LOYENS & LOEFF
Law & Tax

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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.

DEBT AMENDMENT, REFINANCING AND NOVATION

1. What are the key tax considerations on a debt amendment?

Where an amendment to an existing debt results in a new debt for commercial accounting purposes this could trigger taxable results. If the debt amendment results in the formal or economic waiver of debt, this may give rise to taxable debt waiver income at the level of the debtor. This may be different if the amendment only changes terms in a way that is more favourable for the borrower with the result that there is no formal or economic waiver of the existing debt. In addition, Dutch debtors may need to consider whether the amendment affects interest deductibility under the Dutch tax interest deduction limitation rules.

2. Does the deferral of any payments of interest or repayments of principal trigger tax consequences?

For Dutch corporate income tax purposes, interest income and expenses are generally accounted for on an accrual (rather than cash paid) basis. Therefore, the deferral of any interest accrual may have an impact on the timing of recognition of any interest income and expense.

For interest payments and expenses which are subject to the Dutch conditional withholding tax (pursuant to the Dutch Withholding Tax Act 2021), accrued interest that has not been paid during the calendar year will be deemed to have been paid on 31 December of that year. If subsequently an actual payment is made, any interest accrued in a previous year can be deducted from the payment to the extent it is made plausible that the accrued interest has already been taken into account for purposes of this withholding tax.

Unless the deferral has the effect of giving rise to accounting adjustments (see above), the deferral of any repayment of principal should in principle not trigger adverse Dutch corporate income tax consequences for the debtor.

Assuming the debt was not discounted and has not been impaired by the creditor, repayment of principal should not give rise to any adverse Dutch corporate income tax consequences for a Dutch debtor or creditor. Where a debt was issued at a discount or has been impaired by the creditor, any repayment of the principal amount which exceeds the impaired amount of debt recorded in the accounts of the creditor or which constitutes repayment of the discount element, would be taxable in the hands of the creditor for Dutch tax purposes.

3. What are the key tax considerations on a debt refinancing?

Similar to a debt amendment, if a debt refinancing results in a formal or economic waiver of debt, this may give rise to taxable debt waiver income at the level of the debtor. Moreover, Dutch debtors may need to consider (i) the applicability of the conditional withholding tax on interest payments, and (ii) interest deductibility.

i. **Conditional withholding tax:** The Netherlands has a conditional withholding tax on intragroup interest payments. The withholding tax is levied on interest payments to jurisdictions with a statutory profit tax rate of less than 9% or to jurisdictions that are EU blacklisted, to certain hybrid entities and in abusive situations.

ii. **Interest deductibility:** Interest is generally a deductible expense for Dutch corporate income tax purposes on an accruals basis. However, there are a number of detailed rules which can apply to restrict deductibility of interest for Dutch corporate income tax purposes. This includes interest deduction limitations on: long term low-yield related party loans, the general earnings stripping rule, 'abusive' situations.

When debt is refinanced in intra-group situations the arm's length character of the debt refinancing (and the terms and conditions of the debt itself) should be taken into account.

4. Does rolling up interest or satisfying interest through issuing "payment in kind" notes give rise to any tax consequences?

For Dutch corporate income tax purposes, interest income and expenses are generally accounted for on an accrual (rather than cash paid) basis. Therefore, the rolling up of interest and satisfying interest through issuing "payment in kind" notes as such should not have adverse Dutch corporation tax consequences for either a Dutch creditor or a Dutch debtor.

Based on commentary to the OECD Model Convention, the term "paid" has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom. The same holds true for the

Netherlands, where interest is considered paid at the moment at which the interest is paid or offset, made available, becomes interest-bearing or has become due and payable. As a result of the roll-up, addition to the loan principal and becoming interest bearing, the interest is therefore considered to have been paid.

From a VAT perspective it is noted that the payment in kind can be subject to VAT. This depends on the nature of the payment in kind.

- **Roll-up of interest**
  - For interest payments and expenses which are subject to the Dutch conditional withholding tax (pursuant to the Dutch Withholding Tax Act 2021), accrued interest that has not been paid during the calendar year will be deemed to have been paid on 31 December of that year.
  - Any rolled-up interest that becomes part of the principal amount could become subject to accruing interest. As a result, the interest deduction limitations should be considered.

