



Business restructurings in the downturn: Netherlands tax points

This briefing sets out the key Netherlands tax issues in respect of business restructurings in the downturn. In summary, business restructurings normally take the form of asset or share transactions. The transfer of a business, a merger or a demerger may be eligible for relief, but to decide whether requesting this relief will be attractive companies need to take into account other tax consequences. Loss set-off possibilities may for example become more complicated. The transfer of a business in exchange for other (debt) instruments is not eligible for special relief treatment; this is considered a sale. Furthermore, restructurings in cases where a fiscal unity exists, debt remains outstanding or a subsidiary is liquidated may have additional tax consequences.

Introduction

This briefing is of a general nature and does not purport to present a complete picture of all Netherlands tax aspects that could be of relevance to a specific business restructuring. It sets out in general terms some potentially relevant key Netherlands tax points that may arise in business restructurings caused by the current economic climate. These business restructurings could entail internal re-organisations to extinguish intra-group debt, sales of businesses to third parties to raise liquidities or even transfers of businesses to third parties in repayment of debt.

The 'downturn factor' does not lead to special rules being applicable. However, the focus on the relevant tax effects will change, because loss planning and liability issues become more prominent.

General

Business restructurings normally take the form of share or asset transactions. The principle is that combined transactions are split into separate steps, priced at fair market value. This means, for instance, that if debt is repaid through the transfer of a business (whether in the form of assets or shares) and the creditor accepts full repayment in exchange for (part of) the business, the difference between the fair market value of the business (shares) transferred and the principal amount of the debt released as a result of the transfer constitutes a profit that will lead to its own tax consequences. Any such profit would be for the debtor, unless the waiver exemption

can be applied, which exempts that part of the amount waived that exceeds available tax losses.

Tax losses can be carried back for one year and carried forward for nine years. It has been suggested that the three-year carry-back rule should be re-introduced, but this has not yet been decided. For the time being, only the procedures to refund tax paid in the previous year have been accelerated.

Rules intended to combat tax loss trafficking may lead to the expiry of all available tax losses in cases of a change of control in connection with a termination of or major reduction in business activities. Also, for certain holding, financing and portfolio investment activities, there may be baskets of taxable result that prevent compensation of profits by losses in another basket.

In fiscal unity situations, tax losses belong to the group's top company. After a fiscal unity has ended, tax losses may be allocated to the fiscal unity member that realised them on joint request by the group's top company and the company to which the tax losses are to be allocated. Therefore, it is important that careful consideration is given to where available tax losses are likely to have the highest value for the group. It is generally recommendable to conclude tax-sharing agreements between the members of a fiscal unity to formalise the allocation of these losses and thus to avoid disputes when a member is sold out of the fiscal unity or – even worse – after the closing of such a transaction.

Share transactions

Corporate income tax

A restructuring through the transfer of shares in a subsidiary (not involving a fiscal unity) should normally be exempt under the participation exemption. This means that no taxable result (and therefore no loss) would be recognised.

Although 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, losses realised on the completion of the liquidation of a subsidiary are tax deductible provided the group completely ceases the subsidiary's business activities.

Mergers and demergers of companies generally trigger recognition of gain or loss as if the relevant assets have been transferred, unless a roll-over relief is available. Although a (de)merger would result in the transferor's losses being lost (because the transferor would automatically be dissolved), these losses may be transferred to the acquiring company on the transferor's request. Losses may only be allocated to the assets and liabilities that have caused them. In the case of a pure demerger (in which the transferor ceases to exist) the same loss allocation rules apply. This facility is not available in the case of a split-off (in which the transferor does not cease to exist and in which a part of or all assets and liabilities to be divided are transferred to one or more companies).

If the shares in a company that is a member of a fiscal unity are transferred, the fiscal unity will terminate (note that this may already be the case upon signing a sale-and-purchase agreement; ie before closing). This may lead to profit recognition (in any company that was a member of the fiscal unity) if assets have been transferred between the other parts of the fiscal unity and the company whose shares are transferred in the six or three years (depending on whether individual assets or, at least, an independent part of a business have been transferred) before that event. Other de-grouping tax effects may also occur, for instance in respect of the valuation of debt instruments between the (former) members of that fiscal unity.

Special rules apply if the transferor in a merger forms part of a fiscal unity. Although a merger will normally cause the dissolution of the fiscal unity, the fiscal unity may under certain circumstances continue to exist.

Transfer tax

Real estate transfer tax is levied at a rate of 6 per cent on legal and economic transfers of real estate in the Netherlands; it also applies to the acquisition of a one-third (or more) interest in a company if the company's assets predominantly (ie for more than 70 per cent) consist of Netherlands real estate. An exemption applies if the contribution is made in the framework of a qualifying merger or an internal re-organisation. The merger exemption applies if a business or an independent part thereof is acquired in exchange for shares. Under a recapture rule, the exemption is clawed back if the contribution, the company or the properties leave the group within three years.

