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In this article, the authors examine how the EU's second anti-tax-avoidance directive will affect payments from EU entities to subchapter S corporations in the United States, specifically focusing on the taxation of payments from a Dutch BV (a limited liability company) to a U.S. parent.

On January 1, 2020, the EU's second anti-tax-avoidance directive (ATAD 2, 2017/952/EU) became effective.[1] ATAD 2 addresses nontaxation arising out of hybrid mismatches with companies or permanent establishments in third countries (that is, countries outside the EU). This article explores how payments from EU companies to U.S. subchapter S corporations will be affected by ATAD 2. It also examines the impact of the implementation of ATAD 2 in Dutch law for a hypothetical structure whereby a U.S. corporate entity taxed as a subchapter S corporation (U.S. Inc.) conducts business in the Netherlands through a Dutch BV (limited liability company).

S Corps: A Brief Introduction

Subchapter S of the U.S. Internal Revenue Code addresses the tax treatment of S corps and their shareholders. Generally, a domestic (that is, U.S.) corporation that makes the election under section 1362 to be an S corporation (also known as a small business corporation) is not subject to tax itself. Instead, its shareholders are taxed on their pro rata share of the S corp's income. Specifically, section 1366(a)(1) provides that in computing an S corporation shareholder's tax liability:

> there shall be taken into account the shareholder's pro rata share of the corporation's —
>
> (A) items of income (including tax-exempt income), loss, deduction, or credit the separate treatment of which could affect the liability for tax of any shareholder, and
>
> (B) nonseparately computed income or loss.

In order to qualify as an S corp, section 1361(b)(1) provides that the entity must be a domestic corporation that does not have any of the following:

- more than 100 shareholders;
- a shareholder (other than an estate or some specially defined forms of trusts and other organizations) who is not an individual;
- a nonresident alien as a shareholder; and
- more than one class of stock.

Furthermore, under section 1361(b)(2), an S corp cannot be a financial institution, insurance company, or domestic international sales corporation.

Contrary to what the term "small business corporation" suggests, many large family-owned corporations with multibillion-dollar annual revenues are S corps.

Payments by a Dutch BV to an S Corp

Domestic corporations are typically organized under the laws of a U.S. state as either incorporated entities, which are per se treated as

[1] Council Directive (EU) 2017/952 of May 29, 2017, amending Directive (EU) 2016/1164 as regards to hybrid mismatches with third countries (ATAD 2).

associations taxable as corporations for U.S. federal tax purposes,[2] or as LLCs, which must make a federal tax election in order to be treated as an association taxable as a corporation for U.S. federal tax purposes.[3] However, as noted above, a domestic corporation that elects to be an S corporation under section 1362 is generally not subject to U.S. tax itself, but instead passes through items of income, deduction, gain, loss, and credits to its shareholders.

For Dutch tax purposes, an S corp is typically regarded as a taxable entity under the Netherlands' autonomous system of classifying foreign entities.[4] Thus, under the legislative proposal for the implementation of ATAD 2 in Dutch law released in July 2019, an S corp is regarded as a hybrid entity, which is defined as:

> any entity or arrangement that is regarded as a taxable entity for an income tax under the laws of one jurisdiction and whose income is treated as the income of one or more bodies or individuals under the laws of another jurisdiction.[5]

Interest (and Other Deductible) Payments

Suppose in our hypothetical structure, Dutch BV made an interest payment to U.S. Inc.

When considering this payment (or another type of generally deductible payment to an S corp), the first step is to assess whether the payment results in a hybrid mismatch. In the Netherlands, aside from specific restrictions on the deduction of interest, such as those found in articles 10a and 15b CITA, the interest payment would generally be deductible. In the United States, provided it is not a disregarded transaction, the BV interest payment would not be taxed at the level of the S corp, but rather in the hands of the shareholders at their ordinary income tax rates.

At first blush, one of seven listed hybrid mismatch provisions might apply here. Article 12aa(1)b) CITA refers to:

> compensations or payments to a hybrid entity in so far as they lead to a deduction without inclusion as a result of differences in the allocation of those compensations or payments to the entity under the laws of the jurisdiction where the entity is incorporated or in which the entity is established or registered and the laws of the jurisdiction under whose laws an entity is incorporated or in which it is established or registered, which holds a participation in the hybrid entity or of which an individual holding a participation in that entity is tax resident.