5. **Does the novation of debt by a debtor to another group company trigger any adverse tax consequences?**

   As long as the transfer of the debt in intra-group situations takes place on arm's length terms there should be no Dutch corporate tax issues of the debt novation itself. Upon the novation of debt, the original debtor will ordinarily owe the new debtor an amount equal to the debt assumed by the new debtor. Generally, this will take the form of a new intercompany balance between the two entities. With respect to the new intercompany balance and the new debtor, the general points to consider in respect of intercompany debt would be equally applicable (e.g., (i) the applicability of the conditional withholding tax on interest payments and (ii) interest deductibility).

6. **Are there any specific tax considerations to bear in mind where the security / guarantee package is amended as part of the debt amendment / refinancing?**

   In general, no adverse Dutch corporate income tax consequences are expected when amending the security / guarantee package. In intra-group situations, transfer pricing principles should be taken into account to determine whether the guarantor should be remunerated for providing that guarantee for the benefit of the borrower.

   In related party situations, there is a difference between a guarantee to obtain a loan as such and a guarantee to loan funds under better circumstances.

   In case a guarantee of a group entity leads to borrowing under better terms, the borrower then borrows on the basis of the credit rating of the guarantor. If this leads to lower costs for the borrower, it will be willing to pay a fee for the guarantee (the guarantee fee). In case the guarantee fee not only supports better terms, but also increases the borrowing capacity, the OECD guidelines prescribe that the increased borrowing capacity is actually classified as a loan to the guarantor (followed by a capital contribution into the borrowing entity). No guarantee fee can be charged for this as the transaction (the guarantee) is deemed to take place in the capital domain.

DEBT RELEASES

1. **Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?**

   In principle, a businesslike waiver (i.e., if an unrelated party would also have decided to waive the loan in the same circumstances) triggers taxable debt waiver income at the level of the debtor. A non-businesslike debt waiver (i.e., pursued for shareholder motives) does not result in taxable income but, rather, in a deemed capital contribution or deemed dividend distribution (as applicable). Subject to certain conditions (inter alia that the receivable is non-recoverable and expressly waived (e.g., in case of bankruptcy, moratorium of payment or in the Dutch Scheme (i.e., WHOA)), debt waiver income may effectively be exempt at the level of the debtor to the extent it exceeds (i) current year losses (excluding debt waiver income) and (ii) available carried-forward tax losses (the **Dutch Debt Waiver Exemption**).

2. **Does the release of debt trigger any withholding or indirect tax? If so are there any reliefs or exemptions?**

   A debt release as such should not give rise to any Dutch withholding or VAT exposure. A debt release does not affect the VAT position of the creditor.

3. **Can a creditor claim a deduction in respect of any debt that is released?**

   A businesslike waiver by the creditor is in principle tax deductible at the level of such creditor (as far as losses were not already previously taken into account as impairment). If the borrower is a related party and the loan was impaired by the creditor for Dutch tax purposes prior to or upon the waiver and such creditor waives the loan, said prior impairment has to be reversed. At the same time, the gain at level of the creditor can be added to a revaluation reserve. This is not applicable to the extent the gain from the waiver is sufficiently taxed at the level of the (related party) debtor.

4. **Is the position different if the debt being released is a trade debt?**

   No, this is not different for Dutch tax purposes.

5. **Does the release of an uncalled guarantee obligation trigger any adverse tax consequences? Is the position different if the guarantee has been called?**

   Assuming it is not recognised as a liability for accounting and Dutch tax purposes, the release of an uncalled guarantee obligation should not have any adverse Dutch tax consequences. If the borrower has defaulted and the guarantee has been called but no payment has been made under the guarantee, this would likely generally be treated as a liability for Dutch tax purposes. If so, the same principles set out above in “Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?” equally apply in that case.

6. **Do any adverse tax consequences arise on the release of liabilities owed under a derivative contract?**

   If the release of liabilities owed under a derivative contract would give rise to debt release like income for accounting purposes, this would in principle result in taxable income for a Dutch debtor. In that case the same principles set out above in “Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?” equally apply in that case.

DEBT FOR EQUITY EXCHANGE

1. **What are the key tax considerations on a debt-for-equity exchange for the creditor?**

   A debt for equity swap can take place either via: (i) the issuance of new shares by the debtor up to the nominal amount of the receivable and contribution of the receivable to fulfil the contribution obligation; or (ii) the contribution of a receivable by the creditor on (informal) share capital (newly) issued by the debtor, whereby debt is cancelled by operation of law in the hands of the debtor.

