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Law & Tax

Weil

Tax in Distressed Situations

NETHERLANDS

GENERAL

1. Does debt have a specific meaning for tax purposes?

There is no specific definition of debt for Dutch tax purposes. The Dutch civil law form is in principle decisive in this regard. There are three limitative exceptions where the loan is to be regarded as equity for Dutch tax purposes, being (i) the sham loan, (ii) the bottomless pit loan, and (iii) the profit participating loan. If one of these three exceptions does not apply, the loan is considered debt for Dutch tax purposes. Unless specifically mentioned otherwise, the remainder of this commentary assumes that the debt is also treated as debt for Dutch corporate income tax purposes.

Next to the recharacterization of certain debt as equity for Dutch tax purposes, it must be considered whether a loan is considered businesslike or non-businesslike. A loan is considered non-businesslike, if an independent third party would not, under the same conditions and circumstances, have provided the loan and it is not possible to make the loan businesslike with an adjusted fixed interest rate (which in fact is not profit sharing). Non-businesslike loans are treated as debt for Dutch corporate income tax purposes. However, specific rules apply inter alia to interest deductibility, write offs and impairments.

2. Do derivatives have a specific meaning for tax purposes?

Derivatives do not have a specific meaning for Dutch tax purposes. The Dutch corporate income tax treatment of derivatives should be determined on a case-by-case basis, considering the classification for Dutch tax purposes on the basis of the set of rules as set out hereinabove.

3. Generally, are intra-group debts treated differently to external debt for tax purposes?

In principle, intra-group debts and external debts are both treated the same. However, when dealing with intra-group debts, some aspects are different and require additional attention (e.g., the arm's length principle if it concerns intra-group debt, specific interest deduction limitation rules and the conditional withholding tax on intragroup interest payments).

4. Does it make a difference if debt is owed by a partnership or other pass through entity in distress to third parties versus to its partners?

There are no specific rules (and so no essential differences by nature) if debt is owed by a partnership or other pass-through entity in distress to either third parties or to partners under Dutch tax law. Dependent on the structure and relevant facts and circumstances (including which of the parties has a Dutch taxable nexus), there may be certain attention points from a Dutch tax law perspective and hence tax consequences may be different.

DEBT IMPAIRMENT

1. What are the key tax considerations on a debt impairment for the creditor?

For Dutch tax purposes, receivables are in principle valued at nominal value at the level of the creditor. An impairment to fair market value can for Dutch tax purposes be taken into account in three cases: (i) if the position of debtor has worsened (based on a subjective and reasonable judgment of the creditor considering the relevant information available at that time); (ii) in case of a foreign currency receivable, if the relevant foreign exchange rate has dropped; or (iii) in case of a fixed interest rate, if the market interest rate has increased and it is the creditor's intention not to retain the receivable until maturity date.

No deductible tax loss as a result of a foreign currency loss or increased market interest can be taken into account if there is a hedged position. In case of non-businesslike loans, no deductible tax loss can be taken into account (except for any liquidation losses). There are specific anti-abuse rules in case impaired debt is disposed of or converted into equity if the impairment was taken as a deduction for Dutch corporate income tax purposes.

2. What are the key tax considerations on a debt impairment for the debtor?

The impairment of debt by the creditor should have no adverse Dutch corporate income tax consequences for a debtor.

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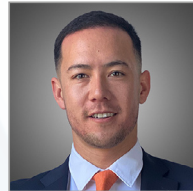
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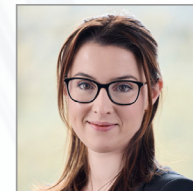
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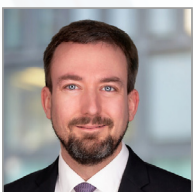
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