



Downturn planning: general Netherlands tax points

This briefing summarises the typical tax subjects arising in downturn planning: avoiding unnecessary cash-outs in the form of tax payments, reducing taxable profits for tax year 2009 in combination with the carry-over of tax losses to other years, how to avoid losing deferred tax assets, what secondary liability risks may arise if counterparties are unable to pay their tax debts, tax aspects involved in restructurings and some possible legislative changes triggered by the financial crises.

Introduction

This briefing sets out in general terms some potentially relevant tax points that may arise in the current economic climate for corporate taxpayers located in the Netherlands. In these times of uncertainty and global recession, managing cash and protecting valuable assets are clearly of primary importance and should include carefully controlling tax payments as well as the value of deferred tax assets.

Making reduced tax payments

Corporate tax in respect of profits realised in a financial year is normally levied on the basis of preliminary assessments already issued during the financial year ('pay as you earn'); the final amount of tax due is established after the tax return for the year has been filed and reviewed, which may be years later. These preliminary assessments can be paid in one instalment or in a number of instalments.

Tax authorities will normally issue preliminary assessments based on estimates; these may be based on a taxpayer's own estimates, usually provided in the autumn of the year before the relevant financial year. These estimates, with the taxpayer's current knowledge of his financial position, may no longer be realistic given rapidly changing markets. Also, the average taxable profits of preceding years may have been used and those averages may also no longer provide a realistic estimate of 2009 taxable profits. Taxpayers should consider

updating their estimates of taxable income for the financial year 2009 and filing objections against such preliminary assessments or request ex officio reductions. These requests can also be made later in the year. Statutory interest will be paid by the tax authorities on tax overpayments; the rates may be attractive compared with market rates but in respect of current-year profits will be calculated only over half the calendar year.

Taxpayers with sufficient excess liquidities may benefit from a tax rebate based on the applicable statutory interest if they pay their assessment in one instalment instead of several monthly instalments.

There are currently no mechanisms in place to allow deferral of tax payments in anticipation of tax refunds (of whatever nature, including refund of tax as a result of carry-back of losses to previous years). In individual cases the collector of taxes may be asked to grant extension of payment, but these will not be granted as a matter of standard practice.

Reducing taxable profits for 2009

Typical ways that could be considered to reduce taxable profits for 2009 without restructuring the taxpayer's operation would be to:

- take devaluation losses on assets (whether this is possible depends on the method of valuation applied by the taxpayer and the type of asset; it is not possible with shareholdings to which the participation exemption applies);

- use the accelerated depreciation relief facility that was introduced on 1 January 2009. There are proposals circulating (but not yet implemented) to further expand the accelerated depreciation relief rules; and
- consider towards the end of the year whether tax provisions can be formed for restructuring and re-organisation costs that will be incurred in later years on the basis of plans formed and/or decisions taken during 2009.

In considering these steps, obviously an estimate of 2009 taxable profit should be taken into account, as well as the likely effect of carry-back and carry-forward rules and their limitations in time.

Tax losses

Currently, tax losses can be carried back for one year and carried forward for nine years. The government is considering re-introducing a three-year carry-back rule, but this has not yet been decided. Introduction of a longer carry-back period would mean that 2009 losses could be converted into cash refunds of tax paid in the three previous years (instead of only one).

Groups of companies should consider carefully whether their corporate and tax structures may result in tax losses being made in one part of the group (no cash benefit) while taxable profits are realised in other parts of the group (actual cash tax payments). If that would be the case, dismantling such structures should be considered, taking into account the group's medium-term outlook. This mismatch may particularly happen if, as a result of prior-year tax planning, group functions have been separated on a low-risk to fixed-income basis (eg group services remunerated on a cost-plus basis).

Realised losses will reduce the available equity amounts on the tax balance sheet and this may lead to non-deductibility of interest due on related-party debt based on thin capitalisation rules. These effects should be monitored during the financial year.

Tax losses may be valuable assets going forward (deferred tax assets). In fiscal unity situations, tax losses in principle, under tax rules, belong to the group's top company. To plan ahead for potential future restructurings, it is important that careful consideration is given to where available tax losses are likely to have the

highest value for the group. Tax losses may be allocated to the fiscal unity member where they were realised. It is generally recommendable to conclude tax-sharing agreements between the members of a fiscal unity to formalise the allocation of these losses to avoid disputes at the time a member is sold out of the fiscal unity or – even worse – after the closing of such a transaction.

