UPDATE ON DUTCH TAX DEVELOPMENTS

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This update provides a snapshot of several Dutch tax matters which are relevant for any Dutch corporate income taxpayer engaged in holding and financing activities.

Introduction

Any corporate structure involving a Dutch corporate income taxpayer ("Dutchco"), a possible subsequent restructuring thereof and its anticipated benefits from a tax point of view, should be closely reviewed and monitored given the OECD recommendations in the BEPS project, recent EU legislative initiatives (introduction of a general anti-avoidance rule in the EU Parent Subsidiary Directive, Anti-Tax Avoidance Directive I and II) and unilateral changes in local country's tax laws that impact amongst others corporate structures of economic operators. This has resulted, and will continue to result, in unprecedented changes in tax laws during the next years. One of the trending topics nowadays is to ensure that corporate structures have sufficient business reasons and economic (qualitative and quantative) substance where each member entity of a structure operates. Each (intermediary) group entity should avail itself more and more of economic substance (such as employees, office space) in its jurisdiction of establishment.

Dividend withholding tax

Dividend distributions by Dutchco are generally subject to a dividend withholding tax at a rate of 15%. This rate may be reduced subject to the applicability of a bilateral tax treaty or the EU Parent – Subsidiary Directive. In the absence of a bilateral tax treaty it may be considered to investigate if it is possible to mitigate this dividend withholding tax exposure by interposing an additional intermediary corporate entity in a tax treaty jurisdiction, such as

Luxembourg. It is noted that the intermediary corporate entity ("Foreign Holdco") would have to meet certain minimum economic substance requirements.

Foreign corporate income tax liability

Under Dutch tax law Foreign Holdco may become subject to Dutch corporate income tax as a foreign resident corporate income taxpayer insofar it generates taxable income from a substantial interest.

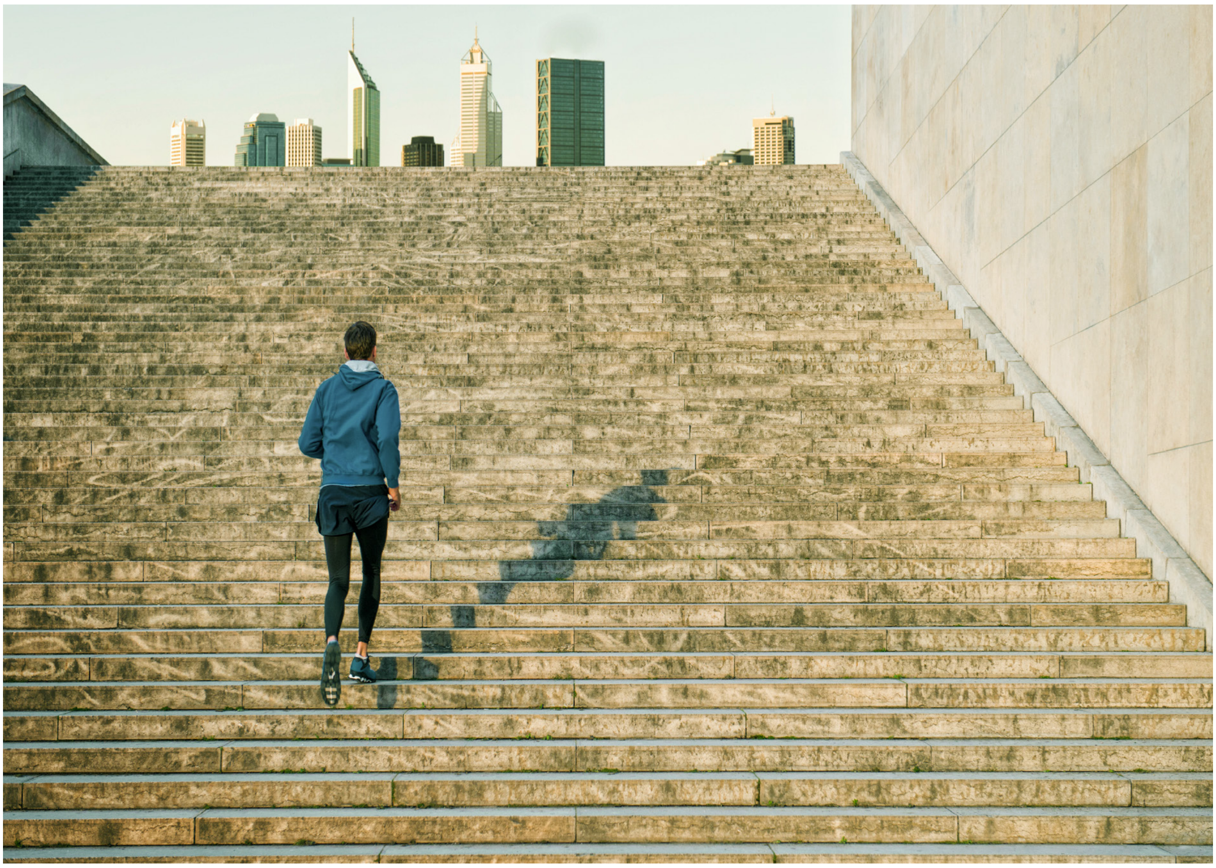
In short, a substantial interest requires that the foreign resident corporate income taxpayer holds at least 5% of (a class of) shares in a Dutch B.V. Any income derived from a substantial interest, such as profit distributions and capital gains, subsequently may be subject to Dutch corporate income tax.

