taxnotes® international

Volume 105, Number 1 ■ January 3, 2022

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Reprinted from *Tax Notes International*, January 3, 2022, p. 65

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by Charlotte Tolman and Michael Molenaars

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In this installment of In Step With Stibbe, Tolman and Molenaars review Dutch efforts to enact a dividend withholding tax exit levy on corporations relocating from the Netherlands and examine how the most recent amendment affects the exit levy proposal.

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On July 10, 2020, shortly after Unilever announced its intent to relocate its headquarters to the United Kingdom,[1] a private member of the Dutch opposition party GreenLeft (GroenLinks) submitted to the Dutch parliament a legislative proposal for a so-called Dividend Withholding Tax Exit Levy Emergency Act (Spoedwet conditionele eindafrekening dividendbelasting) ("exit levy proposal").

The exit levy proposal provides for a dividend withholding tax exit levy for some types of cross-border activities, including reorganizations, relocations, mergers, demergers, and stock mergers. The proposal has been scrutinized and criticized, and multiple amendments have been proposed. For instance, a Fourth Memorandum of Amendment was submitted on December 8, following Royal Dutch Shell PLC's announcement that it was relocating its headquarters to the United Kingdom.[2] This amendment narrows the scope of the initial proposal and modifies some aspects.

However, it is still unclear whether a dividend withholding tax exit levy will be enacted into Dutch tax law. This article examines the most important features of, and recent changes to, the Dutch exit levy proposal.

Parliamentary Process and Purpose

Unilever's and Royal Dutch Shell's announced relocations could be related to the Dutch reconsideration of a dividend withholding tax. In 2017, to enhance the Dutch investment climate, the newly formed Dutch government announced its intent to abolish dividend withholding tax. This action was welcomed by many Dutch companies. However, on Budget Day 2018, one month after a legislative proposal was submitted, the proposal was withdrawn. Notably, the proposal was heavily criticized by some politicians and in the media.

When the initial exit levy proposal was submitted in July 2020, it was criticized in

[1] Parliamentary Papers, Dutch House of Representatives, 35 523, nos. 2 and 3 (July 10, 2020).

[2] Parliamentary Papers, Dutch House of Representatives, 35 523, no. 17 (Fourth Memorandum of Amendment) (Dec. 8, 2021).

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literature and by the State Council.[3] One of the main objections was that it conflicted with EU law and double tax treaties concluded by the Netherlands. As a result of this and other criticism, many amendments have been proposed.[4]

After a period of silence, and following the departure of the initiator, Bart Snels, from parliament, another private member of the opposition party, Tom van der Lee, took over the legislative proposal.[5] This resulted in the Fourth Memorandum of Amendment, which substantially narrowed the scope of the exit levy proposal and should — according to Van der Lee — no longer conflict with EU law or double tax treaties concluded by the Netherlands.

The Exit Levy Proposal

The Dutch Dividend Withholding Tax Act 1965 (Wet op de dividendbelasting 1965) does not provide for a dividend withholding tax exit levy when the dividend withholding tax liability of a Dutch taxpayer ends because the taxpayer ceases to qualify as tax resident in the Netherlands. This means that if a Dutch taxpayer enters into a cross-border reorganization (which typically results in the effective ending of the dividend withholding tax liability through the operation of double tax treaties), the Netherlands generally may no longer levy dividend withholding tax on the taxpayer's latent profit reserves, and the dividend withholding tax claim of the Netherlands on those latent profit reserves would in principle be lost.

The exit levy proposal introduces a dividend withholding tax exit levy that is levied as if there is a deemed dividend distribution immediately preceding a cross-border reorganization, including cross-border relocations of corporate seats and cross-border mergers, demergers, and stock mergers. This preserves the dividend withholding tax claim on latent profit reserves that exceed a threshold of €50 million.

