

# Corporate Structures Newsletter - September 2016

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## Sellers of shares should be mindful of a new restriction on the possibility of exculpation from tax liabilities

As a result of an amendment to the law governing Dutch tax collection, it will now be easier for Dutch tax authorities to hold a seller of shares in a company liable for that company's Dutch corporate income tax debts, even after the shares in the company have been sold.

Individuals and entities that sell shares in a company can be held liable for the Dutch corporate income tax debts of that company as at the end of the year in which the sale occurs. This also applies to Dutch corporate income tax debts of the company in the three years following the sale that relate to certain reserves allowed for tax purposes and unrealized capital gains existing on the date of the sale. A seller can be held liable if:

- (i) the seller – alone or together with a related party – held at least one-third of the shares of the company in which all or a part of the shares were sold;
- (ii) portfolio investments (including cash) make up an important part (30% or more) of the company's assets; and
- (iii) the company's equity has decreased for reasons not related to the ordinary course of business in the five years prior to the sale, in the year of the sale or in the three years following the sale.

Based on the previous rules, a seller could avoid liability by demonstrating that the company's inability to pay its Dutch corporate income tax debts was not their fault. This possibility of exculpation has now been restricted.

In essence, under the new rules, a seller will *not* be held liable for Dutch corporate income tax debts relating to specific reserves allowed for tax purposes or unrealized capital gains only if and insofar as:

- (a) these reserves or unrealized capital gains relate to movable property, immovable property or property rights;
- (b) the property and the rights to which the reserves relate remain with the company for at least six months after the sale of shares; and
- (c) the seller can prove that the fact that the company's assets are insufficient for the payment of corporate income tax is not their fault.

### What to do?

A seller of shares should seek indemnification from the purchaser for liabilities in connection with Dutch corporate income tax debts of the company that is sold. Although this may have also been relevant in the past, a seller should now monitor this matter even more closely in light of the new restriction on the possibility of exculpation for tax liabilities.