Netherlands:
Fiscal unity regime to be amended

On 16 October 2015, the Dutch State Secretary of Finance submitted a bill to parliament that would make changes to the fiscal unity rules to bring the regime in line with decisions of the Court of Justice of the European Union (CJEU) and the Dutch tax court of Amsterdam.

The Dutch fiscal unity regime offers a number of benefits: entities within the group can offset profits and losses; intragroup transactions are ignored; and tax compliance is facilitated because the group can submit a consolidated tax return. Since only one company will exist for Dutch corporate income tax law purposes, losses incurred by one company in the fiscal unity can be offset against the profits of another company. Various requirements must be met to form a fiscal unity, one of which generally requires that group companies be Dutch residents.

The CJEU ruled in the SCA Group Holding case on 12 June 2014 that the Dutch fiscal unity regime is incompatible with EU law, and that there is no valid justification for the regime (for prior coverage, see EU tax alert, 12 June 2014). The CJEU specifically held that EU law is violated to the extent the Dutch rules do not allow:


- A Dutch parent company to form a fiscal unity with its Dutch “sub-subsidiary” in cases where the sub-subsidiary is held by a nonresident intermediary company (i.e. Dutch rules allow a fiscal unity only where the intermediary also is established in the Netherlands and is included in the fiscal unity, or where it is established in another EU member state but has a permanent establishment (PE) in the Netherlands); or
- Dutch resident “sister” companies that have a common nonresident parent company to form a fiscal unity (i.e. Dutch rules allow sister companies to form a fiscal unity with each other only if their joint parent company also is Dutch, or where the parent is established in another EU member state but has a Dutch PE to which the shares in the sister companies are allocated). The proposed rules would allow “horizontal” consolidation.

Shortly after the CJEU decision was issued, the State Secretary announced that a fiscal unity between indirectly held companies that are established in the Netherlands would be permitted. The bill would codify this policy, but it also would be broader in scope.

The proposed bill would extend the fiscal unity regime to include the following situations:

- Where a Dutch parent company holds shares in a Dutch sub-subsidiary through one or more intermediary companies established in the EU/European Economic Area (EEA); and
- Where an EU/EEA parent company holds shares in at least two subsidiaries established in the Netherlands.

The draft bill presented to parliament would make the following changes to the fiscal unity rules in the Corporate Income Tax Act:
• Under both the domestic legislation of the EU/EEA member state in which a connecting company is located and the relevant tax treaty concluded between the Netherlands and that EU/EEA member state, a top-level holding company (i.e. the company that holds the shares of Dutch sister companies) or an intermediary company (that holds the shares of a Dutch lower-tier subsidiary) would have to be considered established in that state. The nonresident intermediary company (or companies) or top-level holding company (as applicable) would have to be subject to (and not exempt from) a tax on profits (which could not be optional) in its capacity as a subject of the country of establishment.

• The top-level company would be required to hold the full legal and economic ownership of at least 95% of the shares in sister companies, i.e. an arrangement involving split ownership no longer would lead to a fiscal unity. If (a part of) the shares are converted into depositary receipts for shares, the new holding requirement no longer would be satisfied. Arrangements existing at the time the bill was submitted would be granted a transition period of two years after the submission to comply with the new rules.

• If horizontal consolidation is applied, the Dutch (sub-)subsidiaries would have to designate a sister company to be considered the “parent company” for fiscal unity purposes. Such a company would have to close its books on the date of consolidation. A decision by the top-level holding company to sell the shares in this (sub-)subsidiary would dissolve the entire fiscal unity; deconsolidation also would take place if the company designated as the parent company no longer is considered to be part of the fiscal unity.

Deconsolidation generally could be avoided only if, immediately subsequent to the event that otherwise would result in deconsolidation, another company would be established, included within the fiscal unity and considered to be the new parent company from that moment onward. A delegation provision is included in the bill, under which, in certain cases, a fiscal unity could change the identity of a top-level holding company without this being considered to result in a deconsolidation of the fiscal unity. The explanation to the bill indicates that this is subject to a requirement that the companies that compose the fiscal unity otherwise could not be changed.

• The explanatory memorandum to the bill discusses various combinations of fiscal unities, and potential switches between different types of fiscal unity. The basic assumption is that the fiscal unity could be maintained, unless the parent company changes.

• The requirements for participating in a regular fiscal unity with a Dutch PE would be amended. Currently, if the shares in a subsidiary are allocated to a Dutch PE, that PE is required to be able to act as the parent company of the fiscal unity. This requirement no longer would apply. The proposed amendment may have been motivated by CJEU case law, under which the Netherlands may not treat a domestic PE less favorably than a domestic company. If a fiscal unity between domestic sister companies is possible, the same must be true for a domestic nonresident taxpayer, or, in other words, the same treatment must apply for a domestic company and a domestic PE. A delegation provision has been included in the bill that would permit a fiscal unity to be continued in cases where a nonresident taxpayer stops earning taxable profit through a Dutch PE in the Netherlands (including a cessation of the PE).

• The bill provides for various anti-abuse rules, to avoid situations such as the double utilization of the same losses. The regime for liquidation losses and the limitation on the
interest deduction relating to certain participations also would be amended. The extent of the related implications cannot fully be determined at this point.

**Future amendments**

This bill does not provide for amendments related to the recent CJEU decision in *Groupe Steria* (for previous coverage, see EU tax alert, 3 September 2015). Based on that decision, under the “per-element” approach, the Netherlands may have to extend any “side effects” (including potential benefits) of applying the fiscal unity regime, which currently are limited to domestic relationships, to include situations involving residents of other EU member states. In other words, if entering into a fiscal unity would grant more preferential treatment to certain elements of the corporate income tax regime in domestic situations, the fiscal unity regime – to the extent of the more favorable treatment of these elements – would be incompatible with EU law. As a result, the fiscal unity regime may require further amendments in the future.


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