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All about: application of Section 403 group exemption



The central topic of every edition of 'All about' is a Dutch GAAP topic, which is explored in depth. This means you have everything that you need to know about that subject in a convenient form.

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1. Introduction and definitions

Section 360 Book 2 of the Dutch Civil Code governs which organisations are covered by Title 9 of this book ('scope'). The subject of Title 9 is 'the financial statements and the board report'. This scope is fairly broad. In principle all BVs and NVs are subject to Title 9, as well as some other legal forms.

Section 360

Paragraph 1: This title applies to cooperatives, mutual insurance associations, public companies and private limited liability companies. Irrespective of their legal form, this title applies to banks as referred to in Section 415, payment institutions as referred to in Section 1:1 of the Financial Supervision Act and electronic money institutions in Section 1:1 of the Financial Supervision Act.

The rules with regard to the financial statements are therefore also applicable to legal entities, such as a BV, belonging to a group. However, under certain conditions these legal entities can use an exemption from the presentation requirements, audit and filing. This is the exemption of Section 403 Book 2 of the Dutch Civil Code, hereinafter also referred to as the 'light regime', or group exemption. Note that the group companies in question still have the obligation to prepare financial statements. Failure to comply with this obligation may, in certain cases such as bankruptcy, result in directors' liability.

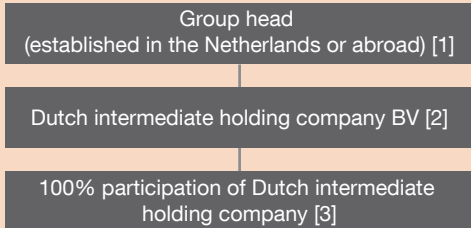
Section 403 Book 2 of the Dutch Civil Code specifies the conditions under which the group exemption can be used. The question of whether it is advisable to use this in a specific case is not easy to answer. The conditions for the exemption can also be disadvantageous, especially because of the issue of a joint and several guarantee by the parent company. The advantages and disadvantages must be carefully considered against each other.

Application of Section 403 Dutch Civil Code

2. Legal exemption under Section 403 Book 2 of the Dutch Civil Code - general rule

To qualify for the exemption, various conditions must be met, see here below under paragraph 3). The section of a law is dealt with integrally based on the various components. The further handling is based on the structure as shown here below, where a declaration of liability is issued by the group head [1] for the 100% subsidiary of the Dutch intermediate holding company [3]. The intermediate holding company [2] is included only illustratively and does not play an important role in the further elaboration (except for the concurrence, paragraph 5). In the rest of this memo, figure 1 is always referred to in order to indicate which legal entities are concerned.

Figuur 1. Structure for application of Section 403



First of all the general rule:

Section 403

Paragraph 1: A legal entity belonging to a group need not prepare the financial statements in accordance with the provisions of this title, provided that:

The facility consists of the fact that under certain conditions (which are dealt with in paragraph 3) a Dutch company [3] is not required to prepare its financial statements in accordance with the provisions of Title 9 of the Dutch Civil Code 2. As indicated earlier, (separate) financial statements must still be prepared, which must also comply with certain minimum requirements, see paragraph 3 under 'Minimum presentation requirements'. Sometimes there is the mistaken belief that there are no obligations at all in the application of Section 403.

Despite the application of the light regime, Section 10(2) Book 2 of the Dutch Civil Code still applies, which states that the board is obliged to prepare the balance sheet and profit-and-loss account of the legal entity annually within 6 months after the end of the financial year on paper. Furthermore, the aforementioned 'financial statements' will generally not be intended for publication (RJ 305.202).

Paragraph 3: For a legal entity to which paragraph 1 applies, Sections 391 up to and including 394 do not apply.

This means that the legal entity applying the light regime is exempt from:

- Section 391 preparing a board report
- Section 392 adding other information to the financial statements
- Section 393 mandatory audit
- Section 394 publication of the financial statements.

Because there is no filing, they are in fact an internal document.

Paragraph 4: This Section does not apply to legal entities as referred to in Section 398(7).

