LOYENS LOEFF

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New amendment protocol to the Dutch-Swiss tax treaty

On 30 November 2020 several amendments to the double tax treaty between Switzerland and the Netherlands have entered into force and will be applicable as from 1 January 2021. The amendment protocol implements BEPS minimum standards and introduces changes to the treatment of pension income as well as clarifications to the treatment of investment institutions and investment funds.

On 12 June 2019 Switzerland and the Netherlands (**the Contracting States**) signed a protocol of amendment (**the Protocol**) to its treaty for the avoidance of double taxation (**the DTT**, **the Treaty**) with respect to taxes on income. In the Netherlands, the Protocol was approved by silent vote already in October 2019. The Swiss parliament approved it on 19 June 2020. The referendum deadline expired unused on 8 October 2020.

The Protocol and hence, the amendments to the DTT have entered into force on 30 November 2020 with effect as from 1 January 2021.

Abuse provisions and implementation of BEPS minimum standards

The Protocol implements the minimum standards required under the OECD BEPS convention. In this respect, the title and preamble of the DTT have been changed and newly contain the addendum "the prevention of tax evasion and avoidance".

The newly introduced art. 22 para. 6 DTT aims to prevent unintended double non-taxation. If a deviating qualification or interpretation leads to a reduced or non-taxation in one contracting state based on the DTT, the other state shall not have to exclude such income from taxation. This incorporates the corresponding provision set forth in the OECD model tax convention.

In addition, an article 27a is added to the DTT introducing a new abuse clause which refers to the principle purpose of an arrangement or transaction. Accordingly, treaty benefits are not granted if one of the main purposes of a transaction or arrangement was obtaining the benefit that resulted directly or indirectly from that set-up. Exceptions apply if granting such benefit under the respective circumstances is in accordance with the object and purpose of the DTT. The principle purpose test applies to all provisions of the Treaty.

Pension schemes and pension income

The Protocol introduces a definition of the term “pension fund”. The definition is based on the domestic rules of the Contracting States and the function performed. Such specification was necessary, as pension funds can claim benefits under the Treaty. The pension schemes included will be outlined in the newly adapted art. II ad art. 3 para 1 j) of the Protocol to the Treaty.

In accordance with recent agreement approach of the Netherlands, the Protocol changes the taxation of pension income, annuities and social security payments. The current exclusive right to tax for the country of residence regarding periodic payments (under the conditions of art. 18 para. 2 DTT) is abolished. From 1 January 2021, the source state has a non-exclusive right (“may be taxed”) to tax periodic payments up to a maximum rate of 15% according to the new art. 18 para. 1 DTT.

The Contracting States agree to grant a tax credit in the amount paid (the Netherlands) or, upon request, a relief from the taxable base of one third of the net amount of the received payment (Switzerland) in case pension income is taxed in the other contracting state in accordance with the new art. 22 para 3 and 5 c) DTT.

See here for more detailed information on the changes regarding the tax treatment of pension income.

Clarifications on tax treatment of investment funds

The Protocol replaces art. IX ad art. 10 para 3 of the Protocol to the Treaty. The new provision sets forth the treatment regarding the residency of investment funds. Most notably, Dutch VBI (*vrijgestelde beleggingsinstelling*), Swiss FCP, SICAV and KmGK do not qualify as residents of one or both contracting states.

The Contracting States may nevertheless apply their domestic law on such investment funds, in particular with regard to withholding taxes on distributions to beneficiaries resident in the other state. The taxation, however, shall not exceed 15% of the gross amount of the income so taxed.

Also, according to the renewed art. X ad art. 10 para. 3, a Dutch FBI (*fiscale beleggingsinstelling*), which is in principle subject to Dutch corporate income tax, but against a rate of 0% provided that certain requirements are met, may not make use of art. 10 para. 3 regarding the exemption for dividend withholding tax, since Switzerland regards the FBI as transparent.

Initiation of mutual agreement procedure

With effect as from 1 January 2021, taxpayers may choose where to request the initiation of a mutual agreement procedure (MAP) as in either their country of residence or in the other country, if they consider themselves subject to a double taxation not in line of the DTT. This provision is consistent with the latest OECD model tax convention. Until now, the request could only be addressed to the country of residence (see art. 25 DTT).

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