LOYENS & LOEFF

JUNE 2019
EDITION 121

Quoted

Practical aspects of the Dutch dividend withholding tax exemption

LOYENS & LOEFF

In this edition

1. Introduction

On 1 January 2018 the Dutch Dividend Withholding Tax Act 1965 (*Wet op de dividendbelasting 1965*) (**DWTA**) was amended with the entry into force of the Act on the Withholding Obligation of Holding Cooperatives and Expansion of the Withholding Exemption (*Wet inhoudingsplicht houdstercoöperatie en uitbreiding inhoudingsvrijstelling*).[1] The amendments affect Dutch companies and cooperatives with foreign shareholders or members. Since the Dutch dividend withholding tax (**DWT**) will not be abolished as from 1 January 2020 after all,[2] these changes, in particular the new anti-abuse rule, will continue to have a major impact for the international tax practice. The anti-abuse rule shifts additional responsibilities to the directors of the distributing company (the *withholding agent*) as it is the distributing company that must determine whether the beneficiary of the dividend (the *taxpayer*) meets the requirements of the withholding exemption.

In this issue of *Quoted* we will set out the principal changes in the DWTA as of 1 January 2018, illustrated by examples and questions in practice.[3] We will specifically address formal aspects and the amendment (as of 1 January 2019) of the rules for substantiating valid business reasons that reflect economic reality (*relevant substance*).[4] Additionally, the possible consequences of the judgements of the European Court of Justice (**ECJ**) in the so-called *Danish cases* are briefly reflected.[5]

2. The principal changes in the withholding exemption

The Act on the Withholding Obligation for Holding Cooperatives and Expansion of the Withholding Exemption brings the tax treatment of 'holding cooperatives' (§ 2.1) in the DWTA (to a large extent) in line with the treatment of private limited liability companies (*besloten vennootschappen, 'BVs'*) and public limited liability companies (*naamloze vennootschappen, 'NVs'*).

Furthermore, the withholding exemption has been extended in respect of (corporate) shareholders in treaty countries (§ 2.2) and a new anti-abuse rule has been introduced (§ 2.3). Specific provisions apply to hybrid beneficiaries (§ 2.4).

2.1 Holding Cooperatives

A cooperative is required to withhold DWT if (i) it qualifies as a 'holding cooperative' and (ii) one or more members hold a qualifying membership right. A cooperative qualifies as a holding cooperative if 70% or more of its actual activities consist of holding participations or (in)directly financing affiliated entities or natural persons. Whether this is the case is in principle determined on the basis of the balance sheet total. However, other criteria, such as the nature of the cooperative's assets and liabilities, turnover, activities and time spent by employees, are also relevant for this activities test. A non-holding cooperative is not required to withhold DWT on its distributions.[6]

Whether a cooperative qualifies as a holding cooperative depends on whether the 70% threshold is usually met in the year prior to the moment of making the distribution available.[7] This is assessed at the level of the cooperative itself, irrespective of whether the cooperative is the parent of a fiscal unity for Dutch corporate income tax purposes.[8] The qualification of a cooperative as a non-holding cooperative is generally discussed with the Dutch tax authorities. An assessment is made on a case-by-case basis, amongst others based on the aforementioned criteria. No standard ('safe harbour') rules apply.

1 Bulletin of Acts and Decrees, 2017, 520

2 Letter titled "Reconsidering the package for creating a favourable business environment" (*Heroverweging pakket vestigingsklimaat*) of 5 October 2018 of the State Secretary for Finance and Parliamentary Papers II 2018/19, 35 028, No. 9; Second Memorandum of Change.

3 Unless otherwise noted, neither the changes in the non-resident corporate taxpayer rules in the Dutch Corporation Tax Act (Article 17(3)(b) and 17(5)) nor EU law aspects of the amendments to the DWTA as of 1 January 2018 are discussed in this issue.

4 Parliamentary Papers II 2018/19, 35 030, No. 6; Memo further to the report, pp. 14-15.

5 ECJ 26 February 2019 in the joined cases C-116/16 and C-117/16, ECLI:EU:C:2019:135.

6 Under circumstances a member of a non-holding cooperative owning a "substantial interest" in such cooperative may however be subject to Dutch non-resident taxation.

7 As confirmed in Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, pp. 16-18; the term 'year' must be defined in accordance with Article 7(4) of the Corporation Tax Act 1969, so that it corresponds to the financial year or, in the event that accounting does not take place on the basis of regular annual closures, the calendar year.

8 Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, pp. 16-18.

