WLP LAW

# TAX PLAN 2019

## Introduction

On Budget Day September 18, 2018 the Dutch government published its Tax Plan 2019 ("**the Plan**"). The Plan introduces various amendments to the Dutch tax laws and is aimed to enter into force on January 1, 2019. Subsequently, on October 15, 2018, the ministry of Finance informed the Parliament that after reconsidering its proposal, certain amendments were made to the Tax Plan 2019. By way of this alert we inform you of the Tax Plan 2019 and the proposed amendments.

This letter will focus on the following aspects of the Plan:

1. Dividend Withholding Tax
2. Corporate Income Tax ("**CIT**")
   - The reduction of the CIT- rate
   - Implementation of ATAD1
     - Earnings stripping rule
     - Flanking measures ATAD
     - Controlled Foreign Company
     - Exit taxation rules
   - Limitation of loss carry-forward compensation

## 1. Dividend Withholding Tax ("DWT")

The Plan originally intended to effectively abolish the Dutch DWT and introduce a tax at source on dividends, royalties and interest paid by Netherlands domiciled entities to affiliated entities located in tax havens and in situations where tax evasion is present. However, on October 15, 2018 the Dutch government has decided to not move forward with its dividend tax proposal. As a result, the Dutch DWT shall continue to apply and the proposed tax at source on dividends is postponed. Please note that the planned introduction of a tax at source on royalties and interest shall not be affected by this decision. The tax at source on royalties and interest shall be implemented – in accordance with the Plan – on January 1, 2021.

The proposed rate of the tax at source on royalties and interest is 22.25% (2021). Please note, however, that this rate may still be subject to possible amendments.

- *Tax haven*

A tax haven is defined as a country that has a statutory rate of profit tax of less than 7% (low tax jurisdictions). It also includes countries on the EU-list of non-cooperative jurisdictions (EU black-list, situation on May 25, 2018 consists of the following countries: American Samoa, Guam, Namibia, Palau, Samoa, Trinidad and Tobago and the US Virgin Islands).

- *Preliminary list of low-tax (less than 7%) jurisdictions*

On September 25, 2018 the Dutch government published a preliminary list of low-tax jurisdictions. The following jurisdictions are included on this list: Anguilla; the Bahamas; Bahrain; Bermuda; the British Virgin Islands; the Cayman Islands; Guernsey; the Isle of Man; Jersey; Kuwait; Palau; Qatar; Saudi Arabia; The Turks and Caicos Islands; The United Arab Emirates; and Vanuatu.

- *Affiliated entity*

Affiliation is present in circumstances where a holding in the capital of an entity confers a definite indirect or direct influence over the entity's decisions and allows him to determine its activities (qualifying interest). Qualifying interest is deemed to be present with an ownership of more than 50% of the voting rights. Affiliation is also present when a third party has a qualifying interest in the awarding entity as well as in the receiving entity.

If the dividend receiving entity is part of a so-called "co-operating group" and such group holds together a controlling interest in the dividend paying entity, affiliation is also deemed to be present.

- *Tax evasion*

An objective test and a subjective test need to be carried out to assess whether or not there has been any question of tax abuse. If both of the following requirements are met the assumption of tax abuse is made.

1. There is an arrangement or a series of arrangements that is considered artificial (objective test). If the arrangement is found to have lacked valid commercial reasons that reflect the economic reality, this could be interpreted as artificial. A valid commercial reason is deemed to be present when the entitled entity has sufficient proper substance including its own duly equipped office space for at least 24 months, its own personnel with professional knowledge to carry out the day-to-day core activities, as well as a minimum salary expense of EUR 100,000; and
2. The subjective test is used to assess at the moment of payment whether the tax charge to be paid by the entity that is entitled to dividend has turned out lower than that what is due and payable by the underlying entity (entities) had the intermediate holding entity not formed part of the construction.

## 2. Corporate Income Tax ("CIT")

- *Phased reduction CIT-rates*

There will be a phased reduction of Dutch CIT-rates from 20% to 15% for the first EUR 200,000 and from 25% to 20.5% for taxable profits exceeding EUR 200,000.

- *Lower CIT-rates*

On October 15, 2018 the Dutch government announced that the lower CIT-rates shall be reduced from 20% (2018) to 15% (2021). As of yet it is unclear in which steps the reduction from 20% to 15% shall be delivered.

