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Global Tax Update

Netherlands

Deloitte Tohmatsu Tax Co.

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Today, the government's budget plans for the coming year were released in public. The budget plans contain the details of the Tax Package 2018.

The Tax Package 2018 does not contain significant amendments-apart from the changes in Dutch dividend withholding tax act- due to the situation that a new government is still to be formed.

Below a summary of the most notable items in the Tax Package 2018 has been stated which are relevant for Dutch subsidiaries of Japanese MNC's.

Please note that the House of Representatives and the Senate have to approve these changes, before implementation, and that the proposals may be changed in the legislative process. Most of the changes in the 2018 Tax Package are proposed to take effect on January 1, 2018.

1. The Netherlands extends the scope of the Dutch dividend withholding tax act exemptions

The 2018 Tax Package contains important changes to the Dutch dividend withholding tax act which are in line with the announcement made by the Dutch State Secretary on 16 May 2017. The Dutch dividend withholding tax treatment of Dutch holding cooperatives will be aligned with that of private limited liability companies (BVs)/public limited companies (NVs). On the other hand, the scope of the exemption from Dutch dividend withholding tax will be expanded and be applied to active business structures.

To align with the changes in the Dutch dividend withholding tax, changes to the tax regime for non-resident taxpayers (the substantial shareholder regime) are included in the Dutch corporate income tax act.

Exemptions in Dutch dividend withholding tax

Under current law, Dutch BVs/NVs are in principle required to withhold a 15% tax on dividends paid to shareholders. However, dividends distributed by a Dutch cooperative, in principle, are not subject to Dutch dividend withholding tax, except in certain situations where abuse of law is present.

The 2018 Tax Package includes legislation to extend the scope of the Dutch dividend withholding tax exemption, as a result of which dividend distributions of cooperatives and BVs and NVs would not be subject to Dutch dividend withholding tax. The exemption would apply to distributions made by Dutch BVs/NVs and Dutch holding cooperatives ("Dutch entity") to parent companies that are tax resident in:

(i) the EU/European Economic Area (EEA), or

(ii) a tax treaty country that contains provisions relating to dividend withholding tax, such as the Japan/Netherlands tax treaty.

The parent company should have a (share) interest of at least 5% in the Dutch entity.

It should be noted that the full domestic Dutch dividend withholding tax exemption would be applicable even in the case of residents of treaty countries where the relevant treaty provides for a reduced rate of withholding tax rather than a full exemption. In other words, also in case the treaty provides for a 5% or 10% dividend withholding tax rate, in such case the full dividend withholding tax exemption can be applied based on domestic Dutch rules.

1) Anti-abuse rule

In view of the broadened dividend tax exemption, also a new anti-abuse rule is introduced. The domestic exemption does not apply to recipients resident in the EU/EEA or in a tax treaty country if:

- the structure is established with the main reason or one of the main reasons to avoid Dutch dividend withholding tax; and
- the structure is considered artificial.

Only if both conditions would be met, the Dutch domestic exemption cannot be applied. The anti-abuse rule is in line with the Principal Purpose Test under BEPS Action 6 (Preventing Treaty Abuse).

A structure and transaction is not (deemed) artificial to the extent it is based on valid business reasons which reflect economic reality. This could, for example, be the case if the direct shareholder or member of the Dutch entity conducts an active trade or business.

The structure is not considered artificial in case an EU/EEA/Tax treaty intermediary company has sufficient substance that performs a so-called "linking function" between the active business or head office activities of the (ultimate) shareholder and the lower tier companies. Newly added substance requirements for the linking intermediary company are that it should incur wages of at least EUR 100k and should have an office available for the use of its intermediary holding function.

If the exemption does not apply, relief under an applicable tax treaty could still be available.

2) Holding cooperatives

So-called Dutch holding cooperative will – in the aforementioned abusive situations - be required to withhold Dutch dividend withholding tax where a member of such a cooperative holds a "qualifying interest." A qualifying interest would exist where a member holds an interest in the holding cooperative and is thereby entitled to at least 5% of its profits and/or liquidation proceeds.

3) Effective date and formalities

The new dividend rules will apply as from 1 January 2018. The additional substance requirements case of a linking intermediary company (EUR 100k salary and office) will apply as of 1 April 2018. To apply the dividend exemption, the distributing company should declare to the tax inspector that the conditions for the exemption are met, as well as should disclose other relevant information (guidance to be expected) within one month after the dividend distribution. Non-compliance could trigger a penalty of maximum EUR 5,278.

4) Conclusion

Based on the proposed legislation it can be concluded that in situations where a BV is directly and at least 5% owned by a Japanese parent company, it would most likely benefit from the new dividend tax exemption as of 1 January 2018. This makes the Netherlands one of the most competitive countries in terms of divided tax treatment within Europe.

2. Other proposed legislation

As of 1 January 2016, a Dutch taxpayer that meets the Country-by-Country Report ("CbCR") requirements, needs to prepare and file a CbCR with the Dutch Tax Authorities in cases when the Ultimate Parent Company of the Group ("UPC") is not (yet) obliged to file a CbCR in its own resident state.

Based on the Tax Plan 2018, "voluntary filing" and/or "parent surrogate filing" of the CbCR is allowed if certain conditions are by the UPC met. Consequently, if the UPC complies with certain requirements, the Dutch taxpayer should merely notify the Dutch Tax Authorities on which Group entity (UPC or surrogate parent entity) will prepare and file the CbCR with the Tax Authorities. As such, the Dutch taxpayer is not obliged to prepare and file a CbCR with the Dutch Tax Authorities for this (interim) period.

Based on current legislation, if a taxpayer files an incorrect and/or incomplete tax return and subsequently, the taxpayer files an amended (i.e. correct and complete) corporate income tax return with the Tax Authorities (i.e. within 2 years) before the Tax Authorities notice the incompleteness and/or incorrectness of this corporate income tax return, the Tax Authorities will not impose an administrative fine for filing (intentionally) an incorrect and/or incomplete corporate income tax return.

This exception will be withdrawn. As such, as of January 1, 2018, the Tax Authorities would impose an administrative fine for incorrect and/or incomplete filed Dutch corporate income tax returns (i.e. tax returns that need to be filed after January 1, 2018) even when this incorrect and/or incomplete tax return will be revised correctly and filed with the Dutch Tax Authorities. However, the amount of fine may be reduced. Further, transitional rules apply for tax returns that should have been filed before 1 January 2018.

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