



## **Proposal to broaden exemptions of Dutch dividend withholding tax**

The Dutch Ministry of Finance has opened a public internet consultation for a legislative proposal amending the Dutch dividend withholding tax act. Basically, all structures in which foreign investors invest in Dutch entities will need to be reviewed to determine what the impact of the proposals will be.

The background of this legislative proposal lies in the different Dutch dividend withholding tax position of Dutch corporate entities. Compared to cooperatives (generally exempt), companies with a capital divided into shares (NVs and BVs) are generally subject to Dutch dividend withholding tax. The current proposal intends to eliminate this difference.

The proposed domestic full exemption of Dutch dividend withholding tax will apply if the shareholders/members are active investors and are resident in a jurisdiction with which the Netherlands has concluded a tax treaty (irrespective of the dividend withholding tax rate in that treaty). Dutch dividend withholding tax will however apply in passive investment structures and artificial structures.

The consultation includes a draft Bill and is intended to gather comments by interested parties. The consultation closes on 13 June 2017. After the consultation, a (potentially amended) proposal will be presented to Parliament. The final legislative proposal is expected on Budget Day (19 September 2017) and it is envisaged that the changes will become effective on 1 January 2018.

Below, we will discuss i) the current framework, ii) the proposed amendments and iii) our take on the legislative proposal.

### **Current framework**

Dutch corporate entities such as BV's and NV's are subject to a 15% dividend withholding tax. In corporate structures this is however in general reduced or eliminated through tax treaties or the application of the EU parent subsidiary directive.

Based on the current legislation, cooperatives are in principle not liable to Dutch dividend withholding tax, unless anti-abuse provisions apply. The anti-abuse provision applies if the main purpose or one of the main purposes to hold the substantial membership interest (5% or more) is to avoid Dutch dividend withholding tax or foreign tax and it concerns an artificial structure or a series of artificial structures.

### **Dividend withholding tax exemption**

The main features of the draft Bill are that an exemption will apply for all Dutch corporate entities owned by (indirect) shareholders which conduct an active business enterprise, if a double tax treaty has been concluded between the Netherlands and the country of residence of the shareholder/member of the Dutch entity, which contains a dividend income clause. The shareholder/member should be a treaty resident (not tax transparent in the treaty jurisdiction), but not meeting e.g. the LOB requirements or the requirements of the dividend provision in the treaty should not impact the application of the domestic exemption.

## **Your global tax partner**

Specific anti-abuse rules will apply which can limit the domestic exemption of dividend withholding tax. The new anti-abuse legislation corresponds with provisions of the amended EU Parent Subsidiary Directive and BEPS action 6. The Netherlands intends to no longer give treaty benefits to passive investors and wholly artificial arrangements. It is to be expected that other countries will also implement similar rules.

A structure is considered abusive if:

- the shares in the Dutch BV, or qualifying membership rights in a holding cooperative, are held with the main purpose, or one of the main purposes, to avoid Dutch dividend withholding tax due by another entity or individual (subjective test/main purpose test)
- if the structure is part of an artificial arrangement or transaction, which will be the case if there are no valid business reasons reflecting economic reality (objective test)

Before applying the above subjective test and objective test, it should first be determined whether the shares/membership rights are held as part of an active business enterprise of the shareholder/member or as a passive (portfolio) investment. In case they are held as a passive investment, distributions by the Dutch company are in principle subject to withholding tax.

For the subjective test it has to be reviewed whether the direct intermediate holding company is interposed to avoid or mitigate Dutch dividend withholding tax. This test can be met if within the chain of ownership, an active business is carried out by a treaty resident or resident of the EU/EEA. The structure will in such cases not be considered abusive and the exemption applies.

The objective test becomes relevant when the direct shareholder/member of the Dutch company is a resident of a tax treaty country with the Netherlands but the ultimate shareholder is considered to have an active business. In that case, the objective test determines that if the direct shareholder of the Dutch company satisfies the amended minimum substance requirements the structure will not be considered abusive and the exemption should apply. A private equity structure can, if certain conditions are met, also qualify as an active business. In addition to the existing Dutch minimum substance requirements the intermediate holding company must have an office at its disposal and incur a minimum of €100.000 labour costs under the current proposal. The office should be available during a period of at least 24 months whereby this office space needs to be equipped and used for the intermediate holding function. The employees may be hired from group companies and they need to perform their activities in the jurisdiction where the intermediary holding company is established.

## **Cooperatives**

The draft Bill proposes to introduce an obligation to withhold dividend tax for so-called holding cooperatives. Holding cooperatives are qualified as such if the activities consist usually for 70% or more of owning shareholdings that qualify for the participation exemption and/or granting - directly or indirectly - loans to affiliated companies or persons. A cooperative with real economic activities should not be affected by the new rules. Therefore, distributions by these cooperatives to their members should not become subject to dividend withholding tax.

Whether the 70% or more test is satisfied needs to be reviewed based on the balance sheet. However, the nature of the assets and liabilities, the turnover, the nature of the activities and the time spent by employees can also be taken into account. A holding cooperative that is actively involved in the management of its subsidiaries, performs headquarter functions, has employees

and that owns office space may be excluded from the obligation to withhold dividend tax based on this analysis. This can also apply in private equity structures.

Through this change, holding cooperatives will be treated in the same way as Dutch BVs and NVs and the domestic exemption as described in the previous paragraph can also apply. The obligation to withhold dividend tax for cooperatives applies however only to profit distributions to a member (alone or together with related persons or a collaborating group) who is entitled to at least 5% of the profits of the holding cooperative.

### **Other amendments**

It is proposed that an adjustment with respect to the foreign substantial shareholder regime will be made to prevent an overlap by implementation of the suggested anti-abuse rule. The overlap will be prevented due to the fact that the foreign substantial shareholder regime will be only applicable to capital gains of the substantial interest instead of both capital gains and dividends.

The proposed changes will broaden the scope of the Dutch dividend withholding tax exemption and are therefore a welcome improvement of the Dutch investment climate. The proposed anti-abuse rule is in accordance with BEPS action 6 and therefore it can be expected that other countries will apply similar requirements.

The dividend withholding tax rate in the respective tax treaty or any other conditions (e.g., limitation on benefits (LOB) provisions, holding period etc.) will no longer be relevant if the conditions are met, as the taxpayer can benefit from the Dutch domestic exemption. Structures involving passive investors or which are qualified as wholly artificial are subject to Dutch dividend withholding tax but may still benefit from the applicable withholding tax rate in the treaty between the Netherlands and the respective country. We note however that these treaties may be subject to change as a result of the BEPS project, especially the multilateral instrument.

Current structures involving Dutch entities, and especially cooperatives, should be reviewed in order to ensure that the dividend withholding tax exemption applies. Changes may need to be made to the structure if the shareholders/members of the Dutch entity are located in a non-treaty country or it concerns a passive/artificial structure. It is expected that current rulings (ATR's) with regard to holding/coop structures will need to be updated in order to reflect the proposed new rules.