Please note that the rates for 2019 and 2020 in the table below are based on the percentages as presented in the Plan. As a result of the changes announced on October 15, 2018 these rates may be subject to possible amendments.

- *Higher CIT-rates*

On October 15, 2018 the Dutch government announced that the higher CIT-rates shall not be reduced from 25% (2018) to 22.25% (2021) – as was originally intended – but shall be reduced from 25% (2018) to 20.5% (2021). It is, however, as of yet unclear in which steps the reduction from 25% to 20.5% shall be delivered. The Dutch State Secretary for Finances has announced that at least for 2019 the higher CIT-rate shall remain 25%.

Please note that the rates for 2020 in the table below is based on the percentage as given in the Plan. As a result of the changes announced on October 15, 2018 these rates may be subject to possible amendments.

In summary:

| Taxable profits | 2018 | 2019 | 2020 | 2021 |
|---|---|---|---|---|
| ≤ 200,000 | 20% | 19%* | 17.5%* | 15% |
| > 200,000 | 25% | 25% | 23.9%* | 20.5% |

* In the government's letter dated October 15, 2018, it was not confirmed, whether or not the rates that were originally proposed will remain in place or shall be amended. Therefore, it is uncertain whether these rates are final.

- *Implementation of ATAD1*

ATAD1 is part of the Anti-Tax Avoidance Package introduced by the European Commission in an effort to mitigate tax avoidance and evasion. As part of the implementation of the EU Anti-Tax Avoidance Directive ("**ATAD**"), the Dutch government has introduced the earnings stripping rule and the Controlled Foreign Company-rule.

- *Earnings stripping rule*

As of January 1, 2019, a general interest deduction limitation (earnings stripping rule) shall be introduced.

The earnings stripping rule limits the deduction of intercompany and third-party net interest expenses (a) if and insofar it exceeds 30% of the gross operating income (Earnings Before Interest, Taxes, Depreciation and Amortization - "**EBITDA**") or (b) EUR 1,000,000 if that exceeds the amount under (a). Moreover, any net borrowing costs that are non-deductible as a consequence of the application of this limitation may be carried forward indefinitely to following years.

- *Flanking measures ATAD*

As part of the implementation of the earnings stripping rule the Dutch government proposes to abolish the specific interest deduction limitations on excessive participation interest (Article 13l CIT 2018) and acquisition holding companies (Article 15ad CIT 2018). Moreover, the Plan includes the abolition of the existing limitation of the setoff losses for holding and finance companies (Article 20 CIT 2018). The general interest deduction limitation (Article 10a CIT 2018) shall remain applicable.

- *Controlled Foreign Company*

As from January 1st, 2019 a permanent establishment or entity will qualify as a Controlled Foreign Company ("**CFC**'') if:

1. A Dutch resident or corporate entity directly or indirectly holds more than 50% of the share capital; and
2. Is resident in a jurisdiction with a statutory corporate income tax rate of less than 7% (please refer to the preliminary list of low-tax jurisdictions above) or is included on the EU-list of non-cooperative jurisdictions.

If these requirements are met, the CFC's income is to be included in the Dutch tax base. This income will consist of specific categories of passive income (i.e. dividends, interest, financial lease, royalties, etc.) minus related costs.

An exception to the CFC-rule is available if the CFC carries out a meaningful economic activity. In accordance with the minimum substance requirements, 'meaningful economic activity' includes, but is not limited to, the CFC having its own duly equipped office space for at least 24 months, its own personnel with professional knowledge to carry out the day-to-day core activities, as well as a minimum salary expense of EUR 100,000.

Additionally, a CFC can be excluded from Dutch taxation if its income consists for 70% or more of other income than passive income, and if the CFC qualifies as a financial institution and the passive income is mostly (70% or more) received from third parties.

- *Exit taxation rules*

The Plan includes a change to bring the current 10-year deferral period allowed to pay exit tax in line with the 5-year deferral period prescribed by the ATAD.

- *Limitation of loss carry-forward compensation*

Currently, a tax loss can be carried back one year and carried forward nine years. Effective from 2019, the plan introduces a shortened loss carry-forward period of six years. Please note, however, that for losses incurred before 2019, the current carry forward period of nine years is still applicable.

**Next steps**

Please note that the proposals as set forward in the Plan – including the reconsideration of the dividend tax proposal and the phased reduction of the higher CIT-rates – are still subject to possible amendments.

If you have questions on how the Plan will affect your business, please do not hesitate to contact us.

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