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Tax Position of Companies in Distress*

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Abstract

In this article, the loss relief rules for companies established in the Netherlands are discussed in light of current developments in legislation, case law and literature. The article discusses loss relief rules within a year and beyond a year. The loss relief rules within a year governing the recognition of losses on assets that affect the annual taxable result. The tax consequences of a write-down on a receivable, a participation loss, a liquidation loss and the possibility introduced by the legislator to offset COVID-19 related losses by creating a reserve are explicitly discussed. The loss relief rules beyond a year are the losses still to be set off determined by decree at the end of the fiscal year (relievable losses). Various subsections deal with loss relief periods, loss relief deferral (*verliesverrekeningstemporisering*), holding company losses, trading in loss entities, loss relief in mergers and demergers, and the single-fiscal unity regime. The article ends with a concluding observation.

Keywords: loss; loss relief; loss relief rules; loss relief deferral; write-down; participation loss; liquidation loss; fiscal unity; Netherlands.

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1. Introduction

In this article, I explain the loss relief rules for companies established in the Netherlands. Among other things, I analyse the extent to which the Netherlands complies or is able to comply with the European Commission's recommendation of 18 May 2021 on the tax treatment of losses incurred during the COVID-19 crisis.[1] The recommendation sets out a coordinated approach to the treatment of losses for the 2020 and 2021 financial years. In addition, I discuss the loss relief rules in light of current developments in legislation, case law and literature.

Section 2 discusses loss relief rules within a year. By this, I mean the rules governing the recognition of losses on assets that affect the annual taxable result. I will explicitly discuss the tax consequences of a write-down on a receivable, a participation loss, a liquidation loss and the possibility introduced by the legislator to offset COVID-19 related losses by creating a reserve. In Section 3, the loss relief rules beyond a year are explained. By this, I mean the losses still to be set off determined by decree at the end of the fiscal year (relievable losses). Various subsections deal with loss relief periods, loss relief deferral (*verliesverrekeningstemporisering*), holding company losses, trading in loss entities, loss relief in mergers and demergers, and the single-fiscal unity regime. In Section 4, I end with a concluding observation.

In this contribution, I will not explicitly elaborate on the loss relief rules in personal income tax, the formal aspects of loss relief (such as the consequences of an incorrectly determined loss decision) and the European law aspects of (final) losses,[2] but I will explain them where relevant.

2. Loss relief rules within a year

2.1. Introduction

During the tax year, losses may arise on assets that are included in the annual result. If an asset depreciates, the rules of sound business practice (usually the precautionary principle and the realization principle) determine – unless otherwise stipulated by law – at what point a loss on the asset can be taken into account. This ultimately results in a lower annual taxable profit or annual taxable loss. However, with regard to some receivables and participating interests,[3] for example, other tax rules (legal and judicial) apply. The sub-sections below specifically discuss the assets of receivables and participating interests and explain how so-called COVID-19 losses are treated.

2.2. Receivables; write-down loss

If a taxpayer can plausibly demonstrate that the value of a receivable has decreased, then a write-off loss on a receivable is, in principle, deductible (based on the precautionary principle). An exception to this is the tenet of the non-arm's length loan. The Dutch Supreme Court (BNB 2008/191 and BNB 2012/37) show that it is considered a non-arm's length loan if it is granted under such conditions and circumstances that an independent third party would not accept the associated default risk,

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2. See T.H.J. Verhagen, *Grensoverschrijdende verliesverrekening*, WFR 2019/55. See also HR 2 July 2021, no. 19/03443, in which the Supreme Court ruled that losses of a German participating interest could not be regarded as final and that no deduction was permitted in the Netherlands.

3. Within the meaning of Article 13 of the 1969 Dutch Corporate Income Tax Act 1969 (*Wet VPB 1969*).

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not even at a higher interest rate. Any loss on the loan cannot - barring *special circumstances* - be deducted from the profit.

Since the basic BNB 2008/191 ruling referred to above, the Supreme Court has given more than thirty rulings in which further substantiation regarding the tenet of the non-arm's length loan is given. The tax problems regarding write-downs of receivables are likely to increase further in the coming years because of the (consequences of the) COVID-19 crisis. The following issues may be considered in this respect:[4]

- Loans that were already labelled as non-arm's length before the COVID-19 crisis (the moment of granting is decisive, see BNB 2012/37) will not lose this status due to the COVID-19 crisis. The non-arm's length default risk already taken on granting the loan manifests itself due to the crisis.
- In principle, loans that are at arm's length before the crisis remain so during or after the crisis. However, an arm's length loan may still become a non-arm's length loan as a result of the creditor acting at non-arm's length or failing to act (see BNB 2012/37 and BNB 2013/148). Pursuant to BNB 2013/148, the tax inspector has a relatively heavy burden of proof to show that a loan that was originally an arm's length loan has become a non-arm's length loan. If an inspector nevertheless succeeds in doing so, the taxpayer may still have the opportunity to demonstrate the existence of 'special circumstances' pursuant to BNB 2017/6. According to the Supreme Court, these circumstances exist if there is a business relationship between a creditor and a debtor that, even in the absence of a group relationship, would have been of sufficient weight for that creditor to grant a loan on the same terms and conditions and to accept the resulting default risk.[5]
- It is conceivable that third-party lenders will be cautious about granting loans in the period ahead. The granting of *new* (internal) loans deriving from the COVID-19 crisis does not necessarily make them non-arm's length loans although it may be more difficult to compare whether a third-party lender would also have granted that loan.
- The 'special circumstances' exception discussed above within the meaning of BNB 2017/6 could play an important role in the provision of new (internal) loans. If the taxpayer can plausibly demonstrate that a business relationship of sufficient weight underlies the granting of the (internal) loan, then any write-down loss on the loan will be deductible in the future.

Another point for consideration is the concurrence between the non-arm's length loan and the more stringent liquidation loss scheme (see Section 2.3). BNB 2014/98 shows that a loss on a non-arm's length loan to a participating interest can still be cashed, for example, in the event of a liquidation of that participating interest because of an increase in the amount paid (sacrificed amount). Whereas it previously made no difference to the taxpayer whether or not a non-arm's length loan existed in the event of a liquidation expected in the future (loss can still be taken in the event of liquidation), as of January 1, 2021, the importance for the taxpayer will be much greater. Now that the liquidation loss scheme has been tightened, the maximum liquidation loss that can be taken in certain situations is €5 million.[6]

4. For an elaboration of the non-arm's length loan case law see also R.R. Boltjes & F.J. Elsweier, *Onzakelijke lening*, FM 163, Chapter 17, Deventer, 2021.

5. The 'special circumstances' exception was also discussed in the Court of Appeal in Arnhem-Leeuwaarden, 2 February 2021, no. 19/00235, V-N 2021/22.8. The Court of Appeal considered in legal ground 4.8 that the total financial interest of the interested party in the continued existence of the debtor was significantly greater than the loan provided by the interested party.

