LOYENS & LOEFF
Law & Tax

Further. Better. Together.

17 September 2024

Budget Day 2024
Real Estate Update

On 17 September 2024, the Dutch government published the 2025 Budget Plan, as well as proposed changes to tax legislation (Tax Plan). In this update, we will summarise the latest proposals and legislative changes that will come into effect in the near future and which are relevant for the Dutch real estate market.

Budget Day proposed changes to tax legislation

The Tax Plan contains the following real estate related tax measures.

Reduction of the RETT rate for residential real estate

As per 1 January 2026 the default real estate transfer tax (RETT) rate of 10.4% will no longer apply to the acquisition of residential real estate. For the acquisition of residential real estate, a new RETT rate of 8% is proposed as per 1 January 2026. The 8% RETT rate for residential real estate is expected to only apply if at the time of acquisition, the acquired real estate is 'in its nature fit for residential purposes'. The 8% RETT rate is therefore not expected to apply to the acquisition of existing non-residential real estate that – after acquisition – will be redeveloped / transformed to residential real estate. Typically, the execution of the deed of transfer constitutes the RETT taxable event and the date of execution is decisive for the applicable RETT rate. Remarkably, the change in legislation is not included in the 2025 Budget Plan proposals, rather, it is stated that this RETT rate reduction will be included in a to be published amendment to the 2025 Budget Plan.

VAT rate increase for hotel stays, holiday letting and short stay

The reduced 9% Dutch VAT rate for hotel and comparable stays will no longer apply per 1 January 2026. From that date, the standard 21% Dutch VAT rate will apply to these services.

The abolishment of the 9% Dutch VAT for hotel stays will not only impact hotel and holiday home operators. This measure will also impact short-stay organizations that lease out furnished homes as well as employers and employment agencies that provide short-stay housing to their staff.

The standard VAT rate will apply to services performed as per 1 January 2026. In deviation of general VAT rules, also prepayments for such services before that date will be subject to the standard VAT rate.

Introduction of VAT revision period for real estate related investment services

The Dutch government proposes to introduce new administrative obligations for all owners and users of real estate which procure real estate related investment services. Such services are characterized by their durable nature. This involves services to real estate, such as the renovation, extension, repair or replacement and maintenance of such property. Demolition work associated with renovation is also included. The government published a draft proposal to introduce a (five-year) VAT revision period for such services with an invoice amount of € 30,000 or higher. Although the draft proposal aims to address VAT-saving practices related to "short stay structures" with renovated residential property and property that's redeveloped from non-residential to residential property, the proposed revision period will affect all entrepreneurs owning or using real estate. A transition period is proposed, with the measure set to take effect on January 1, 2026.

This measure is announced in the 2025 Budget Plan, however, the details were already included in the draft end of year policy decree 2024 that was published for consultation on 5 September 2024. The definitive end of year policy decree 2024 is expected to be published at the end of December 2024. Earlier this year, a draft legislative proposal introducing the revision of VAT on investment services was published for consultation (we refer to our blog via this link).

Earnings stripping rule

Under the earnings stripping rule the deductibility of net interest expenses, i.e. the balance of interest expenses and interest income, including foreign exchange results on loans, is currently limited to the highest of: (i) 20% of the fiscal EBITDA and (ii) a threshold of EUR 1,000,000. The ratio is applied at taxpayer level and no distinction is made between intra-group and third-party interest and costs.

In the Tax Plans 2025 two changes are proposed:

- **The increase of the fiscal EBITDA cap from 20% to 25%**
  This change aims to bring the Dutch implementation of the rule as embodied in the EU Anti-Tax Avoidance Directive (**ATAD**) more in line with the implementation in other EU Member States.
- **Tightening of the earning stripping rule for certain real estate companies**
  As announced on Budget Day 2023, the deductibility of interest under the earnings stripping rule will be tightened for real estate investment companies. To prevent the splitting up of companies for the purpose of using the EUR 1,000,000 threshold at the level of each taxpayer, the EUR 1,000,000 threshold will no longer apply at all for those real estate investment companies, whose adjusted assets - for at least half of the year - consist for 70% or more of immovable property to the extent that such immovable property is made available to non-related persons. Such taxpayers can, from 1 January 2025 only rely on the (proposed) 25% EBITDA threshold.

