Dutch government announces stricter requirements for issuance of tax rulings

Global Tax Alert

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On November 22, 2018, the Dutch State Secretary of Finance sent a letter to the Dutch House of Representatives that includes a proposed change to the Dutch tax ruling practice. The proposed rules relate to: (i) transparency; (ii) process; and (iii) the content of the Dutch tax rulings with respect to cross-border transactions (collectively, the “international tax ruling practice”).

The announced changes with respect to the content will be further developed next year in regulations (supplemented with examples).

When implemented, the new rules should result in a change in the Dutch international tax ruling practice. The State Secretary of Finance aims to publish and implement the rules and examples on or before July 1, 2019.

Proposed measures

The overall purpose of the proposed changes to the Dutch tax ruling practice is twofold: (i) to strengthen the tax ruling practice; and (ii) to continue to issue meaningful rulings to companies with proper substance in the Netherlands.

The new rules primarily relate to companies that want to obtain a Dutch Advance Tax Ruling (ATR) or Advance Pricing Agreement (APA) from the Dutch tax authorities (DTA).
Transparency

In line with the significant international trend toward greater transparency with respect to multinational tax structures, the State Secretary of Finance announced the following new rules with respect to the Dutch international tax ruling practice:

1. The DTA will publish a redacted summary of all international tax rulings it issues
2. The DTA will publish an annual report relating to all international tax rulings and
3. Independent experts will continue to annually investigate whether the issued rulings are lawful and in accordance with Dutch tax law.

Process

All international tax rulings requests will now be forwarded to a central team.

Content

The State Secretary for Finance has announced the following rules to target the issuance of tax rulings for specific structures:

- **Stricter requirements for companies that apply for an international tax ruling.** It will no longer be sufficient for a company to only comply with the Dutch minimum substance requirements. Instead, companies will need to have physical presence ("economic nexus") in the Netherlands. This presence needs to relate to economic/operational activities in the Netherlands that are carried out for the benefit and risk of the Dutch company. The activities need to fit with the function of the company. For example, consideration must be given to whether the company is employing enough people in relation to its overall size and/or its activities in the Netherlands. The costs incurred must also be in proportion with the company's activities/business in the Netherlands.

- **The DTA will more closely examine the purpose of the ruling request.** Rulings will no longer be issued if the sole purpose is to reduce Dutch or foreign taxes. This new rule also applies to rulings for companies based in low-tax jurisdictions or which are resident in a jurisdiction that is on the European Union's blacklist. Low-tax jurisdictions have a statutory tax rate lower than 9 percent.

- **All international tax rulings will have a maximum term of five years.** The five-year term can be extended to ten years only in exceptional cases.

- **There will be a fixed format for all international tax rulings.**

Key takeaways

The State Secretary for Finance explicitly confirmed that a ruling gives companies nothing more or less than certainty about the taxation of a particular business or transaction under Dutch tax law. Because a company is not able to obtain a tax ruling after the proposed rules have become effective does not imply that the company's tax structure does not "work". A tax ruling provides a certain level of certainty but is not mandatory. The proposed measures are part of the Dutch government's aim to make substantial changes to Dutch tax law in the years to come in order to prevent the Netherlands from being used as a conduit to tax havens.

As part of the Dutch government's plan to target tax avoidance, the issuance of tax rulings to multinational companies with limited presence in the Netherlands will not be available in the future.

To that point, companies looking for tax certainty from the DTA need to reconsider their substance in the Netherlands. It is not only the level of substance that will need to be considered, but also the type of substance. For example, a taxpayer may have a distribution center employing 100 people, but this type of substance may not be the right type of substance that will allow the taxpayer to obtain a ruling on substantial intra-group financing arrangements.

Learn more about these developments by contacting either of the authors.

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