Radical change to the tax treatment of W&I insurance? NLTA's internal policy made public

- On 18 October 2022, the Dutch tax authorities' ('**NLTA**') view on the tax treatment of W&I insurance premiums and payments was published under the Government Information (Public Access) Act.

- Based on NLTA's internal policy, W&I insurance premiums should not be tax deductible while payments under the W&I insurance should be tax exempt. The premiums should qualify as transaction costs that directly relate to the acquisition of a participation. These costs are not tax deductible. Therefore, a balanced outcome would result in payments under a W&I insurance to be exempt under the participation exemption.

  I. Premiums paid under a *buyer W&I insurance* should not be tax deductible for the buyer while payments should be tax exempt. The tax book value of the acquired subsidiary should be lowered for the amount of payments received under the W&I insurance.

  II. *Seller W&I insurance* where the seller pays the premium and the insurer pays directly to the buyer should result in non-deductible premiums for the seller. Payments under the W&I insurance should be exempt at the level of the buyer, lowering the tax book value of the acquired subsidiary accordingly.

  III. *Seller W&I insurance* where the insurer pays to the seller and the seller passes on to the buyer should not affect the (taxable) result of the seller as it is merely considered a passthrough entity. The tax consequences should be identical to scenario II.

- The NLTA's internal policy is at odds with the prevailing doctrine in Dutch tax literature. Most Dutch authors take the view that premiums paid under W&I insurances should be deductible and that payments should be taxable income. Therefore W&I insurances typically provide for a gross-up for corporate income tax due on payments received. The prevailing doctrine in Dutch literature is driven by the view that payments under (or in relation to) W&I insurances – unlike under an SPA – cannot result in a direct causal link to the sale or acquisition of a participation (and thus qualify as non-deductible transaction costs under the participation exemption).

- For other specific insurances obtained, a case-by-case assessment should be made whether they directly relate to the acquisition or sale of a participation. This could e.g. in our view be the case if a specific tax risk insurance is taken upon an acquisition of a participation.

Taxand Netherland’s Take

- The NLTA’s view is merely an internal policy standpoint and should not be considered legislative policy.

- Considering the contrary prevailing doctrine in Dutch tax literature and lack of case law on this specific matter, taxpayers may still have a filing position when a position contrary to the NLTA’s policy is reported in corporate income tax returns. However, this may lead to discussions with the NLTA.

- The question also arises on how to deal with positions taken in tax returns that have been filed historically where e.g. W&I insurance premiums were deducted from the Dutch taxable profit. We would recommend assessing this and to determine a strategy going forward.

- For other insurances (e.g. specific tax risk insurance) it should be assessed on a case-by-case basis whether the same treatment applies as for W&I.

- Please reach out to your trusted Taxand Netherlands advisor to discuss the potential impact of the NLTA’s policy and to keep you informed on future developments.

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