See 'Dutch Budget Day 2024: proposed changes for 2025' for other proposed direct tax measures.

New group concept in the Withholding Tax Act 2021

The Netherlands leaves withholding tax on interest payments, royalty payments and dividend payments to affiliated entities in low-tax jurisdictions or in jurisdictions that are EU blacklisted, to certain hybrid entities and in abusive situations.

Mainly for structures involving a hybrid entity, the currently applicable cooperating group definition creates uncertainty. Especially since the Dutch tax authorities do not provide certainty in advance regarding the presence or absence of a cooperating group. Additionally, the current definition may lead to withholding tax being imposed in cases where it is not intended resulting in overkill.

To combat this negative impact on the Dutch investment climate the Tax Plans 2025 propose a new group definition in the Withholding Tax Act 2021. The proposed new group definition is referred to as a 'qualifying unity'. This concept should apply to situations where entities:

- are 'acting together';
- with the main purpose, or one of the main purposes, to avoid withholding tax being levied at one of those entities (**Motive Test**).

The burden of proof regarding the existence of a qualifying unity lies with the tax inspector.

Given the very welcome introduction of the Motive Test in the qualification of a qualifying unity, the given examples in the Tax Plans 2025 and the possibility to obtain certainty in advance regarding qualifying unity, it is expected that only structures that are (partially) set-up to avoid withholding tax will be targeted.

See 'Dutch Budget Day 2024: proposed changes for 2025' for other proposed direct tax measures.

Extension related-party definition following changed entity classification rules

The CITA applies for certain provisions a 'related-party' definition, which is especially relevant to the interest deduction limitation that restricts the deduction of intragroup financing costs in certain 'abusive' situations (article 10a CITA). Since Dutch partnerships, foreign equivalent entities, and foreign tax-transparent entities qualifying for the symmetrical approach will be classified as transparent for Dutch tax purposes as of 1 January 2025 (see also below), this related-party definition would no longer apply to such partnerships and entities. It is therefore proposed to extend the related-party definition, including the cooperating group definition, with aforementioned partnerships and entities.

See 'Dutch Budget Day 2024: proposed changes for 2025' for other proposed direct tax measures.

Legislation to come into effect per 1 January 2025

In addition to the proposals noted above, a number of legislative proposals were already fully adopted and will come into effect automatically as per 2025.

Cancellation of the RETT concurrence exemption for certain share deals

A new 4% RETT-rate will apply to the acquisition of shares in companies owning newly built real estate that is (or will be) used for VAT exempt purposes such as residential real estate. The measure will enter into force as from 1 January 2025. A transitional regime will apply for certain ongoing development projects. This measure was included in the 2024 Budget Plan and adopted by the Dutch parliament.

Background

Currently, newly built real estate can be acquired without VAT or real estate transfer tax (**RETT**), by acquiring all the shares in the relevant real estate company (**REC**), as the transfer of such shares is out of scope of VAT and exempt from RETT. This RETT exemption follows from the so-called *Transparency*-rulings, in which the Supreme Court ruled that the RETT concurrence exemption also applies to a share deal if the concurrence exemption would have applied to a direct transfer of real estate (asset deal). A direct transfer of newly built real estate is taxed with VAT and benefits from the RETT concurrence exemption. The share deal strategy is used often by developers of properties with VAT exempt lease, such as residential or healthcare.

The Dutch government considers the difference in taxation between asset deals and share deals under the current rules a disturbance of the level playing field and intends to resolve it by levying RETT on certain share deals.

To this end, the RETT exemption for share deals of RECs owning building land and newly built real estate that is (partly) used for VAT exempt purposes will be abolished.

RETT exemption remains for real estate used for VAT taxed purposes

The RETT exemption will not be abolished for acquisitions of shares in companies owning new real estate that is used for activities allowing at least 90% VAT recovery in the two years following the acquisition. Reasoning behind this exception is that the RETT proposal is aimed at countering VAT saving structures, and such VAT savings are not considered a motive for a share deal in case of at least 90% VAT recovery for the real estate asset. Consequently, share deals with newly built logistical, office and retail real estate should in most cases still qualify for the RETT exemption, as these types of assets are often rented out VAT taxed for at least 90%.

