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De ondernemingswinstbelasting : een zoektocht naar een rechtsvormneutrale wijze van winstbelasting

Verver, S.J.

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This dissertation addresses the problem of whether the present system of profits taxation is characterized by a lack of neutrality of legal form and whether this lack of neutrality of legal form has undesirable consequences. Where such undesirable consequences are found to occur, a further examination is made of how such undesirable effects can be removed and whether the proposed solutions are effective and feasible.

The research is preceded by a discussion of the basic assumptions of profits taxation and a look at its historical development. The position is taken that taxing the profits from enterprises is justified under the principle of equality in relation to the fact such taxation contributes to the financing of the public services enjoyed by a person or entity. Since both the factor of production labour and capital contribute to taxation, taxing the earnings of the combination of these factors can be justified under the principle of equality. Moreover, public services are also utilized when making business profits. Thus, profits from business activities have to be utilized as a source for the financing of public services.

Hence, I prefer a separate profits taxation, based on the following arguments. The enterprise itself is the entity that generates earnings and not the natural persons who are involved in the enterprise; thus, the enterprise should be taxed separately. It is the enterprise itself that makes profits by combining the factors of labour and capital in the form of a continuous organization and as such to carry on profitable (or loss-making) activities. Compared to other categories of income, profits that are not distributed have a special character and thus, on the basis of the principle of equality, have to be treated differently. After looking at the basic assumptions underlying the current taxation of profits, an inventory is made of deficiencies that arise because of the lack of neutrality of legal form in present-day profits taxation. This points up, among other things, the following differences:

- a difference in the tax treatment of the various persons and entities who make business profits;
- the lack of a uniform concept of entrepreneur;
- differences in how the rules on the labelling of assets (*vermogenstettersing*) are applied;
- differences in the possibilities for setting off losses;
- the diversity in the possibilities for forming a tax-facilitated group (restricted application of the participation exemption and fiscal unity regime);
- a different tax treatment of mergers and transfers of an enterprise;
- a difference in whether it is possible to obtain a partial deferral of taxation through profits retention.

The most striking difference is the distinction in the tax treatment of a private enterprise and a company that is subject to corporate tax as well as that between a private entrepreneur and a substantial shareholder.

The negative social effects of such differences are described; the most important of which are distortion of competition and the effect taxation has on the choice of a legal form. Based on the above inventory, I take the position that the present system of profits taxation is indeed to be characterized by an undesirable lack of neutrality of legal form and

that changes are needed. I go on to elaborate an alternative form of profits taxation, with neutrality of legal form as the starting point. I have coined the term 'enterprise profits tax' (EPT) to describe this system. In it taxation of the enterprise is the focal point and not the legal form of the enterprise. The proposed system draws on a variety of business profits tax systems that have been developed in the past.

Before going into a detailed discussion of the EPT, I provide a working hypothesis. This working hypothesis is based on a number of assumptions. The central assumption is that, in order to increase the likelihood of the EPT being accepted, where possible a link should be made with the present system of taxation. Assumptions that have been borrowed from the present system are, among other things: the distinction made between passive and active participation in an enterprise, the difference in the way equity and borrowed capital are treated and the aim of creating an equal tax burden for employees and entrepreneurs. In general terms, the EPT system contains the following elements. It consists of two taxes that are levied on different taxpayers. Tax is levied first at the level of the enterprise at the moment that the enterprise makes profits. At this point profit tax will be levied in the form of an EPT. An objective approach has been taken to the determination of the EPT taxpayer. As a consequence, the enterprise itself is characterized as the taxpayer. The enterprise's legal form is irrelevant here.

