

## ***Consultation: dividend withholding tax position of Dutch Cooperatives***

*The Netherlands: May 2017*

### **In Brief**

Draft legislative amendments to the Dutch Dividend Withholding Tax Act on the withholding tax position of Dutch Cooperatives are open for consultation from 16 May until 13 June 2017 (“the Consultation Document”). This Consultation Document is not yet a formal legislative proposal but rather a draft proposal. The Consultation Document seeks to align the dividend withholding tax treatment of holding cooperatives and Dutch tax resident entities with a capital divided into shares (e.g. BV/NV). The Consultation Document also proposes introducing a more extensive unilateral dividend withholding tax exemption in conjunction with anti-abuse rules along the lines of Action 6 of the OECD Base Erosion and Profit Shifting (“BEPS”) Project. The Dutch Ministry of Finance anticipates this proposal to (i) address European Commission observations on differential treatment of cooperatives, (ii) maintain a strong fiscal investment climate and (iii) counter international tax avoidance through the use of Dutch Cooperatives in specific situations.

Interested parties can provide input to the Consultation Document until 13 June 2017. Following the initial announcement of anticipated changes through the September 20, 2016 letter of the Ministry of Finance, this Consultation Document is the first step towards a formal legislative proposal. In the short Dutch history of tax law related consultations, our observation is that comments by stakeholders are seriously considered by the Dutch Ministry of Finance and may ultimately lead to changes in the formal legislative proposal. PwC will provide input on the consultation document addressing both technical and strategic aspects to the draft proposal.

### ***Timeline***

The Consultation Document states that the proposed amendments are intended to become effective as of 1 January 2018. We anticipate that a formal legislative proposal will be published on Dutch Budget Day (19 September 2017). The Consultation Document does not propose transitional provisions or grandfathering rules. We anticipate that many stakeholders will consider this a significant omission and that such transitional provision will be requested in the comments to the Consultation Documents.

### ***Draft proposal in a nutshell***

A precondition to the Consultation Document is that ‘real’ cooperative enterprises are not to be affected.

For this reason the Consultation Document only proposes for so called ‘holding’ cooperatives (“Holding Coop”) to become subject to dividend withholding tax if and to the extent distributions are made on qualifying membership rights. Dividend Withholding Exemptions may still be available as further described below. Effectively the Consultation Document proposes treating Holding Coops the same as companies with a capital divided into shares. Cooperatives other than Holding Coops in principle continue not to be subject to Dutch dividend withholding tax as these are not deemed to be companies with a capital divided into shares.

### ***Holding coops***

A Holding Coop is defined as a cooperative of which the factual activities predominantly (at least 70%) consist of holding participations or intra-group financing activities.

For the purpose of this test the activities of the cooperative during the year preceding to the dividend distribution are taken into account. The factual activities are primarily assessed on the basis of the total assets held by the cooperative. However, other factors, such as revenue, activities that generated the profits, time spent by employees, total of assets and liabilities, etc. may also be taken into account. Two examples are given in that regard:

### *Top holding companies*

The Consultation Document provides an example of a cooperative functioning as the top holding company of the group. The top holding cooperative's assets according to its balance sheet consist for at least 70% of participations. If this top holding company actively holds the participations, has employees and conducts other headquarter activities, this top holding does not qualify as a Holding Coop according to the Consultation Document.

### *Cooperatives in private equity structures*

The Consultation Document also makes explicit reference to the use of cooperatives in private equity structures. In respect of cooperatives in private equity structures it is noted that – depending on specific facts and circumstances – even if the assets of such a cooperative predominantly consist of equity interests in subsidiaries (i.e. for 70% or more of the total assets) it may nevertheless be considered a 'regular' cooperative (i.e. not a Holding Coop) and thus remain out of scope of the dividend withholding tax. Relevant factors mentioned are employees, office space and the active involvement in the business activities of the subsidiaries. The Dutch State Secretary of Finance has on numerous occasions reiterated that active structures are to be respected and are not to be subjected to Dutch dividend withholding tax. Further clarification on this point is needed during the formal legislative process.

### *Qualifying membership rights*

The Consultation Document suggests that a Holding Coop will only become subject to dividend withholding tax if and to the extent dividend distributions are made on qualifying membership rights. A qualifying membership right is defined as a membership right of a member, together with the membership rights of related entities or persons, that entitles the holder thereof to at least 5% of the annual profits and/or the liquidation proceeds of a Holding Coop. Membership rights of related

entities or related persons are therefore also taken into account when assessing if the holder is entitled to at least 5% of the annual profits or the liquidation proceeds. Entities or persons within a collaborating group of entities or persons that, as a group, jointly qualify as related are also considered as related entities or persons in this regard.

Dividend distributions on membership rights which are not qualifying membership rights are not subject to Dutch dividend withholding tax according to the draft proposal.