If a cooperative qualifies as a holding cooperative, profit distributions to its members holding 'qualifying membership rights' are in principle subject to DWT.

A 'qualifying membership right' is a membership right that entitles the member to at least 5% of the annual profits or the liquidation proceeds of the holding cooperative. When applying this quantitative test, the interests of the member and the entities and natural persons affiliated with that member are taken into account jointly. Affiliation is determined on the basis of the criteria set out in article 10a, paragraph 4 up to and including 6, of the Dutch corporate income tax act 1969 (*Wet op de vennootschapsbelasting 1969*).[9] Members that individually hold interests of less than 5% but form part of a 'cooperating group' may nevertheless be considered to hold a qualifying membership right in respect of which the holding cooperative is obliged to withhold DWT. According to the Explanatory Memorandum,[10] a cooperating group may exist in the case of a 'coordinated investment' with a joint interest of more than 5%,[11] whereby one or more individual members of that 'group' do not meet the 5% threshold. For instance, this may refer to situations where an investment entity coordinates the pooling of portfolio interests (i.e. interests of less than 5%) in a holding cooperative and offers the membership right as an investment product.

If certain requirements are met,[12] capital repayments by corporations like BVs and NVs can be made free from DWT. Since members' contributions of cooperatives are, from a civil law perspective, not fully comparable to share capital of a corporation,[13] as of 1 January 2018 the DWTA provides specifically that a repayment of members' contributions by holding cooperatives is not subject to DWT.[14]

It is therefore important to properly document whether members' contributions are repaid or profit is distributed. In practice, this may not always be straightforward, especially in cases where it concerns pre-2018 contributions and profits of a holding cooperative that had no withholding obligation prior to 2018.

2.2 Expansion of the withholding exemption

The scope of the withholding exemption has been extended from corporate shareholders in the Member States of the European Union (**EU**) and the European Economic Area (**EEA**) to corporate shareholders in all countries with which the Netherlands has concluded a tax treaty that contains a dividend article.[15] In this respect, it is irrelevant whether the Netherlands is entitled to levy DWT under such tax treaty.[16] The extension of the withholding exemption is based on the principle that no DWT should be levied on distributions by a subsidiary to its qualifying parent company. The corporate shareholder should hold a participation in the Dutch entity that would qualify for application of the Dutch participation exemption if the shareholder would have been established in the Netherlands (in general: a 5% or more shareholding).

2.3 Anti-abuse rule[17]

If the conditions of article 4, paragraph 2 DWTA are met, it must be determined whether the beneficiary complies with the new anti-abuse rule of article 4, paragraph 3, sub c DWTA. This provision is in line with the general anti-abuse rule of the Parent-Subsidiary Directive (**PSD**) and the implementation of the '*principal purpose test*' (**PPT**) of Action 6 of the BEPS project.[18] This implies that the domestic anti-abuse rule must be interpreted in accordance with the PSD and that the application of the anti-abuse rule by the Netherlands is not restricted by tax treaties that contain a PPT.[19]

9 Put briefly, an affiliated entity is (i) an entity in which the member holds a one-third interest; (ii) an entity that holds a one-third interest in the member; or (iii) if a third party holds a one-third interest in both the member and that entity.

10 Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, pp. 16-18.

11 According to the text of Article 1(7) of the DWTA, the requirement is 'at least 5%' and not 'more than 5%'.

12 Article 3(1)(d) of the DWTA.

13 Parliamentary Papers II, 34788, No. 3 Explanatory Memorandum, p. 18.

14 See also Article 1(2) of the DWTA, on the basis of which qualifying membership rights in a holding cooperative are equated, for the purpose of the DWTA, to shares in companies of which the capital is wholly or partially divided into shares.

15 Article 4(2) of the DWTA.

16 This may for instance be the case under the tax treaties concluded with the US, Canada, and China.

17 The anti-abuse rules of Article 4(3) of the DWTA do not apply to domestic distributions.

18 Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, pp. 6-9.

19 Parliamentary Papers II, 34853, No. 6, Memo further to the report, pp. 28-29.

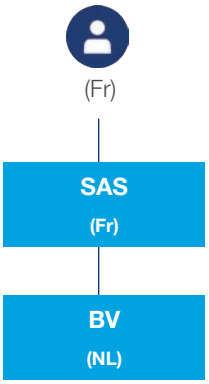
In brief, abuse is considered present if the principal purpose or one of the principal purposes of holding the shares in the Dutch company or the membership rights of a holding cooperative is avoiding the levy of DWT of another person (**subjective test**) and the holding of the shares is part of an artificial arrangement or transaction (**objective test**).