It is noted that such tax liability in general only exists in the absence of a bilateral tax treaty between the Netherlands and the foreign tax residence jurisdiction subject to the foreign resident corporate income taxpayer
(i) holding the shares with the main purpose or one of the main purposes of avoiding Dutch dividend withholding tax or foreign tax of another person (subjective test), and
(ii) there is an arrangement or a series of arrangements that are not genuine. An arrangement or a series of arrangements is considered not genuine if and to the extent that they are not put into place for valid commercial reasons which reflect economic reality (objective test).
In order to establish whether an arrangement is aimed at avoiding taxation, in this case a comparison test has to be applied (possibly resulting in a look-through approach up and to the level of the ultimate shareholder).

A corporate structure that reflects economic reality requires an active business enterprise at the level of the ultimate shareholder of Dutchco which means that it directly carries out material management, policy and financial functions in the corporate chain of control.

Future legislative developments

In a draft bill published on 16 May last several changes are proposed that will have a significant impact on the



Dutch tax treatment of dividend distributions by a legal entity that is organized as a Dutch B.V. The basis assumption is that no dividend withholding tax should be levied in shareholding structures whereby there is a business structure insofar the corporate shareholder of a Dutch B.V. is a tax resident of a jurisdiction that has entered into a bilateral tax treaty with the Netherlands. The draft bill contains both amendments to dividend withholding tax and corporate income tax. The amendments are intended to take effect as from 1 January 2018. The final bill will be presented on or around Budget Day in September.

The draft bill is largely in line with previous communication from the Dutch government and proposes to exempt dividend distributions by a Dutch B.V., under conditions, from dividend withholding tax when the recipient is a resident of a tax treaty jurisdiction.

The draft bill proposes also to include anti abuse rules that are in line with the general anti abuse rule (GAAR) as included in the EU Parent Subsidiary Directive and the principal purpose test as included in Action 6 of the BEPS Project. There is abuse if – in short – the shares in the company or the holding company established in the Netherlands are held for the principal purpose of, or one of the whose principal purposes is avoiding dividend withholding tax being levied on another party (subjective test) and that there is an artificial structure or transaction (objective test). These tests have been explained above.

When an intermediary holding company is interposed between the investment in a Dutch B.V. and the investor, it is proposed that this holding company in addition to the economic substance requirements, has to meet the following conditions:

- a payroll expense requirement of at least EUR 100,000 (the remuneration should be for the holding activities) must also be met, and

- during a period of at least 24 months the intermediate holding company must have its own office equipped with the usual facilities for performing holding activities.

If you have any further questions please do not hesitate to contact me.

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