For legal entities that have been designated as public interest entities, it is not possible to apply the exemption of Section 403 Book 2 of the Dutch Civil Code. Public interest entities (Section 398(7) Book 2 of the Dutch Civil Code) are legal entities that:

- have securities admitted to trading on a regulated market of a Member State within the meaning of Article 4(1) item 14 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ EU 2004, L 145);
- are credit institutions within the meaning of Article 3(1) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJEU 2013, L 176), and which are not institutions as referred to in Article 2(5) of Directive 2013/36/EU;
- are insurance undertakings within the meaning of Article 2(1) of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ 1991 L 374); or
- have been designated by a general administrative order on account of their size or position in social and economic life.

Therefore, if company [3] in figure 1 were to be classified as an organisation of public interest (PIE), it would not be able to use the group exemption. If company [3] is not a PIE but the group head [1] or the Dutch intermediate holding company [2] is, application of Section 403 (for [3]) is possible.

Not many countries have national legislation comparable to Section 403 Book 2 of the Dutch Civil Code. Ireland and Luxembourg do. Group companies in these countries with a Dutch parent or another 'EU parent' also receive exemptions for the preparation, audit and publication of the financial statements by applying these rules. Finally, Section 403(2) regulates the situation in which there are related parent companies.



3. Conditions for exemption

The application of the group exemption is a legal facility. This is subject to various conditions by law (Section 403(1)(a) to (g) Book 2 of the Dutch Civil Code) which will be dealt with in full here below.

Minimum presentation requirements

letter a: the balance sheet in any case mentions the sum of the fixed assets, the sum of the current assets, the amount of the equity capital, the provisions and the debts, and the profit and loss account in any case states the result from ordinary activities and the balance of other income and expenses, after tax;

Often financial statements according to the light regime are referred as such, so that term is also used in this paper. The balance sheet of the company to be exempted must in any event include:

- fixed assets;
- current assets;
- equity;
- provisions;
- debts.

The profit and loss account must in any event include

- the result from ordinary activities after tax and
- the balance of other income and expenses after tax. Further explanations are not required. It is also permitted to include more items than the above.

Decree on Model accounts and adoption by the AGM

The financial statements of the group company that have to be prepared pursuant to Section 403 Book 2 of the Dutch Civil Code only have to meet a limited number of requirements and are not subject to the aforementioned Decree. This means that with the consent of the shareholders certain financial statements compiled by the accounting department, for example for consolidation purposes, can serve as statutory financial statements (provided

that these overviews obviously contain the minimum requested data). The statutory financial statements of the exempt company must always be adopted and approved by the shareholders.

The RJ makes further recommendations when applying the light regime. Reference is made to Sections 105 respectively 216, in which further provisions regarding the distribution/destination of the profit have been included for the NV respectively the BV:

Section 105

Paragraph 3: Distribution of profit will take place after the adoption of the financial statements showing that this is justified.

Section 216

Paragraph 1: The general meeting is authorised to determine the appropriation of profits established by the adoption of the financial statements and to determine the distributions to the extent the equity exceeds the reserves to be maintained pursuant to the law or the articles of association. The articles of association may restrict or grant the powers referred to in the first sentence to another body.

Partially applying exemption

It is also possible to apply the exemption only partially. For example, minority shareholders can agree to exemption from audit and publication, but can request a regular Title 9 of the Dutch Civil Code presentation for the financial statements. A legal entity cannot facilitate Section 403(1) Book 2 of the Dutch Civil Code for the legal entities belonging to its group if no consolidated financial statements have been drawn up by this legal entity using the facility referred to in Section 408 Book 2 of the Dutch Civil Code.

Example (1) partial application exemption

A BV holds 80% of the shares of B BV. The remaining 20% of the shares are held by C BV. C BV only wants to agree to Section 403 if it is informed about the ups and downs of B BV. It can agree if there is a full set of financial statement with an auditor's report. Publication can then be dispensed with.

Policies to be applied

Although not mandatory, the RJ provides further guidance on the principles to be applied if a legal entity applies Section 403. With regard to the reference to Sections 105 and 216 of the Dutch Civil Code, see the explanation for this when adopting the financial statements. The text in RJ 305.203 also suggests that the financial statements according to the light regime need not contain comparative figures from the previous financial year.

RJ 305.203

In view of the significance of financial statements prepared in a simplified manner pursuant to Section 403 Book 2 of the Dutch Civil Code, it is advisable to use principles for valuation and determination of the result when preparing the financial statements as set out in Title 9 Book 2 of the Dutch Civil Code and the Guidelines or IFRS*. This is particularly important in connection with the provisions in Sections 105 and 216 Book 2 of the Dutch Civil Code.

