Dutch tax bill introduced to expand fiscal unity regime

November 11, 2015

This bill largely codifies a decree the State Secretary of Finance issued on 16 December 2014 expanding the fiscal unity regime in the Dutch Corporate Income Tax Act. The bill allows fiscal unities between Dutch sister companies held by an EU/EEA resident parent company. It also enables a Dutch parent company and a Dutch sub-subsidiary to create a fiscal unity if the sub-subsidiary is held by an EU/EEA resident intermediate company. The bill is expected to come into force on 1 January 2016. In anticipation of this, multinational enterprises are advised to start investigating if it is advantageous for them to restructure in order to benefit from the new legislation.

New possibilities in tax bill to amend fiscal unity regime

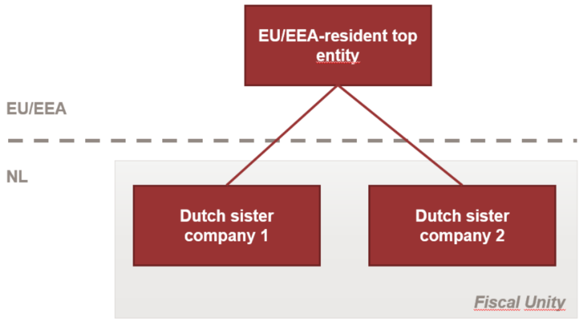
The Dutch fiscal unity regime is a consolidation regime for corporate income tax purposes that provides for the offset of losses and profits and the non-recognition of gains and losses on transactions between members of the fiscal unity. On 12 June 2014, the European Court of Justice ruled in three joined cases that parts of the Dutch fiscal unity regime are contrary to the European principle of freedom of establishment.

In *SCA Group Holding B.V.* and *MSA*, the ECJ ruled that Dutch legislation is contrary to EU law where it allows a Dutch parent company to form a fiscal unity with a Dutch sub-subsidiary held through one or more Dutch intermediate companies, but does not allow this where the intermediate company is a non-resident. In *(X)*, the ECJ also ruled that the Dutch prohibition against forming a fiscal unity between Dutch sister companies with a common EU/EEA parent company is contrary to the freedom of establishment principle in the EU.

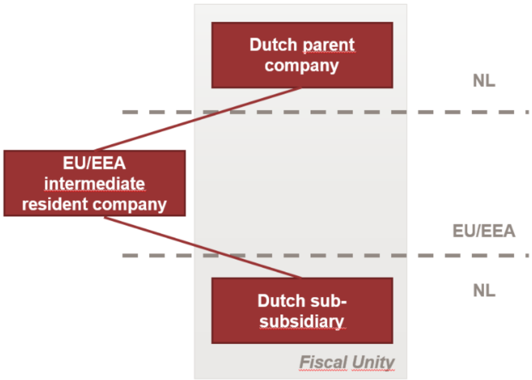
On 15 September 2015, the ECJ ruled in *Groupe Steria* that the French fiscal unity regime conflicts with the EU principle of freedom of establishment. The Dutch State Secretary of Finance has stated that this and other case law should be examined carefully before Dutch legislation is amended again. He has also stated that it is not currently possible to estimate the consequences the bill might have and the measures necessary to respond to these situations. It appears that the State Secretary of Finance will not react to ECJ case law regarding the fiscal unity regimes of other EU/EEA countries. Therefore, it seems that no action will be taken before the ECJ explicitly declares the Dutch fiscal unity system contrary to European Law.

The bill brings the Dutch rules in line with the ECJ's rulings. A new paragraph 2 is added to Article 15 of the Dutch Corporate Income Tax Act, and other paragraphs are amended. Under the bill, it is possible to form a fiscal unity between:

- two Dutch sister companies where an EU/EEA resident top entity has full legal and beneficial ownership of at least 95% of the shares in those sister companies:



- And a Dutch parent company and its Dutch sub-subsidiaries where one or more EU/EEA resident intermediate holding companies have full legal and beneficial ownership of at least 95% of the shares in those sub-subsidiaries.