6. See also A.C.P Bobeldijk & D.L. Heijtel, *De gewijzigde liquidatieverliesregeling: een overzicht en evaluatie* (part 2), NLF 2021/20, Section 4.

2.3. Participations; participation loss and liquidation loss

A company has a participation interest if 5% of the nominal paid-up capital is held in another company. If there is a participation interest, the participation exemption applies to the benefits from the participation, unless the purpose test, the tax liability test and the assets test are not met (Article 13 Dutch Corporate Income Tax Act 1969, hereafter CITA 1969). Both dividends and results from the participation interest are then exempt. One drawback is that a capital loss on a participation (a participation loss) is not deductible. The idea behind the participation exemption is to prevent economic double taxation. A profit or loss already taken into account at the participation interest need not be taken into account again at the parent company.

2.3.1. Liquidation loss/final loss

If a participation cannot offset the loss itself, there is a scheme in the Netherlands whereby the loss can then be taken into account by the parent company: the liquidation loss scheme under Article 13d CITA 1969.[7] Based on the concept of total profit and the ratio of the participation exemption (considering the result (profit and loss) of a company once), the liquidation loss scheme fits into our tax system. The liquidation loss to be taken into account consists of the difference between the amount the parent company sacrificed for the participation and the liquidation distributions. This calculation method has led to the need for all kinds of anti-abuse provisions to prevent the sacrificed amount from being artificially increased and liquidation distributions from being artificially reduced. In addition, there are statutory provisions stipulating when a liquidation loss can be taken into account. For example, a liquidation loss may only be deducted if it is final, i.e., if the liquidation has been completed (see Article 13d(14) CITA 1969).

2.3.2. Tightening of the liquidation loss scheme as of 1 January 2021

As of January 1, 2021, the liquidation loss scheme has been tightened. There are two reasons for this tightening. First, the tax legislator considers it undesirable that a company itself can plan when a liquidation loss will be taken into account by determining the moment of liquidation itself. Therefore, as of January 1, 2021, it has been provided that a liquidation loss will only be taken into account if the liquidation takes place within a period of three calendar years after the calendar year in which the business is completely or almost completely discontinued, or the decision to that end was made (temporal condition, Article 13d(14)(c) CITA 1969). The taxpayer still has the option of submitting proof to the contrary. If the taxpayer can demonstrate that a longer period than the aforementioned period is required (e.g., due to a complex legal liquidation procedure), then the entire liquidation loss may still be taken into account.

On the other hand, the tax legislator considered it undesirable that the liquidation loss scheme offered a very broad opportunity to charge losses incurred abroad to the Dutch tax base.[8] The tax legislator has, therefore, introduced two new conditions for taking into account a liquidation loss in excess of €5 million. The taxpayer must have a decisive influence (usually more than 50% of the voting rights under the articles of association) in the participation (quantitative condition, Article 13d(2a) in the first instance and (4) CITA 1969) and the participation must be established within the EU, EEA or a country with which the European Union has concluded an association agreement (territorial condition, Article 13d(2a) in the second instance CITA 1969). The quantitative condition has been introduced to ensure that the restriction only falls within the scope of the freedom of establishment. According to the tax legislator, this is necessary to prevent a taxpayer from suc-

7. I will not discuss losses from a permanent establishment (non-deductible due to application of the object exemption, Article 15e CITA 1969) and cessation losses of permanent establishments (deductible subject to conditions, Article 15i CITA 1969), which can also form part of a company's annual result. The methodology of these provisions is comparable to the methodology of participation losses and liquidation losses. For a critical review of the comparability of liquidation losses and cessation losses, see L.H.M. Heijligers, *De liquidatie- en stakingsverliesregeling vergeleken*, MBB 2019/32.

8. Parliamentary Papers II 2020-2021, 35568, no. 3, p.3.

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cessfully invoking the freedom of capital movements to deduct a liquidation loss on a liquidated participation in a third country in the Netherlands.[9]

In order to avoid evading these new conditions, all kinds of related regulations have been introduced, such as the requirement that the quantitative and territorial conditions must have been met five years prior to the liquidation (Article 13d(2b) CITA 1969) and the look-through provisions of Article 13d(3) and (15) CITA 1969.

2.3.3. Consistency

The tightening of the rules has led to some ambiguities about the scope and effect of the new provisions.[10] What I find more remarkable is that there seems to be no regard for the basic principles and consistency in corporate taxation. Although the tax legislature claims to still endorse[11] the original objectives of both the participation exemption and the liquidation loss scheme, the tightening/restriction of the liquidation loss scheme does not, in my view, fit in with the above-described rationale (taking into account the result, profit or loss of the participation once) of the participation exemption and liquidation loss scheme. In addition, the tightening of the liquidation loss scheme further infringes the neutrality principle, the aim of which is to ensure equal treatment of equity and loan capital. After all, a (business) receivable on a foreign subsidiary company can be written off against profits, but equity can only be written off in the event of liquidation and if all (stricter) conditions have been met.[12]

I also agree with Kiekebeld that there is no need for this fundamental tightening.[13] If there is abuse, then an anti-abuse measure would be more appropriate. In my view, it would have been more logical to bring this tightening in line with other comparable loss relief measures to ensure greater consistency. I am referring here to the new loss relief deferral that will enter into force on 1 January 2022 (see Section 3.2). The new scheme was, of course, included in the same 2021 Tax Package. In that case, one would at least expect a well-founded consideration or further explanation during the parliamentary process as to whether or not the same system can be used.[14] The Dutch Advisory Committee on Taxation of Multinationals states in its report that an alternative option would be to bring the liquidation and cessation loss rules in line with the loss relief deferral they have also proposed. Liquidation and cessation losses would then be taken into account for up to 50% of taxable profits, combined with an unlimited carry-forward period. According to the Committee, this would also contribute to a lower limit in corporate income tax.[15] Stevens and Stevens propose that the participation exemption be excluded to the extent that the profits originate in a country where the dissolved company was based. In terms of methodology, this resembles the old anti-abuse provision of Article 13c CITA 1969, under which the catch-up provision could be extended

9. Parliamentary Papers II 2020-2021, 35568, no. 3, p.6

10. This is, incidentally, almost always the case with new legislation. For an explanation of some of the ambiguities I refer to A.C.P Bobeldijk & D.L. Heijtel, *De gewijzigde liquidatieverliesregeling: een overzicht en evaluatie* (Parts 1 and 2), NLF-W 2021/16 and NLF 2021/20.

