Corporate Tax Alliance

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The Maltese taxation system

by Antoine Naudi

Malta is the only EU member state which adopts the full imputation system of taxation meaning that both resident and non–resident shareholders are entitled to a full credit of the income tax paid by the company on a distribution of dividends.

Prior to 1st January 2007, it was possible to set up International Trading Companies (ITC's) and International Holding Companies (IHC's) which restricted the tax advantages to non-resident persons.

Changes were effected to Maltese law to eliminate the discrimination between resident and non-resident shareholders and these changes have been approved and endorsed by the EU Commission.

With this EU approval in combination with the EU's Parent-Subsidiary directive and the Interest and Royalties Directive mean that Maltese companies are excellent vehicles for conducting international business

Trading Companies
A Maltese company is subject to a rate of tax equivalent to 35% on all its worldwide income. Nonetheless, due to the full imputation system of taxation adopted by Malta, upon a distribution of profits from the company to its shareholders, the shareholders are entitled to claim tax refunds of the tax paid by the company.

The amount of the refund varies according to the source of the profits from which the distributions are made.

1. 6/7th's refunds in respect of active income. When dividends are made from profits arising out of active income, the shareholders are entitled to claim 6/7th's of the 35% tax paid by the company. This effectively means that the effective tax rate in Malta is only 5%.
2. 5/7th's refunds in respect of passive interest and royalties. When distributions are made from profits earned from passive interest and royalties' income, the shareholders are entitled to claim 5/7th's of the 35% tax paid by the company. This effectively means that the effective tax rate in Malta is only 10%.
3. 2/3rd's refunds. The 6/7th's and the 5/7th's refunds referred to above are only applicable in the event that a Maltese company has not claimed any form of double taxation relief. In fact when dividends are paid out of profits allocated to the foreign income account and out of which double tax treaty relief has been claimed, the shareholders may only apply for a 2/3rd's refund of the tax paid by the company.

Holding Companies
Holding companies that derive dividend income or capital gains from a "participating holding" are entitled to claim a full refund of tax paid by the company when distributions are made to its shareholders. The effective tax rate paid in Malta in similar cases would be 0%.

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1. has at least 10% of the equity shares in the non-resident company; or

2. is an equity shareholder in the non-resident company and is entitled to purchase the balance of the equity shares of the non-resident company, or it has the right of first refusal to purchase such shares; or

3. is an equity shareholder in the non-resident company and is entitled to either sit on the Board or appoint a person on the Board of that subsidiary as a director; or

4. is an equity shareholder which invests a minimum in the non-resident company of Euros 1,164,686.60 and such investment is held for at least a period of 183 days; or

5. holds the shares in the non-resident company for the furtherance of its own business and the holding is not held as trading stock for the purpose of a trade.

Light anti-abuse provisions apply for all companies which acquire a "participating holding" after 1st January 2007. In any such event the foreign subsidiary must satisfy certain conditions.

To read more about these conditions or this subject and other articles, visit: corptax.org/publications

Libyan taxation tips and knowledge *by Tariq Almontaser*

- The tax department assesses tax on the company's activities on basis of the balance sheet submitted at the end of the financial year.

- The balance sheet & income statement should show the company's expenses and revenues and the financial position for the year.

- The financial statements must be certified by a Libyan chartered public accountant.

- Due to the fact that the tax department does not have sufficient resources to check the company's accountants on yearly basis and the large number of national and foreign companies working in Libya, the tax department usually assesses the tax on the company's activities only once in every 3 or 4 years.

- The department will in normal circumstances notify companies one or two weeks before the date of starting examining the accounts (although the law permits them to visit companies without prior notification) in order for the final assessments of taxable income for the period under review.

- Upon finishing the examination of the company's records and books, the department official (who is qualified in accounting auditing and taxation) gives its professional opinion on the taxable income for the years under review. The opinion of the tax department auditors can be classified as one of following:

  - Accepting the result of the company's activity.
  - Accepting the result of the company with adjustments.
  - Refusing the result of the company appearing on the operation result account.

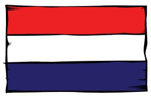
> "the tax department permits offshore companies to apply to objection procedures against unfair taxes"

Offshore companies have different steps of tax assessments with the same tax prices. Recently, the tax department permits offshore companies to apply to objection procedures against unfair taxes in spite of the fact that document traceability is obviously not available.

It is an encouraged step to attract the foreign investors to do business in Libya initially even before establishing a branch.

Dutch fiscal unity with Grandparent Company

by Jan van Tilburg



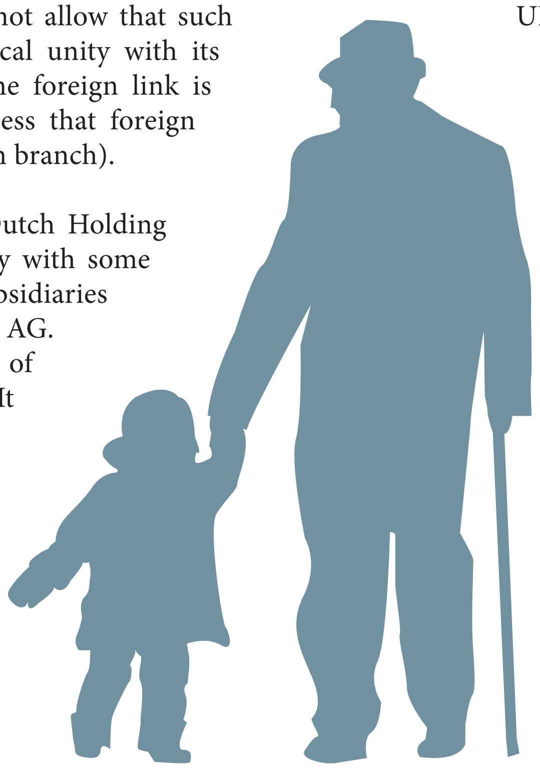
Benefits of the fiscal unity
The Dutch fiscal unity regime provides for a tax consolidation of companies within a group by filing one consolidated tax return. The main benefits of such fiscal unity are:

- losses of one company can be set off against profits of another group company within the same fiscal year.
- transactions between group companies which are part of a fiscal unity are not recognized as the group is treated as one tax payer, thereby allowing, amongst others, internal reorganisation of business assets and activities in a tax neutral way

Main conditions for the fiscal unity
The Dutch tax rules require a direct ownership between the parent company and the subsidiaries that join the tax group. The parent must own at least 95% of the shares in the subsidiary. Another condition is that the parent as well as the subsidiary must be tax resident companies in the Netherlands. Some years ago, the rules have been amended, allowing that a Dutch branch of a foreign company can qualify as a parent company.

Fiscal unity with Grandparent Company
If a Dutch company holds a Dutch subsidiary through a foreign company, the rules do not allow that such Dutch subsidiary joins into a fiscal unity with its Dutch Grandparent Company. The foreign link is prohibitive for that purpose (unless that foreign intermediary company has a Dutch branch).

In a recently published case, a Dutch Holding BV wanted to create a fiscal unity with some subsidiary BVs although these subsidiaries were 100% owned by a German AG. The Holding BV owned 97% of the shares in that German AG. It was no surprise that the Dutch Revenue rejected the fiscal unity application. A lower tax court had decided, however, that there is no valid reason for the Dutch Revenue to reject a fiscal unity in all cases where the shares are indirectly owned through a foreign intermediary company.



The harsh limitations now included in the Dutch fiscal unity regime are in conflict with the EU Freedom of Establishment.

Other cross-border fiscal unities
The story of cross border Dutch fiscal unities will continue. Recently the Amsterdam tax court referred three cases to the European Court of Justice regarding the compatibility of the Dutch fiscal unity regime with EU law.

Also these cases deal with the denial of the benefits of consolidation regarding Dutch companies that are held through EU resident companies. One of the cases deals with a German parent company that directly holds multiple Dutch subsidiaries. The German parent wants to create a fiscal unity between those Dutch sister companies.

While the cases are limited to EU situations there might also be possibilities to claim similar benefits in case the foreign link is through a company resident in a third country. If that third country has a Double Tax Treaty with The Netherlands that includes a foreign ownership non-discrimination clause, similar benefits might be available.

It is interesting to observe that the Dutch cases seems to fit into an international trend. Recently UK tax courts ruled that denying the application of the UK group relief system between two UK resident companies held through a non-resident link violates the non-discrimination article of the applicable tax treaty (Felixstowe Dock and FCE Bank cases).

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German Tax Law

by Volker Streu

The German government has declared September 22nd 2013 as election date for the federal parliament. While the reigning chancellor Angela Merkel is far ahead of her challenger Peer Steinbrück, the former Minister of Finance, in polls on popularity, the coalition lost a streak of 11 (eleven!) state votes. Consequently, the opposition in the Bundestag has not only been blocking power but a majority in the second chamber (Bundesrat). Unfortunately, they were not shy to create a total mess in the latest law making. Even that few changes that were politically agreed upon in the joint committee of Bundestag and Bundesrat were not enacted in time because the paper version of the law was not made available to the members of parliament in time before the Christmas break. These rules with international importance have been passed in January:

- flaws with respect to the civil law rules on profit and loss pooling agreements required for a tax group in Germany (Organschaft), can now be corrected tax efficiently, also the dual loss consolidation rules have been revised.

- The limit on loss carry backs is doubled to € 1 million; loss carry forwards are still subject to the minimum taxation rules (40% of the income in excess of € 1 million cannot be sheltered by loss carry forwards).

> "EU investors in German companies can apply for a zero withholding rate on dividends even if their shareholding is less than 10% in the German company."

Finally failed with little chance to be enacted before the September election these items:

- the German Swiss treaty on future fighting of tax evasion has failed. Some states are expected to further acquire taxpayers' data stolen from Swiss banks.

- deny participation exemption for dividends from hybrid instruments (equity investment in German tax classification, that is treated as debt in the jurisdiction of the issuer).

- treaty override i.e. treaty withholding tax rate for certain payments by a partnership to its foreign partner.

- create new taxable events under the Real Estate Transfer Tax (RETT).

- denial of loss carry forward utilization in retroactive merger transactions.

Amongst the legislation purged by failing to find a compromise was the follow up legislation on dividend withholding tax (ECJ case reported here in September 2012 issue). EU investors in German companies can apply for a zero withholding rate on dividends even if their shareholding is less than 10% in the German company. The ECJ case should be adopted into law with the failed proposal. Third country investors shall not be entitled, according to the proposal (precedence of freedom of establishment rules over freedom of capital rules that would have covered portfolio investors in third countries too). Investors that received dividends should monitor the legislation; the outcome is open.

Another accident happened in response to the European Commission's decision to regard the so called restructuring clause of Germany's rules on loss restriction upon change of ownership in companies as a national government aid that is not in line with the EU Common Market. Germany wanted to appeal the EC's decision but filed its claim too late with the ECJ. The ministry of finance calculated the filing period from the date of receiving the EC's decision in their house, whereas the period ran from the reception of the decision at the German embassy in Brussels.

German tax law - leave it to the experts....

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