   A debt-for-equity swap does in principle not result in profit for the creditor, but in a (deemed) capital (or share premium) contribution by the creditor in the debtor. Such debt for equity swap can take place at nominal value (including accrued interest).

   There is a reversal of prior impairment of the receivable at the level of the creditor, resulting in a gain when debt is converted (i.e., similar to the consequences in case of debt waiver (see “Can a creditor claim a deduction in respect of any debt that is released?”).

2. **What are the key tax considerations on a debt-for-equity exchange for the debtor?**

   A debt-for-equity swap of a non-recoverable/distressed loan does in principle not result in profits for the debtor, but in a (deemed) capital (or share premium) contribution by the creditor in the debtor.

   Any latent foreign exchange gain or loss on the debt will be realized upon the debt-for-equity swap.

   The existing tax losses are in principle not affected. However, loss compensation may be limited in case of a substantial change of ownership (see “Are there any adverse tax consequences arising from a change of control or break of a tax group?”)

3. **Where warrants or similar instruments are issued as part of a debt restructuring does this trigger any adverse tax consequences?**

   The issuance of warrants or similar instruments (such as contingent value rights) can result in different Dutch tax consequences depending on the specific facts and circumstances of the case at hand. This may in any case be relevant for (among others) the Dutch dividend withholding tax and Dutch conditional withholding tax positions, the Dutch participation exemption and the Dutch fiscal unity regime. This should be verified on a case-by-case basis also taking into account the accounting treatment of the relevant warrants or similar instruments.

4. **What are the key tax consequences of capital contributions by a parent company into its subsidiary?**

   Capital contributions as such should not have any adverse Dutch corporate income tax consequences. However, capital contributions can influence various aspects, including:

   - For the parent entity making the capital contribution, the capital contribution leads to an increase of the cost price of a participation by the fair market value of the receivable. For the subsidiary receiving a capital contribution the capital is increased by the nominal value of the debt.
   - Capital contributions can influence the ownership structure. In case the ownership interest falls below 5%, this can for instance influence the application of the participation exemption and the dividend withholding tax exemption. If the ownership interest falls below 95% this can lead to the dissolution of the entity from the fiscal unity for Dutch corporate income tax purposes.
   - In case of capital contributions into a Dutch entity, the tax base to be taken into account by the Dutch taxpayer will be at maximum (for assets) or at minimum (for liabilities) the value that is taken into account in the contributor's or distributor's or transferor's profit tax base.

FEES AND TRANSACTION COSTS

1. **Is there any adverse tax impact in respect of common restructuring fees, for example, consent fees?**

   There is in principle no adverse Dutch corporate tax impact of restructuring fees themselves, with respect to deductibility we refer to "Are transaction costs deductible for tax purposes and is any VAT recoverable?" We note that financing costs (banking fees, etc) may also qualify as 'interest' under the conditional withholding tax and earnings stripping rules which could require further attention.

   From a VAT perspective it is of importance to have a closer look at the financing costs as well. It is of relevance to determine for which specific activity the costs are used. If the respective costs are attributable to the rendering of an interest-bearing loan to a party established in the EU, the VAT on these costs cannot be reclaimed.

2. **Are transaction costs deductible for tax purposes and is any VAT recoverable?**

   Before the question should be answered as to whether costs are non-deductible acquisition or disposal costs, the costs must first be allocated to the appropriate entity. This allocation predominantly revolves around whether all costs related to a disposal (or in some cases an acquisition) should be borne by the shareholders entering into the transaction, or whether some part of the costs should be borne by the target. At the level of the target such costs would in principle be ordinary deductible costs.

   Common costs in a transaction relate to financing, acquisition costs and "basic operating costs". Below the deductibility of each of these categories is discussed:

   - **Financing costs:** Financing related costs (i.e. costs that are made to obtain the financing) should generally be tax deductible, assuming that the interest expenses on the debt itself are tax deductible. Financing costs may be deductible at once or capitalized and amortized over the term of the loan to which the financing costs relate. In case of a one-time payment which actually is a prepayment of interest, these costs should be capitalized and amortized over the term of the loan. We note that financing costs (banking fees, etc) may also qualify as 'interest' under the conditional withholding tax and Dutch earnings stripping rules which could require further attention.

