

Dutch government released legislative proposal that introduces additional withholding tax on dividends to low-tax jurisdictions

On 25 March 2021, the Dutch government released a legislative proposal that introduces an additional withholding tax on dividends that will apply to dividend payments to related entities situated in low-tax jurisdictions, as well as in abusive situations. The conditional dividend withholding tax (CDWT) should enter into force with effect from 1 January 2024. The CDWT will also be applicable to so-called non-holding cooperatives (often used by private equity funds).

BACKGROUND

From 1 January 2021 the Dutch Withholding Tax Act 2021 (DwTA 2021) entered into force. The DwTA 2021 introduced a conditional withholding tax on interest and royalties.

The CDWT will be integrated in the DwTA 2021. Hence, the CDWT will apply in addition to the existing Dutch dividend withholding tax (DWT).

TAXABLE BASIS

The CDWT will be due on dividend payments made by Dutch resident corporate entities. The CDWT will only be due if the recipient of the dividend 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 is currently 25%.

Furthermore, the CDWT 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 CDWT may also be applicable on dividend payments to entities which are considered tax transparent for Dutch tax purposes.

RELATED ENTITIES

The CDWT only applies to dividend 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.

LOW-TAX JURISDICTION

The definition of a low-tax jurisdiction in the DwTA 2021 is consistent with the definition included in the Dutch Controlled Foreign Company (CFC) legislation which applies from 1 January 2019. This means the CDWT 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.

There may be a tax treaty in place between the Netherlands and a low-taxed jurisdiction (currently, Bahrain, Barbados, Panama and the UAE). The CDWT will only apply 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 CDWT. Accordingly, tax treaty jurisdictions that already qualify as low-tax jurisdiction per 1 January 2021 are expected to be in scope of the conditional withholding tax per 1 January 2024.

ABUSE

When the dividend is not paid into a low-tax jurisdiction, the CDWT is also due in cases of abuse. Abuse is defined as artificial constructions aimed at avoiding the CDWT.

Under the anti-abuse rules of the DwTA 2021, CDWT 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 CDWT (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 dividend 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.

RELATION TO DWT ACT AND IMPACT

In case both CDWT and DWT are due on the same distribution, the latter can be credited against the CDWT. Furthermore, in line with the DWT Act, repayments of share capital and share premium are not subject to CDWT if certain criteria are met.

Please note, while only dividend distributions by so-called holding cooperatives are subject to DWT, dividend distributions by all cooperatives are subject to the CDWT. This means that investment structures that make use of non-holding cooperatives (ie, that have sufficient substance in the Netherlands to qualify as an active cooperative as often confirmed in a ruling) can be impacted by the new Dutch CDWT, e.g. in case the membership rights of the cooperative are held directly or indirectly by investors that are residing in a low-tax jurisdiction (as often is the case in private equity structures). Under current legislation these cooperatives do not fall within the scope of the DWT.

TAX COLLECTION

The CDWT 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 CDWT should be remitted to the Dutch tax authorities.

Should you have any questions or require more information, please do not hesitate to contact us.



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