Tax alert February 2020 - Mandatory Disclosure (DAC6) - The Taxman wants to be kept in the loop and this is why you should care

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On July 1, 2020 the reporting obligations under the new mandatory disclosure rules will come into force in the Netherlands. Under these rules, taxpayers and their advisors need to report cross-border arrangements to local tax authorities if these arrangements meet certain criteria - even when no aggressive tax planning is involved. Below we explain why you should care about these new rules.

Mandatory Disclosure – come again?

To increase transparency, the European Union (EU) has drafted obligations for EU member states to introduce rules that will force intermediaries (tax advisors, accountants, lawyers, bankers and other service providers) and taxpayers to report arrangements (including structures or transactions) that bear certain hallmarks. These arrangements must be reported to local tax authorities but may also have to be reported abroad, depending on the countries involved. The relevant taxing authorities will then exchange the information with their counterparts in other EU countries. The new mandatory disclosure rules are included in an amended EU Directive on the automatic exchange of information between taxing authorities in the EU.

The rules have three functions: (i) to determine risks of tax avoidance so loopholes can be closed; (ii) to supervise and enforce in the field of taxation; and (iii) to dissuade taxpayers and their advisors to make use of aggressive tax planning.

The rules will enter in force on July 1, 2020. However, the rules will have retroactive effect as, in short, all reportable transactions that were designed or implemented as from June 25, 2018 need to be reported.

Why is this important?

The reporting of arrangements under the rules will impact on taxpayers and their advisors. The reporting obligations and the exchange of the reported information will likely result in more investigations and audits by taxing authorities and an increase in tax disputes. Not meeting the reporting obligations can give rise to serious penalties and in the worst case may lead to criminal prosecution. The broad scope of the hallmarks, the multiple reporting obligations, the patchwork of rules in Europe, the lack of consistency in the interpretation of these rules and the threat of fines creates a risk of over-reporting as well as under-reporting. These obligations should not be taken lightly.

Who must report?

Intermediaries will have the obligation to report to the authorities. In short, intermediaries are all persons involved in the design or implementation of a reportable arrangement. If there is no intermediary, for example because the

taxpayer came up with the arrangement, the taxpayer is obligated to report. Some advisors qualifying as an intermediary may fall under special rules of professional privilege, such as attorneys-at-law and civil law notaries. Professional privilege rules prohibit these intermediaries from reporting any information about their clients to the authorities. In such case, the reporting obligation shifts to the taxpayer. This scenario may be preferred as the taxpayer keeps control over what is reported.

When is an arrangement reportable?

Cross-border arrangements (e.g. structures or transactions) have to be reported if they bear certain criteria or hallmarks as they are referred to. Hallmarks are characteristics or features of a cross-border arrangement that may be an indication of a potential risk of tax avoidance or abuse. The EU Directive sets out five categories of hallmarks. For some categories considerable weight is given to the purpose of the arrangement and whether obtaining a tax advantage was a main driver. However, a transaction or a series of transactions can also be reportable even if it was not tax-driven. The requirement to report an arrangement or structure does not imply that it is harmful, only that it may be of interest to taxing authorities for further scrutiny.

Timing of reporting

Information on reportable arrangements must be filed with the relevant tax authority within 30 days starting on the day after the reportable cross-border arrangement was made available for implementation, is ready for implementation or when the first step of implementation was taken, whichever occurs first. Intermediaries providing aid, assistance or advice will also be required to file information within 30 days beginning on the day after they provided aid, assistance or advice.

What must be reported?

Information to be reported includes:

i. identification of intermediaries and relevant taxpayers;
ii. details of the relevant hallmarks;
iii. summary of the arrangement;
iv. date of first step of implementation;
v. details of the national provisions forming the basis of the arrangement;
vi. value of the arrangement;
vii. EU member states involved in the arrangement;
viii. identification of any other person in a member state likely to be affected by the arrangement.

What's next?

These new obligations require adequate documentation of arrangements, even if the arrangement is not reportable. We advise taxpayers and their advisors to review their structures, transactions, products (and other arrangements) to determine if there is a reporting obligation. It does not stop there; if there is a reportable arrangement in place thought should go into how to report the arrangement and how to defend the arrangement when it is scrutinized and/or challenged by taxing authorities.

Need assistance?

Determining if there is a reportable cross-border arrangement is complex and technical. If you have any questions on these new reporting obligations and its potential implications for you or if you need assistance in determining whether an arrangement is reportable, please contact:

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