### *Broadened withholding tax exemption*

The Netherlands applies a capital import neutrality policy and holds the view that withholding taxes within a multinational enterprise/active investment structure should be as limited as possible. In this context the Consultation Document proposes broadening the current dividend withholding tax exemption for all Dutch resident entities subject to Dutch dividend withholding tax, including BVs/NVs and Holding Coops with qualifying membership rights (together: "Withholding Agents"). According to the Consultation Document, the dividend withholding tax exemption applies if:

- a) The recipient of the dividends distributed by the Withholding Agent is resident of the EU, EEA or another state with which the Netherlands have concluded a tax treaty that includes a dividend article (The dividend article in the tax treaty does not necessarily have to provide for a 0% dividend withholding tax. Tax treaties without a dividend article, such as treaties on the exchange of information do not qualify); and
- b) The recipient of the dividends would have been able to apply the Dutch participation exemption or participation credit to the dividends if it would have been a resident of the Netherlands.

Currently this exemption is only available to corporate shareholders in Withholding Agents that are established within the EU or EEA.

We emphasize that if a cooperative does not qualify as a Holding Coop, it will not be subject to Dutch dividend withholding tax regardless of whether its members reside in the EU/EEA or tax treaty jurisdiction and therefore it does not need to meet the requirements for this broadened exemption. The Consultation Document mentions that having a tax treaty, which includes a dividend article, is necessary because an unlimited stream of exempt dividends to third countries would not match with the principles in the OECD BEPS action plans.

### *Anti-abuse: principle purpose test*

The exemption from dividend withholding tax for Withholding Agents is subject to anti-abuse rules, according to the Consultation Document. It is the legislator's intention that these anti-abuse rules are (interpreted) in accordance with Action 6 of the OECD BEPS Project. These anti-abuse rules do not apply to cooperatives that do not qualify as a Holding Coop considering these cooperatives are not subject to Dutch dividend withholding tax to start with.

Under the anti-abuse rules it should be assessed if the equity interest in the Withholding Agent is held with the main purpose, or one of the main purposes, to avoid the levy of dividend withholding tax (subjective test) and if the structure may be considered part of an artificial arrangement (objective test). A business structure is artificial if it is not put in place with business reasons that reflect economic reality. This is a cumulative test, which in simplified terms, can be summarized as follows:

To determine whether the non-resident entity holds the equity interest in the Withholding Agent with the main purpose or one of the main purposes to avoid Dutch dividend withholding tax (subjective test), it should be assessed whether the direct shareholder/member of the Withholding Agent has been interposed to obtain a better Dutch dividend withholding tax position. If so, it should however still be determined whether the structure may be considered an artificial arrangement (objective test).

A structure should not be considered an artificial arrangement if it concerns a multinational enterprise/active investment structure. This should be the case if the immediate shareholder/member of the Withholding Agent carries on an active business itself. If the immediate shareholder/member of the Withholding Agent is an intermediate holding company and is considered to generate a more favorable Dutch dividend withholding tax position compared to the indirect shareholder that carries on an active business, the immediate shareholder/member should meet a defined relevant substance criterion for the anti-abuse rule not to apply. If this relevant substance threshold is not met, the anti-abuse rule does apply and a distribution should be subject to Dutch dividend withholding tax.

### *Sufficient relevant substance*

According to the Consultation Document the immediate shareholder/member has sufficient relevant substance if it meets as a minimal two new substance requirements, in addition to the current substance requirements. The company is required

to have at least €100,000 in employee payroll costs, related to its activities. Further the company needs to have its own office space. If all substance requirements are met, the participation in the Withholding Agent is deemed to be held with business reasons that reflect economic reality, in which case the principal purpose test is met and the dividend withholding tax exemption applies.

### *Impact on business*

We anticipate the proposal in the Consultation Document to have a positive impact in most corporate/multinational structures in light of the broadened unilateral exemption. Clearly this broadened exemption is subject to limitations, but in practice these seem manageable. Active investment structures of which Dutch cooperatives are part and (i) which activities predominantly consist of holding participations or intra-group financing activities and (ii) have sufficient people functions, substance and active involvement seem not to be negatively affected. Investment structures using Dutch Holding Coops with minimum substance in the Netherlands may be negatively affected, if the draft proposal in the Consultation Document will become enacted law. Further the broadened dividend withholding tax exemption seems not to apply to entities that do not form part of active structures. This may have a negative impact for companies investing in real estate that does not qualify as an active business for Dutch tax purposes. This may not be intended and we expect this point to be addressed during the consultation.

### *Our view*

We note that the draft proposal in the Consultation Document may be subject to changes after interested parties have made their contributions. PwC will also make contributions in this respect. The Consultation Document contains several unclarified points. Therefore it remains somewhat uncertain as to what the final bill will look like. Some questions may arise on the impact of the envisaged amendments for several businesses, such as real estate companies. We will keep you informed on any further updates regarding the envisaged amendments in the Dutch dividend withholding tax.

### *Further information*

#### **Consultation website**

In Dutch:

[www.internetconsultatie.nl/houdstercooperatie](http://www.internetconsultatie.nl/houdstercooperatie)

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