

LEGAL AND TAX ALERT

Update 14 May 2020 - Alert: additional Dutch relief measures for businesses, response to coronavirus

May 14, 2020

UPDATE 14 May 2020:

On 6 May 2020, the Dutch State Secretary of Finance published a third policy decree in which the COVID-19 crisis measures are further implemented by means of a number of specific authorizations. In addition, this so-called Decree crisis measures corona crisis ("**Decree**") now contains a number of new supplementary authorizations not previously set forth by the Dutch government in its previous decrees. The Decree entered into force on 9 May 2020 and, in principle, applies with retroactive effect as of 12 March 2020. This Decree is an addition to the second policy decree, which was published on 22 April 2020. The new measures from both new Decrees are set out below.

On 28 April 2020, by means of a news release, the Dutch Ministry of Economic Affairs and Climate Policy has provided (further) information about the Compensation for Entrepreneurs in Affected Sectors by COVID-19 (in Dutch: Tegemoetkoming Ondernemers Getroffen Sectoren COVID-19, "TOGS") measure.

To protect employment, the Dutch Minister of Social Affairs and Employment has amended the group provision in the so-called crisis measure for the retention of work (*noodmaatregel overbrugging voor werkbehoud*, NOW) on 22 April 2020.

New measures published in the Decree of 6 May 2020

The measures are still being worked out in detail. Measures that require a legislative basis will as much as possible be included in the 2021 Tax Plan as a separate bill. In anticipation hereof, the measures will, where necessary, be elaborated on in a policy decree granting approvals. Measures that do not require a legislative basis will also be elaborated on in a policy decree as soon as possible.

A reduction of the minimum wage of Dutch directors with a substantial interest (*gebruikelijk loon*)

Normally directors and substantial interest ($\geq 5\%$ shareholdings) shareholders must always pay tax on an appropriate wage as determined in legislation, the so-called 'normative wage'. In light of the large loss of revenue that is being incurred in some sectors due to the corona crisis, the Dutch government is allowing director and substantial interest holders to assume a lower normative wage in 2020 that is in proportion to the decline in revenue due to the corona crisis.

Measure for self-employed professionals: relaxation of 'hours requirement' (*uren criterium*)

Self-employed professionals are entitled to certain types of allowances, such as the self-employed persons' deduction, if they meet the so-called 'hours requirement'. The hours requirement, requires self-employed professionals to spend at least 1,225 hours per year on their business. To prevent self-employed professionals losing their entitlement to these allowances, as a result of the corona crisis, the Dutch authorities will – during the period 1 March 2020 through 31 May 2020 – assume that these self-employed professionals spent at least 24 hours per week on their business.

Work-related cost rules (*werkkostenregeling*)

By means of the work-related costs rules, employers can provide employees with tax free reimbursements and provisions up to a certain percentage of the total payroll expenses. The maximum amount that an employer has available for these untaxed reimbursements will be increased in 2020 from 1.7% to 3% for the first EUR 400,000 of the total payroll expenses (and remains 1.2% for payroll expenses in excess of EUR 400,000).

Dutch corporate income tax provision for COVID-19 in the 2019 accounts

Taxpayers that are subject to Dutch corporate income tax are allowed to set-off (part of) their expected 2020 corona related loss with their 2019 taxable profits (by creating a provision in the 2019 accounts and Dutch corporate income tax return). This may result in a lower 2019 taxable profit, and thus a lower 2019 Dutch corporate income tax due.

Postponement of effective date of the bill on excessive lending as a director and substantial interest shareholder (*excessief lenen van de eigen vennootschap*)

In September 2018, the Dutch government announced the bill on the Excessive lending from the own company Act, which is intended to take effect as of 2022. In short, this bill makes it possible to tax debts in excess of EUR 500,000 that director and substantial interest ($\geq 5\%$) shareholders owe to their own companies. In order to accommodate director and substantial interest shareholders, the government wants to postpone the effective date of this bill by one year, thus until 1 January 2023. This means that director and substantial interest shareholders will have until 31 December 2023 (first reference date) to repay these (excessive) debts. This change will be included in the bill that will shortly be sent to the Lower House of Parliament.