11. Parliamentary Papers II 2020-2021, 35568, no. 3, p.3 and Parliamentary Papers II 2020-201, 35568, no. 6, p.2.

12. See on this subject S.A. Stevens, *Toekomstige ontwikkeling van de vennootschapsbelasting*, TFO 2021/173.4.

13. Interview TaxLive 30 September 2020, *'Stop ingrijpende aftrekbeperking liquidatie- en stakingsverlies! Simpel alternatief is voldoende.'*

14. In the Tax Plan 2021, the State Secretary does briefly discuss the alternative and indicates that deductible losses are a different type of loss compared to liquidation losses. Whereas liquidation losses are losses that are charged to the profit as expenses in the relevant year, deductible losses are deductions that result from a loss-making position of the taxpayer in another year. The nature of liquidation losses and tax-deductible losses differs, which means that, according to the State Secretary, an adjustment of the loss relief in that respect is, in principle, separate from the rules that apply to liquidation losses. Parliamentary Papers II, 2020-2021, 35572, no. 23, p.37.

15. Report of the Advisory Committee on the taxation of multinationals *Op weg naar balans in de vennootschapsbelasting – Analyses en aanbevelingen'*, appendix to Parliamentary Papers II 2019/20, 31066, no. 623, p.105.

to cover all participations of the taxpayer in a certain country.[16] I agree with the authors that this restriction is more proportionate than the exclusion of the deduction of liquidation losses in excess of €5 million. I find it strange that the parliamentary debate on the Dutch Liquidation and Cessation Loss Limitation Act (*Wet beperking liquidatie- en stakingsverliesregeling*) did not discuss these alternatives.

2.4. COVID-19 losses

On 18 May 2021, the European Commission indicated that Member States may consider allowing companies to set off losses backwards against at least the previous financial year, i.e., at least 2019. Member States may choose to extend the loss carry-back period to a maximum of the previous three years, thus allowing companies to set off their losses from the 2021 and 2020 financial years against profits already taxed from the 2020, 2019, 2018, 2019, 2018 and 2017 financial years respectively. To limit the impact on national budgets, Member States could limit the amount of losses that can be carried forward to €3 million per loss-making tax year.[17]

The Dutch government has not chosen to extend the loss relief periods as proposed by the European Commission. The Government did consider extending the loss relief periods in corporate income tax, but it considered this less appropriate given the intended objective of providing businesses with a liquidity advantage in the short term.[18]

2.4.1. COVID-19 reserve

The government opted to give companies in the corporate income tax in 2019 the option of forming a COVID-19 reserve (Article 12abis CITA 1969). The COVID-19 reserve allows a company to set off a COVID-19-related loss of the year 2020 against the profit of the year 2019. By forming a COVID-19 reserve, a taxpayer can obtain a liquidity advantage at an earlier stage compared to a regular loss relief.[19] In principle, the COVID-19 loss is not normally determined until the decision on the loss for the year 2020. However, this loss can already be included in the 2019 annual profit by forming a reserve. As long as a final corporation tax assessment 2019 has not yet been imposed, the taxpayer can still choose to form a reserve, or revise this choice (whether or not regarding the amount thereof).[20]

The government's efforts to support entrepreneurs during the COVID-19 crisis are commendable.[21] However, the necessary comments can be made about the conditions set for forming a fiscal COVID-19 reserve. The fiscal COVID-19 reserve can be formed by corporate taxpayers, only if a tax profit has been made in 2019 and only if a loss is made in its entirety in 2020. The aforementioned conditions seem to be dictated purely from an implementation and pragmatic perspective. I am not at all convinced by the government's arguments for not making it possible for income taxpayers to form a tax COVID-19 reserve.[22] It is an unfortunate choice in the light of the neutrality as to

16. A.J.A Stevens & S.A. Stevens, The subjective and objective corporate tax liability, WFR 2019/188.

17. European Commission, 18 May 2021, Commission Recommendation on the tax treatment of losses during the COVID-19 crisis, C(2021) 3484 final. At the time of the credit crisis, however, the tax legislature did opt for a temporary extension of the possibility of loss carry-back option. Upon request, it was possible for the 2009, 2010 and 2011 tax years to set off losses three years in backwards up to an amount of €10 million. The price taxpayers pay for this is that if they apply for the extended carry-back period, the period for carrying losses forward is reduced to six years.

18. Appendix to the proceedings 29 May 2020. Parliamentary Papers 2019-2020, no. 2883.

19. Parliamentary Papers II, 2020-2021, 35 572, no. 3, p. 15.

20. Parliamentary Papers II, 2020-2021, 35572, no. 17, pp. 60-67.

21. See also Tax Law course, section VPB 2.2.12.F.

22. See also W.E. Nent & G.Th.K. Meussen, *Formeelrechtelijke aspecten van de fiscale coronareserve*, WFR 2020/130, part 2. The authors are of the opinion that this action by the government is clearly in conflict with the principle of equality as set out in Article 6 ECHR and Article 14 ICCPR.

legal forms and the desire to achieve a global balance between the tax treatment of an income tax entrepreneur and a director/major shareholder and his or her private limited company.

2.4.2. Extension?

It might make sense to extend the possibility of forming a COVID-19 reserve by one year, partly in view of the conditions set.[23] A COVID-19 reserve could then be formed in 2020 for the expected COVID-19 related losses in 2021. It is possible that, for some companies, the financial blow will not come until 2021 instead of 2020. In addition, companies may not have been able to meet the conditions for forming a COVID-19 reserve in the 2019 financial year but would be able to do so in 2020. In practice, there are examples of companies that did suffer COVID-19 related losses, but where those losses in addition to the other results led to a net profit for 2020, with the result that no COVID-19 reserve could be formed in 2019. Companies that apply a broken financial year also often have difficulty meeting the conditions for forming a reserve in the 2019 financial year. The one-year extension could be achieved with a minor legislative adjustment.

An extension of the fiscal COVID-19 reserve by one year would also fit in perfectly with the recommendations made by the European Commission on 18 May 2021. One of the recommendations is that Member States should offer companies the opportunity to immediately claim the offset of losses they expect to incur in the 2021 tax year, without having to wait until the end of the year.[24]

3. Loss relief rules beyond a year

3.1. Introduction

If the calculation of the taxable annual profit leads to a negative amount, this will be regarded as a loss (Article 20(1) CITA 1969). The next question is what the tax consequences of this loss are. In principle, the total profit concept is the starting point. Based on the concept of total profit (not taxing more or less than the total profit for the entire life of an entity), it should always be possible to set off losses in full against past or future taxable profits. However, the tax legislator has made various legal exceptions of this. In the sub-sections below, I will analyse whether this is justified, among other things. I will discuss the various tax consequences of the losses to be set off that have been determined by decree and the tax possibilities to be able to set off these losses.