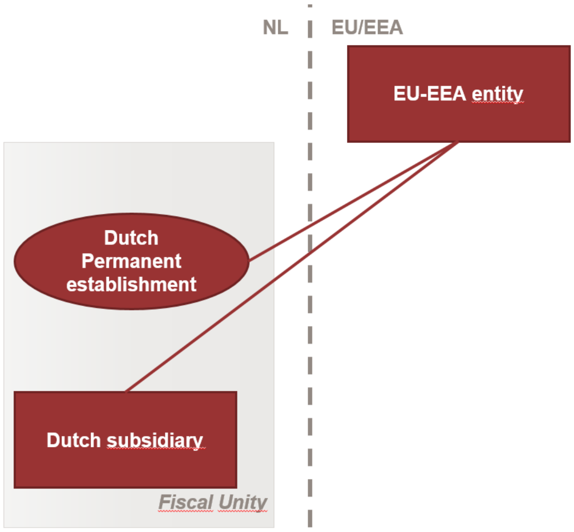
In the first situation, the top entity must be an NV, BV, cooperative, mutual insurance association, or other comparable entity under foreign law. The parties are, in principle, free to choose which sister company is to be regarded as the parent of the fiscal unity; they must specify their choice in the fiscal unity request. But if one sister company directly or indirectly holds one or more shares in the other company, it must be designated as the fiscal unity parent. The activities and assets of the sister company designated as the subsidiary form part of the activities and assets of the fiscal unity parent. Once the sister company acting as the parent is sold, the entire fiscal unity is terminated. This means that parties should examine carefully which sister company should act as the parent. Alternatively, a new sister company can be created to take on this role.

In the second situation, each EU/EEA intermediate resident company should meet the following requirements:

- be a tax resident of another EU/EEA country (Dutch intermediary entities must always be part of the fiscal unity);
- be an NV or BV or other comparable entity under foreign law with capital divided into shares;
- be subject to tax in the EU/EEA member state, without the possibility to choose or obtain an exemption; and
- not have a permanent establishment in the Netherlands.

Including a permanent establishment in the fiscal unity

The bill also makes it easier to include a Dutch permanent establishment of entities resident elsewhere in the EU/EEA in a fiscal unity. Under current law, a permanent establishment and a subsidiary of an EU/EEA entity can form a fiscal unity. The permanent establishment of a foreign entity can form a fiscal unity insofar as the Dutch subsidiary is attributable to the permanent establishment in the Netherlands. The new bill allows fiscal unity in this situation, even if the shares in the subsidiary of the EU/EEA entity do not form part of the assets of the Dutch permanent establishment.



If an EU/EEA company has more than one permanent establishment in the Netherlands via separate EU/EEA intermediate companies, these permanent establishments can also be included in a sister fiscal unity.

Amendment of accompanying fiscal rules

To accommodate these new rules in the existing fiscal unity regime, a number of accompanying rules are amended. Most of these rules contain measures against double loss utilisation.

First, the liquidation loss rules have been amended to avoid a double loss set-off when an intermediate company is liquidated. This new rule makes it impossible to claim a deduction for liquidation losses that have already been taken into account as fiscal unity losses.

Second, the rules for the write down of receivables are amended to prevent the companies within the fiscal unity from double loss utilisation. In the following situation a double loss could occur: a Dutch holding company grants a loan to an EU/EEA intermediate company that on-lends to a Dutch sub-subsidiary that forms a fiscal unity with the Dutch holding company. If this sub-subsidiary is loss-making, these losses suffered by the sub-subsidiary can be set-off within the fiscal unity against the profits of the holding company. In addition, the intermediate company may write down the receivable on the Dutch sub-subsidiary. The bill contains rules that prohibit the holding company from writing down the receivables against the profits of the fiscal unity. Otherwise, a double loss could occur.

Third, the excessive subsidiary interest rules are amended. These rules limit the interest deduction on loans entered into to finance participations. This limitation is determined by a comparison between the total amount of debt and equity. The two new fiscal unity structures mentioned before, might give rise to a double calculation of equity, and this could lead to more participation interest being deducted than intended. If a Dutch sub-subsidiary is included in a fiscal unity through an intermediate entity, the equity of the fiscal unity increases by the intermediate company's equity and the Dutch sub-subsidiary's equity. This double count is eliminated in the bill.

Anticipation to this tax bill

Multinationals, international investors and investment funds with Dutch headquarters or group companies should investigate if these new fiscal unity rules are beneficial to them. It is advisable to check if the proposed legislation has any consequences for international groups with existing fiscal unities or for fiscal unity requests, or if the international group does not yet include a fiscal unity through EU/EEA entities. We would be happy to explore whether any of the new possibilities offered under the bill could improve your structure as of 1 January 2016.

Implementation of the new fiscal unity rules

We recommend that those companies potentially affected by this bill stay abreast of developments, particularly because, if adopted, the changes are likely to become effective as of 1 January 2016. However, the bill may be amended during the legislative process. The Dutch fiscal unity regime may be amended again in the near future, in response to new case law and ongoing developments. We expect more clarification on the interpretation of the new rules as well as guidance from the Dutch tax authorities before 1 January 2016.