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Referentie BR2553

Betreft: BEPS Action 2 – Public Discussion Draft on Branch
Mismatch Structures

Dear madam, sir,

The Dutch Banking Association ("NVB")¹ welcomes the invitation from the OECD to comment on the Discussion Draft on Branch Mismatch Structures as published on 22 August 2016. We are happy to provide our comments on the Discussion Draft and trust our input will help to get an even better understanding of the specific situation of banks.

Bank branches are set up for commercial and regulatory reasons

The discussion draft seems to assume that branch structures may be set up with the aim to take advantage of mismatches in tax laws of different jurisdictions and tax treaty interpretations. However, bank branches are typically set up for commercial and regulatory reasons and any mismatch in the sense of the discussion draft would simply be the result of the (mandatory) application of relevant laws and treaties rather than a deliberate planning instrument. Therefore we would suggest that branches for which there is a clear commercial (and/or regulatory) rationale for existence and thus no structured arrangement is the case should be excluded from the recommended rules. Rather than complicating doing business with more and more complex rules the real way forward in our view would be for (OECD) countries to align their tax laws further.

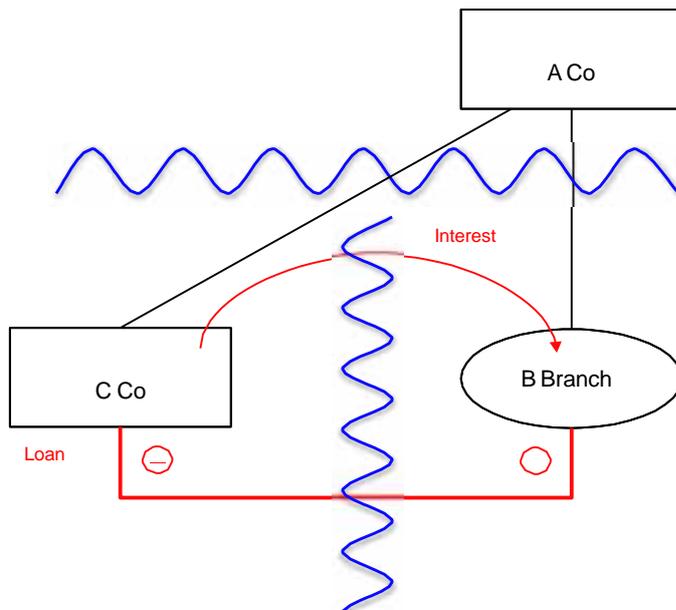
Avoidance of double taxation

If, despite the above comments, countries were to consider implementing the recommended rules, we note the following. We have serious concerns about the scope of the rules as they focus almost entirely at situations where taxpayers may end up with a tax benefit and not so much with situations which result in double taxation. For all five types of mismatches discussed in the draft, for branches set up for commercial reasons the opposite situations are as likely to occur as the situations discussed in the example. If that happens double taxation would be the result. Therefore, the recommended rules (if any) should in our view be drafted in such way that also double taxation will be avoided.

¹ The Nederlandse Vereniging van Banken ("NVB") is the representative voice of the Dutch banking community with over 90 member firms, large and small, domestic and international, carrying out business in the Dutch market and overseas. The NVB strives towards a strong, healthy and internationally competitive banking industry in the Netherlands, whilst working towards wider single market aims in Europe.

To illustrate this we limit ourselves to two examples taken from the discussion draft, but similar comments can be made for all of them.

Example 1 Disregarded Branch Structure

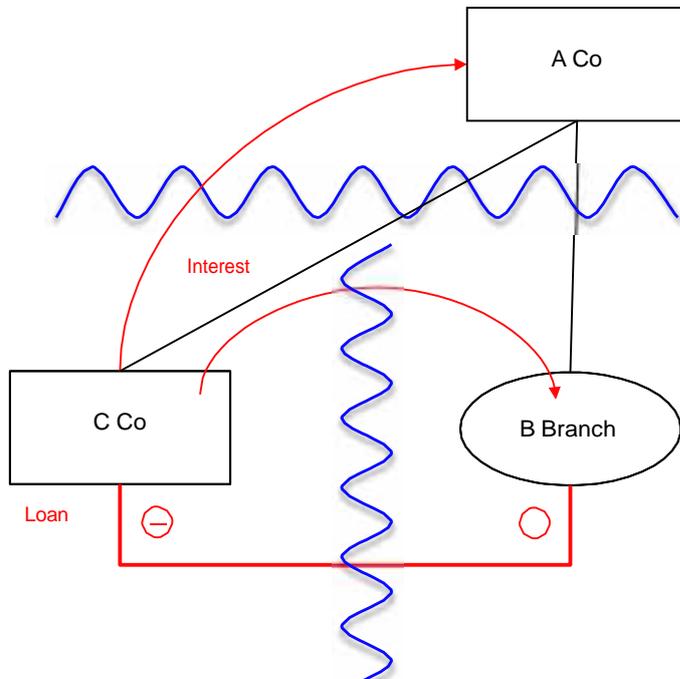


In this case A Co lends money to C Co (a related company) through a branch located in Country B. Country C permits C Co to claim a deduction for the interest payment. The interest income is taxed in Country A on the grounds that it is **not** attributable to a foreign branch because, according to the laws of Country A, A Co does not have a sufficient presence in Country B to be subject to tax in that jurisdiction (i.e. no permanent establishment has been created according to Country A). The interest income is, however, also taxed in Country B as, according to the laws of Country B, A Co has sufficient presence in Country B to be subject to tax there. The payment of interest therefore gives rise to an intra-group mismatch, but in this case resulting in double taxation.

Example 2 Diverted Branch Payment

This is almost the same example as the previous one, except that both the residence and branch jurisdictions recognise the existence of the branch. The mismatch arises due to the fact that the head office in Country A treats the interest payment as if it was paid directly to itself (so not including the income in branch income for which relief for double taxation is claimed), while the branch in Country B treats the payment as made to itself. As a consequence, the payment is subject to tax in both jurisdictions, a double taxation outcome.

Example 2 *Diverted Branch Payment*



Suggested actions

Branches with a clear commercial or regulatory rationale (such as bank branches) should be excluded from the scope of the rules in order to avoid complicating doing business further with highly complex tax rules.

If this is not possible, the recommended rules should be designed such that they not only prevent situations with less than single taxation but also situations in which there is double taxation.

We again thank you for the opportunity to provide our input and are obviously available for any questions you may have or assistance you need to explain the reasoning to to discuss any of the above comments in greater detail.

Yours sincerely,

Eelco Dubbeling
Managing Director