KPMG Meijburg & Co Tax Lawyers

Start of first internet consultation on new corporate income tax group rule

On June 17, 2019, the Deputy Minister of Finance launched an internet consultation on an options document essentially containing four possible solutions for a new corporate income tax group rule. Interest groups, businesses, advisors, academics and other stakeholders are invited to submit a response. The consultation includes nine explicit questions that are linked to the possible solutions. The consultation procedure will end on July 29, 2019.

Background

The Deputy Minister already indicated in October 2017 that the current fiscal unity regime should be succeeded by a new, future-proof group rule. The internet consultation had also been announced previously, see for example our memorandum from May 2018.

The desire to create a future-proof group regime has its origins in the EU-law vulnerability of the current fiscal unity regime, as evidenced by the judgment of the European Court of Justice on February 22, 2018 and the final judgment of the Supreme Court on October 19, 2018 concerning the per-element approach. In connection with this, the legislation has been amended in respect of a number of elements, see the Fiscal Unity Emergency Repair Act (*Wet spoedreparatie fiscale eenheid*), adopted by the Upper House on April 23, 2019. However, with regard to other elements, the risks under European law have not (or may not have) entirely disappeared. The aim therefore is to draft a new group rule.

The options document that has now been opened for consultation was drawn up as a result of a kick-off meeting organized by the Ministry of Finance on February 14, 2019. During this meeting, representatives of the business sector, interest groups and the academic community presented their views on a new group regime.

The options document

Prerequisites
The options document outlines the prerequisites for the new rule, starting with the premise that it must be robust and legally consistent. This means that it must be enduring and not open to abuse or budgetary risks. It is therefore considered vitally important that the new rule should be sustainable under EU law. It is also noted that the new rule must contribute to a good tax business climate and must be practicable for both the business community and the Dutch tax authorities (this also applies to any transitional measures). Finally, the options document states that the budgetary implications are essential for the policy choices to be made.

Possible solutions
The options document then discusses four possible solutions:

a) the continuation of the current regime and, if necessary, extension to include remedial measures;
b) complete abolition of the fiscal unity without a replacement group rule;

c) the introduction of a profit or loss transfer rule;
d) the introduction of a cross-border group rule with source exemption.

Re a)
In this scenario, according to the Deputy Minister, the Netherlands would remain the only EU Member State with full consolidation of assets and results. New remedial measures may be needed in the future – in relation to potential risks under European law – which may lead to further complexity and legal uncertainty, for example. During the kick-off meeting, however, there were a number of calls in favor of this solution.

Re b)
The options document notes that this scenario is expected to lead to a structural increase in tax revenue, but that its amount will depend in part on the extent to which businesses adjust their group structure. In the absence of a tax group rule, the desire to simplify the group structure may increase, for example – where possible – by means of mergers and liquidations. The expectation is that on balance there will nevertheless be an increase in the number of additional tax returns and (normally) in the number of notices of objection and appeals. For the rest, the aim is to redirect any increase in tax revenue back into the corporate income tax system, while any loss of tax revenue must also be covered by this system.

The options document also states that this scenario will lead to a limitation of the current possibilities for mutual loss set-off, to compulsory profit-taking on transactions between entities that are now still part of a fiscal unity, and that there will be fewer possibilities to reorganize businesses within a group on a tax-neutral basis. However, corporate income tax will become less vulnerable and it is expected that fewer rules will be needed. During the kick-off meeting, accompanying measures such as an expansion of the tax base and a reduction of the tax rate were also proposed.

Re c)
The introduction of a profit or loss transfer rule would mean that a significant benefit of the fiscal unity would remain, i.e. the possibility of offsetting the profits and losses of different entities within a group. By virtue of such a rule, each group entity will first have to determine its own result for tax purposes and then, within the tax group, transfer its loss or profit to another entity with profit or loss.

A variant is the one in which the tax provisions are in the first instance applied per entity, but subsequently the profits and losses of all entities belonging to the tax group are accounted for by a designated entity of that group ('profit pooling'). Only one corporate income tax return, which is filed by the designated entity, is then required for each group.

According to the options document, the Dutch tax authorities will need at least three years to make the transition to solution c). In this scenario, too, the administrative burden is expected to increase (certainly initially) and mutual transactions will become visible. In addition, according to the options document, a wide range of anti-abuse measures will be required. Because reorganizations will become more difficult, one of the nine questions with solution c) is whether additional internal tax relief for reorganizations is required.

Re d)
This scenario also attributes the most benefits of the fiscal unity regime in cross-border situations. The regime can thus also be brought into line with EU law. In this scenario, the recently introduced emergency repair measures could be canceled. However, the options document notes that such a system does not exist elsewhere and may be vulnerable to new legal proceedings. Furthermore, this system is expected to be very complex and time-consuming. The Deputy Minister again points out that erosion of the Dutch tax base would be facilitated, for example because of new tax mismatches. The government considers this undesirable. In addition, treaty issues may arise and this solution may, without further measures, for example lead to double taxation and complications in the area of enforceability and recovery.

Comments/follow up

It is striking that the accompanying news report and also the options document itself state that the current regime *will* be succeeded by a future-proof tax group rule, but that one of the possible solutions is to continue the current regime. It is abundantly clear that the government does *not* consider the cross-border group rule to be a realistic solution. We also recognize this position from previous statements. From the repeatedly made remark that a future-proof group regime must be introduced, it can be deduced that the Deputy Minister does not prefer abolition without replacement either. It appears from the schematic overview of the four possible solutions included in the options document that the profit or loss transfer rule is the 'best'. By its very nature, the overview has of course been greatly simplified.

In any case, the business community, interest groups and the academic community, among others, can now respond to all possible solutions. On the basis of these responses, the Deputy Minister then aims to send a framework letter, containing an outline of the proposed tax group rule, to the Lower House in the autumn of 2019. A bill would then have to be presented to the Lower House before the end of the present government's term of office (in principle March 2021) at the latest. We will, of course, keep you informed of developments.

Please feel free to contact your Meijburg advisor if you have any questions or would like to discuss the above matters.

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it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.