

Second amendment to private member's bill on conditional final settlement of dividend withholding tax

On October 9, 2020 Lower House MP Bart Snels (of the GroenLinks parliamentary party) once again amended his private member's bill on the 'Conditional Final Settlement of Dividend Withholding Tax Emergency Act', which he had submitted on July 10, 2020. You can read more about the submitted bill in [our memorandum dated July 13, 2020](#).

Mr. Snels had already submitted a Memorandum of Amendment on the bill on September 18, 2020, in which he also announced that more changes would follow. In response to criticism from the Council of State, he finally submitted a completely new text and Explanatory Memorandum to the Lower House of Parliament on October 9, 2020.

Essence of bill

The essence of the renewed bill is the same as the proposal submitted on July 10, 2020. There will be a final dividend withholding tax settlement obligation for cross-border relocations of the registered office, mergers, split-offs/divisions and share mergers, if as a result of these the (deferred) profit reserves of the withholding agent established in the Netherlands is transferred to a jurisdiction that does not take over the Dutch dividend withholding tax claim, a so-called qualifying state (the taxable event). This is a state that has no withholding tax on dividend distributions or grants a step-up for immigration, legal mergers, split-offs/divisions or share mergers.

Group criterion removed and distributable profit threshold

The original bill only covered withholding agents that were members of a group with a consolidated net turnover of EUR 750 million or more. On September 18, 2020 Mr. Snels removed this criterion with a view to possible adverse EU aspects. In connection with this, the proposed retroactive effect has also been amended, in the sense that if the bill is enacted into law the legislation will have retroactive effect through to 12:00 midday on September 18, 2020.

By removing the group criterion, the bill in principle applies to all withholding agents established in the Netherlands. A threshold still applies in the sense that in the event of a relocation of the registered office, legal merger, split-off/division or share merger, dividend withholding tax will only be payable insofar as the withholding agent's distributable profit is more than EUR 50 million at the time the taxable event occurs.

No dividend withholding tax

The amended bill explicitly provides for no tax to be payable insofar as shareholders of the withholding agent could have used the dividend withholding tax exemption if, at the

time the aforementioned taxable event occurs, the withholding agent had made a 'real' profit distribution to the shareholders.

Anti-abuse provision

As stated, the proposed tax is payable if the right to tax the distributable profit of the withholding agent is transferred from the Netherlands to a qualifying state. If the right to tax is transferred to a non-qualifying state, no tax will thus be payable. In connection with the relevant distinction between qualifying and non-qualifying states, the bill has been expanded to include an anti-abuse provision. According to Mr. Snels, this is intended to combat setups that aim to avoid the proposed final settlement of dividend withholding tax by, before leaving to go to a qualifying state, making a 'stopover' in a non-qualifying state.

Protective assessment, deferral of payment and right of recourse

The taxing technique for the proposed tax has been further amended and now is as follows. The withholding agent must file a tax return if a taxable event occurs as described above. Based on that tax return, a protective supplementary dividend withholding tax assessment will be imposed, for which an interest-free deferral of payment will be automatically granted (thus without the need for a request). The amended bill provides for the debt arising from the assessment in respect of a legal merger or split-off/division to be transferred to the legal successor of the withholding agent. The deferral of payment will end insofar as dividends are actually distributed by the withholding agent that has relocated abroad, or if dividends are distributed on shares that were issued to the shareholders of the withholding agent as part of a legal merger, split-off/division or share merger.

It is noteworthy that the amended bill provides for the withholding agent on whom the protective supplementary assessment was imposed to have a right to recourse against its shareholders in respect of the tax that is payable when the deferral of payment ends. It is then up to the withholding agent how it will effectuate that right of recourse toward the shareholders. However, the bill states that the right of recourse may be waived by agreement or by the articles of association.

Penalty

The amended bill also provides for penalties up to a maximum of 100% of the tax payable and a liability for group companies for the dividend withholding tax to be remitted when the deferral of payment ends.

No expansion of deemed place of residence

It is also notable that the initially proposed expansion of the deemed place of residence for corporate income tax and dividend withholding tax purposes for entities

incorporated under foreign law that are actually resident in the Netherlands for a certain time has been removed from the bill.

Meijburg & Co comments

By removing the group turnover criterion, the scope of the bill has been expanded. This expansion is somewhat eased by limiting the bill to a withholding agent with a distributable profit of more than EUR 50 million. It is noteworthy that the private member has practically ignored the criticism of the bill by tax specialists where this concerns it being contrary to EU law and tax treaties concluded by the Netherlands.

The question is also whether the right to recourse against shareholders proposed by Mr. Snels can be realized under civil law. In particular, we do not believe this will be a simple matter in respect of cross-border mergers, split-offs/divisions or share mergers. After all these reorganizations are partly controlled by, among other things, relevant foreign law and stock exchange conditions.

For the moment, it is unclear whether the bill can count on a parliamentary majority.

Please feel free to contact your usual tax advisor at Meijburg & Co if you would like to discuss this bill. We will, of course, keep you informed of developments.

Meijburg & Co
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