2.3.1 Subjective test

The subjective test is satisfied, i.e. there is no abuse, if shares in the Dutch company are not held with the principal purpose or one of the principal purposes to avoid DWT. This requires a comparison between the (existing) situation in which the Dutch company distributes a dividend to its direct foreign shareholder and the (fictitious) situation in which the Dutch company would distribute a dividend to the beneficiary/ies of the direct shareholder (the 'look through principle'). If, compared to the fictitious situation, less DWT is due in the existing situation, an avoidance motive is considered present on the basis of the subjective test.[20] This is a purely mathematical comparison, i.e. if the existing situation poses a benefit it is assumed that the principal purpose, or one of the principal purposes, is to obtain this benefit.
For purposes of the subjective test the (actual) principal purpose is not assessed separately. It is questionable whether this interpretation is fully in line with the provisions in the DWTA and the PSD.

The subjective test is assessed at the moment of the dividend distribution,[21] which implies that it is a dynamic test.

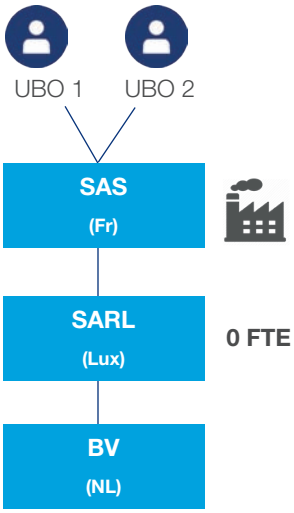
Example 1



An individual is resident in France and holds all shares in the French company SAS. SAS is tax resident in France and its sole asset is a 100% interest in BV. In principle, SAS fulfils the conditions of the withholding exemption for dividend distributions made by BV. For purposes of the subjective test, a comparison is made between a distribution by BV to the French resident individual that holds the shares in SAS. Pursuant to article 10, paragraph 2, sub b of the Netherlands-France tax treaty, the Netherlands may levy 15% DWT on this distribution. On the basis of the subjective test, a tax benefit is considered present and therefore the subjective test is not satisfied. In this situation, the withholding exemption can only be applied if the objective test is satisfied.

In case of a business structure, for purposes of the subjective test one should assess the position of the first entity in the structure carrying on a business enterprise. An entity carries on a business enterprise if there is a permanent organization of capital and labour that participates in economic activities with the objective of making a profit.[22] Based on the Explanatory Memorandum, an entity with a so-called (regional) top holding function should also be considered to operate a business enterprise.[23] An intermediate holding company with a so-called 'linking function' (see also paragraph 2.3.2) cannot be considered to carry on a business enterprise.[24] The above can be explained on the basis of the following example.

Example 2

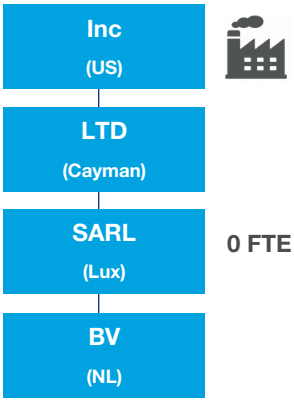


20 Parliamentary Papers II, 34 788, No. 3, Explanatory Memorandum, pp. 6-7.
21 Parliamentary Papers I, 34 788, No. D, Memo further to the report, pp. 23 ff. and Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, p. 7.
22 Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, p. 7.
23 Parliamentary Papers II, 34 788, No. 3, Explanatory Memorandum, p. 9.
24 Parliamentary Papers I, 34 788, No. D, Memo further to the report, pp. 25-26.

Two individuals each hold 50% of the shares in the French company SAS. SAS is tax resident in France and its sole asset is a 100% interest in the Luxembourg company SARL. Unlike SAS, SARL does not carry on a business enterprise. As the position of the first entity 'above the Netherlands' carrying on a business enterprise should be assessed for purposes of the subjective test, a comparison should be made with a distribution made by BV to SAS. As distributions by BV to SAS would qualify for the withholding exemption, the subjective test is met.

The following example shows that the aforementioned interpretation of the subjective test may have a peculiar outcome.

Example 3



The American company Inc, tax resident of the US, carries on a business enterprise, whereas the intermediate holding companies (a Cayman LTD and a Luxembourg SARL) do not carry on a business enterprise. In this situation the subjective test is met, because distributions from BV to Inc would qualify for the withholding exemption. If, however, LTD would carry on a business (as well), the subjective test would not be met because dividend distributions from BV to LTD would be subject to 15% DWT.

