Anti-tax avoidance and Dutch COVID-support for specific individual companies
Unofficial translation, Commentary
June, 2020

On 19 June 2020, the Dutch government published a brief summary, in English, of the key points of a letter concerning COVID-support and tax avoidance. As this matter is of broader interest, we have made an unofficial translation of the original Dutch letter to the House of Representatives. We have taken the liberty of incorporating a number of clarifications and remarks in brackets [...]. We note that a number of footnotes have been omitted or editted. The official Dutch text, which is of course leading, is available at https://www.rijksoverheid.nl/.

In addition to the translation and in-text clarifications, a number of comments with regard to the content and wording of the letter and the English summary provided by the government, is available at https://gunntax.com/news/.

This document is for discussion purposes only.

Unofficial translation
of letter to the House of Representatives

From: Ministry of Finance
To: Chairperson of the House of Representatives
[...]

Madam Chairperson,

In the letter of 1 May 2020 the government informed you [the House of Representatives] about the starting points and considerations for support to individual companies that are in serious difficulties as a result of COVID-19. In that letter, it was explained that the government may consider, in exceptional cases where the public interest exceeds direct business interests, intervening to safeguard the public interest. The letter and the assessment framework provide a guide for the assessments and choices that the government will make when providing individual support. Provision of support to individual companies always requires a tailor-made approach and outcome. Each case presents its own problems and consequently has its own solutions. This principle also applies to potential conditions which support may be made subject to.

The government considers it self-evident that if it supports a company financially in hard times, the profits [of that company] should not be channeled away by means of tax structures in better times, without being taxed. Therefore, I am informing your House, by means of this letter, regarding the starting points of the tax-related conditions which the government shall adopt in the potential provision of individual support. Nevertheless, the final shape of the conditions mentioned below will depend on the individual case at hand.

Choice for tax-related conditions
The government is tackling tax avoidance and tax evasion. This is necessary to prevent the potential deflection of costs of general facilities to taxpayers who do not seek out or cross the borders of what is legally possible. In recent years, many measures have therefore been taken. The government has for example introduced conditional source taxation on interest and royalties flowing to low-tax jurisdictions, and passive income realised in these jurisdictions may under certain circumstances be included in Dutch taxation. Also, I have recently announced that

I will devise measures to restrict the flow of dividends to low-tax jurisdictions. With these measures, the government intends to prevent the Netherlands from being used as a gateway to low-tax jurisdictions. In most cases, these measures will lead to an adjustment of the business structure by the company. This however remains the company's own decision.

In line with the goals of the aforementioned legal measures, the government wishes to take additional steps in tackling tax avoidance by companies that wish to be eligible for individual support from the government. As was already indicated in the assessment framework for individual support, reciprocity is expected from these companies. In light of reciprocity it is not appropriate [for companies] to receive support which is financed from tax revenue, only to avoid taxation in better times. A prerequisite for choosing these conditions is that they are verifiable and workable and fit within the nature and the process of the provision of support.This means i.a. that the conditions must be easy to verify and do not encroach excessively on the business operations of the company that has requested support.

In light of the above, the starting point is that two specific conditions are set for the provision of individual support.

1. Place of residence [note: the English news item refers to 'business location'] - The company requesting support, the (direct and indirect) participations and the direct shareholders of that company are not resident in a low-tax jurisdiction. [Note: the concept of a 'low-taxed jurisdiction' is explained below];
2. Transactions - The Dutch establishments (*vestigingen*) of the company requesting support do not pay interest or royalties to branches of the group in low-tax jurisdictions. [Note: the scope of the term 'vestiging' is not expressly defined in this letter.]

With these two conditions the government gives substance to the message that support will not be provided to companies that make use of undesirable tax structures. The conditions correspond with the legal measures which have been taken to tackle tax avoidance and are largely consistent with the conditions set in neighbouring countries for comparable cases. The conditions are explained further in the below.

Condition 1 - Place of residence

The first condition requires that the company requesting support, as well as its direct shareholders and the (direct and indirect) participations of the company, are not located in low-tax jurisdictions. The government uses the list of jurisdictions which are included in the Regulation for low-tax states and non-cooperative states for tax purposes[1]. This list currently includes 24 jurisdictions which do not levy (sufficient) taxes on profits or jurisdictions that are identified by the European Union as being non-cooperative in the field of taxation.

The government will use the starting point that it is proportional, relating to the intended goal of the provision of support, to refrain from denying support if only a modest equity stake is held by shareholders in a low-tax jurisdiction [note: based on the English publication, we understand this to refer to the shareholders *of* the Dutch company, rather than to a shareholding *by* the Dutch company]. In principle, the government applies a threshold of 10%.

An exception to this condition will be made for participations held by the company, which factually perform business economic operational activities in these low-tax jurisdictions. This must involve real activities of the company which is requesting support. A mere minimal presence in the relevant jurisdiction is insufficient. This will be judged on a case-by-case basis. As an example one may consider an internationally operating group that is resident in the Netherlands and holds a participation in a low-tax jurisdiction, whereby the participation has ample staff which produces goods by order of the head office.

Condition 2 - Transactions

Based on the second condition, a company will not receive support if a Dutch establishment of the company provides interest or royalty payments to other establishments of the group in low-tax jurisdictions. This condition applies regardless of the businesslike character of the transaction or the extent of the presence of the company in the low-tax jurisdiction. In this way it is prevented that support funds or future profits flow out of the Netherlands, towards states where little or no taxes are levied on these payments.

Possibilities for restructuring

The tax-related conditions are set in line with the broader scope of tax-related measures with which the government wishes to tackle tax avoidance and tax evasion. Many of these measures lead to undesirable structures being cleaned up and the stemming of the flow of funds from the Netherlands to low-tax jurisdictions. At the same time, these are exceptional times in which

[1] [The *Regeling laagbelastende staten en niet-coöperatieve rechtsgebieden voor belastingdoeleinden* currently contains the following jurisdictions: tax rate <9%: Anguilla, Bahamas, Bahrein, Barbados, British Virgin Islands, Guernsey, Isle of Man, Jersey, Cayman Islands, Turkmenistan, Turks and Caicos Islands, Vanuatu, United Arab Emirates; EU list: American Virgin Islands, American Samoa, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, and Vanuatu

companies unexpectedly find themselves in a difficult position which may in certain cases require swift action. For this reason, companies which do not meet one of the two conditions at the moment support is requested, will be offered the opportunity to meet the conditions within a term of (in principle) 12 months. In such cases it is all the more important that proper arrangements are made with regard to provision of specific support.

Assessment and compliance

The tax-related conditions shall be part of a broader set of conditions which will be taken into account in potential company-specific support. In the assessment of the provision of support and the potential monitoring of compliance, these frameworks will be taken into account.

Sincerely,
The Secretary of State for Finance - Tax Matters and Tax Authority - J.A. Vijlbrief
The Minister of Economic Affairs and Climate - Eric Wiebes

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