Providing comparative amounts for the items referred to in Section 403 Book 2(1)(a) of the Dutch Civil Code for the purposes of the general meeting that adopts the financial statements can be considered.

When compiling the simplified financial statements pursuant to Section 403 Book 2 of the Dutch Civil Code, account must be taken in any case of any presentation regulations arising from titles other than Title 9, such as the statutory reserves referred to in Sections 94a(6) Book 2 and 98c(4) Book 2 of the Dutch Civil Code (see also chapter 240 Equity).

Shareholders' declaration of consent

Letter b: the members or shareholders have declared in writing after the start of the financial year and before the adoption of the financial statements, to agree to deviation from the regulations;

The (i.e. all) shareholders must declare in writing after the start of the financial year for which the exemption should apply and before the adoption of the financial statements for that financial year

that they agree to deviate from the regulations. The consent must be given every year. If one shareholder does not agree, the exemption cannot be applied.

Example text for declaration of consent:

I, the undersigned, x% shareholder of the private limited liability company ... (name of subsidiary) ..., with its registered office in ... (place of business) ..., represented by ... (director's name) ..., declare, in accordance with the provisions of Section 403(1)(b) Book 2 of the Dutch Civil Code, to agree to the deviation from the regulations with regard to the presentation, audit and publication of the financial statements of ... (subsidiary) ... as described in Title 9 Book 2 of the Dutch Civil Code.

Applicable reporting system

Letter c: the financial data of the legal entity have been consolidated by another legal entity or company in consolidated financial statements which, pursuant to the applicable law, are subject to the Regulation of the European Parliament and the Council on the application of international accounting standards, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (PbEU 2013, L 182) or one of the two Directives of the Council of the European Communities on the annual and consolidated accounts of banks and other financial institutions or of insurance undertakings.

This provision means that the financial data of the legal entity [3], which wants to use the application of Section 403, must be consolidated in the group financial statements of the parent [2] or the grandparent [1], see figure 1. This (grand) parent must have a reporting system that complies with European Union rules (i.e. a GAAP of one of the 27 remaining EU Member States) or IFRS as accepted and approved by the European Union (including the systems of the countries

that are not members of the EU, but do qualify as from the European Economic Area). De facto, this means that only companies of which the group head¹ is located in an EU Member State and the European Economic Area (EEA)² use the group exemption and thus the group regime. A company with a parent established in the United States or Switzerland will not be able to do so, not even if the system of reporting applicable there would be considered equivalent to IFRS or to the EU Directives.

Example (2) application Section 403 if foreign parent

A Inc is a United States entity and 100% parent company of the French entity B SA, which in turn holds all the shares of C BV. Because the EU Directive does not apply to the financial statements of A Inc. This entity cannot facilitate 403 for C BV. B SA can do so in principle, because its financial statements do meet the GAAP requirement.

Due to the developments in the United Kingdom ([Brex](#)it), there is very likely an issue for Dutch subsidiaries with a parent company (group head) based in the UK. Because the UK will no longer be a member state after Brexit, the light regime can no longer be used.

As a condition for the application of the light regime, it is asserted, inter alia, that the financial data of the legal entity (in figure 1 that is [3]) are consolidated in the consolidated financial statements of [1]. This means that a company whose shares are held by two 50% shareholders will normally not be eligible for the application of Section 403. After all, such a joint venture will generally not qualify as a group company of [1]. For a comparable situation, see 'All about: Application of Section 408 Dutch Civil Code interim consolidation exemption paragraph 3 Conditions for the exemption: 'Including financial data in a larger entity'.

Example (3) where group exemption cannot be applied (two 50% shareholders)

Two companies each hold a 50% interest in an underlying company (X). X qualifies as a joint venture for both BVs. In these circumstances, X may not use the consolidation exemption of Section 408 because X is not part of a group. This is also the case if one BV, or both BVs, incorporates the joint venture into its financial statements according to the proportional consolidation method. Neither of the two BVs is group head.

Application of the language

Letter d: the consolidated financial statements, insofar as not drawn up or translated into Dutch, are drawn up or translated into French, German or English;

Letter e: the audit opinion and the management report, are drawn up or translated in the same language as the consolidated financial statements;

These requirements are clear and need no further explanation.