3.2. Loss relief periods

Even though the restriction of loss relief infringes upon the concept of total profit, the loss relief periods for corporate income tax have been increasingly restricted over the years. In 2007, the term for carrying losses backwards was reduced from three years to one year. The previously applicable unlimited forward loss relief period was limited to nine years. As of 1 January 2019, the latter period was further limited to six years. As of 1 January 2022, the loss relief periods will be changed again. This is because the new loss relief deferral will enter into force on that date.[25] It is not at all indicative of consistent government tax policy that, less than two years after the loss relief periods were changed, yet another change is being proposed and introduced.

23. See in detail C. Bruijsten & F.J. Elsweier, *Fiscale coronareserve en coronavoorziening in 2020/2021*, NLFO 2021/3.

24. European Commission, 18 May 2021, Commission Recommendation on the tax treatment of losses during the COVID-19 crisis, C(2021) 3484 final.

25. On 4 June 2021, the Royal Decree was published in the Dutch Bulletin of Acts, Orders and Decrees with which the new loss relief rules will formally enter into force as of 1 January 2022.

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3.2.1. loss relief deferral

Under the new loss relief rules, losses in corporate income tax may be carried backwards for one year and forwards indefinitely, but with a deferment.[26] Up to a profit of € 1 million, losses can be fully offset. Above € 1 million, the loss can only be offset by 50% of the remaining taxable profit of that year. The deferral applies to both the loss carry-forward and the loss carry-back.

The loss relief deferral is a recommendation of the Committee on Taxation of Multinationals in its report 'Towards a Balance in Corporate Tax'. The government has adopted the recommendation and added it to the 2021 Tax Plan by memorandum of amendment on 5 October 2020. According to the State Secretary, the proposed measure will lead to more balanced taxation of multinationals and will ensure that the Netherlands will be more in line with neighbouring countries regarding loss relief.[27]

The amendment relating to carrying losses forward applies to all losses that arise after 1 January 2022, or that can still be carried forward at year-end 2021. This means that a loss from the 2012 financial year can still be carried forward up to and including the 2021 financial year. For 2012, a period of nine years to carry forward losses already applied, and this will remain the case. Losses from 2013 and later years can in principle be carried forward indefinitely, albeit with a deferral. A point for attention for practitioners is that, for example, the creation or break-up of a fiscal unity fiscal unity (or other legal acts) may result in an additional financial year so that, for a 2013 loss (or subsequent years), attention must still be paid to possible losses no longer available for setoff.[28]

3.2.2. Prevention of loss no longer available for setoff

The above implies that methods to prevent losses no longer available for setoff, also referred to as retention of losses available for setoff strategies, will in principle remain relevant until 2021. The law does not contain any explicit rules on methods to prevent losses no longer available for setoff. The theoretical possibilities for preventing losses no longer available for setoff have been discussed in the literature.[29] The following methods are mentioned:

- contribution of profitable activities;
- transfer of assets against acknowledgement of debt;
- realisation of hidden reserves through intercompany transactions;
- charge of costs/fees intercompany/transfer pricing;
- phasing out of provisions/change in tax valuation;
- capitalising of costs;
- extension of the financial year;
- exceptional revenues followed by exceptional charges in the following year;

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26. The deferral measure will not apply to the entrepreneur (Box 1) and the substantial interest holder (box 2) in the income tax. For the entrepreneur in Box 1, losses will therefore continue to be deductible for three years in arrears and nine years in advance as from January 1, 2022. For the substantial interest holder, this will continue to be the case one year back and six years forward. From the perspective of legal form neutrality and the pursuit of global balance, I find this a curious choice. Compare also Raad van State (Council of State), Appendix 2 further report on the bill of amendment on loss compensation.

27. Parliamentary Papers II, 2020/2021, 35572, no. 12.

28. Compare HR 10 July 2015, no. 14/05914, *BNB* 2015/188.

29. See G.W.J.M. Kampschöer RA, *De beperkt van de verliesverrekeningstermijn* WFR 2006/785. G.W.J.M. Kampschöer, *Kwantitatieve aspecten van fiscale verliesverrekening en de consequenties voor de verwerking in de vennootschaps jaarrekening*, Maastricht: University Press, 1992; D.R. Post, *Methoden ter voorkoming van verliesverdamping* TFO 2011/145;

This list cannot be considered exhaustive. Ultimately, the aim is for a company with losses to be carried forward to achieve a taxable profit in a given year such that (part of) the loss can be set off.[30]

From the perspective of the liquidity position of the company, it would seem sensible to apply such loss deferral strategies not only to losses from the 2012 financial year but also to losses from later years. The taxpayer may then suffer less from the deferral.

The use of retention of losses available for setoff strategies within the framework of the law and case law is permitted according to the State Secretary (see the 2014 policy decision referred to above). The State Secretary does point out that this must involve real transactions at fair values.

3.2.3. carry-back Loss

The possibility of carrying losses backwards will continue to exist. Even then, the deferral must be applied. The law as it will read on 1 January 2022 is as follows: *"A loss shall be set off against the taxable profits, or Dutch income, of the preceding year and subsequent years, provided that the loss has been determined by the tax inspector in a decision open to objection. In doing so, the setoff in any one year will only be given up to an amount of €1,000,000 plus 50% of the taxable profit, or the Dutch income, of that year after that profit, or that income, has been reduced by an amount of €1,000,000."*

In my opinion, the legal text leaves room for several interpretations. I will explain this by means of an example.

Example

- Suppose that in year 1 a company suffers a tax loss of €8 million. This loss has been established by a decision open to objection.
- Suppose that in year 2 the company makes a tax profit of €5 million by selling a property. Under the new loss relief deferral, €1 million + 50% of € 4 million = € 3 million can be offset in total. The taxable profit in year 2 is €2 million.
- Suppose that in year 3 a fiscal loss of €2 million is incurred. The loss is determined by a decision open to objection. How is the loss relief in year 3 handled?

Based on the legal text, I think there are three options:

- Option 1: No more losses from year 3 may be set off backwards because profit year 2–despite being taxed by €2 million as a result of the deferral – has already been 'used up' by loss year 1.
- Option 2: The loss from year 3 may be set off backwards, again subject to the loss relief deferral rules. There is a profit of €2 million left from year 2, so a loss may be set off against the threshold of €1 million + 50% of € 1 million is €1.5 million. This leaves a final taxable profit of year 2 of €0.5 million. The text of the law could be read as follows: 'Thereby, settlement in a year *(read: year 3)* will only take place up to an amount of €1 million plus 50% of the taxable profit of that year *(read: transferred residual profit from year 2)* after that profit, respectively that income, has been reduced by an amount of €1 million.'
- Option 3: The loss from year 3 may be set off backwards, taking into account the 50% rule but without taking into account the €1 million threshold. From year 2, there is still €2 million

30. According to the State Secretary, revaluation of business assets to a higher value in use or fair value of real estate is not in line with sound business practice. See the Decree of 16 July 2014, no. BLKB2014/362M, V-N 2014/39.7 and the Note on sound business practice, Annex 1 to the Letter to the Senate on commitments made in the Tax Plan 2012 of 8 March 2012, no. AFP2012/118, NTFR 2012/600. See C. Bruijsten *Herwaardering van bedrijfsmiddelen om verliesverdamping te voorkomen*, WFR 2017/184. A different view may also be taken of the State Secretary's view. See W. Bruin Slot, *Belast herwaarderen van onroerende zaken is toegestaan*, NTFR 2016/2819.

