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Tips for Navigating the 2024 Dutch Tax Roadmap

by Ashley Peeters and Michael Molenaars

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In this installment of In Step With Stibbe, Peeters and Molenaars explain the key markers of the 2024 Dutch Tax Package as well as developments expected in 2024 and 2025 and how they may affect international business.

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The new year has brought a number of changes to Dutch tax law that have either been announced or already taken effect. On December 19, 2023, the upper house of the Dutch parliament adopted the 2024 Tax Package (*Pakket Belastingplan*), which includes the 2024 Tax Plan (*Belastingplan*) and other proposals published on Budget Day (*Prinsjesdag*).

This article provides an overview of some of the most important of these tax developments for international businesses, and explains other 2024 Tax Package changes for 2024 and 2025.[1] These include:

- the new tax classification rules to take effect 2025;
- anti-dividend-stripping measures;
- the abolishment of the dividend withholding tax exemption for the redemption of listed shares;
- the abolishment of the real estate fiscal investment institution (*fiscale beleggingsinstelling*, or FII) regime; and
- amendments to the lucrative interest scheme.

Dutch Tax Classification Rules

From January 1, 2025, new Dutch tax classification rules will take effect.[2] The classification of foreign entities (including partnerships) as either transparent or nontransparent for Dutch direct tax purposes is based on a comparison of civil law characteristics of the foreign and Dutch entities (the comparison method). However, the comparison method does not always provide a satisfactory solution because not all foreign entities have a Dutch equivalent. In situations in which no Dutch equivalent exists, the legal entity comparison method is not conclusive, and a hybrid entity mismatch may occur.

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[1] The 2024 Dutch Tax Package also announced that the national implementation of pillar 2, the EU minimum tax directive (Council Directive (EU) 2022/2523 of December 14, 2022), would simultaneously be discussed with the 2024 Tax Package. Questions were answered on September 11, 2023, by the Dutch Under-Minister of Finance Marnix van Rij. Some amendments to the legislative proposal followed the administrative guidance published by the OECD's inclusive framework on July 17, 2023. The goal is to legally anchor several elements of the guidance, for example the definition of a qualifying interest and the qualifying domestic minimum top-up tax safe harbor rule. The legislative proposal was not part of the 2024 Tax Package, and the developments on pillar 2 will be discussed in a separate column.

[2] For a previous discussion of the Dutch Ministry of Finance internet consultation on this, see Charlotte Tolman and Michael Molenaars, "Tackling Reverse-Hybrid and Entity Classification Mismatches in the Netherlands," *Tax Notes Int'l*, May 17, 2021, p. 909.

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Further, the Dutch tax classification rules are rather unique and deviate from international standards, often resulting in hybrid mismatches. This is mainly caused by a specific criterion for qualifying as a Dutch limited partnership (*commanditaire vennootschap*, or CV): whether accession or substitution of a limited partner requires the consent of all (general and limited) partners. Only if unanimity is required and obtained (consent requirement) is a CV considered transparent for Dutch direct tax purposes. Comparable foreign limited partnerships, generally transparent in their jurisdiction of establishment, are often nontransparent from a Dutch tax perspective.

From January 1, 2025, the consent requirement will be abolished and there will no longer be a distinction between nontransparent ("open") and tax-transparent ("closed") CVs: All CVs will be classified as transparent. The current open CVs will become tax transparent, which will result in a deemed taxable moment for both the CVs and their partners — CVs will be deemed to have disposed of all assets, including goodwill and liabilities, to their participants at fair market value. Several transitional rules and facilities are available to defer tax, including a rollover facility and a maximum 10-year deferred payment facility. Restructurings using these facilities may be created in 2024 to prepare for the tax-triggering moment on January 1, 2025 (the real estate transfer tax exemption only applies in structures that were already in existence on September 19, 2023, at 3:15 p.m.). The same tax consequences may apply to foreign entities comparable with a CV and resident in the Netherlands, or that hold Dutch assets.

