

Refund of Dutch dividend withholding tax based on Sofina judgment

In the cover letter to the 2021 Tax Plan, the Dutch government announced the introduction of a decree providing rules for refunding dividend withholding tax (and tax on games of chance, not further discussed in this Tax Alert) to foreign entities in line with the CJEU decision in the Sofina case (C-575/17). On December 4, 2020, the Deputy Minister of Finance published the decree (Decree of November 26, 2020, no. 2020-24973) containing the conditions for such refunds.

The CJEU decision in the Sofina case established that the free movement of capital was violated when a loss-making French entity was released from its obligation to pay domestic dividend withholding tax until it became profitable again, despite the fact that a foreign loss-making entity was unable to credit this dividend withholding tax, rendering the source taxation a final levy.

In the newly published Decree, the Deputy Minister of Finance stated that, in certain circumstances, outcomes similar to that in the Sofina case are possible with regard to Dutch dividends, if a foreign entity meets three criteria:

- a) The dividend withholding tax withheld on behalf of a foreign legal entity during a financial year would have exceeded the corporate income tax payable had the entity been a tax resident in the Netherlands;
- b) The foreign legal entity is not entitled to a reduction of the dividend withholding tax withheld or to credit it pursuant to corporate income tax law, dividend withholding tax law, similar foreign tax laws, a double tax treaty or case law; and
- c) The corporate income tax payable by the foreign legal entity in later financial years would have been lower than the dividend withholding tax withheld on its behalf had the entity been a tax resident in the Netherlands.

If these criteria are met, the Decree provides for the refund of dividend withholding tax if several additional requirements are met, the most important being that the foreign entity is established in another EU Member State or a qualifying third country (this means any state with which the Netherlands can exchange information in line with international standards for the exchange of information) and that the foreign entity is the beneficial owner of portfolio investments. A request should be filed within three years of the financial year in which the dividend was made available and the correct formalities should be followed. Additionally, the Decree requires that information enabling the tax inspector to assess the eligibility for a refund should accompany the request for a refund. Finally, during a five-year period, a foreign entity that obtained a refund must promptly provide the tax inspector with the necessary information to determine whether an excessively high refund was granted, should circumstances permit the foreign entity to later credit/deduct (part of) the previously refunded amount or corporate income tax payable.

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This Decree potentially provides a meaningful option to foreign entities that have not been able to otherwise obtain relief for Dutch dividend withholding tax through either a reduced treaty tax rate or an exemption. It is especially relevant for foreign entities that

have received Dutch portfolio dividends and have been or will likely be in a loss-making position or have had a low tax base for several years. In such cases, the withheld dividend withholding tax would have probably exceeded the corporate income tax payable had the entity been established in the Netherlands. With the Decree having taken effect on December 5, 2020, the window for filing refund requests for dividends received in 2017 is quickly closing. The applicability of this approval is furthermore limited, since the cover letter to the 2021 Tax Plan announced that in 2022 changes to the Dividend Withholding Tax Act will repair the violation of the free movement of capital in foreign investor situations.

For more information on this matter or if you require assistance with filing a (pro forma) request, please contact Jeroen Bruggeman, Erwin Nijkeuter or your usual tax advisor.

Meijburg & Co
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