KPMG Meijburg & Co Tax & Legal

Private member's bill on conditional final settlement of dividend withholding tax presented to Lower House

On July 10, 2020 member of parliament Bart Snels (of the GroenLinks parliamentary party) presented a private member's bill to the Lower House of Parliament in which he proposes introducing a final settlement obligation for dividend withholding tax purposes in the event of a cross-border relocation of the registered office, a cross-border merger, a cross-border division and a cross-border share merger. This concerns cross-border reorganizations by companies (head offices) resident in the Netherlands that are members of a group as referred to in Section 24b of the Dutch Civil Code or similar foreign rules with a consolidated net turnover of at least EUR 750 million. It has been proposed to introduce the measures with retroactive effect to 12:00 noon on July 10, 2020. In this memorandum we take a closer look at the bill.

Background and qualifying states

The current Dividend Withholding Tax Act does not have a final settlement obligation if the withholding obligation for dividend tax ends because a company is no longer resident in the Netherlands. In most cases, the Netherlands can no longer levy dividend withholding tax on the (deferred) profit reserves present at that time, because the company no longer has a withholding obligation for Dutch dividend tax purposes or a treaty for the avoidance of double taxation prevents this. The bill aims to secure the levying of dividend withholding tax in the event that, as a result of a reorganization, the (deferred) profit reserves are transferred to a jurisdiction that does not take over the Dutch dividend withholding tax claim. This concerns two types of jurisdictions ('qualifying states'), i.e. states that:

- do not have a withholding tax on dividends that is similar to the Dutch dividend withholding tax;
- regard the (deferred) profit reserves as paid-in capital upon arrival ('step-up countries').

According to the bill, there is a tax similar to that in the Dividend Withholding Tax Act if the withholding tax is at least levied on dividends that are distributed by the last link (head office) in a group chain. For example, only a withholding tax on intra-group dividends to countries appearing on a 'blacklist' would not meet this criterion. Taxation at a zero rate or almost zero rate is also not sufficient.

Qualifying states are also those states that regard the (deferred) profit reserves transferred as part of a cross-border reorganization as paid-in capital, so that there is no foreign claim on existing 'Dutch' profit reserves.

Deemed distribution, deferral of payment and settlement

The conditional final settlement obligation is based on a presumed distribution of the (deferred) profit reserves present at the company ('distributable profit'). Under this deemed distribution, the withholding agent is deemed to have distributed, at the time immediately prior to the cross-border reorganization, all the (deferred) profit reserves present at the company to those entitled to these reserves in proportion to their entitlement (the 'protected profit distribution') and insofar as the (deferred) profit reserves are transferred to a legal entity in the qualifying state. The dividend withholding tax payable on the protected profit distribution is levied by way of a tax return. A deferral of payment may be granted upon request, subject to conditions. The bill provides for the dividend withholding tax on the protected profit distribution to be credited against any corporate income tax and personal income tax insofar as the deferral of payment has ended. The right to credit the amounts is accorded to those who receive the income for which the deferral of payment has ended and not to those who were a shareholder at the time the withholding agent became liable for the conditional dividend withholding tax.

Target group

No dividend withholding tax is payable insofar as the protected profit distribution is deemed to have been distributed in a shareholder structure for which an exemption applies. As the bill only covers companies resident in the Netherlands that are members of a group as referred to in Section 24b of the Dutch Civil Code or similar foreign rules with a consolidated net turnover of at least EUR 750 million, the proposed final settlement obligation above all covers the dividend withholding tax claim on the (deferred) profit reserves to which the portfolio shareholders of a listed company are entitled.

Expansion of deemed place of residence

The proposal contains an additional measure under which a company that is incorporated under foreign law and that was resident in the Netherlands for at least two calendar years is still deemed to be resident in the Netherlands for the purposes of the Dividend Withholding Tax Act for a period of 10 calendar years after relocating the registered office (place of effective management) abroad. Partly for the purposes of uniformity, the bill also contains a (similar) expansion of the deemed place of residence in the Corporate Income Tax Act.

Meijburg & Co comments

The private member's bill cannot be seen separately from the announced departure of Unilever's head office from the Netherlands and the uncertainty about whether Shell's head office will remain in the Netherlands. The retroactive effect attached to the bill is noteworthy. The explanatory notes show that the presenter of the bill is optimistic about the tenability of the proposal for treaty purposes. However, we have some reservations about his optimism.

For the moment, it is unclear whether the bill can count on a parliamentary majority. The private member's bill could possibly become a topical issue in the elections for the Lower House set for, in principle, March 2021.

The progress of the parliamentary debates on the private member's bill will be discussed on September 9, 2020, after the summer recess of the Lower House. We will, of course, inform you further should developments give cause to do so.

Please feel free to contact your advisor at Meijburg & Co if you would like to discuss this bill.

Meijburg & Co
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