

## WITHHOLDING TAX ACT 2021

*From 1 January 2021 the Dutch Withholding Tax Act 2021 (DWTA 2021) will entry into force. The DWTA 2021 introduces a conditional withholding tax on interest and royalties. Please note, the impact of the DWTA 2021 could be significant as debt funded joint-ventures or PE/VC-held entities can be impacted by the new withholding tax.*

### INTRODUCTION

The DWTA 2021 introduces a conditional withholding tax on interest and royalties (CWHT) that will apply to payments of interest and royalties to related entities situated in low-tax jurisdictions, as well as in abusive situations.

### TAXABLE BASIS

The CWHT is due on gross interest and royalty payments made by Dutch resident corporate entities. The CWHT will only be due if the recipient of the interest/royalty payments is:

- a corporate entity that is a related entity to the Dutch company; and
- residing in a low-tax jurisdiction.

The applicable tax rate will be equal to the highest corporate income tax rate, which, for 2021 will be 25%.

Furthermore, the CWHT cannot be credited against Dutch corporate income tax payable by non-resident Dutch corporate income taxpayers being subject to Dutch corporate income tax on account of income from a substantial interest in a Netherlands-resident entity.

Please note, the CWHT may also be applicable on interest/royalty payments to entities which are considered tax transparent for Dutch tax purposes.

### RELATED ENTITIES

The CWHT only applies to interest and royalty payments between related entities. An entity is deemed to be related if:

- the recipient entity has a direct or indirect qualifying interest (e.g. more than 50% of the capital or statutory voting rights) in the paying entity;
- the paying company has a direct or indirect qualifying interest (e.g. more than 50% of the capital or statutory voting rights) in the recipient entity;
- a third entity holds a direct or indirect qualifying interest (e.g. more than 50% of the capital or statutory voting rights) in both the recipient entity as well as in the paying company;
- the receiving entity holds a direct or indirect interest in the paying entity and together with other entities of a cooperating group that entity owns a direct or indirect qualifying interest (e.g.

more than 50% of the capital or statutory voting rights) in the paying entity; or

- the paying entity holds a direct or indirect interest in the receiving entity and together with other entities of a cooperating group that entity owns a direct or indirect qualifying interest (e.g. more than 50% of the capital or statutory voting rights) in the receiving entity.

The definition of a 'cooperating group' is deliberately wide. This means that especially many joint-ventures or PE/VC-held entities can be impacted by the new Dutch CWHT, where one of their shareholders is debt-funding the joint venture or entity from a low-tax or non-cooperating jurisdiction.

### LOW-TAX JURISDICTION

The definition of a low-tax jurisdiction is consistent with the definition included in the Dutch Controlled Foreign Company (CFC) legislation which applies from 1 January 2019. This means that the CWHT applies (i) to payments of receiving entities established in countries which have a statutory corporate income tax rate of less than 9% and (ii) to payments to countries which are on the European Union's list of non-cooperative jurisdictions.

If the Netherlands has concluded a tax treaty with a low-tax jurisdiction, the CWHT will only kick-in once three years have passed following the qualification of that jurisdiction as a low-tax jurisdiction. During this 3-year period the Netherlands intends to renegotiate the tax treaty in order to be able to effectively levy the CWHT.

### ABUSE

When the interest or royalty is not paid into a low-tax or non-cooperative jurisdiction, the CWHT is also due in cases of abuse. Abuse is defined as artificial constructions aimed at avoiding the CWHT.

Under the anti-abuse rules of the DWTA 2021, CWHT will be levied if the following two conditions are met:

- The recipient entity is held with the main purpose, or one of the main purposes, to avoid the CWHT (subjective test); and
- The arrangement is considered to be artificial (objective test). The objective test should be assessed based on the substance of and business reasons behind the arrangement. An example of such an artificial arrangement is having the interest or royalty flow-through an entity located in a country which is not regarded as a low-tax or non-cooperative jurisdiction without having any valid business reasons.

With respect to the objective test, since 1 January 2020 the substance requirements no longer function as a 'safe-harbor' [see our [newsflash of 16 October 2020](#)]. This means that even if the Dutch minimum substance requirements are met, the Dutch tax authorities can still prove the structure is abusive. Vice versa, if the intermediate entity does not meet the substance requirements, it may still demonstrate that the arrangement is not abusive. The minimum substance requirements thus only play a role in the allocation of the burden of proof between the taxpayer and the Dutch tax administration.

#### **MOMENT OF TAXATION**

The interest/royalty payments are deemed to be received by the recipient at the moment that:

- the interest/royalty is paid by the Dutch taxpayer;
- the interest/royalty remuneration is settled with a receivable of the recipient;
- the interest/royalty remuneration is made available to the recipient, or
- the remuneration becomes interest bearing.

Interest and royalty's that accrue after 31 December 2020 and are not paid/made available to the recipient during the relevant year, are deemed to be received by the recipient at the 31st of December of the relevant year.

#### **TAX COLLECTION AND INFORMATION OBLIGATIONS**

The CWHT must be withheld by the Dutch paying entity. Within 1 month after the ending of the calendar year, a tax return should be filed and the CWHT should be remitted to the Dutch tax authorities.

The managers of the paying and receiving entities are liable for the CWHT.



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