Declaration of liability

Letter f: the legal entity or company referred to under c has declared in writing that it is jointly and severally liable for the debts resulting from legal acts of the legal entity; (and)

The legal entity or company consolidating the financial data must declare in writing that they are jointly and severally liable for the debts resulting from legal acts of the legal entity. In figure 1, this is the parent company [1]. It is wise to consult a lawyer in such a situation. If there are associate group heads, both group heads must issue a declaration of liability.

1) The group head which also issues the declaration of liability is meant

2) The countries in the EEA are Norway, Iceland and Liechtenstein

Notes in the financial statements

The parent company must, if it falls under Dutch law, state the liability in the notes to its consolidated financial statements, this applies to both the separate and consolidated financial statements.

Section 376 of the Dutch Civil Code: If the legal entity is held liable for debts of others (...), the ensuing obligations, insofar as no provisions are included for them on the balance sheet, are stated and classified according to the form of security provided. The obligations that have been entered into for group companies are mentioned separately.

According to RJ 252.108, the joint and several liability arising from Section 403 is also one of the latter obligations. The same RJ paragraph also states that it must be stated in respect of which legal entities the legal entity (parent [1]) has issued a declaration of liability.

The following provision applies to the consolidated financial statements:

Section 14

Paragraph 15 DCC: It is stated in respect of which legal entities the legal person has issued liability claims in accordance with Section 403.

Retroactive effect

The issue of the declaration of liability (guarantee by the parent) is an important condition for the application of the light regime. The law states that Section 403 can only be applied if all conditions are met, but it is not clear about the time at which it must be decided to opt for the lighter regime at the latest. In practice, the preparation period of the financial statements is often used as a basis. This means that within 5 months after the end of the financial year it can still be decided to use the light regime, provided that at that time all other conditions are met - such as the presence of a guarantee by the parent. In addition, the period of extension of 5 months on the grounds of Section 210(1) Book 2 of the Dutch Civil Code can be added to this. The extension decision can be taken by the General Meeting. Whether the term of 5 months + 5 months can also be extended by an additional 2 months within which filing must take place (or should take place if Section 403 is not applied) is uncertain. It is certain, however, that after that period, i.e. after the final date of filing³ Section 403 cannot be applied retroactively. This means that it is not possible to 'make up for late filing' by opting for the lighter regime.

Example (4) until when can Section 403 be applied?

Company Late has the calendar year as the financial year. On 10 July 20x8, the management decided to apply the light regime after all (and thus to use Section 403) for the financial year ending on 31 December 20x7. This would be possible provided that the following conditions are met:

- The AGM has taken a decision to extend the term of preparation of financial statements by 5 months; furthermore, all shareholders have agreed to the light regime.
- Group head G. issued a declaration of liability as referred to in Section 403(1)(f) of the Dutch Civil Code.
- The financial data of the company Late are included in the group financial statements G.; these group financial statements are drawn up on the basis of the EU Directives or EU IFRS and meet the language requirement.
- The declaration of consent of the AGM and the declaration of liability of G. are filed with the Commercial Register; furthermore, the group financial statements of G. (and audit opinion and management report) were filed before 1 July 20x8 (the terms will be further discussed below in 'publication')

³) In general this is 12 months after the end of the financial year

Publication

Letter g: the declarations referred to in subsections b and f have been filed with the Trade Register as well as, within six months after the balance sheet date or within a month after a legitimate later disclosure, the documents or translations mentioned in parts d and e.

The shareholders' declaration of consent (annually) and the declaration of liability (one-off) must be filed at the office of the Trade Register. In addition, the consolidated financial statements, the audit opinion and the management report (the documents or translations) of the parent company are filed within six months of the balance sheet date or within one month of a legitimate later publication. The consolidating entity may have a longer term for the publication of its financial statements. Section 403 allows for this. The exemption can only be applied once the consolidated figures have been filed.

4. Further elaboration of liability

Economic significance of liability

The liability of the parent company [1] means that this legal person runs the risk of debts of another party (the party to whom the guarantee is issued). In addition to this possible financial consequence for the parent company, however, it also means that the 'solvency' (taking into account off-balance sheet commitments) of that parent company is to some extent adversely affected. After all, the guarantee can lead to the parent being addressed and that can lead to a decrease in equity.