- **Acquisition / disposal costs:** Costs in connection with an acquisition or disposal of a participation which qualifies under the Dutch participation exemption are non-deductible. Such acquisition or disposal costs must have a direct causal link with the acquisition or sale.
- **Basic operating costs:** Basic operating costs are costs inherently linked to the legal form of the taxpayer. These costs are primarily related to the existence of the taxpayer as a legal entity and depend on the amount of capital and not on how the capital will be used. They should not be defined as non-deductible costs in relation to acquisitions or disposal.

From a VAT perspective it is noted that activities consisting of the acquisition, the holding and the sale of shares in principle do not qualify as an economic activity. This also means that, in principle, VAT on costs cannot be reclaimed if the costs in question are attributable to these activities.

In other words, the main rule is that VAT on costs (to the extent) used to acquire/keep/sell subsidiaries is not recoverable. Holding activities do also affect the input VAT deduction right on general costs, being costs not attributable to a specific activity of the company.

The primary exception to the main rule that VAT on costs directly attributable to the acquisition, holding and sale of shares cannot be deducted applies in the case of a majority shareholder who is involved in the respective subsidiary and this involvement is accompanied by performing economic activities against remuneration to that subsidiary. The term ‘involvement’ must be interpreted as performing any form of an economic activity against remuneration to the respective subsidiary.

If the latter is the case, costs directly attributable to the acquisition, holding and sale of shares of subsidiaries are to be considered general costs and the VAT on these costs can then be reclaimed based on the pro rata of the company (i.e. the ratio between its VAT taxed economic activities and its total activities).

DEBT ENFORCEMENT

1. **Aside from insolvency proceedings, what are the key methods of enforcement and their tax impact?**

In order to force payment of a debt, a creditor can initiate court proceedings to obtain a court order for payment. Such an order is required for a creditor to be able to enforce over a debtor’s assets, unless the claim has been laid down in a notarial deed. With a view to ensure recourse, a pre-judgment attachment can be levied over a debtor’s assets before a claim has been established by a court.

To the extent a creditor’s claim has been secured by its debtor (or a third party), such security can be enforced from the moment a payment default exists in respect of the secured obligations.

A creditor can furthermore petition the court to declare its debtor bankrupt. To that end, the creditor will have to prima facie prove to the court that i) the debtor has at least two creditors (one of them being the filing creditor) and ii) that at least one of these two debts is currently due and payable.

2. **If the enforcement results in the creditor taking ownership of equity or assets, what are the key tax considerations to bear in mind?**

When a creditor obtains ownership of the asset via enforcement, the following key tax considerations should be kept in mind:

- Dutch corporate income tax would be due at the level of the debtor if and to the extent the fair market value of the assets acquired by the creditor would be higher than the tax book value of the relevant assets in the books of the debtor.
- When real estate (or shares in a real estate company) is acquired, real estate transfer tax will likely be due.

When shares are acquired, the following key tax considerations should be kept in mind:

- In case of a share transfer, the tax book values of the assets (and liabilities) at the level of the debtor in principle remains unchanged and as such, any difference between the fair market value and the tax book value of the assets (and liabilities) is not realised at the time of the transfer. A court case is pending on the question whether upon a change of control of 30% or more, latent losses need to be taken into account (as deemed realized).

- In case of a Dutch transferor, the transfer of the shares itself should in principle not result in any taxation due if the Dutch participation exemption applies at the level of the Dutch transferor.
- Change of control rules could be triggered and the fiscal unity could be (partly) deconsolidated as part of the transfer of the shares (see "Are there any adverse tax consequences arising from a change of control or break of a tax group?")

3. Are any specific tax considerations arising on payments or transferring security under guarantees as opposed to the debt?

When transferring a security under guarantee, it needs to be analysed whether the transaction is capital related or debt related.

In general, if the guarantor makes a payment to the counterparty, the question arises whether a recourse claim on the guaranteed entity may need to be booked, and if not, whether a deemed dividend or deemed capital contribution should be recognized.

4. Are there any adverse tax consequences arising from a change of control or break of a tax group?

The breakup of a fiscal unity may trigger several claw-back provisions potentially resulting in a taxable result, such as:

- In relation to assets/liabilities that have been transferred within the fiscal unity within the last 6 years (or 3 years in specific facts and circumstances) with a higher (in case of an asset) or lower (in case of a liability) fair market value than the tax book value at the moment of the transfer, such asset/ liability should be revalued at fair market value, immediately prior to the moment of leaving the fiscal unity by the respective transferor or transferee;
- Receivables between fiscal unity members should be valued at nominal value or, if lower, the going-concern value, immediately prior to the moment of leaving the fiscal unity. At the same time, the debts should be valued at nominal value.
- Tax losses of the fiscal unity in principle remain with the parent. Subject to certain conditions, losses may be transferred to subsidiaries leaving the fiscal unity to the extent those losses are attributable to those subsidiaries. Similar rules apply in respect of carry-forward interest under the earnings stripping rule and other tax attributes.

