KPMG Meijburg & Co Tax Lawyers

Internet consultation on tax treaty policy and designation of low-taxed states

On September 25, 2018 the government launched an internet consultation, giving interested parties the opportunity to raise issues that are important to them relating to i) Dutch tax treaty policy and ii) the designation of low-taxed states with a view to – first of all – the application of the measure on Controlled Foreign Companies ('CFC's') proposed on Budget Day.

We will briefly address these two aspects of the consultation.

Tax treaty policy
During the course of 2019 the Deputy Minister of Finance will send a letter to the Lower House informing it about the changes that have taken place in tax treaty policy since the 2011 Memorandum on Tax Treaty Policy. This letter will discuss matters such as the effects of the abolition of the current dividend withholding tax and the proposed introduction of a conditional withholding tax on dividends (in 2020) and on interest and royalties (in 2021). These proposals were discussed in our Budget Day memorandum. The letter will also pay attention to the treaty relationship with developing countries. The explanatory notes to the consultation point out the differences between the OECD Model Convention and the UN Model Convention, which developing countries often use as their starting point. The latter convention, for example, allows withholding tax on profits from international shipping and on capital gains on shares in general.

In short, the conditional withholding tax to be introduced will cover dividends, interest and royalty payments to affiliated entities established in low-tax states and in abuse situations. If a tax treaty concluded with such a jurisdiction hinders taxation, the Netherlands will approach the treaty partner in order to amend the treaty in such a way that the Netherlands can impose the withholding tax. The Deputy Minister also indicated that it may be examined whether, in cases where there is no abuse, only taxation in the state of residence or a reduced rate can be included in the treaty. This is possible by including a specific anti-abuse provision. An example of the latter would be only granting treaty benefits if there is a tax of at least 7% or specific substance.

Designation of low-taxed states
The bill to implement the First European Anti-Tax Avoidance Directive (ATAD1) was presented to the Lower House on Budget Day.
One of the measures contained in the bill is the introduction of a CFC measure, which will apply to financial years commencing on or after January 1, 2019. Under this measure, CFC profits from passive sources of income that are not distributed or not distributed promptly will, in principle, be included in the Dutch tax base. Please also refer to our Budget Day memorandum.

One of the characteristics of a CFC is that it must involve an entity or permanent establishment in a *designated state*, i.e. low-taxed states (without profit tax or with a statutory rate of less than 7%) or a state appearing on the EU list of non-cooperative countries ('EU blacklist').

An exhaustive list of these designated states will be drawn up annually and laid down in a ministerial regulation. It will be based on the rate applying on October 1 of the preceding calendar year or on the most recent EU blacklist for the preceding calendar year.

The designation of low-taxed states will take for place for the first time with October 1, 2018 as reference date, i.e. for the 2019 tax year. The consultation document contains an appendix with a provisional overview of low-taxed states based on currently available information: Anguilla, the Bahamas, Bahrain, Bermuda, the British Virgin Islands, Guernsey, the Isle of Man, Jersey, the Cayman Islands, Kuwait, Palau, Qatar, Saudi Arabia, the Turks and Caicos Islands, Vanuatu and the United Arab Emirates.

According to the consultation document, the consultation is taking place so that current knowledge about the tax systems of other countries can be taken into account when establishing a final list of designated states at the end of the calendar year. This will avoid countries being wrongly placed on the list or mistakenly being omitted from the list.

The EU blacklist (since May 25, 2018: American Samoa, Guam, Namibia, Palau, Samoa, Trinidad and Tobago and the US Virgin Islands) is a fact and is not part of the consultation (but is part of the final list).

The states that are designated as low-taxed in 2019 (with October 1, 2019 as reference date) for the purposes of the 2020 tax year and those designated as such in later years, will also be relevant for the taxation of the aforementioned conditional withholding tax on dividends, interest and royalties that is to be introduced.

Final remarks
The consultation closes on October 22, 2018. If approval is granted, the responses will then be published.

Meijburg & Co
September 2018