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profit left, so a loss may be offset of 50% of €2 million is €1 million. This leaves a final taxable profit for year 2 of €1 million.

From the example given in the commentary on the articles, it is implicit that the tax legislator has option 1 in mind. In this example, the 2020 loss is first set off against the 2022 profit, and the 2021 loss is not treated as subject to the deferral rule (option 2 or option 3). The State Secretary's response to an example given by the NOB concerning the concurrence of holding losses also implicitly shows that this is the option envisaged by the tax legislature.[31] Although options 2 and 3 also leave a lower limit (taxable profit) for corporation tax, option 1 is more in line with the purpose of the loss relief deferral.

On the one hand, it is good for businesses that there is still a carry-back option (some countries have no such option at all). On the other hand, the timing of the loss relief deferral can be described as unfortunate, given the (aftermath of the) COVID-19 crisis. The fact that the loss relief deferral also applies to loss carried backwards does not seem to be in line with the recommendations of the European Commission of 18 May 2021 (see also Section 2.4). The European Commission points out the importance of broad loss carry-back options to support the liquidity position of businesses.[32]

3.2.4. Concurrence with other arrangements in the VPB

The new loss relief rule (carry-back) in corporate income tax may possibly have a tax concurrence/effect on other regulations.[33] I find it remarkable that the rule was barely discussed in detail during the parliamentary debate in the House of Representatives. Only during the parliamentary debates in the Senate was any attention paid to the outstanding issues and the concurrence with and consequences for other corporate income tax provisions. It is then disappointing to find that the explanatory memorandum is either brief or often dismissed with a standard passage stating that the new loss relief rule is simply intended to create a lower limit in corporate income tax and that it fits in with the objective of the rule to achieve more gradual loss recognition and more stable taxable amounts.[34] The fact that the loss relief rule can have an undesirable effect on, for example, start-up losses and the final settlement profit, and that the intentions of the waiver of profit or revaluation rule in Article 20a(12) CITA 1969 (see Section 3.4) are frustrated is apparently accepted.[35] It is also strange that, in the same tax package for 2021, another loss scheme in corporate income tax (the liquidation loss scheme) is being tightened up, with the same aim as the loss relief deferral (creating a lower limit in corporate income tax for multinationals) but that no consideration or further explanation is given as to whether the same system can be applied (see also Section 2.3).

3.3. Holding company losses

The introduction of the restriction on holding company and financing losses as a partial solution to the Bosal loophole has met with criticism from the academic and practical worlds.[36] Systematically,

31. For the sake of the scope of this contribution, I refer to the parliamentary documents where these examples are elaborated. Parliamentary Papers II, 2020-2021, 35 572, no. 12, *Nota van wijziging en Kamerstukken I,* 2020-2021, 35572, no. F, p.11.

32. European Commission, 18 May 2021, Commission Recommendation on the tax treatment of losses during the COVID-19 crisis, C(2021) 3484 final p. 1 (point 5).

33. For a comprehensive analysis of the concurrence of the loss relief referral with the aforementioned other schemes, see D.R. Post & F.J. Elsweier, *Enige vraagpunten rondom de voorgestelde verliesverrekeningsmaatregel in de vennootschapsbelasting* (, WFR 2020/193.

34. See Parliamentary Papers I, 2020/2021, 35572, no. I, p.1; Parliamentary Papers I, 2020/2021, 35572, no. F, pp.6, 8 and 9.

35. See also A.C.P. Bobeldijk, *Maatschappelijk onaanvaardbaar: belastingheffing over kwijtscheldingswinst*, WFR 2021/6.

36. See for example Council of State in Parliamentary Papers II, 2003-2004, no. 29210, no. 10; D.R. Post, *De handel in verlieslichamen en de houdsterverliesregeling*, FM no. 98, Kluwer 2009, paragraph 6.2; F.P.J. *Snel, Waar is het Bosalgat? Pleidooi voor fact-finding*, WFR 2012/1104; A. Broos and T. Schoeman, *De andere Bosal reparatie, beperking van*

the rule did not fit in well with the statutory system, as in no other corporate income tax loss scheme is the activity of the company concerned decisive (except that in some schemes, as regards the tax consequences, it matters whether it is an enterprise or an investment). A-G Wattel also leaves nothing to be desired in terms of clarity; in his opinion on the BNB 2014/247-250 ruling,[37] he calls the holding company and financing loss scheme an “incident-driven, stakeholder consultation-based, unsystematic, budgetary-opportunistic measure”.

I believe few tax specialists will have mourned the fact that the holding company and financing losses provision was abolished on 1 January 2019. However, for holding company and financing losses that already existed, the restriction lives on through the transitional provision Article 34i CITA 1969. This provision states that holding company and financing losses designated on 31 December 2018 do not lose this designation and can only be set off against holding company and financing profits.

In principle, the holding company and financing loss limitation would disappear permanently by 31 December 2027 (because the nine-year carry-forward loss period for the holding company and financing loss 2018 would then expire). However, the change in the loss relief rules as of 1 January 2022, in principle, allows the holding company and financing loss limitation to continue indefinitely.[38]

3.3.1. Relief options

As a result of the new loss relief rules and the transitional law for holding company and financing losses, the retention of losses available for setoff strategies for being able to offset holding company losses also remain relevant. Post points out the following possibilities.[39]

- Attributing more functions, risks at a higher remuneration, but retaining the status of ‘holder’;
- Acquisition of low-taxed investment participations (participation exemption/object exemption not applicable);
- Borrowing an ‘Article 10b loan’ and the on-lending of a normal loan;
- The incorporation of a new subsidiary company and its inclusion in a fiscal unity.

The Supreme Court issued an interesting ruling on the latter possibility on 11 June 2021.[40] The case raised the question of whether a holding company loss could be set off against the profits of a newly established subsidiary company that became part of a fiscal unity upon its incorporation (Article 5(4) Fiscal Unity Decree 2003, hereafter FUD 2003). Based on the literal text of Article 5(4) FUD 2003, the position can be taken that the *profit* of the newly established subsidiary is attributed to the founder(s) in proportion to their capital contribution, but not the *nature* of the activities. Therefore, if a holding company were to establish a subsidiary company and include it in the fiscal unity at the time of incorporation, inclusion of non-holding results seems possible if, for example, the subsidiary company were to engage in non-holding activities. This interpretation does not fit in well with the objective and purpose of the holding company loss scheme.[41]

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houdsterverlies: het kan beter, het moet beter, WFR 2003/1937, paragraaf 3.3; S.R. Pancham/G.W.J.M. Kampschöer, Beperking verliesverrekening: *De “echte” Bosal-reparatie*, WFR 2003/1929, Section 2.