As mentioned above, the Anti-Abuse Rule must be interpreted in accordance with the PSD. Therefore the recent ECJ judgements in the Danish cases should also be taken into account. In those judgements the ECJ ruled that EU Member States are not allowed to grant the withholding exemption under the PSD in case of abuse.

In its judgements, the ECJ also applied a look through approach: there is no abuse if the beneficial owner of the income is resident in a country that would allow to obtain an identical tax benefit.

According to the ECJ, the beneficial owner is not a formally identified recipient but rather the entity which benefits economically from the income received and accordingly has the power to freely determine the use of such income. If LTD should be considered the beneficial owner of the dividend distributed by BV, there would be abuse for purposes of the look through approach as applied by the ECJ, since LTD would not qualify for the withholding tax exemption. However, if Inc should be considered the beneficial owner, there would not be abuse for purposes of the look through approach as applied by the ECJ.

2.3.2 Objective test

The objective test is satisfied, i.e. there is no abuse, if the holding of the Dutch shares is not part of an artificial arrangement or transaction. This will be the case if the shareholding structure is motivated by valid business reasons reflecting economic reality. According to the Explanatory Memorandum, there is no artificial arrangement or transaction if the direct shareholder carries on a business enterprise and the interest in the Dutch company can be allocated to that business enterprise.[25]

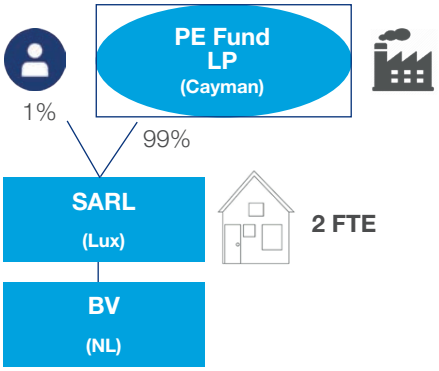
Valid business reasons are also considered present if the direct shareholder has a 'linking function' and avails of 'relevant substance' (with the following new requirements: at least €100,000 of salary costs and own office space). Such linking function is considered present if the intermediate holding company creates a relation between the business activities or head office activities of the parent company and the activities of its (indirect) subsidiaries. If one or more indirect shareholders are not part of a business structure, a linking function cannot be present.[26]

This can be illustrated as follows.

25 Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, p. 6-9.

26 Parliamentary Papers I, 34788, No. D, Memo further to the report, p. 26.

Example 4



BV is wholly owned by the Luxembourg entity SARL. SARL meets the relevant substance requirements. The shares in SARL are held by a private equity fund and an individual. The private equity fund can be considered to carry on a business enterprise. Although SARL has 'relevant substance', it does not fulfil a (100%) linking function because 1% of the shares in SARL is held by a shareholder that does not carry on a business enterprise. The indirect participation of the individual 'taints' the DWT position for the entire structure.

The examples included in the Explanatory Memorandum for meeting the objective test concern business structures and can be regarded as 'safe harbours'. If the direct shareholder carries on a business enterprise or has a top holding function, and in the event of a linking intermediate holding company with relevant substance, an artificial arrangement or transaction is in any event not considered present. However, the judgements of the ECJ in the Danish cases (see below) must be taken into account.

Furthermore, based on parliamentary history, the question whether an artificial arrangement is present should be assessed on a case-by-case basis on the basis of the actual circumstances of the relevant situation.[27] It however is also possible that an artificial arrangement is not present either in a non-business structure or if a linking intermediate holding company does not meet the relevant substance requirements. This view is supported by the judgment of the ECJ in *Deister Holding/Juhler Holding*[28] which induced the Dutch government to alter the application of the objective test (see also paragraph 2.3.3).

In turn, based on the *Danish* cases the fact that a shareholder in a corporate structure meets the relevant substance requirements may, as such, not be sufficient to conclude that an intermediate holding company is not artificial. In the *Danish* cases, the ECJ ruled that an assessment of abuse requires an analysis of all relevant factors, taking into account whether there is an actual economic activity.[29]

2.3.3 Amendment as of 1 January 2019

In view of the application of the anti-abuse rule to intermediate holdings, the amendment of article 1bis of the Dutch Dividend Withholding Tax Implementation Decree 1965 (Uitvoeringsbeschikking dividendbelasting 1965)[30] as of 1 January 2019 is a welcome addition.[31] This article provides rules for substantiating valid business reasons that reflect economic reality (relevant substance) if the interest in a Dutch company is held by a linking intermediate holding company. In light of the Deister Holding/Juhler Holding judgment,[32] these rules have been supplemented with a possibility to make plausible by other means that valid business reasons exist (the additional possibility). In Deister Holding/Juhler Holding the ECJ ruled that for each situation all aspects of the specific case must be examined separately and that general, pre-determined criteria do not suffice.

