The Dutch Supreme Court has rendered three important judgments on the treatment of so-called intercompany non-businesslike loans (onzakelijke lening).

In its rulings, the Supreme Court confirms that, in principle, the legal form is decisive when determining whether a provision of funds qualifies as equity or debt. Thus, a loan arrangement between related parties is generally respected.

Based on earlier Dutch case law (Supreme Court, 27 January 1988, no. 23 919), there are only three exceptions to this main rule under which the legal form will be disregarded for tax purposes:

1. The economic substance of the loan differs from its form, *i.e.*, parties intend to make a capital contribution (*schijnlening*)

2. The loan should be considered a participating loan (*deelnemerschapslening*) and

3. Upon granting of the loan, it is already clear to the creditor that the debtor cannot repay the loan (*bodemloze put-lening*)

In its judgments, rendered in November 2011, the Supreme Court upheld this framework and stated that in case a loan arrangement bears a non-businesslike interest rate, an arm's length interest rate should be determined and applied for tax purposes (*i.e.*, an interest rate that does not alter the character of the loan into a participating loan and also takes a businesslike guarantee into consideration). Consequently, the creditor may deduct any losses on its receivable that it incurs for corporate tax purposes. If, however, it is not possible to determine an arm's length interest rate, the loan is qualified as a non-businesslike loan. As a consequence, any losses on the receivable are not deductible for the creditor.

Furthermore, the Supreme Court ruled that assessing whether a loan should be qualified as a non-businesslike loan should be reviewed at the time of providing the loan. It added, however, that a “good” loan during its term can be re-qualified as a non-businesslike loan if the creditor carries out acts which are non-businesslike.

Following these judgments, it will be even more important in practice to maintain transfer pricing documentation supporting the arm's length nature of a loan in order to (i) mitigate the risk of interest rate adjustments by the tax authorities and (ii) to substantiate the deductibility of any losses on loans.
The judgments of 25 November 2011 are in line with a recent lower court decision (Court Arnhem, 15 March 2011, no. 10/00431) which held that losses incurred under a non-businesslike guarantee arrangement are not deductible. The taxpayer in this case has appealed to the Supreme Court, and we are awaiting the final judgment of the Supreme Court.

Should you have any queries regarding these matters, please contact Ágata Uceda and Jian-Cheng Ku.

AUTHORS

Jian-Cheng Ku
Partner
Amsterdam | T: +31 (0)20 541 98 88
[email protected]