Mortgage payment hiatus (*uitstel hypotheekbetalingen*)

In the Netherlands, individuals can deduct their mortgage interest paid on a loan that is taken up for the acquisition of their own home.

For mortgages for home owners taken out on or after 1 January 2013, a mortgage interest deduction can, in principle, only be claimed in the Dutch Personal Income Tax Act 2001, if that mortgage is repaid in a maximum of 360 months under at least an annuity repayment schedule.

If this repayment schedule is not complied with - for instance due to the corona crisis, an individual is allowed (by his/her bank) to postpone repayment of his/her mortgage for several months - the paid mortgage interest in 2020 would no longer be tax deductible for this individual. Based on this Decree, the paid mortgage interest will nevertheless be tax deductible for this individual once certain requirements are met.

New measures published in the second policy Decree (22 April 2020)

On 22 April 2020, the Dutch State Secretary of Finance has published a second Decree, in which the corona crisis measures are further implemented by means of a number of specific authorizations.

The measures in this second Decree concern – among others – the following subjects:

- Postponement for payment of energy tax;
- VAT consequences of the employment/assignment of health care professionals;

- VAT consequences of the free of charge provision of medical supplies and equipment;
- Reduced VAT rate for offering sports lessons online;
- Frontier workers (temporary exemption from some German and Belgium social benefits);
- Relaxation of legal administrative obligations with regard to wage tax;
- Reduction of collection interest;
- Decrease of the provisional 2020 tax assessment.

Set forth below are some of the above subjects.

Frontier workers (*grensarbeiders*)

- The Netherlands and Germany have made an agreement on how to deal with salaried frontier workers who work from home during the corona crisis. In short, the agreement boils down to taxpayers being able to treat the extra days at home resulting from corona measures in accordance with where that tax payer would work under normal circumstances, so that under the applicable tax treaty the right to tax does not shift to the other country (e.g. as a result of the so-called '183 days' rule). This agreement is valid from 11 March 2020 to 31 May 2020 and is then automatically renewed monthly until either country cancels the agreement. A similar arrangement has been concluded between the Netherlands and Belgium. However, this arrangement is not renewed automatically, but will be renewed monthly, should the Netherlands and Belgium agree upon an extension;
- Residents of the Netherlands who work in Germany will normally pay wage/income tax in Germany. However, it may be that due to the corona crisis, these employees have to stay at home (in the Netherlands) and are eligible for German social security benefits (e.g. German Kurzarbeitergeld, Insolvenzgeld and Arbeitslosengeld). To the extent these benefits do not exceed EUR 15,000, such German benefits may be subject to tax in the Netherlands. The Decree provides for allocation rules that in fact exclude these German benefits from Dutch taxation that a resident of the Netherlands receives in the period from 11 March 2020 to 31 December 2020. The income must concern the German Kurzarbeitergeld, Insolvenzgeld and Arbeitslosengeld, to which payments the resident of the Netherlands was demonstrably not yet entitled to before 11 March 2020.

Relaxation of administrative burdens and the so-called travel allowance in the wage tax

- As long as the Decree is in force, the Dutch tax authorities will act flexible in case employers fail to fulfil certain administrative obligations in the Dutch wage tax Act, or do not comply on time or in full;
- If an employee is obligated to work from home for a longer period of time due to the corona measures, it may be the case that the agreed and fixed travel allowance has to be reduced under the Dutch wage tax regulations. However, in such a situation, the employer may use the regular travel pattern of this employee to compute the travel allowance.

Reduction of collection interest (*verlaging invorderingsrente*)

- As set out in our previous corona crisis alerts, the Dutch government has announced that the collection interest rate for all tax debts over the three-month period would be reduced from 4% to 0.01%, as from 23 March 2020. This decision has now been implemented in the Decree.
- This temporary reduction does not apply to the collection interest to be reimbursed by the Dutch government (receivable collection interest);
- Taxpayers who, as a result of the reduction of the collection interest rate, can no longer claim a so-called payment discount on a provisional 2020 tax assessment (because of the link between the amount due on the provisional 2020 tax assessment and the collection interest rate) can object to such provisional 2020 tax assessment in which the amount of the payment discount is included, after which the payment discount will still be granted.