For the subsidiary, the issued declaration of liability, in addition to a larger credit margin, has the advantage that the exemptions from Section 403 Book 2 of the Dutch Civil Code can be used. This generally means:

- a saving in administration and audit costs (at most, an audit must only be performed for consolidation purposes);
- that no insight needs to be given to third parties (competition) into the separate financial position: no separate financial statements are published.

The liability of the parent company pursuant to Section 403 Book 2 of the Dutch Civil Code does not release the subsidiary and its directors from their own liability for their debts. However, the more intensive supervision of the financial management of the subsidiary desired by the parent company can be regarded as a disadvantage.

Date of effect and scope of liability

The declaration of liability from the parent company [1] extends to the 'legal liabilities arising from legal acts' of the subsidiary to be exempted [3]. It therefore concerns debts resulting from agreements entered into, obligations for compensation based on breach of contract or a termination fee. Debts that do not originate from legal acts, but arise from the law (such as tort, tax debts and premium debts) are not covered by the declaration of liability.

The literature shows that the liability must extend to all existing and future debts arising from legal acts at the time the declaration of liability is issued. In the first application of Section 403 Book 2 of the Dutch Civil Code, the liability therefore applies to:

- all outstanding debts from legal acts already performed by the principal debtor;
- all debts arising in the future and emerging from legal acts already performed by the principal debtor (for example, future lease payments for existing leases);
- all debts that arise or ensue from the future legal acts of the principal debtor.

It should be borne in mind that substitute and additional indemnifications are also covered by the term 'debt'.

The liability is joint and several. As a result, the creditors of the entity for which the declaration of liability is filed (the exempted subsidiary) can also recover from the entity that issued the declaration of liability (parent company). This liable entity, if it pays a claim from the exempt entity, takes over this claim against the exempt entity. The creditors can also address the liable entity directly and need not first address the exempt entity.

End of liability

The withdrawal of the declaration of liability and the termination of liability do not coincide. Both are regulated in Section 404 Book 2 of the Dutch Civil Code.

Section 404 DCC

1. A liability claim referred to in Section 403 may be withdrawn by filing a declaration to that effect with the Trade Register.
 2. Nevertheless, liability remains for debts arising from legal acts performed before the withdrawal can be invoked against the creditor.
 3. The remaining liability is terminated in relation to the creditor if the following conditions are satisfied:
 - a. the legal entity no longer forms part of the group;
 - b. a notification of the intention to terminate has been available for inspection at the Trade register for at least two months;
 - c. at least two months have passed since the announcement in a nationally distributed newspaper that and where the notice is available for inspection;
 - d. the creditor has not objected in time to the intention or his opposition has been withdrawn or has been declared unfounded by an irrevocable court decision.
 4. If the creditor so requires, a subject to declaration that the opposition is well-founded, security will have to be furnished for him or he must be given another guarantee for the payment of his claims for which liability is still relevant. This does not apply if, after the termination of liability, in view of the legal situation of the legal entity or on other grounds, he has sufficient guarantees that these claims will be paid.
 5. Until two months after the announcement, the creditor for whose claim liability still exists may oppose the intention to terminate by petitioning the court of the domicile of the legal entity that is the principal debtor.
 6. The court declares the opposition to be well-founded only after a period it has prescribed to give a guarantee it has prescribed has expired without it being given.
- The starting point is that a registered declaration of liability can be withdrawn by submitting a declaration to that effect to the office of the Trade Register (Section 404(1) Book 2 of the Dutch Civil Code). This means that no new liability can arise. Despite the withdrawal, the liability remains for those debts arising from legal acts that have been performed before withdrawal can be invoked against the creditor (the so-called residual liability, for example continuing performance contracts such as leases, Section 404(2) Book 2 of the Dutch Civil Code). This residual liability or remaining liability can only be terminated if the conditions mentioned here below are met. The liability of the parent company for these old debts will only be lifted in relation to the creditors if:
- the subsidiary or other group company ceases to belong to the group; and
 - a notice of the intention to terminate the liability has been available for inspection for at least two months at the office of the Commercial Register, where the subsidiary or other group company is registered; and
 - at least two months have elapsed since the announcement in a nationally distributed newspaper that the notice has been filed and where this has been done; and
 - the intention to terminate the liability is not opposed within two months of the announcement by the creditor (at the court of the place where the subsidiary or other group company is located) or the creditor has withdrawn his opposition, or
 - his opposition has been declared unfounded by irrevocable judicial decision (Section 404(3) and (5) Book 2 of the Dutch Civil Code)
- If it is forgotten to withdraw the declaration of liability, liability will continue to apply, even if the exemption is no longer used and even if the shareholder relationship no longer exists.

