



The hybrid mismatch documentation requirement

How can Dutch corporate taxpayers meet this new obligation?

On 1 January 2020, the Dutch implementation of the EU Anti-Tax Avoidance Directive 2 (ATAD2) came into effect for tax years starting on or after that date. ATAD2 aims to neutralize hybrid mismatches resulting in situations with a double deduction or a deduction without inclusion. The Netherlands has introduced a new documentation requirement for Dutch corporate taxpayers on the basis of which they substantiate that the hybrid mismatch rules are (not) applicable during each financial year.

What is the Dutch corporate taxpayer obliged to do?

The documentation requirement generally comes down to the following:

- If the position is taken in the corporate income tax return that the hybrid mismatch rules do not apply, the taxpayer must have documentation in its administration substantiating this; and
- If the position is taken in the corporate income tax return that the hybrid mismatch rules do apply, the taxpayer must have documentation in its administration substantiating to which extent the hybrid mismatch rules apply.

Please find in Annex 1 the ATAD2 flowchart that has been included in the explanatory notes to the legislative proposal in relation to the implementation of ATAD2 which can be used to determine whether the hybrid mismatch rules will apply.

Based on the documentation, the Dutch tax authorities should be able to assess whether the hybrid mismatch rules are applied correctly in the corporate income tax return.

If no documentation is available upon request of the Dutch tax authorities, taxpayers will be given a reasonable amount of time to fulfil this request (generally 6 weeks, but may be longer depending on the complexity and the (hybrid) nature of the transactions). If the documentation is then still not present, the tax inspector can shift the burden of proof regarding the application of the hybrid mismatch rules to the taxpayer and increase the burden of proof without an immediate legal remedy (i.e. the possibility to file an objection and appeal before a court). In addition, (intentional) non-compliance with the documentation requirements can attract criminal charges.

For a Dutch corporate taxpayer which is part of a group that is only operating in the domestic market, the new documentation requirement is fulfilled if the taxpayer can substantiate that no cross border payments are made.

What type of information should be available?

The Dutch Secretary of State of Finance has clarified what type of information should be maintained by taxpayers in order to fulfil the documentation requirement. These include, for example:

- Worldwide organisational charts;
- An assessment (internal or external) of the financial instruments, hybrid entities and permanent establishments used on the basis of the relevant foreign and Dutch tax law;
- Foreign tax returns and/or assessments if it demonstrates the tax treatment of the financial instruments, hybrid entities and permanent establishments;
- An opinion of an expert in the area of foreign tax law.

If the hybrid mismatch rules apply, a substantiated calculation of the applied adjustment should be included in the documentation.

Let's discuss

Dutch corporate taxpayers will need to have documentation containing a substantiation of the position taken in their corporate income tax returns with respect to the (non) application of the hybrid mismatch rules.

Grant Thornton Netherlands can determine the impact of the hybrid mismatch on the tax position of Dutch corporate taxpayers and can assist – in possible collaboration with Grant Thornton member firms - with the preparation of the required documentation.

Contact

If you have any questions about the hybrid mismatch rules or the required documentation, feel free to contact us.



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Annex I

ATAD 2 flowchart