Qualifying States

The dividend withholding tax exit levy would only apply to cross-border reorganizations involving Dutch taxpayers and "qualifying states," which is defined as:

- states that do not have a withholding tax on dividends comparable to Dutch dividend withholding tax;[6] and
- states that have a withholding tax on dividends comparable to Dutch dividend withholding tax but that, on arrival, designate the profit reserves of the former Dutch taxpayer as paid-in capital recognized for tax purposes (that is, provide a step-up).

The Fourth Memorandum of Amendment proposes to exclude members of the EU and European Economic Area from being designated as qualifying states. According to Van der Lee, the initiator of the fourth amendment, the exit levy would no longer breach the EU freedom of establishment if it excluded EU or EEA members. This means that cross-border reorganizations involving Cyprus, Estonia, Latvia, and Malta, which do not have a withholding tax on dividends comparable to Dutch dividend withholding tax, would no longer fall within the scope of the exit levy proposal. Reorganizations involving third countries like Hong Kong, Singapore, and the United Kingdom may still be within scope.[7]

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[3] *See, e.g.*, Parliamentary Papers, Dutch House of Representatives, 35 523, no. 6 (Advice State Council) (Oct. 9, 2021). See also two academic fact sheets on the levy (in Dutch): Dennis Weber, "'Spoedwet conditionele eindafrekening dividendbelasting' — EU-rechtelijke aspecten," Wetenschappelijke Factsheet (Dec. 2, 2020) ["'Dividend Withholding Tax Exit Levy Emergency Act' — EU Law Aspects"]; and Peter Kavelaars, "Wetsvoorstel spoedwet conditionele eindafrekening dividendbelasting," Wetenschappelijke Factsheet (Dec. 4, 2020) ["Dividend Withholding Tax Exit Levy Emergency Act"].

[4] Parliamentary Papers, House of Representatives, 35 523, no. 5 (Letter of Amendment) (Sept. 18, 2020); Parliamentary Papers, House of Representatives, 35 523, no. 13 (Second Memorandum of Amendment) (Oct. 26, 2021); and Parliamentary Papers, House of Representatives, 35 523, no. 15 (Third Memorandum of Amendment) (Nov. 15, 2021).

[5] *See, e.g.*, Sarah MacFarlane, "Shell to Move Headquarters to London Amid Energy Transition," *The Wall Street Journal*, Nov. 15, 2021; Stanley Reed, "Shell Proposes a Shift to Britain, Dropping 'Royal Dutch' From Its Name," *The New York Times*, Nov. 15, 2021; and Amanda Athanasiou, "Shell Shareholders Vote to Move Tax Residence to United Kingdom," *Tax Notes Int'l*, Dec. 20, 2021, p. 1468.

[6] A withholding tax comparable to Dutch dividend withholding tax is a withholding tax on dividends paid by the final link (that is, the head office) in the group structure. A withholding tax on dividends that only applies to intragroup dividends paid to entities in blacklisted jurisdictions is, for instance, not sufficient in this respect. The applicable rate of the withholding tax is in principle irrelevant, though a zero or near-zero percent rate is not considered a withholding tax comparable to dividend withholding tax.

[7] Fourth Memorandum of Amendment, *supra* note 2, at 6.

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We note that a question remains as to whether the proposal may constitute a breach of the EU free movement of capital — as non-EU or non-EEA resident shareholders of an EU or EEA company may rely on this principle.

Exemption for Portfolio Shareholders

The Fourth Memorandum of Amendment proposes an exemption from the dividend withholding tax exit levy for individual and corporate shareholders that are residents of: (i) an EU or EEA member state; or (ii) a country with which the Netherlands has concluded a double tax treaty that contains a dividend withholding tax provision. The exemption would be comparable to the withholding exemption for participation dividends and would contain a similar antiabuse provision (that is, it has to be determined whether: (a) the main purpose or one of the main purposes is the avoidance of the dividend withholding tax exit levy; and (b) there is an artificial arrangement or a series of artificial arrangements or transactions).[8] According to Van der Lee, this amendment would minimize the risk of the dividend withholding tax exit levy being considered in breach of double tax treaties entered into by the Netherlands.

