

# Taxperience newsflash – ATAD-2 documentation requirements

- The Dutch hybrid mismatch rules (ATAD 2 rules) cover financial instruments resulting in a tax-deductible payment in one jurisdiction without a taxable pick-up in another jurisdiction (within a reasonable period) as a result of a ‘qualification difference’ with respect to (payments derived from) the financial instrument. The term financial instrument is broadly defined as ‘any instrument generating a return on a loan financing or similar agreement or equity financing as well as a hybrid transfer.
  - Example - Dutch based corporate taxpayer makes a tax-deductible payment on a financial instrument that is regarded as debt financing in the Netherlands, whereas the jurisdiction in which the creditor is located qualifies that same financial instrument as equity financing (qualification difference) and exempts the corresponding income on that basis (e.g. on the basis of a participation exemption regime in that jurisdiction). In that case the Dutch hybrid mismatch rules would (effective as of 1 January 2020) deny deduction of the payment on such financial instrument insofar there is no taxable pick-up in the other jurisdiction.
  - Within an EU context, as a result of an earlier amendment of the EU Parent Subsidiary Directive, the actual scope of application of the hybrid mismatch rules may be more limited in relation to financial instruments in situations as those in the example above.
- The hybrid mismatch rules also apply in case of payments by or to a (reverse) ‘hybrid entity’ insofar these result in a tax-deductible payment without a taxable pick-up (in case of a reverse hybrid entity as a result of differences in the allocation of those payments to that entity resulting from qualification differences with respect to that entity). In short, a (reverse) hybrid entity may exist where one jurisdiction considers the entity as taxpayer, whereas the other jurisdiction regards that same entity as tax-transparent and allocates the income of that entity to the participants in that entity.
- The hybrid mismatch rules furthermore cover certain mismatches involving (i) payments resulting in a ‘double deduction’ (of payments, expenses (including depreciation expenses) or losses), (ii) (deemed) payments from or to (a) foreign permanent establishment(s) / branch(es) or where there are differences between States in the recognition of the existence of a permanent establishment / branch, (iii) so-called ‘imported mismatches’, and (iv) mismatches resulting from ‘dual tax residence status’.
- The hybrid mismatch rules are in principle limited to ‘related entity’ transactions, unless a so-called ‘structured arrangement’ has been established. A structured arrangement may exist between third parties, where third parties engage in transactions to create a hybrid mismatch aimed at obtaining a tax advantage. This ‘structured arrangement exception’ should however not apply if the group to which the taxpayer belongs is not aware of this tax benefit and (based on objective standards) does also not share in that tax benefit following from the arrangement.

## Documentation requirement (!)

- A Dutch taxpayer is obliged to include information in its administration reflecting to which extent and in which manner the hybrid mismatch rules apply in respect of a (deemed) payment, expense or loss.
- In case the hybrid mismatch rules actually apply to a certain (deemed) payment, expense or loss, the administration then also needs to reflect how the hybrid mismatch rules have been applied, including a tax correction calculation.
- The Dutch taxpayer needs to be able to provide this information within a reasonable term upon the Dutch tax authorities’ request.
- Please contact your Taxperience tax advisor to discuss your preparation for the ATAD-2 documentation requirements.