Companies included in a fiscal unity are jointly and severally liable for the Dutch corporate tax debts of the entire fiscal unity for the period during which they were part of the fiscal unity. This liability will in principle only materialise if the parent fails to remit the CIT due to the Dutch tax authorities.

The break-up of a fiscal unity for Dutch VAT purposes should not trigger similar claw-backs as described above. However, note that members of a VAT fiscal unity may be secondarily liable for VAT of other group members for the period in which the subsidiary was part of such fiscal unity. Moreover, transactions between members that were part of a fiscal unity for VAT purposes will become subject to VAT again (unless the transaction is exempted from VAT). Moreover, the break-up of a fiscal unity for VAT purposes will affect the input VAT deduction right of the members. The members will have to establish their right to deduct input VAT on a stand-alone basis after termination of the fiscal unity for VAT purposes.

With respect to RETT it is noted that in case of claw-backs, RETT can become due if the fiscal unity is terminated.

In addition, change of control rules are relevant in respect of carry forward losses and carry forward interest.

The change of control rules stipulate that if the ultimate ownership interest in the taxpayer has changed substantially (i.e., 30% or more) compared to the ultimate ownership at the start of the oldest year of which the losses can be carried forward, losses incurred before the moment of the change in the ultimate ownership occurred can no longer be offset against future profits of the taxpayer. Losses will however remain available for offset if the following cumulative conditions are met:

A. in both the loss-making year and the year in which a profit is made, the assets of the taxpayer do not consist mostly (for more than 50%) during at least nine months of passive, portfolio type of investments;

B. the total size of the taxpayer's activities directly preceding the change in ultimate ownership interest has not been reduced to less than 30% of the total activities at the beginning of the oldest financial year in which losses are incurred which are available for offset; and

C. at the time of the change in ultimate ownership interest, there is no intention to reduce the total size of the activities within three years to less than 30% of the activities at the beginning of the oldest financial year in which losses are incurred which are available for offset.

Currently a court case is pending on the question whether upon a change of control of 30% or more, latent losses need to be taken into account (as deemed realized).

The earnings stripping rules stipulate that if the ultimate ownership in the taxpayer has changed substantially (i.e. 30% or more) compared to the ultimate ownership at the start of the oldest year of which interest can be carried forward, the amount of interest carry forward before the moment of the change in the ultimate ownership occurred can no longer be offset against future profits of the taxpayer. Interest will remain available for offset if the earlier mentioned cumulative criteria under A. – C. are met.

5. **Where equity / assets are indirectly transferred as part of an enforcement, does that trigger adverse tax consequences?**

   There are no specific Dutch tax considerations in case of indirectly transferred assets as part of an enforcement, the Dutch tax consequences ultimately depend on the specific facts and circumstances. The principles set out above in "If the enforcement results in the creditor taking ownership of equity or assets, what are the key tax considerations to bear in mind?" may especially be relevant in that case.

6. **Is any claw back permissible where a distressed company pays taxes for which a solvent shareholder is liable?**

   Under Dutch tax law, there are no such clawbacks.

ACQUISITION OF DEBT

1. **Does the acquisition of a creditor's interest in distressed debt trigger any adverse direct tax consequences for the debtor?**

   The transfer of a receivable by a creditor does in principle not have any adverse Dutch tax consequences for the debtor. If the receivable is transferred to the debtor itself this may result in debt waiver income at level of the debtor, for example, if the receivable is transferred for an amount below nominal value. In that case, the same principles set out above in "Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?" equally apply.

2. **Does the acquisition of distressed debt trigger any adverse withholding or indirect tax consequences for the debtor?**

   Dutch debtors may need to consider the CWT position (in case of a new creditor). However, acquisition of distressed debt does not trigger any adverse VAT consequences for the debtor.

3. **What are the key tax considerations for the purchaser of a creditor's interest on the acquisition of distressed debt?**

   There is in principle no specific adverse Dutch corporate tax consequences for the purchaser of a creditor's interest on the acquisition of distressed debt. However, in related party situations the purchase price should be at arm's length to avoid tax adjustments, including deemed dividends or deemed capital contributions.