A payment by the BV to the S corp may seem to fall under this definition — that is, "a payment to a hybrid entity that leads to deduction without inclusion." However, the second limb of this definition clarifies that our situation is not a hybrid mismatch within the meaning of article 12aa(1)(b) CITA. The mismatch resulting in a deduction without inclusion is not the result of differences in the allocation of the payments to the entity under the laws of (i) the jurisdiction where the entity (S corp) is incorporated (United States) and (ii) the jurisdiction in which an individual holding a participation in that entity is tax resident (again, the United States). Instead, the mismatch is the result of differences in the allocation of the payments to the entity under the laws of (i) the jurisdiction where the entity is incorporated (United States) and (ii) the jurisdiction in which the company making the payments is tax resident (the Netherlands). That mismatch, though, is not caught by article 12aa(1)(b) CITA.

In the explanatory memorandum to the legislative proposal (that is, the proposal to transpose ATAD 2 into Dutch law),[6] the example used to illustrate article 12aa(1)(b) CITA is a payment to a so-called reverse hybrid entity (a classic Dutch CV-BV structure). That means the deduction without inclusion of a royalty payment

[2]Treas. reg. section 301.7701-2(b)(1).

[3]Treas. reg. section 301.7701-3(b)(1)(ii) and Treas. reg. section 301.7701-3(c)(1).

[4]*See* Classification Decree of Dec. 11, 2009, nr. CPP 2005/519.

[5]Article 12ac(1)(g) of the Dutch Corporate Income Tax Act 1969 (CITA). This definition is similar to the definition of hybrid entity in article 1(2)(b)(i) of ATAD 2. Unless otherwise indicated, all translations are the work of the author.

[6]Kamerstukken II (explanatory memorandum), 35 241, nr. 3, at 44-45 (2018-2019).

that is the result of a mismatch between the laws of the jurisdiction where the entity (CV, a Dutch limited partnership) is incorporated (that is, the Netherlands) and the laws of the jurisdiction where an entity (for example, U.S. Inc.) holding a participation in the first entity (the Dutch CV) is tax resident. The Netherlands would consider the CV transparent; the United States would consider the CV nontransparent.

All of this leads to the conclusion that payments to a reverse hybrid entity — with participants in a different state than the entity itself — may be caught by article 12aa(1)(b) CITA, but payments to a hybrid entity like the S corp — with participants in the same jurisdiction as the entity — are not caught by this provision.

Although there is no inclusion of the payment at the level of the S corp itself, the explanatory memorandum clarifies that there can be a qualifying inclusion if the income is taxed at the level of an individual through an income tax. For example, a tax comparable to the tax on business profits by sole proprietors in the Dutch Individual Income Tax Act 2001 (Box 1) would qualify.

In summary, the interest payment by the BV to the S corp is not caught by the reverse hybrid entity mismatch provision of article 12aa(1)(b) CITA because the mismatch is at a different level, and there is actually a qualifying inclusion of the payment (albeit at the shareholder level).

Notably, neither ATAD 2 nor the "*travaux préparatoires*" (that is, the working papers) from the implementation of ATAD 2 in Dutch law clarify which payments are caught by the anti-hybrid mismatch rules; they seemingly have a broad scope.[7] It is clear from the fifth and seventh recital of the ATAD 2's preamble that its objective was to provide a framework that is "consistent with and no less effective than the OECD BEPS report on Action 2."[8] The 28th recital is even clearer:

> In implementing this Directive, Member States should use the applicable explanations and examples in the OECD BEPS report on Action 2 as a source of illustration or interpretation to the extent that they are consistent with the provisions of this Directive and with Union law.

Further, paragraph 188 of the final report on action 2 of the BEPS project states:

> 188. The meaning of deductible payment is the same as that used in other recommendations in the report and generally covers a taxpayer's current expenditures such as service payments, rents, royalties, interest and other amounts that may be set-off against ordinary income under the laws of the payer jurisdiction in the period they are treated as made.

This raises a question: Can noncurrent deductible expenditures by a taxpayer (for example, a distributor's purchase of stocks or inventory) be caught by ATAD 2 even if they are not caught by the BEPS action 2 report? That would have far-reaching ramifications for Dutch distributors buying stocks and inventory from their U.S. S corp parent companies. A recent parliamentary clarification implicitly confirms that the term "payment" does have a broad reach.[9]

What If the Dutch BV Is Disregarded?