The EPT taxes business profits that are determined on the basis of the present rules on total and annual profits. Nevertheless, if the existing provisions are in conflict with principle of neutrality of legal form on which the new system is based or they create major problems in practice, I propose legislative changes: for example, extension of the participation exemption to private enterprises as well as considering the provision of capital to be a deemed enterprise and thus an EPT taxpayer. Levy of EPT at the level of the enterprise is followed by a secondary levy on the shareholders. This secondary levy is part of the existing schedular system in the present Wet IB 2001 (Individual Income Tax Act 2001). The taxpayers subject to the secondary levy are the persons known as '*winstgenieters*' (profit-makers); in other words, participants that are entitled to 5% or more of the earnings of the enterprise. The secondary levy taxes the advantages arising from the participation in the enterprise. In defining the word 'advantages' a narrow approach is used. Only those advantages related to the provision of equity are taxed with the secondary tax. Payments for work are, however, taxed as wages in box 1.

The coherence between the secondary tax at the level of the persons making profits and the EPT at the level of the enterprise can be seen in the indirect imputation system on which the EPT is based. The indirect imputation system is given a concrete form by levying EPT at a proportional rate, followed by the secondary taxation which is also levied at a proportional rate. However, in setting the tax rate the interconnection of the two taxes is taken into account.

With regard to the effectiveness of the EPT system, I take the position that to a large extent this system offers a solution for the problems that exist because of the lack of neutrality of legal form. The only distinction I found in this system is whether the participation is held as an active or as a passive investment. In the last case the secondary tax is not levied but instead the shareholder is taxed in box 3 on the 'earning capacity' of its assets, whereby the legal form of the enterprise is irrelevant. This difference is, however, the result of using the distinction made in the present system between entrepreneurship and investment.

Lastly, I discuss whether the proposed alternative is practicable and whether it will be an effective solution for the bottlenecks mentioned earlier. The following examples can be given to demonstrate the effectiveness of the system. First, the introduction of the EPT will lead to a tax-neutral treatment of natural persons participating in the enterprise. The most important reason for this is the generic approach of the secondary tax. The secondary tax contains only *one* kind of taxpayer, the person or entity that enjoys profits, and only *one* type of taxation. The criteria for being viewed as a person or entity making profits do not include a legal form requirement. Consequently, the distinction that is made at present between the tax treatment of the co-participant and the 'true' entrepreneur, in

particular with respect to the availability of business deductions, no longer exists. One of the reasons for this is that for the purpose of the EPT the taxpayer is determined without regard to legal form (objectively). Every enterprise that has real business activities is an EPT taxpayer regardless of its legal form.

The introduction of an EPT system means that the present distinctions for tax purposes between substantial shareholder and private entrepreneur will no longer exist. This results from the above-mentioned generic approach in the secondary tax both with regard to the taxpayer and the taxable item. All person or entities that make profits are subject to the secondary tax at the same proportional rate and with regard to the same taxable items. Hence, there will be equality with regard to the tax rate against which the costs of financing a participation in an enterprise may be deducted.

A second example is how the provision of capital will be labelled in the EPT system. The provision of capital to one's own private enterprise as well as to one's own enterprise carried on in the form of a legal person will be deemed for tax purposes to be an enterprise within the meaning of the EPT. The most important consequence of this will be that business capital will always exist. The distinction in the tax treatment of the provision of capital made at present will disappear as a result.

A third example is the tax treatment of losses. I take the position, among other things, that the EPT system means that at the national level there will no longer be any differences in loss set-off possibilities for businesses. Each enterprise will be entitled to set off losses regardless of its legal form. Once again, the EPT's generic approach can be considered to be the most important reason for this. Here, the objective approach of the EPT system, whereby the losses continue to exist as long as the enterprise continues to exist, plays an important role. The consequence is that there is no non-utilization of losses when an enterprise is transferred.

The losses will continue to exist regardless of who is making the profits. This is a broadening in comparison with the way losses may currently be set off (under Article 20a Wet VPB 1969

(Corporate Income Tax Act 1969 or CITA) under certain circumstances loss set-off is not possible when ownership of the enterprise is transferred). However, a disadvantage could be that when the enterprise is wound up the losses disappear as well. I take the position that for cross-border losses that the EPT system does not entirely resolve the lack of equality. However, it does do so partially. In any case, the current lack of equal treatment of losses of a foreign subsidiary and those of a permanent establishment will be resolved. Once again, this stems from the objective approach to the EPT taxpayer.

