Potential refund of Dutch dividend withholding tax under ECJ jurisprudence

Under Dutch law, Vastned Retail N.V. is required to distribute its annual taxable profits and to withhold 15% Dutch dividend withholding tax ("DWHT") on such distributions. Shareholders resident in the Netherlands are, generally, effectively entitled to a full credit for, or refund of, this withholding tax. Following a decision of the European Court of Justice (the "ECJ"), a foreign shareholder may also be entitled to a (partial) refund of DWHT.

BACKGROUND

On 4 March 2016, the final decisions of the Dutch Supreme Court have been published in three cases that had previously been referred to the ECJ for a preliminary ruling (joint cases Miljoen (C-10/14), X (C-14/14) and Société Générale (C-17/14)). In short, the ECJ ruled that non-resident portfolio shareholders (shareholdings <5%) may claim a refund of DWHT if their tax burden is higher than the total tax burden, DWHT and income tax, of resident portfolio shareholders. On 25 April 2016 the State secretary for Finance has issued a decree on the practical aspects of such a refund[1], in anticipation of legislative changes.

INDIVIDUAL SHAREHOLDERS

The total Dutch tax levied from resident individual shareholders includes both DWHT and income tax on savings and investments. Income from savings and investment of Dutch resident portfolio shareholders is taxed at 30%. This income is deemed to be 4% of the total value of savings and investments at the beginning of the year, after deduction of a tax free allowance. The DWHT is offset from the income tax payable, and is refunded to the extent it exceeds the income tax payable. Non-resident individual shareholders are not subject to income tax, therefore no tax free allowance is attributed; DWHT of 15% is the final levy. This can lead to a lower tax burden for resident shareholders than for non-resident shareholders. The State secretary of Finance has acknowledged that the tax free allowance in the income tax must be available to non-residents as well. The tax free allowance for 2016 amounts to € 24,437 for individuals with no tax partner, and € 48,874 for individuals with a tax partner.

Furthermore, individuals realizing (high) returns on their investments, in excess of their tax free allowance may also benefit from the ECJ cases. Although the income tax rate (30%) is double the DWHT (15%), the yield for income tax purposes is determined on a deemed 4% basis. Consequently, a return in excess of 8% may thus result in a higher tax burden than income tax of 30% on a deemed yield of 4%. A return of 8% may seem relatively high, but may be realized for example in cases of 'dividend balloons' (e.g. after a sale, or cumulated dividends).

1 Nr. DGB 2016/1731M, published in Staatscourant 2016 nr. 22561

CORPORATE SHAREHOLDERS

For corporate portfolio shareholders, the ECJ compares the DWHT on gross dividends levied from non-residents to the total Dutch (DWHT and corporate income) tax on net dividends levied from residents. Net income is the taxable amount after deduction of costs. In this respect, the ECJ concludes that non-residents should not be taxed heavier than the tax burden calculated based on net dividends for residents. However, the ECJ applies a very restrictive definition of expenses relating to dividends. Only expenses directly linked to the actual payment of dividends have to be taken into account. That means that only expenses for collection of dividends are deductible and not, for instance, financing costs. It is, therefore, very unlikely that a non-resident corporate shareholder is effectively entitled to a refund.

REFUND REQUESTS

Vastned Retail N.V. has to withhold the full amount of DWHT. Non-residents who wish to invoke the ECJ cases, will have to request a refund of DWHT. For companies, the period to claim a refund is limited to 3 years following the calendar year in which the dividends were paid. The refund period for individuals is 5 years. Individual investors living outside the EU may also be entitled to a refund, however, this situation is more complex.

DISCLAIMER

Vastned Retail N.V. considers it important to inform its shareholders properly. Vastned Retail N.V. intends hereby to provide guidance to its non-resident shareholders to safeguard their interests. Each non-resident shareholder should, however, make his or its own decision as to whether or not to file a refund request. Vastned Retail N.V. cannot accept any liability in this respect.

