The Netherlands - Budget 2018 - Dividend withholding tax and non-resident taxation

September 21, 2017

On 19 September 2017, the Dutch government released the State's Budget for the year 2018. The Budget includes a draft bill to expand the dividend withholding tax exemption to tax treaty countries, to introduce a withholding tax obligation for holding cooperatives and to limit the taxation of non-resident investors. If the draft bill is adopted, the changes will become effective as from 1 January 2018.

1. Dividend Withholding Tax

A. Expansion dividend withholding tax exemption

Current law

Dividend distributions by a Dutch company are subject to 15% dividend withholding tax. An exemption applies if the shareholder:

i. owns an interest of at least 5% in the nominal paid up capital of the Dutch company;
ii. is the beneficial owner of the dividend;
iii. is a company that according to the tax laws of a EU/EEA member state is a resident in that state; and in addition thereto
iv. would have been able to claim the Dutch participation exemption if it were a resident of the Netherlands.

The current anti-abuse rule states that the above exemption does not apply if the Netherlands has concluded a tax treaty with the country of residence of the shareholder which contains an anti-abuse rule on basis of which the shareholder could not have claimed the reduction as provided for in that tax treaty.

Proposed changes

The draft bill proposed to expand the above exemption to a company that is a tax resident of a country with which the Netherlands has concluded a tax treaty, and which treaty contains a dividend article.

It is further proposed to replace the current anti-abuse rule. The dividend withholding tax exemption will not apply if (i) the shareholder owns the shares in the Dutch company with the main purpose (or one of the main purposes) to avoid Dutch dividend withholding tax which would otherwise have been due if the shareholder would not have been interposed, and in addition thereto (ii) the (scheme of) construction(s) or (scheme of) transaction(s) is artificial. Artificial means that the construction or transaction is not entered into for valid commercial reasons that reflect economic reality. In case a foreign holding company is interposed to obtain the withholding tax exemption, it will not be regarded as artificial if it meets all of the substance requirements set forth in Annex 1.

The Dutch company must inform the Dutch tax authorities in writing within one month following the date of putting the dividend at the disposal of the shareholder that all requirements for claiming the exemption are satisfied.

If a tax treaty provides for an exemption of tax on dividends, and contains less stringent rules than the new anti-abuse rule, the tax treaty prevails. The Netherlands aims to include a similar anti-abuse rule in its tax treaties.

Specific rules are proposed to deal with dividend payments to hybrid entities.

B. Withholding tax obligation for holding cooperatives

Current law

Profit distributions by a Dutch cooperative are not subject to dividend withholding tax, except if:

i. the cooperative owns shares of which the main purpose (or one of the main purposes) is to avoid foreign or Dutch dividend withholding tax which would have otherwise been due in case the cooperative would not have been interposed; and in addition thereto
ii. the (scheme of) construction(s) or (scheme of) transaction(s) is artificial. Artificial means that the construction or transaction is not entered into for valid commercial reasons that reflect economic reality.

In case the cooperative carries out a business enterprise itself, the construction is generally not regarded as artificial. The same is for example true if the (indirect) member(s) of the cooperative carries out a business enterprise and the cooperative owns subsidiaries which are active in the same line of business as the member(s) of the cooperative.

Proposed changes

Profit distributions by a Dutch holding cooperative will be subject to dividend withholding tax, except if:

i. a member owns an interest in cooperative giving entitlement to less than 5% of the profits, and such member does not belong to a group of which the total entitlement is 5% or more; or
ii. a dividend withholding tax exemption applies (see section A. above).

A holding cooperative means a cooperative of which 70% or more of the activities consist of owning shareholdings that qualify for the participation exemption and/or granting directly or indirectly loans to related parties, for a period of 12 months prior to putting the profit at the disposal of the members. The starting point for this analysis will be the composition of the balance sheet, but also other aspects play a role such as turnover, the profit contribution of the activities, as well as the time spent by the employees. If a cooperative is the top holding of a group, or a private equity investment platform, it may be regarded as ‘non-holding’.

Profit distributions by non-holding cooperatives will remain exempt from the obligation to withhold dividend tax.

2. Corporate Income Tax

Current law

A non-resident company that owns an interest in the nominal paid up share capital of a Dutch company of 5% or more, is subject to 20-25% Dutch corporate income tax with respect to dividends, capital gains and interest derived from such investment if:

i. the non-resident company owns the Dutch shares with the main purpose (or one of the main purposes) to avoid Dutch dividend withholding tax or Dutch personal income tax which would have otherwise been due in case the non-resident company would not have been interposed; and in addition thereto
ii. the (scheme of) construction(s) or (scheme of) transaction(s) is artificial. Artificial means that the construction or

transaction is not entered into for valid commercial reasons that reflect economic reality.

If a tax treaty provides for an exemption or lower rate of Dutch corporate income tax, and contains less stringent rules than the above anti-abuse rule, the tax treaty prevails.

Proposed changes

The draft bill proposes to limit the above rule to abuse of Dutch personal income tax, since the abuse of dividend withholding tax will be exclusively targeted via the Dutch dividend withholding tax Act (see Section 1.A and 1.B above). Furthermore, the draft bill clarifies when an interposed non-resident holding company is not artificial. Reference is made to Annex 1.

Annex 1 – Substance requirements for a non-resident holding company

1. At least 50% of the total executive members of the board of directors live or is established in the state in which the holding company is a resident ('resident directors');
2. The resident directors of the holding company have the necessary professional knowledge to perform their duties well. These duties consist of at least the decision taking on basis of the holding company's own responsibility and within the framework of the usual involvement of the holding company's headquarter, with respect to transactions to be concluded by the holding company as well as the proper dealing of the concluded transactions.
3. The holding company has adequate personnel for the adequate execution and registration of the holding company's transactions;
4. The board decisions are made in the state in which the holding company is a resident;
5. The main bank accounts of the holding company are kept in the state in which the holding company is a resident;
6. The bookkeeping of the holding company takes place in the state in which the holding company is a resident;
7. The employee costs that forms a remuneration for the activities on behalf of the holding function role of the holding company amount to, translated to Dutch standards, at least €100,000 (*); and
8. The holding company owns or rents office space in the state in which the holding company is a resident for a period of at least 24 months, and which office is equipped to perform the holding function role, which role is actually performed from that office (*).

(*) These two requirements will become effective as from 1 April 2018 instead of 1 January 2018.

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