Comparative figures

An additional question is what this means for the legal entity [3] that used the light regime and now, because the declaration of liability has been withdrawn, falls back to the 'normal' regime and has to prepare financial statements according to all the requirements of Title 9 of the Dutch Civil

Code 2. Not or no longer satisfying one of the other conditions of Section 403 also leads to the following conclusions. The following example discusses the consequences for the comparative figures.

Example (5) no longer applying light regime Section 403

Company Light applies the light regime of Section 403 up to and including 31/12/20x5, but no longer from 1/1/20x6. Complete financial statements are prepared for the financial year 20x6 on the basis of Title 9 of the Dutch Civil Code 2. The question is whether these 20x6 financial statements should include the comparative figures for 20x5.

It is justifiable not to present comparative figures for the profit and loss account in the case of Section 403 (over 20x5), otherwise the exemption for the previous financial year would be cancelled out afterwards - including the publication of the figures on that comparative year. However, it is preferable to include an opening balance sheet for the financial year in which 403 has ended (i.e. two balance sheets: one per 31/12/20x5 and one per 31/12/20x6).

Mandatory audit

Another issue is the obligatory audit. A company applying Section 403 is exempted from it. The question now is whether such a company that falls back onto the normal regime because the declaration of liability has been withdrawn is immediately subject to the statutory audit. There is nothing in the law about a transition of regime. Based on the provisions of Section 396(1), we are of the view that a company that is medium-sized in the first year of the normal regime (year: x) on the basis of the size criteria and in year x-1 would also be medium-sized if Section 403 had not been applied, with effect from year x is subject to a statutory audit. After all, this company was in fact already medium-sized in year x-1, but the consequences of the classification as medium-sized expired as a result of the exemption. Now that the exemption lapses, the normal regime revives.



5. Concurrence with other exemptions

Concurrence Section 403 and Section 408

An important condition for the application of Section 403 is that the financial data of that legal entity (which wishes to use the light regime of Section 403) will be consolidated by another legal entity. This can lead to complications if within the same group the aim is to apply the consolidation exemption as referred to in Section 408 of the Dutch Civil Code. As the name implies, in Section 408 an exemption from consolidation is used, which means that consolidated financial statements are missing. This can frustrate the application of Section 403. Below are some texts from Dutch Civil Code 2 and from the RJ, with a further explanation and an example.

RJ 217.216

If the legal entity does not prepare consolidated financial statements under Section 408 of Book 2 of the Dutch Civil Code, a legal entity belonging to its group for which the legal entity has issued a declaration as referred to in Section 403(1)(f) Book 2 of the Dutch Civil Code cannot use the provision of Section 403(1) Book 2 of the Dutch Civil Code that the financial statements do not have to be presented in accordance with the provisions of Part 9 Book 2 of the Dutch Civil Code.

Example (6) concurrence of Sections 403 and 408 - see figure 1

A group consists of a group head [1], intermediate holding company [2] and a group company [3]. All entities have a 100% shareholder interest in the underlying company/companies. On the basis of the consolidation general rule, both the group head [1] and the intermediate holding company [2] have a consolidation obligation. An exception to this can be made for [2] by applying the consolidation exemption of Section 408 Book 2 of the Dutch Civil Code.

In addition, the aim is to allow the group company [3] to use the exemption provided for in Section 403 Book 2 of the Dutch Civil Code, which means that this company can suffice with the preparation of a simplified financial statement (light regime).

Concurrence with other consolidation exemptions

In order to qualify for the light regime, the financial data of that legal entity [3] must be consolidated in consolidated financial statements (at a higher level). The absence of such consolidated financial statements will therefore generally lead to the legal entity in question [3] being unable to apply the light regime. This is the case, for example, if the group head is a small legal entity and uses the consolidation exemption of Section 407(2)(a) of the Dutch Civil Code.

Section 407

Paragraph 2 DCC: Consolidation may be omitted if

- the limits of Section 396 would not be exceeded in the event of consolidation;
- none of the companies included in the consolidation are legal entities as referred to in Section 398(7);
- no written objection to the legal entity has been made by the general meeting within six months of the start of the financial year.