37. HR 19 September 2014, no. 13/03611, no. 13/03973, no. 13/03975, no. 13/03979, BNB 2014/247, BNB 2014/248, BNB 2014/249, BNB 2014/250.

38. Post therefore argues for a tax credit along the lines of the tax credit scheme in Article 4.53 of the Wet IB 2001, to free taxation from this provision once and for all. D.R. Post, Plea for a tax credit for holding losses, WFR 2021/23.

39. D. R. Post, *Methoden ter voorkoming van verliesverdamping*, TFO 2011/145.

40. HR 11 June 2021, no. 20/00239. See also the conclusion of the A-G dated 25 August 2020, no. 20/00239, V-N 2020/50.5.

41. These tax consequences have already been pointed out several times in the tax literature. See D.R. Post, *Vraagpunten rond een fiscale eenheid met een nieuw opgericht dochtermaatschappij: wanneer houdt het denken op?*, WFR 2006/1131

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However, the Supreme Court ruled that the textual interpretation of Article 5(4) FUD 2003 prevails. According to the Supreme Court, each provision applicable in this case (in this case, Article 20(4) (old), Article 15ae CITA 1969 and Article 5(4) FUD 2003 has its own background and rationale. According to the Supreme Court, the fact that the outcome of the application of the aggregate of these provisions when interpreted grammatically is at odds with the objective and purpose of one or more of these provisions when considered in isolation, cannot justify giving a different interpretation to this aggregate of provisions. The holding company loss can therefore be set off against the profit of a subsidiary company newly established within the fiscal unity.

On 21 September 2021, the (outgoing) government announced its intention to repair the Supreme Court ruling.

3.4. Trading in entities incurring losses

If a company has suffered losses for many years, there may come a time when the shareholders come to the conclusion that it is better to terminate the (business) activities of the company. However, the losses accumulated during the loss years of such a company do not disappear. It is only when the subjective tax liability ends, for example, because the company is liquidated or dissolved, that the company's tax loss carryforwards are lost. By transferring the shares in such a loss-making company to a new shareholder, these losses could be utilised if, for example, the new shareholder were to bring profitable activities into the loss-making company. Without an explicit legal measure, the tax authorities would not be able to take action against a tax-induced change of shareholders or stakeholders in the company aimed at benefiting from that company's loss relief.

The rule to prevent trading in entities with losses is contained in Article 20a CITA 1969. The main rule is that all losses incurred by a company up until the change of shareholder are no longer deductible if the ultimate interest[42] has changed significantly (by at least 30%) and

- the company is an investment company,[43] or
- there is a downsizing of activities.[44]

The exceptions, as a result of which losses are still (partly) deductible, can be summarised as follows:

- The change of shareholder results from a transfer under inheritance law or matrimonial property law (paragraph 2a);
- A large shareholder (at least one third interest) increases his/her interest in the company (paragraph 2b);
- The taxpayer is not aware, or could not have been aware, of the fact that the ultimate interest in the taxpayer has changed to a significant extent (paragraph 3; this applies to listed companies);
- To the extent that profits and incomes are attributable to activities that already existed immediately prior to the shareholder change (paragraph 11);

and F. van Horzen, *Verliesverrekening in de vennootschapsbelasting*, FED Fiscale Brochures, Deventer: Kluwer, fourth edition, 2020, p.63.

42. The term 'ultimate interest' means that the entire chain of companies must be looked through until the ultimate shareholder-natural persons (or possibly a foundation). See also section 2.4 of the decision of 17 April 2020, no. 2020-19072, *Stcrt* . 2020, 23674, V-N 2020/28.9.

43. For at least nine months of the year in question, the assets of the loss corporation in question consisted largely (more than 50%) of investments (paragraph 4a, investment test).

44. The taxpayer's activities have decreased by more than 70% compared to the oldest loss year (paragraph 4b, reduction test, or activities test).

- Insofar as there are hidden reserves attributable to activities that already existed immediately prior to the shareholder change (paragraph 12, revaluation possibility of assets to fair value).

3.4.1. Total profit and anti-abuse

Various authors are of the opinion that the provision against the trade in entities with losses in the Corporate Income Tax Act 1969 does not fit within the structure of corporate income tax. The essence of this criticism is that corporate income tax is an independent taxation of entities, for which, in principle, it is not important who the shareholders are. The scheme also violates the concept of total profit as losses subject to the penalty are definitively not offsetable.[45] During the parliamentary debate on the predecessor to Article 20a CITA 1969, the State Secretary of Finance himself acknowledged that he had introduced a scheme which did not fit into the corporate tax structure.[46]

In my view, despite an infringement on the concept of total profit, the legislator is justified in introducing a scheme to prevent the trade in entities with losses to prevent abuse (i.e., a change of interest specifically aimed at being able to use (other's) losses). In general terms, the scheme is very well designed, and the exceptions ensure that there is little overkill in the scheme.[47]

3.4.2. Consistency with the loss relief deferral

As of 1 January 2022, however, there may be unwanted overkill. Application of the loss relief deferral in combination with Article 20a CITA 1969 may result in the evaporation of more losses than would have been the case without the application of the deferral provision. In addition, the purpose of the revaluation option under Article 20a(12) CITA 1969 may[48] be frustrated if the loss relief deferral is applied after the revaluation. A release of goodwill and hidden reserves in excess of €1 million would then lead to a taxable position in the company concerned. This point was raised during the parliamentary process but was dismissed by the State Secretary with the far from convincing standard rant that, even in such a situation, it is desirable to create a lower limit in the corporate income tax for companies with profitable activities in the Netherlands.[49]

3.4.3. Unrealised losses

The decree on Article 20a CITA 1969, which was updated on 17 April 2020 and contains various positions of the State Secretary on this provision, is of importance for practitioners.[50] A remarkable point in the decree concerns Section 2.5. The State Secretary is of the opinion that unrealised losses and profits also fall under Article 20a. He deduces this from the case law that was rendered under the former Article 20(5) decree. From the ratio of the scheme, I can well understand that the trade

45. See for example D. Brüll, *De lege NV met verrekenbare verliezen* WFR 1962/4598. A.J. van Soest, *Lege naamloze vennootschappen met verrekenbare verliezen*, De NV June 1962. E.J.W. Heithuis, *De bijzondere bepaling tegen de handel in verlieslichamen* (Aticle 20a CITA 1969): *Vereenvoudiging dringend gewenst*! WFR 2005/1532.

