



## Welcome proposal for a relaxation of the Dutch ATAD2 rules

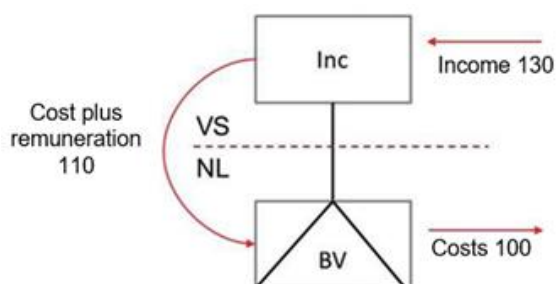
**Unfortunately, this proposal was withdrawn on 11 November 2021 and will therefore not implemented.**

On 25 October, a Dutch member of parliament submitted a [proposal](#) for a legislative amendment aimed at taking away some of the overkill of the Dutch ATAD2 anti-hybrid rules. The overkill situations are typical for (but technically not exclusive to) US multinationals, considering the US check the box election rules.

The proposed legislation would have the effect that expenses that should currently qualify as non-deductible, because they are effectively deducted twice as a result of the hybrid nature of the Dutch entity, will nevertheless become deductible. The reason for this legislative proposal is that the current ATAD2 rules can result in an effective tax rate of more than 100% in certain situations, and that allowing these expenses to be deducted should not be considered contrary to the ATAD2 Directive.

Ireland has introduced similar rules (Section 835AB) to avoid this unintended outcome, which seem to be accepted by the European Commission. The overkill that the current legislative proposal aims to repair is illustrated by the following two examples:

### Example 1

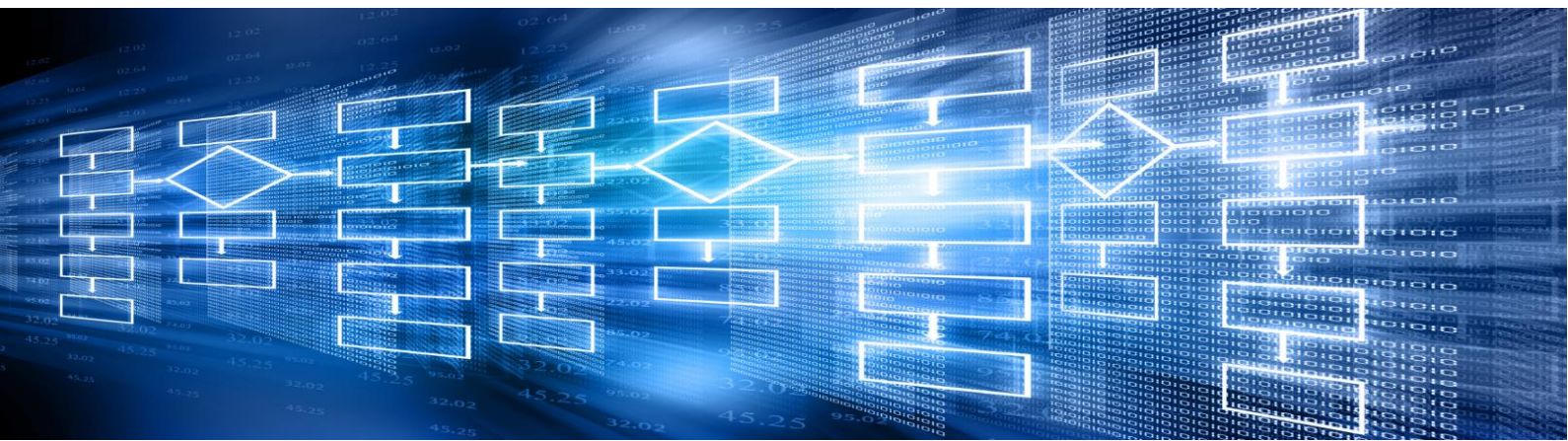


### Facts

- » BV is checked as a disregarded entity for US tax purposes.
- » BV produces products in the Netherlands on a cost plus 10% basis.
- » BV has third party costs of 100.
- » BV receives a remuneration of 110 from Inc.

### Analysis

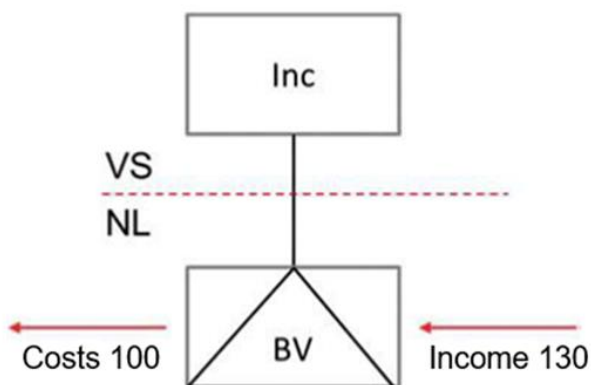
- » Absent the ATAD2 rules:
  - BV would be taxed in NL on 10 profit ( $10 \times 25\% = 2.5$ ).
  - In the US, Inc. is taxed on 30 profit ( $30 \times 21\% = 6.3$ ).
- » The costs of 100 are deducted in NL and in the US. Double deduction, caused by the hybrid nature of the (checked) BV.
- » Double deducted expenses are disallowed from deduction in the Netherlands under the ATAD2 rules, unless there is also dual included income.
- » The income of 110 is included in NL but not included in US (the US does not recognise a payment). By contrast, the cost-plus remuneration results in non-deduction (US) and inclusion (NL) income, which from an economic point of view is the same as dual included income, but does not qualify as such under the current rules.
- » Double deduction without dual included income results in a disallowance of the



deduction in the Netherlands.

