Proposed revision of the Dutch tax ruling practice

On 22 November 2018, the Dutch State Secretary of Finance proposed in a letter to the parliament new rules regarding the application and issue of tax rulings in the Netherlands. The idea behind this proposal is to improve the quality of tax rulings for companies with 'real economic activities'.

Background

In the Netherlands companies that operate in more than one country can request for a tax ruling which provides these companies with certainty in advance regarding their taxable presence in the Netherlands. During the last couple of years, the Dutch tax ruling practice gained much attention. On November 22, 2018 the State Secretary has sent a letter to the Dutch parliament in which he announces new rules under which circumstances a company can request for a ruling and he clarifies the changes he wants to implement.

Content of the letter

The aim of the revision is to improve the quality of the tax ruling practice for companies with 'real economic activities' and to increase the robustness of the tax ruling practice in general. The proposed revision covers both procedural and substantive elements. The key elements of the revision are transparency, content and procedural changes. By making changes in these areas, the State Secretary wants to improve the tax ruling practice.

Transparency

A key focus point of the tax ruling revision is to improve the transparency of the tax ruling practice. Currently, the content of a tax ruling is not shared with the public. This will change after the revision is implemented because an anonymised summary of all tax rulings will be published. Furthermore, an annual report will be published with important questions that were raised in tax ruling cases followed by the answer of the tax authority. For the sake of transparency, independent researchers will continue to investigate tax rulings retrospectively.

Economic nexus (content)

Currently, the substance requirements determine amongst others whether or not a tax ruling will be granted to a company. This means that when a company has sufficient substance in the Netherlands, the Dutch tax authority are usually allowed to grant a tax ruling. When the tax ruling revision is implemented it will be more difficult to obtain a tax ruling from the tax authorities.

The revision introduces the term 'economic nexus' as a new requirement that must be fulfilled for a company to obtain a tax ruling. Economic nexus means that a Dutch company must perform so-called 'business economical operational activities'. These activities must be carried out at the expense and at the risk of the Dutch company. Furthermore the activities of the company requesting the tax ruling must match with the functions performed by the Dutch company.

The letter does not specify the term ‘business economical operational activities’, but it does mention that the Dutch company must have sufficient qualified personnel to perform its functions and that the number of personnel in the Netherlands must be in proportion with the total number of personnel of the group worldwide. Further guidance about the economic nexus requirement will be provided in a decree which will be published later on.

Motive test (content)

Apart from the economic nexus requirement, a separate motive test must be performed by the tax authority. Currently, the Dutch tax authority already examines whether a structure was set up in order to avoid Dutch taxation. If the main motive – or one of the main motives – of a structure is to avoid Dutch taxation, no tax ruling will be granted. After the implementation of the revision, the Dutch tax authority will also examine whether a structure was set up in order to avoid international taxation. This implies - according to the letter - that when a group entity is located in a low tax jurisdiction or in a jurisdiction that is included in the EU list of non-cooperative jurisdictions, no tax ruling will be granted with regard to transactions with these entities.

Procedural elements

The tax ruling revision also contains some procedural changes. First of all, the period for which a tax ruling is granted will be reduced from 10 to 5 years. Only in exceptional circumstances will a tax ruling be granted for a longer period. This might for example be the case when there is a long term contract. In order to assure that all tax rulings will be handled uniformly, all tax rulings will be subjected to a second assessment by a newly formed team within the Dutch tax authority. This measure must ensure that in the future there will be no deviations from the general rules.

Implementation

The State Secretary aims to implement the new rules for the tax ruling practice on 1 July 2019. Further guidance on the new rules, such as a decree regarding the application of the economic nexus test, will be provided in the meanwhile.

Concluding remarks

The new rules for the Dutch tax ruling practice are an important development. When implemented, these rules will lead to more transparency and a more uniform approach to tax rulings. Furthermore the rules clarify that in the future only companies that perform real economic activities can request for a tax ruling. It is therefore important to examine whether or not a company meets the requirements of the economic nexus and meet the motive test. We are happy to answer your questions regarding these new rules.

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