The default U.S. entity classification for a BV is an association taxable as a corporation.[10] However, it is common for a BV that is wholly owned by an S corp to make an election to be treated as a disregarded entity — that is, the BV is

[7] What has been addressed is the meaning of "deductible": A payment is deductible if, by its nature, it can be deducted from the taxable base of a tax on income. *See* Kamerstukken II, 35 241, nr. 7, at 39 (2018-2019). Implicitly, this also suggests a broad notion of "payment."

[8] Regarding the interpretative value of the BEPS action 2 final report, the Dutch State Secretary for Finance Menno Snel has held that the text of the Dutch implementation legislation and the parliamentary clarifications, interpreted in light of the ATAD 2 directive, will take precedence. In some cases, the BEPS action 2 report can serve as illustration or can be used for the interpretation of specific structure, but in case of conflict, the text of the law and parliamentary clarifications will prevail. *See* Kamerstukken II, 35 241, nr. 7, at 32 (2018-2019).

[9] Kamerstukken II, 35 241, nr. C, at 8 (2018-2019).

[10] Treas. reg. section 301.7701-2(b)(2)(B).

disregarded as an entity separate from its owner for U.S. federal income tax purposes.[11]

S corps and their U.S. shareholders tend to prefer their foreign subsidiaries, especially those organized in jurisdictions that do not have an income tax treaty with the United States or that have moderate to high effective corporate income tax rates, be classified as disregarded entities. This classification allows an S corp and its U.S. shareholders to, *inter alia,* avoid the U.S. controlled foreign corporation rules, which are onerous and difficult to apply, and use taxable losses that the disregarded entity generates, subject to some limitations. Further, the election generally allows the S corp's shareholders to claim a foreign income tax credit against their U.S. federal income tax liability for foreign income tax incurred on foreign income.

In terms of U.S. federal tax, the combined effect of the parent domestic corporation having S corp status and the BV constituting a disregarded entity is that when the individual U.S. shareholders are taxed on their worldwide income, it will include the BV's income. To the extent the BV pays foreign income tax on its earnings (such as Dutch income tax), those foreign income taxes are generally available for use as a foreign tax credit against the shareholders' U.S. federal income tax under section 901(a). The highest marginal U.S. federal ordinary income tax rate for individuals is 37 percent (section 1(j)(2)), while the top Dutch CIT rate is 25 percent — generally a favorable fact pattern for U.S. individuals when it comes to fully utilizing FTCs. However, the U.S. FTC system has many restrictions that could potentially limit the individual's ability to utilize an FTC.

Because the BV is disregarded for U.S. federal tax purposes, it too — like the S corp — becomes a hybrid entity. This hybrid mismatch situation is caught by article 12aa(1)(e) CITA:

> compensations or payments by a hybrid entity in so far as they give rise to a deduction without inclusion due to the fact that the compensations or payments are disregarded under the laws of the payee jurisdiction.

The explanatory memorandum clarifies that this example of a deduction without inclusion follows from the payment being disregarded under the laws of the payee jurisdiction (the United States). Accordingly, article 12aa(1)(e) CITA applies, and the deduction of the payment to S corp is disallowed at the level of the BV. If, however, because U.S. Inc. is an S corp and the BV has elected to be disregarded, the BV's income is taxed in both the Netherlands and the United States — albeit at the shareholder level — the hybrid mismatch arising out of the payment would not create a tax benefit to the extent that the dually included income exceeds the payments. Therefore, as article 12aa(3) CITA states, the restriction of article 12aa(1)(e) CITA does not apply to the extent that the payment can be set off against dual inclusion income (the BV's income if it is taxed in both the Netherlands and in the United States).[12]

To qualify, dual inclusion income must be income taxed in the same two jurisdictions between which the hybrid mismatch arose — in our example, the Netherlands and the United States. The taxation must be on the basis of a profit tax (*een belastingheffing naar de winst*), and the explanatory memorandum clarifies that a foreign personal income tax on business profits that is comparable to the Dutch personal income tax on business profits (often referred to as Box 1) qualifies.

The explanatory memorandum gives an example of a payment by a Dutch BV to its sister company B (resident in third jurisdiction, B), which is also disregarded for U.S. tax purposes and falls within the scope of 12aa(1)(e). Since it is B's income — not BV's income — that is dually included, the dual inclusion rule of article 12aa(3) does not apply and the full payment by BV to U.S. Inc. is nondeductible.[13] If the BV's income comes from the S corp, the income would be taxable in

[11] Treas. reg. section 301.7701-3(c)(1).