The economic activities of the intermediate holding company are important to substantiate the existence of valid business reasons under the additional possibility.

These activities should be genuine and relevant in view of the holding of the Dutch shares. This will not be the case if the activities are only of a supporting or administrative nature. The same applies when activities are carried out for the benefit of the (indirect) shareholder, e.g. insuring pension rights.[33]

27 Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, p. 8.
28 ECJ 20 December 2017 in the joined cases C-504/16 and C-613/16, ECLI:EU:C:2017:1009.
29 ECJ 26 February 2019 in the joined cases C-116/16 and C-117/16, ECLI:EU:C:2019:135
30 The same applies to Article 2d of the Corporation Tax Implementation Decree 1971.
31 Parliamentary Papers II, 35 030, No. 7, Memo further to the report, pp. 14-15.
32 ECJ 20 December 2017 in the joined cases C-504/16 and C-613/16, ECLI:EU:C:2017:1009.
33 Parliamentary Papers II, 35028, No. 3, Explanatory Memorandum, pp. 49-50.

Real and relevant activities are present if the intermediate holding company is actually engaged in the administration and management of the Dutch company. This may also be the case if, for instance, an intermediate holding company fulfils a role in respect of business succession or in the context of a joint venture. The intermediate holding company should furthermore avail of own office space and (own, seconded or hired) qualified staff, be able to take decisions independently, have sufficient financial resources of its own and run business risks, as appropriate for the activities of the intermediate holding company.[34]

In any event, it can be assumed that valid business reasons are present if the interest in the Dutch company would be allocated to a permanent establishment in the hypothetical situation that the intermediate holding company would be a permanent establishment.
The requirements included in the decree of 21 November 2011[35] and the decree of 15 January 2011[36] should be applied for purposes of this allocation.[37] In light of the strict conditions included in these decrees, it is questionable whether this guidance is useful in practice.

The additional possibility for substantiating valid business reasons does not only apply to intermediate holding companies in the EU/EEA, but also to intermediate holding companies in third countries.

It is uncertain whether the aforementioned additional possibility only applies to intermediate holding companies with a linking function in business structures or whether it applies to other intermediate holding companies as well, e.g. the personal holding company of a director and principal shareholder. Based on the parliamentary explanations and taking into account the Deister Holding/ Juhler Holding judgment, which offer no indication that it is restricted to business structures, the additional possibility seems to apply to non-business structures as well, and could potentially be invoked in Example 4 (see above). Ultimately, it should be assessed on a case-by-case basis whether there are valid business reasons that reflect economic reality.

2.4 Hybrid entities

Special conditions apply to the application of the withholding exemption in respect of dividend distributions made by Dutch companies to hybrid entities.
Two situations can be distinguished:

i. The shareholder is not transparent from a Dutch tax perspective, but is transparent from a foreign tax perspective.
ii. The shareholder is transparent from a Dutch tax perspective but is not transparent from a foreign tax perspective ('*reverse hybrid*').

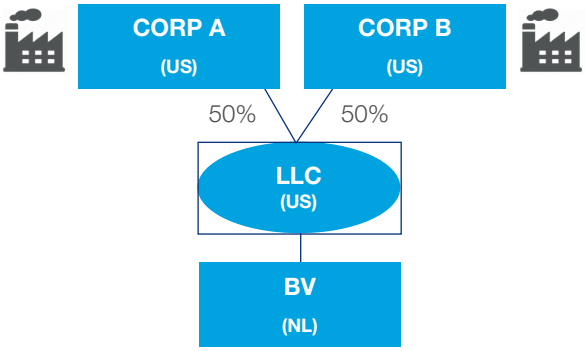
2.4.1 Non-transparent from a Dutch perspective / transparent from a foreign perspective

Article 4, paragraph 9 DWTA contains a specific rule for the situation in which the shareholder of the Dutch company is non-transparent for Dutch tax purposes, but is transparent under the tax laws of the country pursuant to which laws the entity has been established. Based on this provision, the withholding exemption applies provided that:

i. each of the participants in the hybrid entity would individually qualify for application of the withholding exemption in case they would have held a direct interest in the withholding agent; and
ii. each participant is considered to be the recipient of the distribution under the laws of its country of residence.

