filing is involuntary) and that at least one of these two debts is currently due and payable. The most important effect of the bankruptcy is that the debtor loses the power to dispose of its assets, only the bankruptcy trustee can dispose of the assets from then on. In case of a bankruptcy, secured creditors cannot enforce their security during a cooling off period (maximum of 4 months).
- ii. Suspension of payments (*surséance van betaling*) – legal moratorium where the debtor is given temporary relief against pressing creditors in order to achieve, by way of reorganization, continuation of its business and/or, ultimately, satisfaction or partial satisfaction of creditors by way of a composition. A suspension of payments may be granted for a maximum period of 18 months and may be extended without limit at the request of the debtor for successive 18 months periods. If a definite suspension of payments is not granted by the court, or if the court refuses to grant an extension, the court may – and usually does – at the same time declare the debtor bankrupt. Secured creditors cannot enforce their security during a cooling off period (maximum of 4 months).
- iii. Court Approval of a Private Composition (Prevention of Insolvency) Act 2021 (*Wet Homologatie Onderhands Akkoord - WHOA*) – a procedure similar to the Chapter 11 of the United States Bankruptcy Code and the UK restructuring plan. The company itself can offer a composition (i) to restructure its debts outside an insolvency proceeding, or (ii) to liquidate the assets of the company outside an insolvency proceeding. In principle, the offeror can design the composition as it deems fit. If at least one class of 'in the money' creditors voted in favour of the composition, the company can request the court to approve the composition and declare it generally binding (i.e. also on dissenting creditors and shareholders). An important element in the WHOA is that also claims of surety's, joint and severally liable debtors and guarantee providers can be amended by the composition (noted is that employees are excluded from the WHOA process).

2. What are the key tax considerations arising upon entry into an insolvency procedure?

There are no specific adverse Dutch tax consequences arising upon entry into an insolvency procedure. The tax considerations depend on the specifics of the case at hand.

In particular, we would like to note an important Supreme Court decision ('Fokker II' decision) with respect to debt obligations that remain unpaid in case of bankruptcy. It follows from Fokker II that any debt obligations that remain unpaid upon liquidation should generally not result in a (taxable) capital increase for Dutch tax purposes, as the Dutch Supreme Court ruled that such debt obligations remain due for Dutch tax purposes. However, the Supreme Court mentioned that there may be an exception in case the bankrupt company formed part of a fiscal unity. The scope of the exception by the Supreme Court in Fokker II has been clarified by the Supreme Court in its decision of September 10, 2010 (BNB 2010/308). In this decision, the Supreme Court ruled that in case debt obligations of the debtor remain unpaid, that there will be a taxable capital increase at the level of the fiscal unity head at the moment that the relevant debtor (fiscal unity subsidiary) ceases to exist within the fiscal unity as a result of the end of bankruptcy due to the lack of income.

3. Does entry into an insolvency procedure impact tax groupings?

The entry into an insolvency procedure itself does not have any specific adverse Dutch tax consequences for Dutch tax groups. The tax considerations depend on the specifics of the case at hand.

4. Are there any specific tax set offs available in an insolvency?

There are no specific tax set offs available. Any set offs follow the general insolvency laws.

5. Is the tax authority a preferential creditor in an insolvency?

In the Netherlands, the Dutch tax authorities are a secondary preferential creditor in an insolvency.

6. Are directors or other managers personally liable for tax debts in an insolvency?

If a limited liability company (*besloten vennootschap* or BV) is no longer able to pay its taxes (only applies to VAT, wage tax and several other (mostly excise) taxes (not corporate income tax)) and contributions when due, it must report this to the Dutch tax authorities, the Employee Insurance Agency and (if applicable) the company pension fund. This notification must be made within two weeks after the taxes or contributions should have been paid, failing which each managing director is jointly and severally liable for the unpaid taxes and contributions. In that case, an individual managing director can only exculpate himself if he proves that he is not to blame for the fact that the company has not complied with the reporting obligation and that the unpaid tax and premium payments are not the result of improper management on his part.

If the report is made in time, a managing director will only be liable if it is proven that the non-payment of the debt is the result of manifest mismanagement on his part. This is the case when the director has facilitated that the company's tax debts have remained outstanding, while he knew or reasonably should have known that his actions would result in those tax debts remaining unpaid and he may personally be blamed.



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[CLICK HERE](#) for more guides providing a high-level overview of important tax considerations for debt restructurings, enforcement, acquisitions of debt and insolvency proceedings for both debtors and creditors from UK, US, French, Luxembourg, Swiss, Belgian and Dutch tax perspectives.