[12] The dual inclusion income test applies in both profit and loss years. *See* Kamerstukken II, 35 241, nr. 7, at 10 (2018-2019).

[13] This example is similar to S corp case study 2 in the letter that the tax committee of the American Chamber of Commerce in the Netherlands sent Minister of Finance Wopke Bastiaan Hoekstra, State Secretary for Finance Menno Snel, and Minister for Economic Affairs and Climate Policy Eric Derk Wiebes on May 23, 2019. The interest payment itself would be invisible from a U.S. tax perspective since the Dutch BV and its sister company are disregarded for U.S. tax purposes. *See* Kamerstukken II, 35 241, nr. 7, at 42 (2018-2019).

the Netherlands but disregarded for U.S. federal tax purposes; therefore it does not qualify as dual inclusion income either. This seems somewhat logical: Even if the income was technically dual included, there would be a corresponding deduction at the S corp level that would effectively mean the income is not dual included.

In the parliamentary proceedings regarding the Dutch version of ATAD 2, lawmakers discussed the example of a Dutch manufacturing company that produces goods by order of its U.S. parent company. The hypothetical Dutch manufacturing company incurs expenses of 100 and the U.S. parent remunerates it on a cost-plus 10 percent basis; accordingly, the Dutch company receives 110 from the U.S. parent company. If the Dutch company is disregarded for U.S. tax purposes, the 100 expenses would be deductible in both states, but only the Netherlands would tax the 110 remuneration. In other words, there is no dual inclusion income, and deduction of the 100 will be denied. The Dutch State Secretary for Finance considers this an uneasy yet inevitable outcome in light of the binding character of the ATAD 2 directive and has said that he will bring it to the attention of the European Commission.[14]

Two statements in the explanatory memorandum imply that the availability of a U.S. FTC for Dutch CIT paid may (at least partially) disqualify the BV's income from being dual included. It is, however, unclear how the different ATAD 2 rules interact if article 12aa(1)(e) CITA applies. When determining whether the BV's income is effectively dually included, if a U.S. FTC is calculated in part based on the BV's foreign-source gross income (as the payment made by the BV to U.S. Inc. would be nondeductible), there is potentially a full U.S. FTC utilization of the Dutch CIT paid by the BV; at 37 percent, the highest marginal individual ordinary tax rate in the United States exceeds the top Dutch CIT rate of 25 percent. However, because the U.S. income tax rate imposed on the BV income is greater than the Dutch corporate tax rate, a residual U.S. tax cost is likely, which suggests that the dual inclusion rule should apply. However, if the payment by the BV to the S corp is considered deductible owing to the dual inclusion rule of article 12aa(3) CITA, the BV may owe minimal (if any) Dutch CIT. Accordingly, the U.S. FTC utilized on the Dutch CIT would be smaller, resulting in a higher residual U.S. tax cost, and the largest part of the BV's income is actually dual included, and the dual inclusion rule should apply.[15]

There may also be timing differences between when income is taxed at the level of the BV and when the S corp's income is taxed in the hands of the U.S. individual shareholders. The explanatory memorandum acknowledges the potential for timing mismatches: It is possible that there is a difference between the moment when the Netherlands taxes the income and when the other state does so. In those cases, the income is still considered to be dual included as long as the income is eventually included in both states.

The mere expectation that current-year income will be included — as opposed to actual inclusion — by the other state does not transform the income into dual inclusion income,[16] which seems logical.

The foregoing shows that the impact of the ATAD 2 rules should be carefully examined on a case-by-case basis: Its effects will depend on the interaction of the Dutch implementation of the EU's mandate and the U.S. tax rules applicable to the S corp and its shareholders. If, overall, the hybrid mismatch results in a tax advantage, the ATAD 2 rules may apply.[17]

Dividends From a Dutch BV to an S Corp

Dividend distributions are not deductible for Dutch tax purposes. Therefore, they do not create a risk of double deduction or deduction without inclusion, and they are outside the scope of ATAD 2. Nonetheless, alongside the implementation of ATAD 2 on January 1, 2020, a decree from the Dutch State Secretary for Finance concerning hybrid entities under the Netherlands-U.S. tax treaty was repealed. The Netherlands will also

[14] Kamerstukken II, 35 241, nr. C, at 15-16 (2019-2020).