- » The overkill would result in an effective tax rate of more than 90% because of (i) tax in NL of 27.5 (i.e.,  $25\% * 110$ , as the costs of 100 are disallowed) and (ii) an overall commercial profit of 30.
- » Taxation in NL on the gross revenue ( $25\% * 110$ , as the costs of 100 are disallowed) = 27.5. An effective tax rate of more than 90%.
- » Under the proposal, the double deducted costs of BV should nevertheless be deductible in the Netherlands under the ATAD2 rules. If adopted, this would be a very welcome relaxation of the current rules, as we have seen many situations where this adverse and unjust effect materializes.

### Example 2

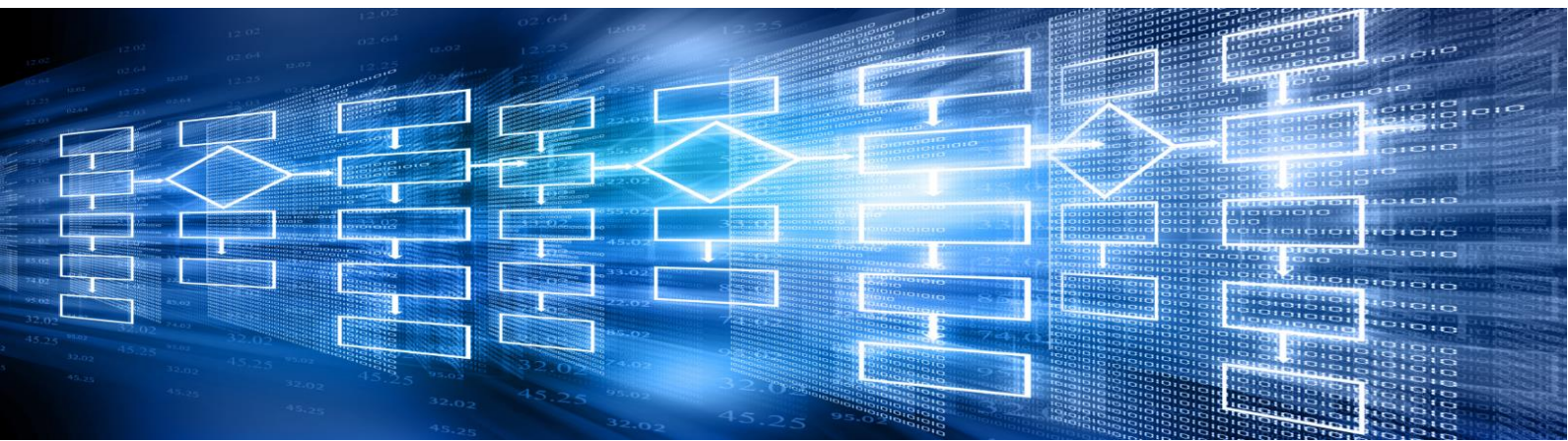


### Facts

- » BV is checked as a disregarded entity for US tax purposes.
- » BV realizes taxable income of 130.
- » BV has third party costs of 100.

### Analysis

- » Absent the ATAD2 rules:
  - BV would be taxed in NL on 30 profit ( $30 * 25\% = 7.5$ ).
  - In the US, Inc. is also taxed on 30 ( $30 * 21\% = 6.3$ ).
- » In the US, a tax credit is given for the taxes paid in NL, i.e. no additional tax in the US, and 1.2 of the excess credit is carried forward.
- » The costs of 100 are deducted in NL and in the US. Double deduction, caused by the hybrid nature of the BV.
- » Double deducted costs are disallowed from deduction in the Netherlands under the ATAD2 rules, unless there is also dual included income.
- » The income of 130 is included in NL and the US. Therefore, one would normally think there is no disallowance of the costs under ATAD2. However, the initial version of the Memorandum of Understanding (in Dutch: memorie van toelichting) stated that if the US provides a credit for the Dutch taxes, then the income does not qualify as dual included income.
- » As a result, the initiator of the proposal appears to be of the understanding that this situation will therefore result in a disallowance of the deduction.
- » The overkill would result in an effective tax rate of more than 100% because of (i) tax in NL of 32.5 (i.e.,  $25\% * 130$ , as the costs of



100 are disallowed) and (ii) an overall commercial profit of 30.

- » The current proposal would allow the deduction of the costs in NL again. Noteworthy is that we believe the initiator of the legislative proposal may be under the erroneous assumption that the income does not qualify as dual included income under the current rules. In a later statement from the Legislator, he seems to come back on his earlier comment that a foreign tax credit prevents income from qualifying as dual included income.

### **Any questions?**

We will keep you informed on the developments about this proposed legislative amendment of the ATAD2 rules.

If you have any questions or should you need assistance, please contact the Editorial Team.

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