   If the acquisition of distressed debt is considered an investment in the underlying asset, this could trigger real estate transfer tax in case of the financing of real estate assets.

4. Are there any particular beneficial regimes accessible to a purchaser of a distressed debt portfolio?

There is no specific regime for Dutch tax purposes that applies for purchasers of a distressed debt portfolio.

INSOLVENCY PROCEEDINGS

1. What are the key insolvency procedures?

Dutch companies can become subject to three different types of insolvency or restructuring proceedings in the Netherlands that are governed by the rules of the Dutch Bankruptcy Code (Faillissementswet):

i. Bankruptcy (faillissement) – a process aimed at liquidation, where the debtor's assets are liquidated and the proceeds are distributed to its creditors. Bankruptcy can be filed for by one or more of the creditors of the debtor (involuntary filing), or by the debtor itself (voluntary filing). The basis for a bankruptcy adjudication is that the debtor has at least two creditors (one of them being the filing creditor if the filing is involuntary) and that at least one of these two debts is currently due and payable. The most important effect of the bankruptcy is that the debtor loses the power to dispose of its assets, only the bankruptcy trustee can dispose of the assets from then on. In case of a bankruptcy, secured creditors cannot enforce their security during a cooling off period (maximum of 4 months).

ii. Suspension of payments (surceance van betaling) – legal moratorium where the debtor is given temporary relief against pressing creditors in order to achieve, by way of reorganization, continuation of its business and/or, ultimately, satisfaction or partial satisfaction of creditors by way of a composition. A suspension of payments may be granted for a maximum period of 18 months and may be extended without limit at the request of the debtor for successive 18 months periods. If a definite suspension of payments is not granted by the court, or if the court refuses to grant an extension, the court may – and usually does – at the same time declare the debtor bankrupt. Secured creditors cannot enforce their security during a cooling off period (maximum of 4 months).

iii. Court Approval of a Private Composition (Prevention of Insolvency) Act 2021

(Wet Homologatie Onderhands Akkoord - WHOA) – a procedure similar to the Chapter 11 of the United States Bankruptcy Code and the UK restructuring plan. The company itself can offer a composition (i) to restructure its debts outside an insolvency proceeding, or (ii) to liquidate the assets of the company outside an insolvency proceeding. In principle, the offeror can design the composition as it deems fit. If at least one class of 'in the money' creditors voted in favour of the composition, the company can request the court to approve the composition and declare it generally binding (i.e. also on dissenting creditors and shareholders). An important element in the WHOA is that also claims of surety's, joint and severally liable debtors and guarantee providers can be amended by the composition (noted is that employees are excluded from the WHOA process).

2. What are the key tax considerations arising upon entry into an insolvency procedure?

There are no specific adverse Dutch tax consequences arising upon entry into an insolvency procedure. The tax considerations depend on the specifics of the case at hand.

In particular, we would like to note an important Supreme Court decision ('Fokker II' decision) with respect to debt obligations that remain unpaid in case of bankruptcy. It follows from Fokker II that any debt obligations that remain unpaid upon liquidation should generally not result in a (taxable) capital increase for Dutch tax purpose, as the Dutch Supreme Court ruled that such debt obligations remain due for Dutch tax purposes. However, the Supreme Court mentioned that there may be an exception in case the bankrupt company formed part of a fiscal unity. The scope of the exception by the Supreme Court in Fokker II has been clarified by the Supreme Court in its decision of September 10, 2010 (BNB 2010/308). In this decision, the Supreme Court ruled that in case debt obligations of the debtor remain unpaid, that there will be a taxable capital increase at the level of the fiscal unity head at the moment that the relevant debtor (fiscal unity subsidiary) ceases to exist within the fiscal unity as a result of the end of bankruptcy due to the lack of income.

3. Does entry into an insolvency procedure impact tax groupings?

The entry into an insolvency procedure itself does not have any specific adverse Dutch tax consequences for Dutch tax groups. The tax considerations depend on the specifics of the case at hand.

4. Are there any specific tax set offs available in an insolvency?

There are no specific tax set offs available. Any set offs follow the general insolvency laws.

5. Is the tax authority a preferential creditor in an insolvency?

In the Netherlands, the Dutch tax authorities are a secondary preferential creditor in an insolvency.

