

ATAD2 AND THE DUTCH DOCUMENTATION REQUIREMENT

The Anti-Tax-Avoidance-Directive II (“ATAD2”) has been implemented in the Dutch legislation with effect from 1 January 2020. The ATAD2 provisions, which aim to neutralize certain tax effects of hybrid mismatches, include an annual documentation requirement. Although the ATAD2 provisions have been in the Dutch legislation for over one year now, we notice that the documentation requirement is often overlooked. The aim of this newsletter is to draw your attention to this documentation requirement pursuant to which taxpayers may have an obligation to have documentation available at the time of the corporate income tax return filing.

DOCUMENTATION REQUIREMENT IN MORE DETAIL

The ATAD2 documentation requirements aim to enable the tax authorities to review whether the ATAD2 hybrid mismatch rules have been correctly applied in the corporate income tax return of the taxpayer. As such, all taxpayers subject to corporate income tax should have documentation in place which substantiates whether or not a hybrid mismatch exists in their structure. Please note that this obligation also applies to entities which take the position that the hybrid mismatch rules do not apply to them.

The legislation which provides for the documentation requirement does not provide details on how the information should exactly be documented. However, the requirement comes down to gathering relevant information regarding financial instruments, (hybrid) entities and permanent establishments present within the group. This could include, among other documents, intra-group documentation such as:

- A worldwide structure chart;
- Intercompany (direct and indirect) payment flows;
- Intercompany agreements;
- Foreign tax returns and assessments.

In case the ATAD2 rules apply, additional documentation substantiating the position taken on whether or not and to what extent (in numbers) the hybrid mismatch rules have an impact may be required, such as a written analysis and the tax compliance file.

Companies without any cross-border activities which are not part of an international group may suffice with simplified documentation confirming that there is no hybrid mismatch situation considering that no cross-border transactions have been entered into.

NON-COMPLIANCE & PENALTY

As noted above, the documentation must be available at the time of the corporate income tax return filing and needs to be annually updated. As 2020 is the first year in which the documentation requirement applies, the documentation for this year should be available by the time the corporate income tax return for 2020 needs to be filed.

Upon request of the Dutch tax authorities for the documentation supporting the ATAD2 position, the taxpayers will generally be given 6 weeks to gather the relevant information. If the documentation is not made available within the given timeframe, the Dutch tax inspector may increase and shift the burden of proof regarding the ATAD2 rules to the taxpayer. Moreover, (intentional) non-compliance can raise criminal charges in the Netherlands.

LINK WITH TRANSFER PRICING DOCUMENTATION REQUIREMENTS

The transfer pricing master file and local file, which multinationals with consolidated revenues in excess of EUR 50 million are required to prepare annually as well, may provide for a source for some of the information to be included in the ATAD2 documentation, as detailed above. Notably, structure charts, intercompany payment flow overviews and intercompany agreements are typically included in these transfer pricing documents. Also considering that for ATAD2 documentation and master and local file the same deadline applies, from an efficiency perspective it may be well-advised to combine both documentation processes.

RECOMMENDED NEXT STEPS

We strongly advise you to make sure the relevant documentation is available in your administration. Due to the complexity of ATAD2, the complexity of this process should not be underestimated. Our international tax team is ready to assist with providing additional information, tax advice and/or an opinion on the applicability of the ATAD2 rules, an assessment of the available information and/or the preparation of the required documentation. Please reach out to us should you have any questions and/or wish to discuss.