UPDATE ON DUTCH TAX DEVELOPMENTS

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Following a reform as per 1 January 2018 of Dutch tax law, dividend withholding tax (DWT) should now also be charged on profit distributions by holding cooperatives, but it also favorably extends an existing DWT exemption for qualifying recipients.

Distributions by a Dutch resident cooperative/BV/NV (distributing entity) are under these new rules exempt from DWT in the situation when its direct shareholder (or member in case of a cooperative) is (i) a legal entity, (ii) having its tax residency in a tax treaty jurisdiction (with a treaty containing a dividend article) or in a EU/EAA country, (iii) holding an interest of at least 5% in the distributing entity, (iv) in a non-abusive situation (which generally means the presence somewhere within the upper tier corporate chain of an active business enterprise, with enhanced substance requirements for intermediary holding companies - see below).

One of the technical elements of this tax reform is that an already existing anti-abuse rule will be brought in line with the General Anti-Avoidance Rule as included in the EU Parent/Subsidiary Directive (the GAAR) and the Principle Purpose Test included in the BEPS Action 6 Report (the PPT). This will be a cumulative, two-fold test: a corporate structure was set up to avoid a liability to DWT for a person (the subjective test) and a corporate structure is deemed part of an artificial arrangement or transaction (the objective test).

According to parliamentary history the subjective test requires to look all the way through the corporate structure above the Dutch corporate taxpayer, until the first company in the corporate structure that conducts an active business, which does not need to be the direct shareholder of the Dutch resident corporate taxpayer. The structure is not deemed abusive if a DWT exemption would also have applied to a distribution when made by the distributing entity to such first active company, since in that case apparently the direct shareholder was not interposed to avoid a liability to DWT.

The objective test requires that there are valid business reasons for the relevant corporate structure that reflect economic reality.

If it can be substantiated that the direct shareholder of the distributing entity itself runs an active trade or business to which the interest can be allocated, this would generally be the case. If the direct shareholder of the distributing entity is a top tier holding company that carries out management, governance and/or financial activities with respect to the group as a whole, this may be sufficient to satisfy the valid business reason criterion.

If, on the other hand, the Dutch resident corporate taxpayer is held by an intermediate foreign holding company, which is not by itself running an active trade or business and which is interposed between the distributing entity and a company that is engaged in an active trade or business, that intermediate foreign holding company should have sufficient relevant local substance. This means that the intermediate foreign holding company has to meet the substance requirements that already have been developed in Dutch tax practice applicable to Dutch resident corporate taxpayers, together with a payroll cost- and office space requirement. The payroll cost requirement means that the intermediate foreign holding company should have at least the equivalent of €100,000 of (internally or externally rendered) labor costs related to the holding activities. Following the office space requirement it should own or rent office space that is used to perform its activities for at least 24 months (this requirement may also be met prospectively). In case of existing corporate structures the payroll cost and office space requirements should both ultimately be met on 1 April 2018.

Also a statutory notification obligation has been introduced which requires a distributing entity to notify the Dutch tax authorities within one month after each distribution and to provide information that is sufficient to verify whether the DWT exemption has been applied correctly.

The new rules apply to all distributions made as from 1 January 2018 irrespective of such distributions being attributable to earnings of prior years.

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