Fiction of Relocation of Tax Seat Abroad

The initial exit levy proposal contained an additional measure that aimed to safeguard the dividend withholding tax claim in the event of a relocation abroad of a company's corporate tax seat. Under the so-called Dutch incorporation fiction, an entity incorporated under the laws of the Netherlands is in principle deemed to be a resident of the Netherlands for Dutch corporate income tax and dividend withholding tax purposes, irrespective of its place of effective management and other facts and circumstances. The measure provided that a company incorporated under foreign law that has resided in the Netherlands for at least two years, and that relocates its corporate tax seat to a foreign country (based on its place of effective management), will be deemed to remain a tax resident in the Netherlands for a period of 10 years.

Although this measure was removed from the exit levy proposal because of heavy criticism, especially from the State Council, the Fourth Memorandum of Amendment reintroduces the concept in a modified form: A company that has been resident in the Netherlands for at least five years will remain tax resident for a period of 10 years. This means that the Netherlands will have full taxation rights regarding dividend distributions for 10 years, and after 10 years, the dividend withholding tax exit levy may apply, subject to protection under applicable tax treaties, if any.

Administrative Aspects

The dividend withholding tax exit levy will be withheld from distributions to the shareholders of the Dutch tax resident company involved with the cross-border reorganization. Before the cross-border reorganization, the company will be deemed to have distributed its latent profit reserves exceeding €50 million to its shareholders. The company will act as withholding agent, similar to the structure under the regular Dutch dividend withholding tax system.

The initial exit levy proposal provided that an assessment would be imposed on the withholding agent, which would have the option to either pay the amount due immediately or file a request for a payment extension (subject to specified conditions). The withholding agent would consequently have a right of recourse against the shareholders.

The Fourth Memorandum of Amendment abandons the payment extension proposal and instead provides that the withholding agent would become immediately liable for the dividend withholding tax exit levy. The agent would also have a right of recourse against the shareholders by law. The company would file a tax return and pay the taxes within one month after the cross-border reorganization and, if applicable, file a statement that the shareholders meet the conditions to apply an exemption. This approach is similar to the one used for regular dividend withholding tax. Also, to safeguard the shareholders' right to object and appeal, the company must notify the shareholders of the withholding.

[8] *See* article 4 of the Dutch Dividend Withholding Tax Act 1965.

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Retroactive Effect

The initial exit levy proposal indicated that to avoid any adverse consequences resulting from its announcement, the dividend withholding tax exit levy should have retroactive effect to noon Central European Time, July 10, 2020 (that is, to the moment the exit levy proposal was submitted to the Dutch parliament). Although amended a few times, the proposal was eventually withdrawn because the legislative process was taking a long time, which caused legal uncertainty for taxpayers. Van der Lee reintroduced the retroactive effect to 9 a.m. Central European Time, December 8, 2021 (that is, the moment the Fourth Memorandum of Amendment was submitted). Van der Lee considers the retroactive effect necessary to prevent the relocation of one or more headquarters of listed multinationals from the Netherlands without any taxation over its latent profit reserves, especially in view of the budgetary loss as a substantial part of the net dividend withholding tax proceeds is collected from shareholders of such listed multinationals.[9]

Conclusion

The Fourth Memorandum of Amendment narrows the scope of the exit levy proposal to shareholders located in non-EU, non-EEA, and nontax treaty countries. It also reintroduces the incorporation fiction for foreign companies that have been tax residents in the Netherlands for at least five years. Although Van der Lee stated that the proposal should no longer be in breach of the EU freedom of establishment and double tax treaties, the question remains whether the proposal may constitute a breach of the EU free movement of capital.

Because the proposal was submitted by the opposition party, it is unclear whether it will be supported by the majority of the Dutch government. The Fourth Memorandum of Amendment is scheduled for debate in the House of Representatives in mid-January. ■

[9] Fourth Memorandum of Amendment, *supra* note 2, at 9.

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