46. Parliamentary Papers II, 1968-1969, 6000, 65th session (proceedings), 11 June 1969.

47. However, Post and Stals's suggestion for the inclusion of a rebuttal scheme could be reconsidered, whereby a taxpayer could make it plausible that business motives lie behind the share exchange (and that the losses would then be preserved). D.R. Post/K.P.E. Stals, The tax treatment of corporate losses: a comparative study, Intertax, Vol. 40, 2012, pp. 232-245.

48. The purpose of Article 20a(12) CITA 1969 is to offer the taxpayer the possibility to liquidate hidden reserves in assets - which arose during the period in which the losses were incurred - in order to be able to set off still existing losses that would evaporate after the change of shareholders.

49. Parliamentary Papers I, 2020-2021, 35572, no. F. p.11.

50. Decision of 17 April 2020, no. 2020-19072, *Stcrt.* 2020, 23674, V-N 2020/28.9.

in silent (negative) reserve companies must also be prevented. However, the legal text (Article 20a(1) CITA 1969) clearly refers to 'losses incurred' and 'profits enjoyed'.[51]

3.4.4. Emergency repair of the fiscal unity

Finally, I would like to refer to the concurrence of the trade in loss entities and the fiscal unity regime. On May 17, 2019, the Dutch Tax Entities (Emergency Repair) Act (*Wet spoedreparatie fiscale eenheid*) entered into force (Article 15(16) and 15(17) CITA 1969).[52] The emergency repair of the fiscal unity regime implies that some corporate income tax regulations, including Article 20a CITA 1969, should be applied as if there were no fiscal unity for corporate income tax purposes. The application as if there were no fiscal unity mainly affects the activities test. The relevant change in activities must be determined per separate entity as if the companies of the fiscal unity were independently liable to pay tax.[53] The concurrence between the accelerated repair and the trade in loss entities is very complex and a discussion of these issues is beyond the scope of this contribution. I refer to the extensive literature on this subject.[54]

3.5. Merger, demerger, and losses

The main rule in the case of a merger or demerger is that a (notional) tax assessment must be made for the taxable capital gains on the assets transferred. Under certain conditions, the tax settlement can be postponed by applying the merger or demerger facility. The statutory conditions, or the additional conditions set by the tax inspector, must ensure that the tax claim is preserved for the tax authorities.

3.5.1. The existing system for referral of (pre-merger/division) losses

An important practical aspect of mergers and demergers is the provision that claims regarding the referral of losses carried forwards are subject bound and are not transferred to the acquirer/acquirers.[55] The main rule is therefore that losses still to be offset remain behind. In the case of a business merger or demerger, the transferor or demerger entity continues to exist and the losses still to be offset can (normally) be set off against the profits (achieved with the remaining assets) of the transferor or demerger entity. In practice, this may mean that the losses can no longer be set off if, for example, the company is transferred to a newly formed subsidiary and only (exempted) income is received from the relevant participation interest. In the case of a legal merger or pure demerger, entities disappear and any losses that can still be carried forward evaporate. The State Secretary has made an exception to this main rule.[56] Losses can be passed on to the acquirer. The basic principle is that pre-merger and pre-demerger losses can be offset against post-merger or post-demerger profits if the profit is attributable to the assets and any

51. See, among others, the following publications that elaborate on this point: D.R. Post, *Het kan wel, maar we doen het niet*, NTFR 2017/1617 and R. de Smit, *Maakt de Hoge Raad handel in latente winstvennootschappen mogelijk*, NTFR 2017/1298.

52. Dutch Tax Entities (Emergency Repair) Act, Act of 24 April 2019, *Stb.* 2019,175, *Parliamentary Papers* 34 959. The Act is a response to CJEU 22 February 2018, C-398/16 and C-399/16, BNB 2018/92.

53. *Parliamentary Papers II 2017-2018, 34 959, no. 3, p. 16.*

54. D.C. Simonis & D.R. Post, *De invloed van onderlinge rechtsrelingen op artikel 15 lid 17 Wet VPB*, WFR 2021/99; L.N. Kluinhaar & D.C. Simonis, *Belangenwijzigingen bij vastgoedlichamen*, WFR 2020/136 B. Suvaal, *Een belangwijziging, een fiscale eenheid en mogelijk onverrekende verliezen - en dan? Een (spoed)stappenplan!* NTFR-A 2020/2; F.W. van Willigenburg, *Artikel 20a Wet VPB 1969 onder de spoedreparatiemaatregelen – Wanneer en hoe?* WFR 2019/250; F. van Horzen & B. Suvaal, *Aangeboden! Gedeeltelijke antwoorden en (her)bezinning - de spoedreparatie fiscale eenheid en art. 20a Wet VPB 1969 (het vervolg),* NTFR-A 2018/10; F. van Horzen & B. Suvaal *Gevraagd! Antwoorden en (her)bezinning - de spoedreparatie fiscale eenheid en art. 20a Wet VPB 1969*, NTFR-A 2018/4.

55. See in detail G.C. van der Burgt and R.J. de Vries, *Fusies, splitsingen en de verrekening van (voorfusie)verliezen: voorstellen voor het wegnemen van enkele onduidelijkheden en knelpunten*, WFR 2012/356.

56. Decisions of April 28, 2021, Stcrt. 2021, 22897, Stcrt. 2021, 22892, Stcrt. 2021, 22894, Stcrt. 2021, 22883.

associated activities that caused the losses in the past (see Section 4.6, the system for offsetting pre-merger losses in a fiscal unity). This is achieved by requiring profit splitting. According to the State Secretary, new activities should be placed in a historical perspective as much as possible, and the inspectors should exercise a certain degree of flexibility when splitting profits. In practice, however, it appears that it is very difficult to correctly allocate the profits of old and new activities. The rules described above regarding loss relief in the case of mergers and demergers have existed for many years.

Although the State Secretary has announced that he intends to regulate the concurrence between the loss relief deferral (which will enter into force on 1 January 2022) and the merger and demerger facility in the policy decisions,[57]this has unfortunately not yet happened in the recently updated decisions of 28 April 2021.

3.5.2. Alternative; transfer at an intermediate value

In Germany, it is possible to transfer assets and liabilities in the case of mergers and demergers at a value between the book value and the market value (intermediate value). In my opinion, it would be advisable to also introduce such an option of being able (or obliged) to transfer assets and liabilities at an intermediate value under the Dutch legal merger and demerger facility. The transferor would then have the option (or obligation) to transfer assets at an intermediate value (i.e., book value plus offsetable losses).[58] A comparable method is applied in the case of the tax-free return facility (*terugkeer uit de BV*, Article 14c CITA 1969), whereby a mandatory revaluation is prescribed insofar as there are offsetable losses, and in the case of the revaluation option under Article 20a(12) CITA 1969. The latter provision gives the taxpayer the option to revalue assets to a value between the book value and the market value to be able to still (partially) utilise losses, which would otherwise be lost. Such a methodology can be much simpler for both taxpayers and the tax authorities because it avoids the need to deal with potentially burdensome profit splitting issues (after the merger or demerger). Moreover, it does justice to the concept of overall profit. Such a system could possibly also be applied when forming a fiscal unity, although in that case - unlike in the case of a legal merger and a demerger - the company (the subject) would continue to exist.

