

The Netherlands announces new tax ruling policy

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Through rulings from the Dutch tax authorities, such as advance tax rulings (ATRs) and advance pricing agreements (APAs), taxpayers can obtain certainty in advance regarding the Dutch tax consequences of specific (international) transactions and the arm's-length nature of transfer prices and the allocation of profits.

On 22 November 2018, the Dutch Government issued a letter that sets out a proposal for a new policy in relation to rulings with an international character. This proposal should be seen as another step to be more transparent and to further combat undesired international structures that e.g., lack relevant substance, while maintaining an accessible and robust ruling process for genuine operations.

The Dutch Government aims to implement the amended policy as of 1 July 2019. Further updates on the implementation are expected in April 2019.

Key elements

The proposal for new ruling policy involves a number of amendments that focus on: (1) transparency, (2) internal procedures and (3) content of the rulings.

1. Transparency

- The Dutch tax authorities will publish anonymized summaries of every ruling with an international character.

- The Dutch tax authorities will publish an annual report on the Dutch ruling practice.
- A committee of independent experts will (continue to) annually investigate the rulings.

2. Internal procedure

- All rulings with an international character will be handled by one centralized team at the Dutch tax authorities. This currently already applies with respect to APAs and ATRs.

3. Content of the ruling

- No rulings will be issued if the sole purpose of the relevant case or structure is to reduce Dutch or foreign taxes or if entities are involved that are established in non-cooperative tax jurisdictions (European Union list) or in a low-taxed jurisdiction (jurisdictions with a corporate income tax rate below 9%).
- The (current) minimum Dutch substance requirements which should be met in order to be eligible for a tax ruling, will be replaced with the Dutch “economic nexus” requirement (set out in more detail below).
- International rulings will have a maximum term of 5 years; this can only be extended to 10 years in exceptional cases.

Economic nexus

In order to have economic nexus in the Netherlands, in short, the following conditions should be met:

- ▶ The Dutch entity should conduct operational activities for its own account and risk.
- ▶ The activities performed by the Dutch entity should be in line with the function of the Dutch entity within the Group.
- ▶ In relation to its operational activities, the Dutch entity should incur an appropriate amount of operational costs.

A mere holding/licensing/financing entity (letterbox company) with only Dutch minimum substance will not be eligible for a ruling. The economic nexus requirement will apply per activity.

Based on the facts and circumstances of each ruling request the Dutch tax authorities will determine whether the conditions set by the new ruling policy are met.

Impact

While not addressed in the letter from the Dutch Government, existing rulings are not expected to be impacted by the new ruling policy as the relevant Dutch tax laws are not amended by this policy.

The publication of ruling summaries may trigger some concern among taxpayers seeking rulings. However, because the Government needs to adhere to its confidentiality obligations, it has emphasized that only a very limited anonymized summary of the ruling will be published.

Although certain cases that today are still eligible for certainty in advance through a tax ruling may no longer be eligible for a tax ruling as of 1 July 2019, the new policy itself will not amend any tax legislation and accordingly, there should not be any impact for technical positions.

The changes to the Dutch ruling policy are in line with the general trend in international taxation and as such covers aspects of international taxation for which many taxpayers were already no longer seeking certainty in advance.

We will continue to monitor the developments and provide more updates as information becomes available.

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