

Real Estate Tax Services News

Keeping you informed

PwC Netherlands | April 2021

Dutch government started an internet consultation on the tax policy of foreign entity qualification

In brief

On 29 March 2021, the Ministry for Finance started the internet consultation for the foreign entity tax qualification policy. The changes that are expected most important for the real estate industry are highlighted below.

Foreign entity tax qualification policy

Introduction

On 29 March 2021, the Dutch Ministry of Finance published a consultation document which includes proposed amendments to the Dutch qualification rules for Dutch and foreign entities. The consultation period ends on 26 April 2021. The aim of the proposal is to reduce the number of hybrid mismatches in an international context. It is envisaged that a legislative proposal will be published after the consultation period and that this proposal will be part of the 2022 Budget Day tax plan. The amendments are proposed to enter into force on 1 January 2022.

Dutch limited partnerships (CV) and comparable foreign limited partnerships

Currently, the qualification of a Dutch limited partnership (*commanditaire vennootschap*, or CV) or comparable foreign limited partnerships – as either transparent or non-transparent – depends on the so-called “unanimous consent requirement”. In short, (foreign) limited partnerships are generally transparent only if the accession and replacement of limited partners are subject to the prior consent of all (general and limited) partners.

These Dutch transparency conditions deviate significantly from equivalent rules in other jurisdictions, resulting in unnecessary hybrid mismatches. It is proposed to revoke the unanimous consent requirement, therefore treating all Dutch limited partnerships as tax transparent. Under the internet consultation, this qualification equally applies to foreign limited partnerships that are comparable to a Dutch limited partnership.

For Dutch tax resident Dutch limited partnerships or comparable foreign limited partnerships currently qualified as non-transparent, the change to transparency (by fiction) will result in the transfer of assets and liabilities to their limited partners. In order to avoid a tax cash-out, the consultation document includes various reliefs including conditional roll-over provisions and payment deferrals.

PwC observation

Common non-Dutch tax resident entities in the real estate industry such as limited partnerships and other fund vehicles currently often qualify as non-transparent for Dutch tax purposes, resulting in undesired and unintended adverse tax consequences of, for example, the anti-hybrid mismatch legislation of ATAD II, the Dutch conditional withholding tax on interest (and royalties) and the Dutch dividend withholding tax.

Therefore, an amendment of the qualification policy is highly welcome: the Netherlands now intends to abandon the strict consent requirements. It is anticipated for the number of hybrid mismatches to be reduced quite considerably and more flexibility is expected for funds pursuing a transparent Dutch CV structure.

Dutch mutual funds (FGR) and comparable funds for joint account

In relation to the Dutch mutual fund (*fonds voor gemene rekening*, or FGR) the unanimous consent requirement will also be revoked. However, in contrast to a Dutch CV, an FGR could still opt for being either tax transparent or tax non-transparent. Under the consultation document, a Dutch mutual fund (and comparable funds for joint account) will only be treated as non-transparent if (in short) it meets one of the following two criteria:

- The participation rights in the Dutch mutual fund are publicly traded; or
- The Dutch mutual fund is required upon request to redeem its outstanding participations and this obligation is exercised on a regular basis.

PwC observation

The consultation document should be carefully analysed to avoid unexpected results for structures that are already in place. It is recommended to review contractual arrangements of Dutch mutual funds, or similar foreign entities, that directly hold Dutch real estate as these entities may currently be deemed tax transparent if it were to include certain redemption and issuance wording.

Foreign entities comparable with Dutch mutual funds, currently qualifying as non-transparent, should closely monitor developments in this respect to avoid potential adverse Dutch CIT consequences of potentially being requalified as tax transparent.

Foreign entities not comparable to a Dutch legal form

Currently, foreign entities are classified as either transparent or non-transparent based on their similarities with a Dutch legal form. This approach is continued in the consultation document. Foreign entities however, that are not comparable to an existing Dutch legal form, will be qualified based on the following two approaches:

- Fixed approach: If the foreign entity has its tax residency in the Netherlands, such entity will be considered non-transparent.
- Symmetry approach: If the foreign entity does not have its tax residency in the Netherlands, the qualification of the jurisdiction where the entity is established is followed.

The consultation document mentions a UK limited liability partnership (LLP), an Irish unlimited company (ULC) and a German *Kommanditgesellschaft auf Aktien* (KGaA) as examples of entities that are not comparable to a Dutch legal form.

PwC observation

Other real estate specific entities that may not be comparable to a Dutch legal form are trusts established under common law. In this respect, it is recommended to monitor legislative developments following the consultation phase.

Your contacts

Global and regional contacts

Uwe Stoschek

Global Real Estate Tax Leader
Tax Partner, PwC Germany
Tel.: +49 30 2636-5286
uwe.stoschek@pwc.com

Jeroen Elink Schuurman

EMEA Real Estate Tax Leader
Tax Partner, PwC Netherlands
Tel.: +31 6 53 98 48 10
jeroen.elink.schuurman@pwc.com

Contacts – PwC Netherlands

Jeroen Elink Schuurman

Real Estate Tax Leader
Tel.: +31 6 53 98 48 10
jeroen.elink.schuurman@pwc.com

Serge de Lange

Real Estate Industry Leader
Tel.: +31 6 53 68 66 60
serge.de.lange@pwc.com

Matthijs Vogel

Tax Partner
Tel.: +31 6 13 51 50 55
matthijs.vogel@pwc.com

Richard van der Linden

Tax Partner
Tel.: +31 6 27 82 58 07
richard.van.der.linden@pwc.com

Leyla Yildirim

Tax Director
Tel.: +31 6 53 96 35 63
l.yildirim@pwc.com

Dexter Wismeijer

Tax Senior Associate
Tel.: +31 6 30 26 80 40
dexter.wismeijer@pwc.com

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