This provision can be explained on the basis of the following example.

Example 5



BV distributes a dividend to LLC, which is an entity organized under US law and non-transparent for Dutch tax purposes. The US considers LLC to be fiscally transparent. Both participants in LLC (CORP A and CORP B) would,

34 *Ibid*.
35 Decision of the State Secretary for Finance of 21 November 2011, No. DGB 2011/6870M (Government Gazette. 2012, 151).
36 Decision of the State Secretary for Finance of 15 January 2011, No. IFZ2010/457M (Government Gazette. 2011, 1375).
37 Parliamentary Papers II, 35028, No. 3, Explanatory Memorandum, pp. 49-50.

if they would have held a direct interest in BV, qualify for application of the withholding exemption. Since LLC is transparent for US tax purposes, both CORP A and CORP B are recipients of the distribution under US law (each for 50%). In this situation the conditions of article 4, paragraph 9 DWTA are satisfied and the withholding exemption applies.

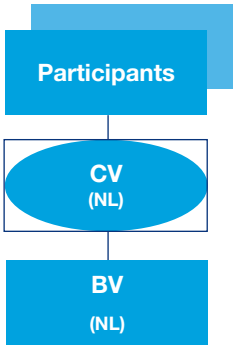
This would be different if CORP A would hold an interest in the LLC of less than 5%. In such situation CORP A would not meet the conditions for application of the withholding exemption if it would have held a direct interest in BV. If CORP A would have been a Dutch BV ('BV A'), article 4, paragraph 9 DWTA would not apply either, as in that event the second condition would not be met; under Dutch tax law BV A is not the recipient of to the distribution. In both cases it is due to the 'failing' participant that the withholding exemption cannot be applied at all.[38]

2.4.2 Transparent from a Dutch perspective / non-transparent from a foreign perspective

Article 4, paragraph 10 DWTA provides a rule for the opposite situation, i.e. where the shareholder is transparent for Dutch tax purposes, but is considered non-transparent under the tax laws of the country of establishment (or residence) of the participants. In such case, the withholding exemption can only be applied if the hybrid entity is, in its country of establishment, considered to be the recipient of the distribution and qualifies for application of the withholding exemption. This rule aims to prevent application of the withholding exemption in case a dividend is not 'picked up'.[39]

This provision can be illustrated by the following example, taken from the Explanatory Memorandum.[40] It concerns a dividend distribution to a Dutch limited partnership (*commanditaire vennootschap*, 'CV'), the interests of which are held by US participants:

Example 6



BV distributes a dividend to a CV that is transparent for Dutch tax purposes. The participants of the CV are resident in the US, which does not consider the CV fiscally transparent. Based on article 4, paragraph 10 DWTA, BV may apply the withholding exemption if:

i. CV is entitled to the distribution under the tax laws of its country of establishment; and
ii. CV qualifies for application of the withholding exemption.

If CV is not entitled to the distribution under the tax laws of its country of establishment, the conditions for applying the domestic withholding exemption are not satisfied.[41]

With respect to the above, it is expected that the use of reverse hybrid entities will decrease considerably going forward, as a result of the US Tax Reform[42] and the anti-hybrid mismatch rules of 'ATAD 2'.[43]

3. The role and responsibility of the withholding agent

Before and when distributing a dividend, the (board of the) withholding agent should observe a number of formalities.

Firstly, the provisions of Book 2 of the Dutch Civil Code (DCC) and the company's articles of association, must be observed. In the case of a BV a shareholders' resolution

38 Article 4(9) of the DWTA solely deals with the domestic withholding exemption and does not impact the application of comparable treaty provisions (e.g. in the treaty concluded with the US (Article 24, (4)) and the United Kingdom (Article 22, (3))). The Decision of the State Secretary for Finance of 19 March 1997, No. IFZ97/204M also remains applicable.

39 Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, p. 27.

40 Parliamentary Papers II, 34788, No. 3, Explanatory Memorandum, pp. 26-28.

41 Article 4(10) of the DWTA only deals with the domestic withholding exemption and does not affect the application of the tax treaty concluded with the US and the Decision of the State Secretary for Finance of 6 July 2005, No. IFZ2005/546M.

42 131 Stat. 2054, *public law* 115-97, 22 December 2017.