New RETT rate of 4%

To prevent overkill with this measure, a new RETT rate of 4% is introduced which will apply to acquisitions of shares in companies with building land and new real estate for which the VAT recovery right is less than 90%. During the construction of this new real estate at least part of the VAT on construction costs is not recoverable, justifying a lower RETT rate than the general rate of 10.4% (RETT-rate 2024).

Transitional law

There is transitional law for ongoing development projects. Acquisitions of shares in companies owning building land or newly built real estate will qualify for the RETT exemption if a letter of intent was agreed in writing with the intended buyer before 19 September 2023, 15:15 hours, provided that the acquisition of the shares takes place ultimately on 1 January 2030. In order to apply for the transitional law acquirers should have filed a notification with the Dutch tax authorities within 3 months from 1 January 2024. Further, it should be plausible that the conclusion of the letter of intent was not mainly aimed at making use of the transitional law.

Limited partnerships

The RETT concurrence exemption may also apply to the acquisition of a limited partnership interest or interests in comparable, tax transparent vehicles for whose account building land or newly developed real estate is held. Similar to the acquisition of shares, the acquisition of such an interest is not taxed with VAT. In the wake of the abolition of the RETT concurrence exemption for certain share deals in respect of RECs, the application of the RETT concurrence exemption on the acquisition of an interest in a limited partnership and similar vehicles is expected to be abolished to the extent the partnership holds new real estate that is used for activities allowing at least 90% VAT recovery in the two years following the acquisition. Instead, the 4% RETT rate should also extent to these acquisitions. The policy decree of the State Secretary of Finance on the application of the concurrence of RETT and VAT are expected to be updated to reflect this.

New Dutch entity tax classification rules

As of 1 January 2025, Dutch partnerships and equivalent foreign partnerships will be classified as transparent for Dutch tax purposes, except when the partnership would also classify as non-transparent FGR (i.e., in such case the FGR classification prevails). This includes existing non-transparent Dutch limited partnerships (CVs), which will cease to be Dutch corporate taxpayers immediately preceding 1 January 2025, due to the transition into a tax transparent classification. In addition, the tax classification rules applicable to Dutch funds for joint account (FGRs) are amended as of 1 January 2025. In short, an FGR may only be non-transparent, if it is: (i) regulated and (ii) the participations in the FGR are freely tradeable.

The Dutch tax entity classification rules for entities formed under foreign law will also change. As a starting point, they will still be classified in accordance with the classification of an equivalent entity governed by Dutch law (the similarity approach). However, and this is new, if no clear Dutch equivalent entity can be identified, the classification for foreign tax purposes would generally be followed also for Dutch tax purposes, if the foreign entity is based outside the Netherlands (the symmetrical approach). Foreign entities with no clear Dutch equivalent that are based in the Netherlands will always be classified as non-transparent for Dutch tax purposes and will thus be Dutch domestic taxpayers. As the new entity tax classification rules could result in tax being due (dry tax charge) as a result of the transition from a non-transparent to a tax transparent classification, during 2024 transitional law provides, subject to certain conditions, for several facilities to mitigate this exposure for both the entities concerned as well as their participants.

The new classification rules and the transitional law are described in detail in our Quoted of June 2024.

Abolishment of direct real estate as qualified investment for fiscal investment institutions

A company can, under conditions, qualify for the fiscal investment institution regime (*FBI-regime*) resulting in a 0% corporate income tax rate and a mandatory annual distribution of profits subject to generally 15% Dutch dividend withholding tax. As of 1 January 2025, a fiscal investment institution may no longer hold *direct* investments in Dutch real estate. It, inter alia, remains possible to hold direct investments in non-Dutch real estate and indirect investments in Dutch real estate owned by a regular taxpayer.

Disclaimer
Although this publication has been compiled with great care, Loyens & Loeff N.V. and all other entities, partnerships, persons and practices trading under the name ‘Loyens & Loeff’, cannot accept any liability for the consequences of making use of the information contained herein. The information provided is intended as general information and cannot be regarded as advice. Please contact us if you wish to receive advice on this specific topic that is tailored to your situation.