Decrease provisional 2020 tax assessment

- In the Decree, the Dutch State Secretary of Finance confirms that taxpayers who expect a lower profit in 2020 than the amount mentioned on the provisional 2020 tax assessment, can submit a request for a reduction of this provisional 2020 tax assessment, which reduction shall be granted by the Dutch tax authorities.

Compensation for Entrepreneurs in Affected Sectors by COVID-19 (in Dutch: *Tegemoetkoming Ondernemers Getroffen Sectoren COVID-19, "TOGS"*) is exempt from taxation

- The so-called TOGS measure (set out in our previous alerts hereunder), which concerns a one-off lump sum payment of EUR 4,000, is exempt from taxation.

TOGS measure

As set out above, the TOGS measure concerns a one-off lump sum payment of EUR 4,000, applies per legal entity and not per business unit and is not subject to taxation.

- In order to apply for the TOGS measure, among others, the following criteria need to be met:
 - the entrepreneur needs to have a qualifying SBI code;
 - the entrepreneur needs to realise a loss of revenue of at least EUR 4,000; and
 - have at least EUR 4,000 in fixed expenses, even after using other Dutch government support measures related to the corona crisis.
 - Prior to the news release on 28 April 2020, only entrepreneurs whose main activity – as registered in the Dutch Chamber of Commerce Registry – corresponded to one of the established SBI codes could appeal to the TOGS measure;
 - However, as of 29 April 2020, the TOGS measure has been expanded insofar that entrepreneurs can also claim the EUR 4,000 subsidy on the basis of one of their *secondary* activities as registered by their SBI code in the Dutch Chamber of Commerce Registry;
 - Please note that if an entrepreneur claims the EUR 4,000 subsidy on the basis of one of their *secondary* activities, the minimum EUR 4,000 loss in revenue and fixed costs must refer to this *secondary* activity.

NOW measure (for Dutch companies within a group)

As set out in the introduction, to protect employment, the NOW measure has been amended on 22 April 2020. For more information on the NOW measures taken in the past we refer to our previous alerts.

Briefly put, the NOW measure aims to provide employers who are confronted with (i) a decrease in revenue of at least 20%, for (ii) a consecutive period of three calendar months and (iii) in the period from 1 March to 31 July 2020, under certain conditions, with financial compensation (provided that the employees remain employed).

With respect to the first condition, the NOW measure has been amended insofar that a company that has lost more than 20% of its revenue due to the corona crisis, but that belongs to a group of companies that does not meet this condition, may still apply for the NOW measure. However, such a company (“**Company**”) should meet several conditions, which shall be set forth hereunder.

Conditions

- The Company should be a separate legal entity;
- Groups of companies, which company invokes the NOW measure, must declare that they will not pay dividends or bonuses or repurchase their own shares for 2020 until and including the date of the shareholders' meeting in which the annual accounts for 2020 are adopted;
- A Company that applies for the NOW measure with more than 20 employees must have an agreement with the relevant unions concerning the preservation of employment. For a Company with

less than 20 employees, agreement with a representation of the employees is sufficient;

- Groups of companies that have a separate legal entity that employs all employees should always measure the decrease in revenue at group level;
- The Company may not transfer business to other group companies, in order to increase the loss of revenue;
- The Transfer Pricing system as used in the 2019 financial statements or the last adopted financial statements is leading for the 2020 measurement period and may not be adjusted;
- So-called movements in stocks of finished products are also part of the revenue. For instance, a production company that produces goods and normally sells them directly to the group sales company should also sell these goods during the measurement period.

Should you have any questions on how these relief measures in response to the corona virus will affect your business, please do not hesitate to contact us.

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