43 Council Directive (EU) 2017/952 of 29 May 2017, OJ 2017, L 144/1 amending Directive (EU) 2016/1164 (ATAD 1) as regards hybrid mismatches with third countries. Some provisions (the 'neutralizing measures') in ATAD 2 must be implemented by 1 January 2020; the other provisions (the 'tax obligation measures') must be implemented by 1 January 2022.

and board resolution will generally be required to make a legally valid dividend distribution. Pursuant to article 2:216, paragraph 2 DCC, a resolution of the general meeting of shareholders of a BV to distribute a dividend is usually without effect until such resolution is approved by the board of the BV.

Secondly, the fiscal-administrative formalities must be satisfied. A notification obligation applies to a withholding agent that applies the withholding exemption of article 4, paragraph 2 DWTA as of 1 January 2018. Within one month[44] after the date on which the dividend has been declared, the withholding agent must submit a notification to the Dutch tax authorities confirming that all conditions of the withholding exemption are satisfied.[45] This is done by way of the 'DWT Notification' form.[46]

If the withholding exemption applies, the withholding agent does not have the obligation to issue a dividend notice.[47] However, the obligation to issue a dividend notice may apply in respect of shareholders that do not qualify for application of the withholding exemption.[48] In those situations, the withholding agent is also obliged to file a DWT return and to remit the DWT due.

3.2 Certainty in advance?

A withholding agent may request the Dutch tax authorities for certainty in advance in respect of application of the withholding exemption[49] or the qualification of a cooperative as holding cooperative.[50]

If no certainty in advance has been obtained but the withholding agent nevertheless applies the withholding exemption on the basis of a defensible position, the withholding agent should realize that the tax inspector may challenge this position. In this respect, penalties as well as tax interest may become payable.

If there is a defensible position, no tax negligence penalty can be imposed. The tax inspector may however impose a default penalty. This penalty may comprise of an amount payable for failing to timely file the DWT return (€ 66 to € 131 in exceptional cases)[51] and an amount payable for failing to timely remit the DWT due (up to a maximum of € 5,278).[52]

Tax interest in respect of DWT amounts to 4% per annum and starts accumulating on the day following the calendar year to which the late payment pertains. This means that no tax interest is levied if the additional DWT assessment is issued in the calendar year to which the additional DWT assessment pertains. Tax interest also is not charged if the additional DWT assessment results from an adjusted DWT return (supplementary return), filed within three months after the end of the calendar year to which the additional DWT assessment pertains. Tax interest is calculated on a non-compounding basis in relation to the period that starts on the day following the calendar year to which the additional DWT assessment pertains and ends on the day before the day on which the additional DWT assessment is collectable.

Another important aspect in practice is the risk that the tax inspector imposes an additional DWT assessment on the basis of the general DWT rate, i.e. without considering a reduced rate under the relevant tax treaty. This may result in a cash flow disadvantage as well as a disadvantage in respect of calculating the tax interest.[53] It would therefore be reasonable if the tax inspector issued the additional DWT assessment on the basis of the applicable treaty rate.[54] In this respect, it should be taken into account that the PPT may restrict application of a reduced treaty rate.

44 If the notification is not submitted in time, a default penalty may be imposed on the withholding agent, up to a maximum of €5,278 (Article 67ca(1)(d) Dutch General Administrative Law Act in conjunction with Article 11(1)(1) of the DWTA).

45 Article 4(11), the DWTA in conjunction with Article 1a Dividend Tax Implementation Decree 1965.

46 See: https://download.belastingdienst.nl/belastingdienst/docs/opgaaf_div_belasting_div0122z2fol.pdf.

47 Article 9(3)(a) of the DWTA.

48 Pursuant to Article 9(3)(b) of the DWTA, there also is an exemption from the obligation to issue a dividend notice if the entitled party holds a substantial interest in the withholding agent as referred to in Chapter 4 of the Dutch Income Tax Act 2001.

49 Parliamentary Papers II, 34 788, No. 3, Explanatory Memorandum, p. 7.

50 *Ibid*., p. 17.

51 Article 67b(1) of the General Administrative Law Act in conjunction with para. 22 of the Administrative Fines (Tax and Customs Administration) Decree (*Besluit Bestuurlijke Boeten Belastingdienst*).

52 Article 67c,(1) of the General Administrative Law Act. Based on para. 23 of the Administrative Fines (Tax and Customs Administration) Decree this fine is limited, in principle, to 3% of the amount due in tax (with a maximum of EUR 5,278).

