

## **Private member's bill on conditional final settlement of dividend withholding tax radically amended**

On December 8, 2021 the private member's bill 'Conditional final settlement of dividend withholding tax' that Lower House MP Bart Snels (of the GroenLinks parliamentary party) had originally presented to the Lower House of Parliament on July 10, 2020 was radically amended by means of a 4th Memorandum of Amendment. Although MP Snels had left parliament at the end of October 2021, Lower House MP Tom van der Lee took up the bill again after the announcement on November 15, 2021 that Shell would relocate its head office to the United Kingdom. Although the essence of the bill has remained the same, the 4th Memorandum of Amendment contains several essential changes to the scope and the tax methodology.

The essence of the proposal is that a final dividend withholding tax settlement obligation will be introduced for cross-border reorganizations, consisting of cross-border relocations of the registered office, cross-border mergers, cross-border split-offs/divisions and cross-border share mergers. This concerns cross-border reorganizations by companies established in the Netherlands (head offices) with a distributable profit of more than EUR 50,000,000 at the time of the reorganization. It was originally proposed to introduce the measures with retroactive effect to 12:00 noon on July 10, 2020. However, it has now been proposed to introduce the measures with retroactive effect to 9:00 a.m. on December 8, 2021, the date on which the 4th Memorandum of Amendment was presented to the Lower House of Parliament.

### Number of 'qualifying states' narrowed down

The bill aims to secure the levying of dividend withholding tax in the event that, as a result of a cross-border reorganization, the (deferred) profit reserves are transferred to a jurisdiction that typically 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').

Under the 4th Memorandum of Amendment, the group of qualifying states are in that sense narrowed down, so that Member States of the EU and the European Economic Area ('EEA') are not regarded as qualifying states. However, account must be taken of the fact that the proposal contains an anti-abuse provision that addresses the situation where a departure to a non-qualifying state is only short-term, after which there is a departure to a qualifying state.

### Number of shareholders affected by taxation narrowed down

Under the 4th Memorandum of Amendment, the final dividend withholding tax settlement will only apply insofar as the shares in the withholding agent are held by natural persons who are residents of or entities that are established in a country that:

- is not a part of the EU/EEA;

- has not concluded a double tax treaty with the Netherlands containing rules for dividends.

Shareholders who live or are established in the Netherlands, on the BES islands, on Aruba, Curaçao or Sint-Maarten, in a Member State of the EU/EEA or in a Contracting state with rules for dividends will therefore not be affected. This has taken the form of a withholding exemption, similar to the current withholding exemption for participation structures.

This narrowing down of the number of shareholders based on the proposed withholding exemption has administrative implications for the withholding agent affected by the final settlement (see below under the heading Administrative obligations withholding agent).

#### Changes to tax methodology

The conditional final settlement obligation will take the form of a deemed distribution of the (deferred) profit reserves available at the company, insofar as these exceed EUR 50,000,000. Under this distribution fiction, the withholding agent is regarded as having distributed their available (deferred) profit reserves above that amount on a pro rata basis to the shareholders falling under the scope of the bill (see the previous section) on the date immediately preceding the cross-border reorganization. According to the original proposal, a protective assessment would be imposed on the withholding agent, for which a deferral of payment was granted until the time that the withholding agent or their legal successor actually distributes dividends. The withholding agent or their legal successor would also be given a right of recourse against the shareholders in respect of the protective additional assessment.

Under the 4th Memorandum of Amendment, this complicated technique has been abandoned and the withholding agent will become immediately liable for the dividend withholding tax payable on the dividends that the company, as a result of the reorganization, is deemed to have distributed to the shareholders falling under the scope of the proposal. Therefore, no protective supplementary assessment will be imposed and the dividend withholding tax payable must be remitted to the tax collector within one month of the taxable event occurring.

#### Administrative obligations withholding agent

The company must suitably disclose to the relevant shareholders that a (deemed) withholding has taken place. The announcement should be made on the date on which the withholding is considered to have taken place. In addition, the withholding agent will be given a right of recourse against the relevant shareholders for the amount of the deemed withholding. Within a month of the taxable event of the cross-border reorganization having taken place, the withholding agent must also provide the Dutch tax authorities with a statement showing the extent to which the conditions of the withholding exemption have been met. According to the explanatory notes to the 4th

Memorandum of Amendment, this should include the name, address or the place of establishment of the shareholder. If the shareholder lives or is established in a third state with which the Netherlands has concluded a tax treaty containing rules for dividends, a (copy of a) certificate of residence signed by the tax authorities of the relevant Contracting state, which is not older than two years from the date of the departure, should be provided.

#### Reintroduction of comprehensive place of establishment fiction

The proposal originally contained an additional measure under which a company that was incorporated under foreign law and that was resident in the Netherlands for at least two years, was still deemed to be resident in the Netherlands for the purposes of the Dividend Withholding Tax Act 1965 and the Corporate Income Tax Act 1969 for a period of 10 years after the relocation of the registered office (place of effective management) abroad. However, this additional place of establishment fiction had disappeared from the proposal, partly in response to criticism from the Council of State. The additional place of establishment fiction has now reappeared in the proposal, in slightly modified form, both for the purposes of dividend withholding tax and corporate income tax. A company that is incorporated under the laws of another state and that had been established in the Netherlands for at least five consecutive calendar years at the time the place of effective management was relocated from the Netherlands to a qualifying state, will during a period of 10 calendar years from the date of that relocation be deemed to still be established in the Netherlands. This would mean that dividend tax would still have to be withheld on profit distributions by the company for a period of 10 years after the relocation of the management and that only after the end of that period would a final settlement take place due to the end of the withholding obligation.

#### **Comments by KPMG Meijburg & Co**

The 4th Memorandum of Amendment cannot be seen in isolation from the announced departure of Shell's head office from the Netherlands in mid-November 2021, shortly after the departure of Unilever. Compared to the original proposal, the scope and the tax methodology has been radically changed and narrowed down. The MP who presented the 4th Memorandum of Amendment argued that these changes mean the proposal no longer conflicts with EU law and the double tax treaties concluded by the Netherlands. However, the question will now be whether and to what extent the proposal conflicts with the free movement of capital, which can also protect non-EU resident or non-EU established shareholders of companies established within the EU. The reintroduction of the comprehensive place of establishment fiction is clearly aimed at Shell. The private member's bill is currently set to be debated by the Lower House in the second week of January 2022, but it cannot be ruled out that this may be postponed. Given the current fragmented political relationships in the Lower House of Parliament it is unclear whether the bill can count on the support of a majority in the Lower House. We will of course keep you informed about the progress of this bill.

KPMG Meijburg & Co  
December 8, 2021

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