[15] Kamerstukken II, 35 241, nr. C, at 18 (2018-2019), emphasizes the need to focus on the income actually dual included in the Netherlands and the United States as well as the tax credit actually claimed in the United States to determine the amount of dual inclusion income. *See also Kamerstukken II*, 35 241, nr. 7, at 41 (2018-2019).

[16] Kamerstukken II, 35 241, nr. 3, at 62 (2018-2019).

[17] Kamerstukken II, 35 241, nr. C, at 17 (2018-2019).

reconsider other decrees that relate to the measures included in the ATAD 2 legislation.[18] This development, coupled with a passage in the 2018 annual report by the Dutch tax authorities, warrants consideration of how dividends that the Dutch BV distributes to U.S. Inc. (the BV's S corp parent) will be taxed in the ATAD 2 era.

Under Dutch domestic law (specifically, article 4(2) of the Dutch Dividend Withholding Tax Act 1965 (DWHTA)), a distribution from a BV to U.S. Inc. is exempt from Dutch dividend withholding tax (normally, 15 percent) if, in pertinent part, the beneficiary is a body that is established in a state with which the Netherlands has concluded a tax treaty according to the tax laws of that state. U.S. Inc. is legally the beneficiary of a dividend distributed by the BV and it is a body; the key question is whether U.S. Inc. (with S corp status) is "established" in the United States according to the tax laws of the United States (that is, a state with which the Netherlands has concluded a tax treaty). Based on parliamentary clarifications, established appears to have the same meaning as resident,[19] or fiscally transparent.[20]

In the United States, S corps are generally considered fiscally transparent entities for purposes of U.S. federal tax; in other words, the entity is not considered tax resident under U.S. domestic law.[21] The next question is whether the Netherlands-U.S. tax treaty might change that result. With the 2004 protocol, the parties added a new article 24(4) to the treaty, which reads:

> 4. In the case of an item of income, profit or gain derived through a person that is fiscally transparent under the laws of either State, such item shall be considered to be derived by a resident of a State to the extent that the item is treated for the purposes of the taxation law of such State as the income, profit or gain of a resident.

Even if one were to consider the Netherlands-U.S. tax treaty to be part of the "tax laws of the State with which the Netherlands has concluded a tax treaty" — despite the language suggesting reference should only be made to U.S. domestic law, and not to tax residence under the Netherlands-U.S. tax treaty — this clause still does not make the S corp U.S. resident. Instead, it merely declares that income received through the S corp is derived by a resident of a state.

Because article 4(2) DHWTA does not apply, the look-through provision of article 4(9) DWHTA should be considered. It reads:

> If a beneficiary according to the tax laws of the State under whose laws that beneficiary is incorporated is not considered there as the beneficiary of the income of shares . . . since the beneficiary is not resident in that state according to the tax laws of the State . . . for the purposes of this article an underlying beneficiary is considered to be the beneficiary, provided each recipient is treated as the beneficiary of that income according to the tax laws of the State where it is resident. . . . The second paragraph does not apply if not each underlying beneficiary would have been entitled to exemption from tax in case it had held its indirect interest in the distributing company directly.

In our example, U.S. Inc. is not considered the beneficiary of the income of the shares in the BV since the beneficiary is not established or resident in the United States, according to the tax laws of the United States. Also, the underlying beneficiaries — the S corp's shareholders — will be treated as the beneficiaries of the S corp's income, according to subchapter S. What is problematic, however, is the last sentence of article 4(9) DWHTA: As none of the S corp's (individual) shareholders would have benefited from an exemption of Dutch dividend withholding tax had they held the shares in the BV directly, the exemption from Dutch dividend withholding tax under article 4(2) DWHTA does not apply. This interplay of article 4(9) and article 4(2) DWHTA is confirmed in the explanatory memorandum using a U.S. LLC as an example.

The next question is whether the S corp would be entitled to a reduction of Dutch dividend

[18] Kamerstukken II, 35 241, nr. 3, at 45 (2018-2019). Reference is likely made to, *inter alia*, the Decree by the Dutch State Secretary for Finance of Mar. 19, 1997, nr. IFZ97/204M, BNB 1997/168.

[19] It is the Dutch implementation of article 2(a)(ii) of the parent-subsidiary directive (2011/96/EU), which refers to "resident in that Member State."

[20] Kamerstukken II, 35 241, nr. 3, at 19 (2018-2019).