VAT and stamp duties

The transfer of shares should not be subject to VAT. The Netherlands does not levy stamp duties.

Asset transactions

Corporate income tax

In an asset transaction, the transfer of a business will lead to the recognition of a taxable result on the difference between the fair market value and the carrying value, unless roll-over relief is available and claimed. Such relief would be available only in the case of a transfer of a complete business (or an independent part thereof) in exchange for shares issued, provided the business remains subject to Netherlands taxation and provided that the acquirer records the business at the original carrying value.

Whether requesting roll-over relief is attractive will depend to a large extent on the availability of tax losses. If the transferor has losses available and the transaction result, if positive, can be set off against those losses, it may be more attractive to accept recognition of a taxable gain on the transaction; this could especially be the case if the losses would otherwise possibly expire as a result of the nine-year term for carry-forward of losses. Care should also be taken that the size of the

transferred business would not, in combination with a change-of-control event in the transferor, lead to the complete extinction of the losses available to the transferor for carry-forward.

In roll-over relief cases, a condition for automatic relief is that the companies involved do not have losses available for carry-forward. If this condition is not met, advance clearance from the tax authorities is needed. The conditions for advance clearance will usually include a requirement that the losses remain attached to the business transferred only; applying roll-over relief for a business transfer in an asset transaction that involves companies with available losses for carry-forward has the adverse effect that the loss carry-forward rules for the acquiring company will be restricted. As a principle, post transfer, pre-transfer losses of the acquiring company may be offset only against profits that can be allocated to the acquiring company's business before the acquisition. The transferor's pre-transfer losses may not be transferred to the acquiring company and the acquiring company may not set off its post-transfer losses against the transferor's profits; nevertheless, this may under certain circumstances be possible if the transferor is no longer subject to tax in the Netherlands.

If tax losses cannot be used before expiry of the nine-year period, 'loss renewal' transactions are often considered; essentially, assets are transferred at a gain (triggering a profit that is compensated by the available losses). Whereas the Netherlands does not distinguish between capital gains and regular operational results, this in effect leads to a step-up of the asset basis and thus increased amortisation expenses going forward; alternatively, assets are sold and leased back. Especially with intangible assets, valuation issues are critical in those cases. Unlike in some other jurisdictions, there are no specific anti-abuse rules that prohibit this type of transaction.

Transfer tax

The legal and economic transfer of real estate in the Netherlands will trigger real estate transfer tax.

VAT and stamp duties

No VAT is due on a transfer of a going concern or an independent part thereof if the transferred business is continued as before. This exemption is interpreted relatively broadly. It is important to consider carefully

the application of this going concern exemption for VAT purposes, because incorrect application of it may lead to liability issues if the party that should have paid VAT to the tax authorities becomes insolvent. The Netherlands does not levy stamp duties.

Asset transactions in repayment of debt

Unlike in some other jurisdictions, the transfer of a business in exchange for other (debt) instruments is not eligible for relief treatment; it is considered a sale.

A key issue in restructuring indebtedness is to establish whether and to what extent a debt instrument for tax purposes is also qualified as regular debt (which would normally be the case) and whether the proposed restructuring could change that qualification. A related-party situation in which an independent creditor would not have granted a loan under the same circumstances leads, for example, to the denial of interest deduction for the debtor and, if interest would actually be paid, may lead to dividend withholding tax being due. It could also lead to different tax treatment for the creditor.

If debt is still outstanding after a business restructuring and is subsequently waived, this partial or full waiver of the principal amount of a debt instrument (and/or accrued interest) will lead to a taxable profit for the debtor, unless the specific waiver exemption can be applied. The debtor may benefit from this exemption for the amount of the waiver exceeding the available tax losses, if the waiver occurs because (and to the extent that) the amount waived is no longer recoverable and the creditor expressly waived the obligation to pay for the debtor unconditionally; this means that the profit realised on the waiver reduces the amount of available tax losses, but does not lead to effective taxation. If the creditor is related to the debtor and it can be shown that the waiver would not have been granted by an unrelated party creditor, the amount waived would be considered for tax purposes an equity contribution (informal capital) and should not lead to profit recognition or the reduction of available tax losses for the debtor.¹

¹ Please refer for more details on this topic to our briefing of March 2009 on the Netherlands tax points of restructuring indebtedness.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2009
www.freshfields.com

For further information please contact	Machiel Lambooij Tax partner Restructuring and insolvency task force T +31 20 485 7608 E machiel.lambooij@freshfields.com
	Stasja Krzeminski Tax associate Restructuring and insolvency task force T +31 20 485 7686 E stasja.krzeminski@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to www.freshfields.com/support/legalnotice. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.