Non-resident shareholders wishing to object to the distinction in treatment of non-resident and resident shareholders under Dutch tax law, may consider seeking advice from Loyens & Loeff N.V., Etienne Spierts (T: +31 20 578 5770; E: etienne.spierts@loyensloeff.com) or Yves Landheer (T: +31 20 578 5526; E: yves.landheer@loyensloeff.com).

ANNEX I QUESTION AND ANSWER

Please contact your tax advisor for more information.

I am an individual and I hold <5% shares; am I entitled to a refund?
Depending on your personal circumstances, you may be entitled to a refund. You may for example claim a refund if your total portfolio shareholdings (shareholdings <5%) in the Netherlands are below or just above the tax free allowance (e.g. € 24,437 in 2016 for individuals with no tax partner; double the amount for individuals with such tax partner). However, a refund is for example not available if your country of residence already granted a full credit for the Dutch dividend withholding tax.

I am an individual and I hold a substantial interest of ≥5% shares; am I entitled to a refund?
No, your tax burden as non-resident is not higher than the tax burden of Dutch resident portfolio shareholders. Please contact your tax advisor for more information.

My company holds <5% shares; is the company entitled to a refund?
It is very unlikely that the company is entitled to a refund. Only if the company incurred substantial costs to effectuate the actual payment of dividends (costs for collection), it may be entitled to a refund. Please contact your tax advisor for more information.

I am living outside the EU and hold <5% of the shares; am I also entitled to a refund?
You may be entitled to a refund, but this is more complicated than the situation within the EU. Please contact your tax advisor for more information.

How long do I have to claim a refund?
For companies, the period to claim a refund is limited to 3 years following the calendar year in which the dividends were paid. The refund period for individuals is 5 years.

Legislation
It is likely that in the near future the Dutch Ministry for Finance issues a decree on the practical aspects of the refund in anticipation of legislative changes.

Disclaimer
The information above is of a general nature only and is not an advice. You should always consult your tax advisor to discuss your tax position taking into account all relevant circumstances.

ANNEX 2 EXAMPLES

Example 1

A foreign individual holds <5% of the shares in a Dutch listed company. The value of the shares at the beginning of the year is € 20,000. The foreign individual receives dividends of € 600. The listed company withholds € 600 x 15% = € 90 dividend withholding tax. The foreign shareholder has no further savings or investments.
The value of the shares is lower than the tax free allowance available for Dutch residents. Therefore, the non-resident investor is entitled to a refund of € 90 dividend withholding tax.

Example 2

A foreign individual holds <5% of the shares in a Dutch listed company. The value of the shares at the beginning of the year is € 100,000. The foreign shareholder received a dividend of € 3,000, a return of 3%. The listed company withholds € 3,000 x 15% = € 450 dividend withholding tax.
A Dutch resident portfolio shareholder would have been taxed with 30% income tax over the 4% deemed yield of the savings and investments at the beginning of the year, i.e. 30% x 4% x (€ 100,000 -/- € 24,437 tax free allowance =) € 75,563 = € 906.76. The dividend withholding tax of € 450 is fully creditable for resident individual shareholders. The foreign portfolio shareholder's Dutch tax burden is the € 450 (final) dividend withholding tax. As dividend withholding tax is lower than the tax burden of a resident individual, the foreign portfolio shareholder is not entitled to a refund.

Example 3

A foreign individual holds <5% of the shares in a Dutch listed company. The value of the shares at the beginning of the year is € 100,000. The foreign shareholder received a dividend of € 9,500, a return on equity of 9.5%. The listed company withholds € 9,500 x 15% = € 1,425 dividend withholding tax. The foreign shareholder has no further savings or investments.

A Dutch resident portfolio shareholder would have been taxed with 30% income tax over the 4% deemed yield of the savings and investments at the beginning of the year, i.e. 30% x 4% x (€ 100,000 -/- € 24,437 =) € 75,563 = € 906.76. As the income tax burden for resident individuals is lower than for non-residents, the foreign individual is entitled to a refund of € 1,425 -/- € 906.76 = € 518.24