The amendments to the open CV may solve some hybrid mismatch situations with foreign entities. It will, however, mainly help foreign entities that are comparable to a CV. It has therefore also been proposed to introduce two supplementary methods to classify foreign entities. As of 2025 the comparison method will only apply to foreign entities with a Dutch equivalent. For situations in which the comparison method does not provide a clear solution, the following rules will apply:

1. Foreign entities without a clear Dutch equivalent that are resident in the Netherlands are deemed to be nontransparent (fixed method).
2. Foreign entities without a clear Dutch equivalent residing outside the Netherlands are classified as nontransparent if, according to the tax regulations of their resident state, they are considered a taxpayer (regardless of whether any taxes are levied). Foreign entities that are not considered independent taxpayers in their resident state, are classified as transparent for Dutch direct tax purposes (symmetrical method).

No clear guidance is available yet on how some foreign legal entities should be classified. For example, it is unclear whether U.S. limited liability companies have a Dutch equivalent. If U.S. LLCs by default would fall under the symmetrical method (assuming they should be viewed as not having a Dutch equivalent) and follow the U.S. classification, the next question would be how to interpret the U.S. tax treatment of U.S. LLCs. It is not clear yet whether this would be based on the general U.S. tax treatment or whether elections would also be taken into account under the U.S. check-the-box system. Assuming the goal of the new rules is to mitigate hybrid mismatches, we would expect elections made under U.S. check-the-box to be relevant for the Dutch classification under the new symmetrical method. Guidance on how to apply the relevant classification tests and when a foreign entity can be considered to have a Dutch equivalent is expected to be published in the first quarter of 2024.

Dividend Stripping

Dutch tax legislation already contains an antiabuse provision to counter dividend stripping; however, in the view of the Ministry of Finance, it is insufficient to address dividend stripping in all situations. Therefore, three measures were put into effect January 1:

1. *Reallocation of the burden of proof:* The burden of proof will shift toward the (legal) person claiming a dividend withholding tax (DWT) benefit — that is, the recipient of the dividend — and no longer be on the company paying the

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dividend. The dividend recipient must prove beneficial ownership of the dividends received if it is contested by the Dutch tax inspector.[3] The enhanced burden of proof applies in all situations in which a DWT exemption is claimed, even if it is clearly not a dividend-stripping situation. No further guidance has been published yet on how a taxpayer can establish that it is the beneficial owner of the dividends.

2. *Guidance on series of transactions:* One of the elements for establishing dividend stripping is a "series of transactions" that have been set up to obtain a DWT benefit. It has been clarified that whether there is a series of transactions will be assessed at the group level. According to the Ministry of Finance, discussion arose on whether there could also be a "series of transactions" when a related entity or individual enters into specific transactions. The assessment at the group level seeks to prevent the concealment of transactions across borders or the splitting up of share interest within a group to move outside the scope of dividend stripping.
3. *Codification of the registration date:* The registration date for listed shares is the end of the business day on which it is determined which shareholders are entitled to the proceeds of the shares. This rule was already included in the dividend decree,[4] but for the sake of legal certainty, it has been codified.

In the wake of these changes, taxpayers' administrative burden will significantly increase, while the position of the tax authorities regarding the determination of the beneficial owner will improve. Therefore, it might become more difficult to prove beneficial ownership, resulting in lengthy discussions with Dutch tax authorities.

Redemption of Listed Shares

Following parliamentary debate on the 2024 budget, parliament abolished the DWT facility for share redemptions. A share redemption by a listed company will now be subject to DWT starting in 2025. The amendment significantly affects the attractiveness of share redemptions for both the listed company and its shareholders.

The redemption of shares is an often-used tool for listed companies to:

- enhance earnings per share;
- lower excess equity;
- reshape the capital structure; and
- return excess cash to shareholders.

Listed companies can rely on a specific redemption facility that deviates from the main rule that, in principle, share redemptions are subject to DWT. The facility allows a Dutch listed company to redeem shares free of DWT if specific conditions are met. These conditions are:

- the total amount in share redemptions in any one calendar year may not exceed (a) 20 times the average amount of cash dividends in the five preceding calendar years, less (b) the amount paid in share buybacks in the four preceding calendar years; and
- in the calendar year, a cash dividend is paid at least equal to the average cash dividend paid in the five preceding calendar years.