If the intermediate holding company [2] uses the exemption from consolidation, no consolidated financial statements are available at that level to facilitate the group exemption in [3]. In that case, the choice should be made for either exemption from consolidation at intermediate level or application of a light regime for group company - in any case, both facilities do not coincide.

As an alternative, consideration can also be given to facilitating the 403 regime in [3] by having the group head [1] issue the declaration of liability.

N.B.: a condition not mentioned here for the application of Section 403 concerns its approval by the shareholders (in this case [2]).



A group that is considered small under Section 396 but does not use the consolidation exemption as referred to above qualifies as the group head as referred to in Section 403(1)(c), after all, there is then 'just' consolidated financial statements. Is the application of the light regime permissible by the subsidiaries? The starting point further is that the small group does not opt for a voluntary audit and does not prepare a management report - which it is also exempt from under Section 396(7).

The question is therefore whether the subsidiaries of this group head can use the light regime. There are consolidated financial statements but the conditions of, for example, Section 403(1)(g) (filing of the audit report and management report of the group head) are not met. A strict interpretation would be that the lack of application of the light regime is not possible, after all, not all conditions are met; the checklist is not complete. Another view however, is that the law has allowed certain exemptions for such small groups, so that management report and audit opinion are obviously missing. And if something is missing (on the basis of a legal title) it cannot be filed either.

Other consolidation exemptions are dealt with in paragraph 1 of Section 407, even in these cases a subsidiary cannot use the light regime:

Section 407

Paragraph 1: The consolidation obligation does not apply to data:

- a. of companies to be included in the consolidation whose collective significance is negligible on the whole,
- b. of companies to be included in the consolidation, the necessary data of which can only be obtained or estimated at disproportionate cost or with great delay,
- c. of companies to be included in the consolidation in which the interest is only held to sell it.

In all cases, there are no consolidated financial statements, and that is an essential condition for applying Section 403.

6. IFRS

The group exemption, in which it is permissible to prepare financial statements according to the light regime under certain conditions, does not exist under IFRS. Of course, a declaration of liability can be issued to a Dutch company that applies IFRS, but in that case these financial statements must meet all the requirements of IFRS. If that Dutch company were to apply Dutch GAAP - if all other conditions of Section 403 of the Dutch Civil Code were met - the light regime would suffice. The legal entity that issues the guarantee will have to explain this under both IFRS and Dutch GAAP as 'Commitments not included in the balance sheet'.

ANNEX: Frequently asked questions

FAQ 1: May Section 403 Book 2 of the Dutch Civil Code be applied to the financial statements of a subsidiary that changes owner during the year?

A: That is possible, because 'financial data' in this interpretation does not mean all financial data, but the financial data that the consolidating legal entity must incorporate in its consolidated financial statements. In a takeover situation for example, this is the financial data from the acquisition date.

Incidentally, the consolidated financial statements mean a complete set of financial statements, i.e. the balance sheet, the profit and loss account, the cash flow statement and the explanatory notes.

As far as Section 403 Book 2 of the Dutch Civil Code is concerned, it is also logical from the point of view of creditor protection that this provision can be applied after, for example, a takeover during the course of the year. The essence of Section 403 Book 2 of the Dutch Civil Code is that the creditors of the group company have a guarantee by holding the consolidating company liable. This guarantee means the interests of the creditor are not harmed in the absence of the complete financial statements of the relevant group company.

Consideration can be given to including pro forma figures in the financial statements of the consolidating group head (the acquirer) in the notes for the entire financial year of the entity applying the light regime.

FAQ 2: Can an intermediate holding company whose subsidiaries use Section 403 Book 2 of the Dutch Civil Code and for which the intermediate holding company has issued the letter of guarantee itself apply Section 408 Book 2 of the Dutch Civil Code?

A: No. The legal entity that provides the declaration of liability as referred to in Section 403 Book 2 of the Dutch Civil Code must draw up and file consolidated financial statements. See section 5.

FAQ 3: To what extent can Section 403 be applied retroactively?

A: although this is not explicitly regulated by the legislature, there is some room in the subsequent application of Section 403. As a legal demarcation, the starting point is often the time when the financial statements of the legal entity that wishes to use the light regime have to be drawn up. See also section 3, Conditions for the exemption, retroactive effect.

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