

Bill for ratification of new Dutch-UK tax treaty submitted to Dutch parliament

This bulletin is issued by the London office of Loyens & Loeff on 9 October 2009. It is intended to provide you on an ad hoc basis with news flashes or background information on topical corporate, finance and tax law issues in the Benelux.

The Netherlands set its first step in obtaining the necessary parliamentary approval for the new tax treaty signed between the Netherlands and the United Kingdom (the “**New Tax Treaty**”) by submitting the bill, and accompanying explanatory notes, with the Lower House on 23 September 2009. The accompanying explanatory notes contain clarifications and explanations to the New Tax Treaty.

The New Tax Treaty was signed in London on 26 September 2008. The United Kingdom already completed the procedures necessary for bringing the New Tax Treaty into force earlier this year.

It remains to be seen whether the necessary parliamentary approval is obtained in the Netherlands before the end of 2009. This is a prerequisite for the New Tax Treaty to have effect in the Netherlands as per 1 January 2010 and in the United Kingdom as per 1 April 2010 in respect of corporation tax and as per 6 April 2010 in respect of income tax and capital gains tax.

Below an overview is provided of the highlights of the changes the New Tax Treaty will bring compared to the current tax treaty (the “**Current Tax Treaty**”).

Pension Schemes and Charities

Under the New Tax Treaty, pension schemes (*pensioenregelingen*) and charities qualify as a treaty resident.

Residency tie-breaker

The current tie-breaker clause for dual resident entities, pursuant to which the place of effective management is decisive, is to be abolished. The New Tax Treaty provides for a mutual agreement procedure in the event of dual residency of an entity. In the absence of a mutual agreement, the dual resident entity shall not be considered a resident of either the Netherlands or the United Kingdom for the purpose of claiming treaty benefits, except for the benefits of elimination of double taxation, non-discrimination and the mutual agreement procedure. The arbitration procedure cannot be applied by the dual resident in case no mutual agreement is reached.

The explanatory notes to the New Tax Treaty provide for a grandfathering for existing dual resident entities governed by the current tie-breaker, in line with the grandfathering provided by the UK explanatory memorandum to the New Tax Treaty. This means that for existing dual resident entities the Netherlands and the United Kingdom will not seek to revisit the treaty residency determined under the current tie-breaker clause as long as all material facts and circumstances remain the same.

A special rule is introduced for entities which participate in so-called dual listed company arrangements. In such case, the entity is deemed to be a resident only in the state in which it has been incorporated, provided it has its primary stock exchange listing in that state. A dual listed company arrangement refers (briefly) to two publicly listed entities with a separate legal entity status but with stapled stock and operating as a single group.

Dividend withholding tax

- The New Tax Treaty provides for a general reduction of dividend withholding tax to 10% for portfolio dividends as opposed to the general cap of 15% under the Current Tax Treaty.

- The New Tax Treaty introduces an exemption from dividend withholding tax for the following beneficial owners:
 - 1) an entity which has directly or indirectly at least 10 percent of the votes in the dividend paying entity. It should be noted, however, that under Dutch domestic rules generally a full exemption will be granted if an interest of at least 5 percent is owned. The treaty exemption does, however, not apply to dividends paid out of profits directly or indirectly derived from immovable property through an investment vehicle which distributes the greater part of this income on an annual basis and whose immovable property income is tax-exempt. The dividends paid by such investment vehicles, typically the UK REIT and the Dutch fiscal investment institution, are in principle subject to a dividend withholding tax of 15%.
 - 2) a pension scheme, or
 - 3) a charity.
- The New Tax Treaty explicitly confirms that proceeds derived from the liquidation of a company or from share repurchases will qualify as a 'dividend' rather than 'capital gain' for Dutch tax purposes.
- The New Tax Treaty abolishes the current theoretical entitlement of Dutch tax residents to payment (in whole or in part) of the UK tax credit attached to dividends distributed by a UK entity. Dutch statement of practice currently confirms that this notional credit can be utilised as a credit against Dutch corporation or income tax.
- The New Tax Treaty contains a revised generic anti-abuse provision in respect of the dividends, interest and royalty provisions. Furthermore, the New Tax Treaty introduces a generic anti-abuse provision for the "other income" provision.

Interest and royalty withholding tax: triangular cases

As under the Current Tax Treaty, the New Tax Treaty prohibits the United Kingdom from levying withholding tax on interest and royalty payments. However, for so-called triangular cases an exception to this main rule is introduced in the New Tax Treaty by allowing the United Kingdom to levy withholding tax against its domestic tax rate if the UK source interest or royalties are attributed by the Dutch recipient to a lowly-taxed permanent establishment in a third state whilst the Netherlands provides exemption for the avoidance of double taxation in respect of such income.

Capital gains on sale of shares in certain real property companies

Pursuant to the New Tax Treaty, capital gains derived from the sale of non-listed shares, or other comparable interests, in certain real property companies can under certain conditions now be taxed in the country where the immovable property is located.

Directors' Fees

The New Tax Treaty provides that directors' fees or other remuneration derived by a resident of one of the states in the capacity of being a member of the board of directors ("*bestuurder*" or "*commissaris*") of a company resident in the other state, maybe taxed in the resident state of the company only to the extent that such remuneration is attributable to services rendered in that state.

No treaty protection for non-remitted income and capital gains

The New Tax Treaty will extend the "remittance-base" provision to also cover capital gains. This change will override Dutch Supreme Court case law pursuant to which the current remittance-base provision does not prohibit the Current Tax Treaty from giving treaty protection for non-remitted capital gains.

For further information with respect to the above, please feel free to contact Willem Bon, Margriet Lukkien or Michiel Beudeker, or any other adviser at Loyens & Loeff.

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