As of 2025 this facility will no longer be available.

Abolishment of the Real Estate FII Regime

According to a 2022 announcement, FIIs will no longer be allowed to invest directly in real estate from January 1, 2025.[5] However, contrary to the earlier announcement, according to the 2024 Tax Package:

1. FIIs will be allowed to invest directly in non-Dutch real estate but not Dutch real estate.
2. The financing requirement (financing of the investments with debt may not exceed 60 percent of the book value of the real estate) will apply to non-Dutch real estate

[3] To avoid unduly burdening small investors, the reversal of the burden of proof will only apply to taxpayers for which the DWT amount exceeds €1,000 per year.

[4] Decree of the state secretary of finance regarding dividend tax, Collective Decree (Stcrt. 2022, 32364) (Nov. 29, 2022).

[5] *See* Tolman and Molenaars, "Key Markers on the Dutch Tax Roadmap for 2023," *Tax Notes Int'l*, Dec. 19, 2022, p. 1569.

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as a result of the change but will be amended to reflect the fact that it only applies to non-Dutch real estate. This also applies to some investment fictions that exist in the current regime.
3. FIIs may, in accordance with the 2022 announcement, indirectly invest in Dutch real estate through a subsidiary that is a regular taxpayer. The prohibition on managing these subsidiaries has been abolished.

Following the abolishment of the real estate FII regime, a temporary Dutch real estate transfer tax exemption has been introduced for existing FIIs that plan to convert to a tax-transparent structure before the new regime becomes effective. Under current law, if an entity applies the FII regime, the income from real estate at the level of the FII is not taxable and will be taxed at the level of the shareholders. When converted to a tax-transparent structure, there will be no additional level of taxes at the former FII entity level.

Based on current law, once an FII no longer qualifies under the FII regime, the value of its assets (including real estate) will be set at the FMV directly before the loss of its status. Any increase or decrease in the value will remain tax exempt under the FII regime. It is therefore expected that most FIIs investing in real estate will restructure in the coming year to prevent an additional layer of taxation.

Lucrative Interest Regime

If a participation in, for example, a management equity plan can be considered a remuneration for services and it includes specific types of leveraged investments, the income and gains derived may be seen as a lucrative interest subject to Dutch personal income tax within the highest tax bracket (a progressive rate of 49.5 percent (2024)). There are two conditions to be met for remuneration to qualify as a lucrative interest.

The first condition (remuneration for services) is generally considered to be met if the investment is only open to employees or certain other individuals who work for or are connected to the respective company but are not deemed employees.

According to the second condition (leveraged instrument), instruments are generally considered to be lucrative if:

- they constitute a separate class of shares that is legally or factually subordinated to other classes of shares and the total share capital of this subordinated class represents less than 10 percent of the company's total issued nominal share capital (the 10 percent criterion); or
- they have a preference of at least 15 percent dividend per year.

Following an April 14, 2023, ruling of the Dutch Supreme Court,[6] when calculating the 10 percent criterion, only loans treated as informal capital (equity) for Dutch tax purposes should be taken into account.

According to the Dutch government, the Court ruling may lead to abusive situations in which shareholder loans that do not qualify as equity for tax purposes would be out of lucrative interest rule scope.

With the amendments that took effect January 1, loans that (partially) serve to remunerate performed activities by creating a leveraged effect for the management equity plan but do not qualify as an informal equity contributions for Dutch tax purposes (for example, shareholder loans) will also be taken into account when assessing a possible lucrative interest (when applying the 10 percent criterion). This would limit the possibility for taxpayers to avoid application of the lucrative interest scheme by structuring loans in such a way that the loans function as a remuneration for performed activities (within the meaning of the lucrative interest scheme), but do not qualify as equity for tax purposes (and thus would be outside the scope of the lucrative interest rules as determined by the Court).

As a result, when setting up an incentive plan for managers or employees, it is even more important to review whether any loans are taken out by the employees and whether these loans should be taken into account when assessing whether there is a lucrative element under Dutch income tax law. ■

[6] Dutch Supreme Court, ECLI:NL:HR:2023:557 (Apr. 14, 2023).

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