6. Are directors or other managers personally liable for tax debts in an insolvency?

If a limited liability company (besloten vennootschap or BV) is no longer able to pay its taxes (only applies to VAT, wage tax and several other (mostly excise) taxes (not corporate income tax)) and contributions when due, it must report this to the Dutch tax authorities, the Employee Insurance Agency and (if applicable) the company pension fund. This notification must be made within two weeks after the taxes or contributions should have been paid, failing which each managing director is jointly and severally liable for the unpaid taxes and contributions. In that case, an individual managing director can only exculpate himself if he proves that he is not to blame for the fact that the company has not complied with the reporting obligation and that the unpaid tax and premium payments are not the result of improper management on his part.

If the report is made in time, a managing director will only be liable if it is proven that the non-payment of the debt is the result of manifest mismanagement on his part. This is the case when the director has facilitated that the company's tax debts have remained outstanding, while he knew or reasonably should have known that his actions would result in those tax debts remaining unpaid and he may personally be blamed.

MEET THE AUTHORS OF OUR JURISDICTIONAL GUIDES

WEIL CONTACTS

London

Jenny Doak
Partner, Tax
London
+44 20 7903 1060
jenny.doak@weil.com

Stuart Pibworth
Counsel, Tax
London
+44 20 7903 1398
stuart.pibworth@weil.com

Anna Ritchie
Associate, Tax
London
+44 20 7903 1348
anna.ritchie@weil.com

United States

Devon Bodoh
Partner, Tax
Washington, D.C.
+1 202 682 7060
devon.bodoh@weil.com

Stuart Goldring
Partner, Tax
New York
+1 212 310 8312
stuart.goldring@weil.com

Joseph Pari
Partner, Tax
Washington, D.C.
+1 202 682 7001
joseph.pari@weil.com

Grant Solomon
Associate, Tax
Washington, D.C.
+1 202 682 7029
grant.solomon@weil.com

France

Edouard de Lamy
Partner, Tax
Paris
+33 1 4421 1571
edouard.delamy@weil.com

Benjamin Pique
Partner, Tax
Paris
+33 1 4421 9831
benjamin.pique@weil.com

MEET THE AUTHORS OF OUR JURISDICTIONAL GUIDES

LOYENS & LOEFF CONTACTS

The Netherlands

Bartjan Zoetmulder
Partner – Tax Adviser
T +44 20 7826 3071
M +44 7879 607 977
bartjan.zoetmulder@loyensloeff.com
(Currently on assignment in London)

Bart Wingen
Senior Associate – Tax Adviser
T +31 20 57 85 730
M +31 6 10 89 60 57
bart.wingen@loyensloeff.com

Aziza Tisser
Senior Associate – Tax Adviser
T +31 10 22 46 593
M +31 6 53 42 48 78
aziza.tissir@loyensloeff.com

Jacoline Kleijn
Associate – Tax Adviser
T +31 10 224 61 66
M +44 7736 381 775
jacoline.kleijn@loyensloeff.com
(Currently on assignment in London)

Luxembourg

Pierre-Antoine Klethi
Partner – Tax Adviser
T +352 466 230 429
M +352 6 91 96 31 57
pierre-antoine.klethi@loyensloeff.com

Kévin Emeraux
Senior Associate – Tax Adviser
T +352 466 230 570
M +352 6 91 96 32 24
kevin.emeraux@loyensloeff.com

Enxhi Basho
Associate – Tax Adviser
T +352 466 230 647
M +352 6 91 96 32 21
enxhi.basho@loyensloeff.com

Victoria Hodireva
Associate – Tax Adviser
T +312 057 853 27
M +352 6 91 96 31 84
victoria.hodireva@loyensloeff.com

Switzerland

Beat Baumgartner
Partner – Attorney at Law
T +41 43 434 67 00
M +41 79 93 06 352
beat.baumgartner@loyensloeff.com

Pascal Hammerer
Senior Associate – Tax Adviser
T +44 207 826 3070
M +41 79 878 62 03
pascal.hammerer@loyensloeff.com
(Currently on assignment in London)

Belgium

Aldo Engels
Counsel – Attorney at Law
T +32 2 743 43 92
M +32 496 13 76 21
aldo.engels@loyensloeff.com

Benno Daemen
Senior Associate – Attorney at Law
T +32 2 773 23 67
M +32 497 32 99 02
benno.daemen@loyensloeff.com

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