INTRODUCTION OF GENERAL WITHHOLDING TAX

The Dutch government intends to abolish the dividend withholding tax and introduce a general (intra-group) withholding tax.

As part of the measures announced yesterday (Budget Day in the Netherlands), the Dutch government intends to abolish the dividend withholding tax act, but to introduce, as per January 1, 2020, a withholding tax on dividends (including capital gains) for distributions to certain related entities in low taxed jurisdictions. As per January 1, 2021, a similar conditional withholding tax will then be introduced for interest and royalty payments.

The Dutch government expects on the one hand that with these measures the Netherlands will remain attractive for multi-nationals, however, that it will become more difficult to use the Netherlands in so-called aggressive tax planning schemes (for example by setting up a letter box company in the Netherlands to access the extensive tax treaty network of the Netherlands).

1. CURRENT WITHHOLDING TAX ACT

Since January 1, 2018, profits distributed by a Dutch entity (such as a corporation and, under certain conditions, a cooperative) to its foreign parent company are exempt from withholding tax if the parent company is located in an EU country or a country with which the Netherlands has concluded a tax treaty that includes an article on dividends. In addition to this, the interest in the Dutch entity may not be:

(i) held with (one of) the main purpose(s) to avoid Dutch dividend WHT, that otherwise may have been due by another individual/entity, and;

(ii) part of a(n) (series of) artificial arrangement(s)/transaction(s).

In other words, the structure should reflect economic reality and have valid business reasons. Valid business reasons may exist if the interest held in the Dutch corporation/cooperative can be allocated to the foreign parent company which carries on a business. This is the Dutch interpretation of the so-called principal purposes test (PPT) as introduced by the OECD BEPS project.

2. NEW WITHHOLDING TAX ACT PER JANUARY 1, 2020.

Although the Dutch dividend withholding tax will be abolished and replaced by a general withholding tax act, elements from the existing dividend withholding tax act, such as the above described PPT, will be transposed into the new withholding tax act.

In brief, the new withholding tax extends the scope of the current dividend withholding tax exemption, but at the same time introduces more strict anti-abuse provisions:

As per January 1, 2020, distributions by Dutch resident entities to related entities established in low taxed jurisdictions may become subject to a withholding tax if this new act is approved by parliament. Entities are considered related if the recipient entity (either directly or indirectly via a third party) effectively controls the distributing entity (eg, more than 50% voting rights). Furthermore, a jurisdiction is considered low taxed if the corporate income tax rate is less than 7% or if the jurisdiction is on the EU list of non-cooperative jurisdictions. Distributions to individuals are out of the scope of the new withholding tax act, however, please note that they could still be subject to the Dutch non-resident taxation (in case the individual owns, directly or indirectly, 5% or more in the Dutch distributing entity).

Payments made to entities not established in low taxed jurisdictions could still be subject to withholding tax if the ultimate recipient/beneficiary is an entity in a low taxed jurisdiction and that entity effectively controls the distributing entity.

However, in such case, the payments will only be subject to the withholding tax if the PPT applies (ie, the structure is considered artificial):

If in such case the direct foreign parent company qualifies as an intermediate holding company ("linking function"), which is often seen in private equity investment structures, it will have to meet the 'relevant substance' criteria as introduced earlier this year. In addition to the normal substance requirements it should (i) allocate salary costs of at least EUR 100,000 to its activities, and (ii) have its owns office for at least 24 months). In case however such intermediate holding is established in an EU country (for example Luxembourg), these relevant substance criteria are considered a safe harbor and other arguments may be used to demonstrate that the structure is not abusive (for example a joint venture structure in another jurisdiction).

An important and significant increase of the scope of Dutch taxation is that as of 2020 not only direct distributions will fall under the new withholding tax act, but also capital gains that are, ultimately, derived by an entity in a low taxed jurisdiction from either a direct or an indirect sale of an interest in the Dutch entity. For example, if the ultimate parent company is located in a low taxed jurisdiction and sells the shares in its Luxembourg subsidiary entity - that in turn owns shares in the Dutch entity - the sale of the shares in the Luxembourg entity may trigger Dutch withholding tax.

Also distributions made via a hybrid entity (tax transparent from a Dutch perspective however opaque from the perspective of the ultimate shareholder/investor's jurisdiction), may be subject to withholding tax if such hybrid entity is not a tax resident anywhere or a tax resident of a low taxed jurisdiction.

The rate of the withholding tax is set at the same rate as the corporate income tax (23.9% for 2020 and 22,25% for 2021). Please note that in case the non-resident taxation applies as well, the withholding tax cannot be credited against the non-resident tax.

Furthermore, as per January 2020, repayments of share capital may be subject to withholding tax, under the above described conditions, to the extent the distributing entity has profit reserves. Under current legislation, such a repayment of share capital was, under certain conditions, not subject to dividend withholding tax.

Finally, the withholding tax will no longer be due upon the distribution, however, will be due within one month after the relevant calendar year. This is different in case of capital gains, in which case the entity subject to the taxation will have to file a tax return in the Netherlands declaring the income.

3. INTEREST AND ROYALTIES

To make the Netherlands less attractive for so-called aggressive tax planning schemes, the Dutch government intends to introduce, as per January 1, 2021, a withholding tax on interest and royalties as well.

The scope of this withholding tax is expected to be similar to the scope of the withholding tax on dividends as described above and thus only apply in intra-group structures.

4. WAY FORWARD

The new rules will have an impact on many investment structures (either positive or negative). Investors/shareholders owning minority interests in Dutch entities will most likely benefit from abolishing the dividend withholding tax. However, especially private equity/investment funds using Dutch entities as platforms for their investment structures should carefully analyze the impact of the new legislation. A solution for them could be to remove all low taxed entities from the investment structure.

In certain circumstances (especially where it concerns the withholding tax on interest and royalties), a migration of the platform/investment structure to another jurisdiction (such as Luxembourg) might be an alternative.

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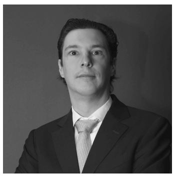

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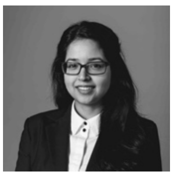

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