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Major changes to Dutch tax consolidation regime

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The Dutch government has issued a legislative proposal providing for major changes to the Dutch tax consolidation group rules. This legislation would essentially render the tax consolidation ineffective for purposes of a number of statutory corporate income tax and dividend withholding tax provisions, including anti-base erosion restrictions on interest deduction and anti-loss trafficking provisions. This could significantly impact the tax position of Dutch taxpayers. The new legislation would, if adopted in current form, have retroactive effect until 25 October 2017.

The current Dutch tax consolidation regime in principle provides for full consolidation of the members of the consolidated group. The default position is that the members are treated as if they are one single taxpayer, including for purposes of certain statutory anti-base erosion restrictions on interest deduction, anti-loss trafficking rules, application of the participation exemption and a remittance discount for Dutch dividend withholding taxes for certain foreign-sourced dividends. The tax consolidation often results in a more favourable application of these statutory provisions than a stand-alone application would entail. Only Dutch taxpayers can be a member of a tax consolidation group. Hence, a Dutch taxpayer with a Dutch group company could be better off than a similar Dutch taxpayer with a foreign EU group company, because a tax consolidation group can be formed in the first structure while it cannot in the second.

In its decisions in Staatssecretaris van Financiën vs. X BV (C-398/16) and X NV (C-399/16), the European Court of Justice decided that this different treatment insofar as it regards EU group companies, is incompatible with EU treaty freedoms. The Dutch government is extremely cautious about the significant budgetary effects of the Netherlands having to allow application of these specific statutory rules as if the relevant Dutch taxpayer and EU group companies formed a tax consolidation group. Therefore, it issued a notice announcing changes to the tax consolidation rules as of 25 October 2017, immediately after the conclusion by the ECJ's Advocate General was issued on the same date.

The essence of the new rules is that these statutory provisions apply to members of a tax consolidation group as if there is no tax consolidation. Hence, the government opts to restrict the benefits of the tax consolidation regime in domestic situations, rather than extending it in cross-border EU structures; obviously, for the budgetary reasons mentioned.

The new rules may significantly increase the tax liabilities of many Dutch corporate groups. In addition, the new rules may result in administrative complexities because application of some of these rules on a stand-alone basis, in particular the anti-base erosion restrictions, may require tracing transactions back over many years. Only very limited grandfathering is provided for; up to a maximum of EUR 100,000 of interest per annum on existing debt attracted for existing tainted transactions is deemed to fall outside the scope of the anti-base erosion restrictions as applied under the new rules.

A new future-proof group taxation regime is expected to eventually replace the current fiscal unity regime, but this may take several years.