

NovioTax Recent amendments Dutch substance requirements

April 2018

In our November 2017 Blog (#9) we have discussed the impact of the legislative amendments effective from 1 January 2018. The new law introduces a dividend withholding tax (“WHT”) obligation for holding cooperatives. Under the old legislation, such cooperatives, commonly used in international tax structures, were not subject to dividend WHT, except for certain “abusive” situation. The new legislation aims to eliminate the difference between holding cooperatives and public (NV’s) and limited (BV’s) liability companies by imposing the withholding obligation on such cooperatives and to broaden the general exemption from the withholding obligation for public and limited liability companies.

Introduction

As a result of the legislative amendments, which have been adopted by the upper house of the Dutch parliament on 19 December 2017, investors using Netherlands holding companies that currently face challenges in respect of satisfying a number of anti-abuse provisions such as Main Purpose Tests (“MPT”) (Double Tax Avoidance Agreement (“DTAA”) Netherlands – UK and Netherlands – Switzerland), Limitation on Benefits (“LOB”) provisions (DTAA Netherlands – US and the Netherlands – Curaçao tax regulation) or that are faced with 5-10% dividend WHT on participating investments (>10%+) in a Dutch company may check whether they are able to satisfy the new requirements to enable application of the general dividend WHT exemption. As the main test is satisfying the substance requirements, the Netherlands government has recently disclosed the latest extended substance requirements which are listed below.

Substance requirements (minimum list)

- §.1 at least 50% of the statutory managers and managers authorized to take decisions are resident in the state of the intermediary holding;
- §.2 the managers must have the necessary professional knowledge to properly fulfil their tasks, including decision-making, based on their own responsibility for the intermediary and within the framework of the normal group practice, transactions of the intermediary and the responsibility to ensure proper settlement of the concluded transactions;
- §.3 the intermediary has qualified personnel for the proper execution and registration of transactions to be concluded by the intermediary;
- §.4 the intermediary’s board decisions are taken in the state in which the intermediary is located;
- §.5 the main bank accounts of the intermediary are held in the state in which the intermediary is located;
- §.6 the intermediary’s accounting is conducted in the state in which the intermediary is located;
- §.7 the intermediate company incurs employment costs of at least EUR 100,000 (adjusted to the CPI) in relation to its intermediary holding functions. Examples of CPI indexes to be taken into account with respect to other countries are 90% for Cyprus, 100% for Luxembourg, 80% for Malta and 100% for Switzerland.
- §.8 the intermediate company has (for at least 24 months) own office space at its disposal used for carrying out the intermediary holding functions.

It should be noted that §.7 and §.8 apply as of 1 April 2018. The requirements mentioned in §.1 - §.6 to a large extent already applied for group financing, licensing and leasing companies and for holding companies that wanted to obtain an advance pricing agreement or advance tax ruling from the Dutch Tax Authorities.

Amendments extended substance requirements (April 2018)

The aforementioned amendments have been implemented in the Dutch Dividend Withholding Tax Act (“DWTA”) and Dutch Corporation Income Tax (“CIT”). The latter relates to the taxation rules concerning non-resident corporate shareholders holding a substantial interest in Dutch companies. Most recently in April 2018, the Lower House of the Dutch Parliament has confirmed the extended substance requirements (§.7 and §.8) but acknowledges at the same time that these (extended) requirements do not take into account the scale and nature of the (worldwide) activities of enterprises. Hence, the Lower House has resolved a motion requesting the government to take into account the scale and nature of activities in applying the extended substance requirements (§.7 and §.8). Once we have received additional information we will update this Blog.

The Hague Court Case (December 2017)

On 12 December 2017, The Hague Court published a decision involving the application of the non-resident taxation rules as adopted in article 17 CIT Act. In paragraph 3 of this article, the following provisions of non-resident taxation of holding a substantial interest in a Dutch resident company are clarified:

- I. the foreign company holds this interest with the (or one of the) main purpose(s) of avoiding Dutch personal income tax or dividend tax (the main purpose test); and
- II. the substantial interest cannot be allocated to the business enterprise carried on by the foreign company (the enterprise test).

Without going into detail, the The Hague Court case related to a dividend distribution from a Netherlands entity to its Netherlands parent company that had migrated its effective place of management to Luxembourg. Hence, from a Netherlands perspective the parent company was recognized as a resident for tax purposes of Luxembourg. In this case, the The Hague Court decided that the parent company, which ultimately had limited substance (i.e. no personnel, no premises, limited expenses et al), was not able to satisfy the enterprise test. Consequently, the dividend (appr. EUR 25mio) at the level of the Luxembourg parent company was taxable at 2,5% CIT (based on the DTAA Netherlands – Luxembourg CIT).

Among other considerations, the The Hague Court concluded that the managers of the parent company had limited involvement with the lower-tier subsidiaries. Hence, there was no functional attribution between the shares in (among others) the Netherlands company distributing the dividend and the parent company. If for instance the directors of the Luxembourg parent company were also involved elsewhere in the group, this could have been different. Following this case, it might be necessary (at least preferred) to involve directors of holding entities in the trading activities and the (strategic) management of the group elsewhere, and that sufficient documentation exists to demonstrate this.



Day-to-day questions: information disclosure provision

In day-to-day practice we have received questions in respect of the information disclosure provisions introduced in the DWTA. In article 4, paragraph 11 DWTA, a holding company is required to inform the Dutch Tax Authorities of application of the general dividend WHT exemption. From the outset, the necessary information should not be new. In the Dutch CIT return, for instance, the names of the larger shareholders have already been disclosed. In addition, distributed dividends have also been reported in the Dutch CIT return.

In our opinion however, the most relevant aspect of these new information disclosure provisions is the requirement to fill in and submit with the Dutch Tax Authorities a dividend WHT exemption form, such within one month of a dividend distribution. The person signing this form (presumably a director of the company) declares that it has satisfied (among other elements) article 4, paragraph 3 DWTA. This paragraph more or less functions as a Principle Purpose Test (i.e. Action 6 of the OECD BEPS Project and also the Parent-Subsidiary Directive).

Hence, it should be assessed if the interest in the Dutch entity (e.g. holding cooperative, BV or NV) is held with the main purpose, or one of the main purposes, to avoid dividend WHT abroad (subjective test), and if the structure should be considered as an artificial arrangement (objective test). The latter test would be failed if the structure is not based on valid business reasons reflecting economic reality. In this respect it needs to be considered if the intermediate shareholder carries-on an active business itself, or accordingly meets the requirements for having relevant substance in relation to intermediate companies. In this respect we expect that a large amount of attention will be given to the substance requirements, and in particular §.7 and §.8 as well as the implications of the The Hague Court case.

ABOUT NOVIOTAX

NovioTax is a Dutch research-oriented tax consultancy firm with offices in Amsterdam and Nijmegen. Our employees are members of the Dutch Association of Tax Advisers (NOB) and the International Fiscal Association (IFA), have many years of experience and some are much sought-after guest speakers on tax policy and other topics that fall within their field of expertise. We typically serve midsized and large MNE clients, coordinate discussions with the DTA and closely cooperate with international law and tax law firms.

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