Dutch Government extends application of substance safe harbor rules

Executive summary

On 30 August 2013, the Dutch State Secretary of Finance and the Minister of Foreign Trade and Development Cooperation published a letter to the Dutch Parliament regarding the role of The Netherlands in international taxation and its tax treaty network with developing countries (the 30 August letter).

Recently, there have been various international discussions on international tax avoidance and the allocation of taxation rights. These discussions are being held within international organizations, such as the OECD, the EU, the G20 and the G8. One of the main outcomes so far is the OECD’s Action Plan on Base Erosion and Profit Shifting, issued on 19 July 2013.¹

The Netherlands has been actively engaged in the different international discussions on taxation, with the aim of developing a durable solution while not harming the Dutch fiscal investment climate. The position of the Dutch government has been and is that international platforms are indeed the place for such discussions. Furthermore, measures should be taken in an international context and not unilaterally in order to be effective, according to the Dutch Government. This has been previously stated in various communications by the Dutch Government, for example in its letter to the Dutch Parliament on 17 January 2013, and is reconfirmed in the 30 August letter.

The 30 August letter addresses mainly four items:

- Application of safe harbor rules on substance to group financing/licensing companies, also if no Advance Pricing Agreement (APA) is requested

- Application of safe harbor rules on substance to holding companies that wish to conclude an Advance Tax Ruling (ATR)
• Exchange of information regarding companies with an APA that have no other activities in The Netherlands
• Tax treaties with developing countries

Dutch substance requirements

In 2001, the Dutch Government published safe harbor rules regarding Dutch substance requirements. These requirements are required to be met in order for a Dutch company to be able to obtain advance certainty from the Dutch tax authorities by way of an ATR. Furthermore, a Dutch company is subsequently able to obtain a Dutch certificate of residency and the Dutch Government will generally not exchange information spontaneously to foreign tax authorities if the substance requirements are met.

The focal point of these requirements is that important decisions are made in The Netherlands and the company has certain nexus with The Netherlands. Examples of these requirements are that the board of directors is comprised of at least 50% of Dutch residents, the main board decisions are taken in The Netherlands, the main bank account is maintained from The Netherlands and book keeping is prepared and maintained in The Netherlands. In the meantime, other countries have followed the Dutch example and have implemented similar rules.

In the 30 August letter, the Dutch Government underlines that holding/intermediate companies make an important contribution to the Dutch economy, and that it is not willing to take measures that may damage The Netherlands’ position as an attractive location for such companies. Hence, the Dutch Government will not alter the main elements of the Dutch tax regime, such as the Dutch participation exemption, the tax treaty network and the possibility to obtain tax rulings from the Dutch tax authorities. The Dutch government, however, also wishes to avoid potentially abusive situations particularly regarding developing countries. The Dutch Government states that the aforementioned existing Dutch substance requirements can play a role in preventing such abusive situations.

The Dutch Government makes it clear that these substance requirements are adequate in the sense that meeting these requirements demonstrates sufficient nexus with The Netherlands. For this reason, it is reaffirmed that these substance requirements are required to be met by companies in order to obtain an APA or ATR. If a company does not yet have such substance, but has concrete plans to create sufficient Dutch substance in the near future, a tax ruling can also be obtained on that basis.

Furthermore, the substance requirements will become relevant for intragroup financing/licensing companies even if they do not request an APA, but do claim tax treaty benefits. Such a company must explicitly declare in its tax return whether it meets these substance requirements. If so, the Dutch tax authorities (i) will generally not exchange information spontaneously to foreign tax authorities; (ii) will provide a tax residency certificate; and (iii) will defend the company’s entitlement to tax treaty benefits.

Special attention should be paid by companies that wish to or have concluded an APA with the Dutch tax authorities. If such a company, or the group to which it belongs, does not have other activities in The Netherlands besides those activities required to satisfy the minimum substance requirements, the Dutch tax authorities will exchange information regarding the APA with foreign tax authorities. Although it is not clear yet how and in what form such information will be exchanged, this should further support The Netherlands’ position that it is fully transparent towards its tax treaty partners.

Dutch tax treaties with developing countries

The Dutch Government also underlines its desire to avoid double taxation through an extensive tax treaty network, of which 23 tax treaties with developing countries...
are an important part. With respect to tax treaties currently in place or under negotiation with developing countries, discussions with treaty partners will be initiated in order to determine whether anti-abuse provisions need to be included. One example concerns the treaty with Zambia; The Netherlands will invite Zambia to discuss an update of the existing tax treaty.

Impact

The 30 August letter makes it clear that the Dutch Government is committed to maintaining its key position for international investments with an attractive fiscal regime. In line with current policy and practice, the Dutch tax authorities will continue to provide certainty in advance, including on international holding/financing activities. In order to obtain such advance certainty, the existing safe harbor rules regarding the required level of substance in The Netherlands remain relevant.

In light of these new policies, it is recommended that companies with group financing/licensing/holding activities in The Netherlands review their level of Dutch substance and – where necessary – take appropriate action.

Endnote


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