

## **Answers to parliamentary questions about conduit companies**

On February 26, 2019, the Court of Justice of the European Union ('CJEU') rendered [two important judgments](#) on the anti-abuse rules in the Parent-Subsidiary Directive (PSD) and in the Interest and Royalties Directive (IRD), and on the beneficial ownership concept in the IRD (hereinafter: the February 26 judgments). On June 14, 2019, the Deputy Minister of Finance, Menno Snel, answered Parliamentary questions about these judgments, which mainly concern the implications of the judgments for the Netherlands. Below we will discuss the main points of the letter, subdivided into the implications for Dutch national provisions, ruling practice and the Dutch treaties for the avoidance of double taxation.

### *National provisions*

The Netherlands has implemented the general anti-abuse provision in the PSD in the withholding tax exemption for dividend withholding tax purposes (Section 4(3)(c) Dividend Withholding Tax Act 1965 ('DwTA')) and in the tax liability for entities resident abroad holding a substantial interest in a Dutch company (Section 17(3)(b) Corporate Income Tax Act 1969 ('CITA')). In the event of abuse, the Netherlands therefore refuses, for example, to grant an exemption from withholding tax on dividends resulting from Article 5 PSD, which is implemented in Section 4(2) DwTA.

At present, these provisions are subject to a number of conditions in the form of substance requirements. If a linking intermediate holding company meets these requirements, there is by definition no abuse ('safe harbour'). The Deputy Minister does not consider Dutch law to be in line with the February 26 judgments on this point. Therefore, on Budget Day, amendments to dividend withholding tax and corporate income tax will be proposed, which will take effect as of January 1, 2020. The planned amendments will mean that the substance requirements are only relevant for the division of the burden of proof. These amendments will apply to linking intermediate holding companies established elsewhere in the EU as well as in a third country. The safe harbour for linking intermediate holding companies will therefore not always be 'safe' in abuse situations. Nevertheless, the Deputy Minister does not expect that the Dutch tax authorities will be much more often able to successfully take the position that there is abuse, because he believes there is sufficient overlap between the Dutch substance requirements and the indications of abuse in the CJEU judgment. The Dutch tax authorities will however bring 'strong cases' before the courts. This includes situations in which, for example, the EUR 100,000 payroll costs are disproportionate to the amount of dividends, interest and royalties received and paid by the intermediary, or situations in which the intermediary very quickly passes on the dividends, interest and royalties received. Furthermore, the bill to be submitted on Budget Day for conditional withholding taxes on interest and royalties (expected effective date January 1, 2021) will also be amended as a result of the February 26 judgments. Finally, the Deputy Minister does not see any State aid risk due to the application of the withholding exemption, because there is no selective advantage. The idea seems to be that the same conditions apply to all taxpayers.

This participation exemption of Section 13 CITA is a provision that serves to implement Article 4 PSD. However, in its February 26 judgments, the CJEU did not comment directly on this exemption. Therefore, according to the Deputy Minister, the extent to which the judgment could have consequences for the participation exemption needs to be studied in more detail.

#### *Ruling practice*

Existing rulings that have been issued in situations where the substance requirements have been met, but that qualify as abuse under the new legislation, will lapse as of January 1, 2020. After all, there is in that case an amendment of the law that is relevant to the ruling. The Dutch tax authorities will reassess existing rulings on the basis of risk, focusing on the 'strong cases' referred to above. As previously discussed, the Deputy Minister does not expect that the Dutch tax authorities will much more often be successfully able to take the view that abuse has occurred. The Deputy Minister therefore confirms that taxpayers can continue to rely on existing rulings for their remaining term, unless the Dutch tax authorities inform the taxpayer that they will lapse.

#### *Treaties on the avoidance of double taxation*

According to the Deputy Minister, it 'only' follows from the February 26 judgments that taxpayers can no longer invoke the benefits of EU law, such as the PSD. As stated above, the withholding exemption in Section 4(2) DWTA is a provision intended to implement this Directive. However, this does not apply to similar tax treaty benefits. The Deputy Minister therefore believes that these are independent of EU law. It consequently remains possible to invoke tax treaty benefits, such as the 2.5% tax rate in the Netherlands-Luxembourg Treaty, in the same way as before the February 26 judgments.

According to the Deputy Minister, if a principal purpose test (PPT) is included in a tax treaty, the national courts are not bound by a CJEU judgment when interpreting this provision. Judgments by the CJEU may however have an impact on the interpretation by the national courts.

Finally, according to the Deputy Minister, the beneficial ownership rules in the tax treaties concluded by the Netherlands will be interpreted in accordance with the most recent OECD Commentary. The same applies, incidentally, to the beneficial ownership rules in Section 4(4) DWTA. In the Deputy Minister's opinion, this explanation in accordance with the OECD Commentary is no stricter than that in the case law of the Supreme Court.

#### *Meijburg & Co comments*

All in all, according to the Deputy Minister, the February 26 judgments have only limited consequences for the Netherlands. However, with effect from January 1, 2020, the Dutch tax authorities will have more points of reference to refuse the dividend

withholding tax exemption under national law, particularly in the 'strong cases' referred to above. Your Meijburg advisor can inform you about the exact consequences for your tax structure.

Meijburg & Co  
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