53 Gross-up aspects are not discussed.

54 See also Dutch Supreme Court, 9 February 2007, No. 43 203, BNB 2007/141.

4. Practical conclusions and recommendations

The amendments to the DWTA as of 1 January 2018 and, in particular, the application of the withholding exemption give rise to many questions for the withholding agent.

The Dutch tax authorities are of the view that application of the domestic withholding exemption prevails over treaty application. If a withholding agent has doubts as to satisfaction of the conditions for the domestic withholding exemption, it may – to be on the safe side – request a permit to apply a reduced treaty rate, and withhold and remit DWT on the basis thereof. In practice withholding agents often opt for this route in view of the limited 'safe harbours' in respect of the new anti-abuse rule. The amendment to the rules for substantiating valid business reasons that reflect economic reality as from 1 January 2019 are a welcome addition and will certainly offer a solution in certain cases. As mentioned earlier, the additional possibility seems to be applicable to non-business structures as well. On the other hand, the guidance of the ECJ in relation to abuse and beneficial ownership in its judgements in the Danish cases should also be taken into account.[55]

The anticipated implementation of the PPT as from 1 January 2020 in many tax treaties, as a result of the entry into force of the MLI, will intensify the discussions concerning the application of the withholding exemption. In the view of the Dutch government, in case the tax treaty includes a PPT, a taxpayer is not entitled to a reduced treaty rate if the conditions for applying the domestic withholding exemption are not satisfied. Existing structures should be revisited and, if necessary, be timely restructured. Of course, restrictions such as the anti-dividend stripping rules should be considered in such situations.

5. Looking ahead

On Budget Day 2018, the Dutch government submitted a legislative proposal for the introduction of a conditional withholding tax on intra-group dividends to low-taxed jurisdictions and in situations of abuse.[56] In light of the coherence with the non-abolishment of the DWT (after all), it has been decided not to introduce the conditional withholding tax on dividends (yet) and to first examine the integration of the DWT and this conditional withholding tax as well as the effects thereof on, for instance, collection of taxes in practice.[57] For the time being it is uncertain where this will lead us. In addition, the Dutch Ministry of Finance is reviewing the *Danish* cases to assess whether amendments to Dutch tax laws are required or desirable. If that is the case, a legislative proposal will be published on Budget Day 2019.[58]

By contrast, there is more clarity about the introduction of the new conditional withholding tax on intra-group interest and royalties to low-taxed jurisdictions and in situations of abuse. The Dutch government has repeatedly emphasized that it intends to introduce this conditional withholding tax as of 1 January 2021. A legislative proposal will be presented for this purpose on Budget Day 2019 at the latest.[59]

55 ECJ 26 February 2019 in the joined cases C-116/16 and C-117/16, ECLI:EU:C:2019:135.

56 Parliamentary Papers II, 35028, No. 2, Bill.

57 Letter of the State Secretary for Finance on 'Reconsidering the package for creating a favourable business environment'(*Heroverweging pakket vestigingsklimaat*) of 15 October 2018.

58 Parliamentary Papers II, 25087, No. 236, International tax (agreement-)policy.

59 Parliamentary Papers II, 35028, No. 6, p. 25, Memo further to the report.

About Loyens & Loeff

Loyens & Loeff N.V. is an independent full service firm of civil lawyers, tax advisors and notaries, where civil law and tax services are provided on an integrated basis. The civil lawyers and notaries on the one hand and the tax advisors on the other hand have an equal position within the firm. This size and purpose make Loyens & Loeff N.V. unique in the Benelux countries and Switzerland.

The practice is primarily focused on the business sector (national and international) and the public sector. Loyens & Loeff N.V. is seen as a firm with extensive knowledge and experience in the area of, inter alia, tax law, corporate law, mergers and acquisitions, stock exchange listings, privatisations, banking and securities law, commercial real estate, employment law, administrative law, technology, media and procedural law, EU and competition, construction law, energy law, insolvency, environmental law, pensions law and spatial planning.

loyensloeff.com

Quoted

Quoted is a periodical newsletter for contacts of Loyens & Loeff N.V. Quoted has been published since October 2001.

The author of this issue is Imme Kam (imme.kam@loyensloeff.com).

Editors

You can of course also approach your own contact person within Loyens & Loeff N.V.

LOYENS & LOEFF

LOYENSLOEFF.COM

As a leading firm, Loyens & Loeff is the logical choice as a legal and tax partner if you do business in or from the Netherlands, Belgium, Luxembourg or Switzerland, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need.

Amsterdam, Brussels, Hong Kong, London, Luxembourg, New York, Paris, Rotterdam, Singapore, Tokyo, Zurich