Restructurings that lead to changes of control over entities with tax losses may lead in certain situations (eg in the absence of business operations or in combination with a major reduction of business activities) to those losses no longer being available for compensation. Also in the case of certain holding, financing and portfolio investment activities, there may be baskets of taxable result that prevent compensation of profits with losses in another basket.

Liability for unpaid taxes due by others

Given the economic climate, it is not unlikely that taxpayers will default on their tax obligations. Netherlands' tax laws contain a number of secondary liability rules under which other parties than the taxpayer itself can be held liable for unpaid taxes. In respect of indirect taxes (such as value added tax and wage withholding tax) and social security contributions, if a taxpayer is unable to make the required regular payments, it is critically important that timely and correct notification of such inability is made, because otherwise the members of the taxpayer's board of directors are likely to be held personally liable for such payments.

Other rules that may be relevant apply, for instance, in the case of:

- fiscal unities (for corporate income tax and value added tax purposes): each member of a fiscal unity is liable for unpaid corporate income and value added taxes and the tax authorities may offset certain tax refunds against amounts of tax due from parties having been a member of a fiscal unity;
- contractors, employment agencies and in certain cases companies providing outsourcing services (this may include cleaning companies but also IT services if rendered on the premises of the client): the client may be liable for its counterparty's employment-related taxes;

- liquidators in the case of voluntary liquidation: for the liquidated company's unpaid taxes;
- shareholders that sell cash companies with residual tax liabilities if these taxes remain unpaid;
- the de facto leader of a Dutch branch of a foreign taxpayer, in the case of unpaid corporate income tax; and
- the person factually organising the moving abroad of a Netherlands company's tax residency (this may occur if all local directors resign) for unpaid taxes.

Restructurings

Companies in financial distress may be forced to restructure their outstanding debt or sell off assets (including subsidiaries with underlying business operations). These types of restructurings may have a substantial tax effect and should therefore be carefully considered.

Profits realised by restructuring indebtedness are in many cases in principle considered taxable. This includes the profit realised as a result of the buy-back by a debtor of outstanding debt at a discount. To the extent that the relevant taxpayer has sufficient tax losses available there should not be any actual tax payable. Care should be taken that available tax losses are not lost as a result of restructurings of the business in combination with a change in beneficial owners.

Any excess profit resulting from a waiver of indebtedness by the creditor may benefit from an exemption under specific conditions, which include that the debt is not recoverable and that the waiver is formally made.

Selling shares in operating subsidiaries in most cases does not give rise to taxable profits or tax deductible losses as a result of the application of the participation exemption. On the other hand, losses realised upon the completion of the liquidation of a subsidiary that has ceased its business activities (provided these activities are not continued elsewhere in the group) are tax deductible.

The sale of business assets would normally trigger a realisation of a taxable result. As the Netherlands does not apply a schedular system, capital gains or losses can normally be offset against trading losses or profits in the same financial year.

VAT

In the case of a sale of business assets, it is important to consider carefully the application of the going concern exemption for VAT purposes, because incorrect application of the exemption may lead to liability issues for the other party if the party that should have paid VAT to the tax authorities becomes insolvent.

Legislative changes

There are general discussions ongoing on legislative measures to support businesses through these difficult financial times. No concrete legislative proposals have yet been tabled. Areas in which changes have been suggested comprise:

- tax loss carry-over rules (re-introduction of three-year carry-back rules), which would bring immediate relief because prior-year taxes would be refunded;
- extension of the flexible depreciation scheme for business assets;
- introduction of additional relief for (re)education of employees; and
- extension of payment of tax due if tax refunds are expected but have not yet been formalised.

Although unconnected with the current crisis, the Ministry of Finance has announced the release of proposals for a major overhaul of the related-party interest rules (including the 'interest box rules' under which related-party interest would be effectively subject to a 5 per cent tax rate) in the first half year of 2009. As these rules could have a negative effect on certain categories of businesses, it is unclear whether this project will proceed this year.

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