

2022 Tax Plan package amended via Memorandums of Amendment

On Tuesday, October 5, 2021, the caretaker government presented two Memorandums of Amendment to the Lower House of Parliament. These memorandums had already been announced on Budget Day (see our [Budget Day memorandum](#)). Among other things, the possibilities for setting off holding company losses have been limited and the permanent establishment concept has been expanded for the purposes of withholding tax on interest and royalties. The latter amendment is particularly relevant for non-resident real estate investment funds investing in the Netherlands.

Following on from this, a further Memorandum of Amendment is expected on October 15, 2021 to implement the Hermans motion. Thus, several important additional measures will also be proposed, such as lowering the earnings stripping percentage to 20% and raising the top corporate income tax rate to 25.8%.

These (proposed) measures are discussed below.

1. Corporate income tax

Adjustment of pre-fiscal unity loss set-off against the profit of subsidiary included upon incorporation in the fiscal unity

In its judgment of June 11, 2021 the Supreme Court further clarified the concurrence between the holding company loss rules and the fiscal unity regime for corporate income tax purposes. Under the holding company loss rules, losses incurred in a year in which the actual activity of a taxpayer during (almost) the entire year consisted for 90% or more of the holding of participations or the (in)direct financing of related entities ('holding company loss'), may only be set off against profits realized in a year in which these tests are also met ('holding company profit'). Although the holding company loss rules were canceled as of January 1, 2019, they still apply, pursuant to transitional rules, to losses available for set off that were incurred in financial years commencing before that date. Moreover, any holding company losses still available for set off as of January 1, 2022 will be able to be carried forward indefinitely as of that date.

Losses incurred before a taxpayer was included in a fiscal unity can, in principle, only be set off against the fiscal unity profit attributable to that taxpayer/company. However, the Fiscal Unity Decree 2003 contains additional rules, under which the profit of a subsidiary included upon its incorporation in a fiscal unity is regarded as profit of the parent company for the purposes of setting off any pre-fiscal unity losses. On the other hand, for the purposes of this set off, the activities and the assets of the subsidiary are not attributed to the parent company, so that of relevance is only whether the parent company performs (sufficient) holding company activities on a stand-alone basis. In its judgment, the Supreme Court allowed the wording of these provisions to prevail, as a result of which a parent company may set off any pre-fiscal unity holding company losses it incurred against the other types of profit realized by a newly incorporated and direct subsidiary included in the fiscal unity.

According to Deputy Minister of Finance Mr. Vijlbrief, the implications of this judgment are contrary to the spirit and intent of the holding company loss rules and result in a

significant loss of tax revenue. The repair measures now proposed mean that if the profit of a subsidiary that upon its incorporation was included in a fiscal unity is regarded as profit of a (holding) company and that (holding) company has losses to which the holding company loss rules still apply, then for the purposes of those rules the activities and the assets of that subsidiary are regarded as the activities and the assets of the (holding) company that incorporated that subsidiary. Together with this amendment, the aforementioned provision in the Fiscal Unity Decree 2003 will be included in the Corporate Income Tax Act 1969 ('CITA 1969'). This amendment will take effect on January 1, 2022 and will apply for the first time with regard to financial years commencing on or after January 1, 2022.

2. Withholding tax on interest and royalties

2.1 Expansion of permanent establishment concept

It has been proposed to expand the 'permanent establishment' concept as of 2022. Interest and royalties payable by entities not established in the Netherlands will only be subject to withholding tax if these are attributable to a permanent establishment located in the Netherlands. For the meaning of the permanent establishment concept, reference is now made to Section 3 CITA 1969. It has been proposed that a permanent establishment should also include the sources referred to in Section 17a CITA 1969. Consequently, withholding tax will also be imposed on interest and royalties attributable to, among other things, immovable property located in the Netherlands.

2.2 Clarification of rebuttal provision hybrid measure

It has also been proposed to clarify the rebuttal provision for hybrid entities. As a result of this amendment, hybrid entities will not be subject to withholding tax if not at least one of the underlying beneficiaries (by themselves or via a cooperating group) has a qualifying interest in the hybrid entity. This amendment will have retroactive effect to January 1, 2021.

3. Real estate transfer tax

To lessen the administrative burden for civil-law notaries, several measures have been proposed to simplify the tax return procedure for real estate transfer tax when applying the starter's exemption or the rate of 2%.

4. Further measures to implement the Hermans motion

In addition to these measures, which were already announced on Budget Day, new measures are also in the pipeline as a result of the implementation of the Hermans motion that was adopted by the Lower House of Parliament during the parliamentary debate on the speech from the Throne (*Algemene Beschouwingen*). These measures will be elaborated on in a further Memorandum of Amendment and are expected to be sent to the Lower House on October 15, 2021.

Various parliamentary documents and letters from Ministry of Finance officials indicate that the top corporate income tax rate will be raised to 25.8% for taxable profit above EUR 395,000. The low rate would remain at 15%. In addition, the generic interest deduction limitation (earnings stripping measure) will be tightened by lowering the deduction percentage from 30% to 20% of the EBITDA for tax purposes. It had previously been stated that the risk of 'splitting up' companies in order to be able to make more frequent use of the threshold (EUR 1 million) and thus avoid the earnings stripping measure would also be looked into. It is currently unclear whether such an anti-fragmentation measure is still being considered.

Comments by KPMG Meijburg & Co

The above (proposed) measures could significantly impact the business sector. Raising the top corporate income tax rate will affect the timing of recognizing costs and income, while the earnings stripping and withholding tax measures require a reconsideration of the means of financing, especially in the case of non-resident investment funds that invest in Dutch property.

We will of course keep you up-to-date on these and any other important developments regarding the 2022 Tax Plan package.

KPMG Meijburg & Co
October 6, 2021

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