[21] *See* OECD, "United States — Information on Residency for Tax Purposes."

withholding tax under the tax treaty between the Netherlands and the United States. Article 10(2) and 10(3), in conjunction with article 4(1) of that treaty, requires that the beneficial owner of the dividends (the S corp) is a resident of the United States — but it is not. Notably, article 10(2) does not provide for a reduction of Dutch dividend withholding tax on dividend distributions to an individual who is a resident of the United States. Under article 24(4) of the treaty, a dividend derived through a person that is fiscally transparent under the laws of either state shall be considered to be derived by a resident of the United States to the extent that the item is treated for the purposes of the tax law of the United States as a dividend of a resident — which it is.

Nonetheless, it appears the Dutch interpretation of this provision holds that if a dividend distributed by a BV is treated as a dividend of a U.S. individual, article 10 must be applied on the basis of that fact pattern.[22] This would mean no reduction of Dutch dividend withholding tax.[23] This approach would apply even when all the S corp's shareholders are U.S. resident individuals, as is commonly the case.[24] Notably, this approach differs from that which the German Federal Tax Court took in a decision of June 26, 2013 (I R 48/12).[25]

In light of the conclusion that a U.S. S corp receiving dividends from the BV is not entitled to any reduction of Dutch dividend withholding tax (whether domestically or under the tax treaty), a passage in the 2018 annual report from the Dutch tax authorities' advance pricing agreement and advance tax ruling team is remarkable.[26] It concerns one of the topics that the team discussed with the Dutch Ministry of Finance in 2018:

> b. Exemption from withholding tax with an S-corporation
>
> The question has arisen . . . whether a company incorporated under the laws of the United States (US) that has opted for the so-called "S-corp"-status, can be regarded beneficiary for purposes of the exemption from withholding tax in Article 4 DWHTA 1965. For purposes of Article 4 DWHTA 1965 the question should be answered if the S-Corp can be considered resident of the US under the tax laws of the US. In short, the S-corp-status entails that a company can elect under certain conditions to be regarded as transparent for federal tax purposes. One of the conditions is that all shareholders should be resident of the United States. The company's income is then directly taxed at the level of the shareholders. Substantively the S-corp-status is very similar to a transparent status. For certain (passive) income elements the company remains independently subject to tax. The S-corp is also required to annually file a simplified tax return. On the basis of the above it has been concluded that if the shares of a Dutch NV or BV are held by a US company that has elected for S-corp-status, the exemption from withholding tax of Article 4 DWHTA 1965 can be applied provided all other conditions are met.

This passage is remarkable since it suggests that, although the S corp status is substantively similar to a transparent status, it may nonetheless be regarded as being established in the United States, and hence, benefit from the exemption from withholding tax in article 4 DWHTA, provided all other conditions are met (for example, a minimum ownership percentage of 5 percent). This logic appears to be based on reading the term "established" more broadly than the term "resident." This is a favorable interpretation of article 4(2) DWHTA. This interpretation would only apply to dividends distributed after January 1, 2018, when the domestic exemption of Dutch dividend withholding tax was extended to third countries (that is, non-EU member states such as the United States).

[22] Kamerstukken I, 29 632, nr. H, at 15-16 (2004-2005).

[23] This approach was already taken in a decree from the Dutch State Secretary for Finance on Mar. 19, 1997, nr. IFZ97/204M, BNB 1997/168, which is before the amendment of the Netherlands-U.S. treaty through the 2004 protocol.

[24] The 2004 protocol introduced article 24(4). The technical explanation of the protocol does not suggest that a different interpretation should be followed here.

[25] *See* Juergen Luedicke, "Re US S Corporation's German Withholding Tax Status," 16 *ITLR* 428-441 (2013).

[26] *See* Dutch Rijksoverheid (government), "Jaarverslag APA/ATR-team 2018" (annual report by the APA/ATR team), at 25 (Apr. 2018).

Conclusion

In the common set-up of an S corp holding a disregarded Dutch BV, payments that the BV makes to the S corp will only be deductible as of January 1, 2020, if the BV's income is dual-included in the Netherlands and the United States. Whether there is effective dual inclusion in cases involving a U.S. FTC must be carefully considered on a case-by-case basis. Dividend distributions by the BV to the S corp are unaffected by ATAD 2.

An important development in this area is that the Dutch tax authorities recently issued a favorable interpretation that implies that S corps can now benefit from an exemption of Dutch dividend withholding tax. ■