A fourth example of the tax-neutral treatment of the EPT is the tax aspects of forming groups. Among other things, the participation exemption and the fiscal unity for private entrepreneurs are at issue here. I argue that broadening the participation exemption and the fiscal unity puts an end to the problems currently caused by the difference in neutrality of legal form for both. Finally, in addition to an expansion of the present group reliefs in the EPT system, a third relief for groups is proposed, namely the so-called option for a horizontal fiscal unity. The introduction of this new form fiscal unity is not based so much on the need to achieve a greater neutrality of legal form but on the need to simplify the tax system.

Because the EPT taxpayer is determined objectively it is possible that one or more (legal) persons will carry on more than one separate enterprise, each of which will be characterized as a separate taxpayer. For simplicity's sake I propose that a horizontal fiscal unity may be formed where a group of separate enterprises is held exclusively by the same shareholders and a number of other requirements (comparable to the conditions for a fiscal unity) are met. Application of this fiction has the consequence that these separate enterprises may be characterized as one taxpayer.

The neutrality of legal form that results from the EPT system can be seen in the tax aspects of the transfer of ownership of enterprises. Transfer of ownership of an enterprise, whether directly or indirectly, results, in principle, that no matter what the legal form, a final taxation will take place with respect to the secondary tax, but that no final settle-

ment will take place at the level of the EPT. The distinction mentioned above between the transfer of ownership of a private enterprise (whereby the final settlement is always at a progressive rate) and the transfer of ownership of an enterprise (which is subject 'only' to corporate tax of 25.5% or a substantial shareholding claim) will thus disappear.

The above discussion would not be complete without an assessment of whether such a system is feasible, both from a national and an international perspective.

I take the position that with regard to the international consequences very few problems will be created if the Netherlands were to unilaterally adopt an EPT system. Only in two situations is a heavier tax burden likely to occur. In the first – a foreign enterprise with a resident that enjoys dividends or capital gains – I nevertheless propose a unilateral solution in the form of an exemption with progression for the Netherlands' supplementary tax. This exemption means that the adoption of the EPT will be more burdensome for this group of private entrepreneurs but neither does it lead to a loss of revenue for the Treasury. After all, currently the Netherlands tax authorities are not able to tax a resident who enjoys profits from a foreign enterprise since the taxation rights are allocated to the foreign country under Article 7 OECD Model.

I have not proposed a solution for the second situation – a foreign enterprise with a foreign person or entity who receives profit distributions, capital gains and wages while the foreign country gives a credit for the taxable business profits. The tax burden will increase due to the fact that what was once a one-off Netherlands levy of income tax on the business profits has been split into two separate taxes. If the foreign country uses a credit mechanism as the method of avoiding double taxation, the secondary tax will not be creditable. Only the business profits tax owed on the business profits will be granted a credit and this is considerably lower than the previously creditable Netherlands income tax on the business profits.

With a view to the above, I draw the conclusion that the international consequences of the EPT system should not make this system less feasible. The same conclusion can be drawn with regard to its feasibility at a national level. The most important factor influencing the feasibility on the national scene is that, on the one hand, there is the law on transfers whereby the main rule is the transfer of an enterprise without tax consequences and, on the other hand, the starting point which is part of the working hypothesis, that a link should be made to the existing system of taxation as much as possible.

The research question posed in this dissertation can be answered as follows. The assumption that the current system of profits taxation is characterized by a lack of neutrality of legal form appears to be correct, based on the inventory of differences in the tax treatment. The negative consequences this has for society make a reconsideration of profit taxation necessary and point in the direction of an increase in the neutrality of legal form. The EPT system – in the form of an indirect imputation system – whereby the profits tax functions independently alongside the income tax owed by the shareholder – can be considered both effective and feasible.

For this reason I take the view that we need to fundamentally re-think the method of profit taxation. The EPT system described in this dissertation could serve as an alternative to the existing system.