3.6. Fiscal unity losses

One of the most important consequences of a fiscal unity for corporate income tax purposes is the possibility of horizontal loss relief. Within a fiscal unity, it is possible to offset a loss incurred by a Dutch company against the profits of another Dutch company. It is still not possible for a foreign-based company to be part of a Dutch fiscal unity (not including permanent establishment situations). The rules for the setoff of offsetable losses of fiscal unity entities beyond the time of merger and demerger can be found in Article 15ae-15ag CITA 1969, whereby Article 15ah CITA 1969 provides special rules for the profit split.

3.6.1. Pre-fiscal unity losses

Losses prior to the fiscal unity (pre-fiscal unity losses) that can still be offset are settled based on Article 15ae CITA 1969, Article 15ah CITA 1969 and Article 12 FUD 2003. The starting point of these rules is that a fiscal unity may not lead to more extensive loss relief possibilities. First, the profits and losses of the companies forming part of the fiscal unity must be netted horizontally, i.e., between the joined companies in the same year. This prevents the offset of a larger loss than the (net) outcome of the fiscal unity. In that context, the profit or loss (depending on whether there is carry-forward or carry-back) of the year in question is allocated to the separate companies (joined in the fiscal unity) under Article 15ah CITA 1969. The horizontal loss relief under Article 12 FUD

57. Parliamentary Papers I, 2020/2021, 35572, no. F, p.9.

58. See in detail F.J. Elsweier, *Een pleidooi voor het kunnen doorschuiven tegen een tussenwaarde bij fusie en splitsing*, WFR 2019/37.

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2003 may then be applied as favourably as possible, i.e., the profit or loss is first allocated as much as possible to those companies that have no independent relief possibilities. In the case of several companies eligible for loss relief over the time of becoming a fiscal unity, the combined result may not (unfortunately for the taxpayer) be allocated to the companies concerned in the most favourable manner. Article 12 FUD 2003 then prescribes allocation in proportion to the loss or profit suffered. In such a case, without there being any question of improper use of the fiscal unity, it may be that a loss remains unallocated although both the company concerned and the fiscal unity still had loss or profit available for relief. In my view, the decision regarding this is unnecessarily strict and inconsistent with Article 10a FUD 2003. The latter provision deals with the relief method for pre-merger interest (within the meaning of Article 15b(5) CITA 1969 in conjunction with Article 15aha CITA 1969) and includes a possibility for *repeated* pro rata allocation of the result until the remaining relief space has been allocated.[59]

3.6.2. Concurrence with the loss relief deferral measure

The new loss relief deferral measure that will enter into force on January 1, 2022, also raises the necessary questions regarding (for example) the relief of pre-merger losses.[60] The State Secretary indicated in the parliamentary explanatory notes that the method of allocation of the €1 million franchise in relation to a fiscal unity will be determined in more detail in the FUD 2003, and that this will be done in line with the system already in place for the relief of losses.[61] I believe it would be useful for this policy to be published as soon as possible, so that both the taxpayers and the tax authorities can prepare themselves for it.

3.6.3. Future of the fiscal unity regime

The fiscal unity regime may be replaced by another group regime in the future. Following the ruling based on a per-element approach of the European Court of Justice on February 22, 2018,[62] the State Secretary has indicated that the current fiscal unity regime is due for replacement. The latest situation is the letter from the State Secretary dated September 15, 2020, in which he outlines a new group regime in corporate income tax.[63] This outline shows that the Government has a loss or profit transfer scheme or a result pooling system in mind.[64]

The State Secretary estimates that - if it is decided to introduce a new group scheme - the current fiscal unity regime with existing emergency repair measures is expected to remain in place for the next few years (estimated at a minimum of five years) due to the time required for legislation, the parliamentary handling of the bill and subsequently the implementation by the tax authorities. The decision to introduce a bill has been left to the new government.

4. Final review

In this contribution, I set out the loss relief rules for companies established in the Netherlands in the light of current developments in legislation, case law, and literature.

59. See extensively F.J. Elsweier & Y.E. Noij, *De verrekening van voorvoegingsrenten en -verliezen*, WFR 2020/4.

60. See also R. van der Wilt & R.W. Vermeer, *De gewijzigde verliesverrekeningsregels in de vennootschapsbelasting: een aanzet voor een evenwichtige samenloop met het huidige fiscale-eenheidsregime*, FED 2021/52.

61. Parliamentary Papers I, 2020/2021, 35572, no. F, p.9.

62. CJEU 22 February 2018, nos C-398/16 and C-399/16, V-N 2018/11.14.

63. Letter State Secretary of Finance of September 15, 2020, no. 2020-0000168588, *V-N* 2020/51.6.

64. For an explanation and thoughts on a new group scheme, I refer to Q.W.J.C.H. Kok, *Enkele aandachtspunten bij het ontwerp van een verliesoverdrachtsregeling in de vennootschapsbelasting?,* WFR 2020/158 and R. van den Dool & M. Nieuweboer, *Een territoriale groepsregeling deel 1 en deel 2*, WFR 2019/ 227 and WFR 2019/235.

The tax legislator distinguishes between losses in different circumstances depending on the nature of the company (company subject to income tax rules, corporate taxpayer, and fiscal unity), activity (holding company losses) or events (COVID-19 related losses, change of beneficial interest). The question is whether this distinction is fair and systematically correct. Of course, the regulations governing losses do not all have the same rationale, but a more consistent approach to the eligibility of losses and the relief of losses would seem appropriate.

All in all, it appears that the Dutch loss relief rules can be regarded as complex and that various (concurrence of) schemes are not geared to one another. This applies particularly to the more stringent liquidation loss scheme that has entered into force on 1 January 2021 and the loss relief deferral that will enter into force on 1 January 2022 (for corporate income tax purposes only). The concurrence of this latter new loss relief rule with various regulations is not clear or contains overkill given the purpose and intent of the other regulations. In my view, it is therefore a missed opportunity that, when the loss relief deferral was introduced, the parliamentary debate did not include a more fundamental discussion of the loss (relief) rules in both corporate income tax and personal income tax and how these can and cannot be better aligned.

However, missing opportunities does not mean you have to lose. Hopefully in the future a gain (with regard to the loss (relief) rules) can still be achieved.