Hamelink & Van den Tooren
Tax Lawyers

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newsletter

In this newsletter we will summarize a recent landmark case rendered by the European Court of Justice ("ECJ"). The ECJ ruled that the levy of 15% Dutch dividend tax can be in breach with the free movement of capital. Below, we will first summarize the relevant Dutch rules, followed by the facts of the case, the decision of the ECJ and the importance of this case for non-Dutch resident taxpayers.

Relevant Dutch rules

For Dutch resident taxpayers, Dutch dividend tax serves as a prepayment of the relevant corporate income tax ("CIT") or personal income tax ("PIT) liability. For non-Dutch resident taxpayers, Dutch dividend tax is a final levy, although double taxation may (wholly or partially) be eliminated under the application of a tax treaty.

Facts of the case

Two Belgian resident individuals and a French resident company requested a refund of Dutch dividend tax by arguing that they suffer a higher tax burden on dividends received from a Dutch company than Dutch resident taxpayers.

The Dutch Supreme Court requested the ECJ whether this different tax treatment of Dutch resident taxpayers and non-Dutch resident taxpayers constituted a prohibited restriction on the free movement of capital.

Decision of the European Court of Justice

The ECJ rendered its decision on 17 September 2015. The main conclusions thereof can be summarized as follows:

- The Dutch Supreme Court should compare whether the non-Dutch resident taxpayer (individual or company) ultimately bears a higher tax burden on dividends received from a Dutch company than a Dutch resident taxpayer. In this comparison, the following aspects are relevant:
  - The reference period is the calendar year;
  - The comparison should be made on the basis of all shares held in Dutch companies by the non-Dutch resident individual and the capital exemption for Dutch tax resident individual taxpayers should be taken into account;
  - Expenses of the non-Dutch resident company which are directly linked to the actual payment of the dividends should be taken into account when comparing the tax burden of Dutch resident and non-Dutch resident companies. Dividends included in the purchase price of shares and financing costs of shares are not considered to be directly linked to the actual payment of the dividends.
- If a non-Dutch resident taxpayer ultimately bears a higher tax burden on the dividends than a Dutch resident taxpayer, this cannot be justified by the difference between the situation of Dutch resident and non-Dutch resident taxpayers.

- In addition, the difference in the treatment between a Dutch resident and non-Dutch resident taxpayer cannot be justified by a tax treaty, unless this difference is entirely eliminated by the relevant tax treaty.

Importance of the case

Non-Dutch resident taxpayers should make a comparison between their effective tax rate on the dividends received (after tax treaty application) from a Dutch company and the effective tax rate on these dividends if the investments would have been held by a Dutch resident taxpayer. If the non-Dutch resident taxpayer is subject to a higher overall tax burden than the Dutch resident taxpayer, it is recommended to request a (partial) refund of Dutch dividend tax.

Should you have any questions on the above, please contact your advisor within Hamelink & Van den Tooren at + 31 70 310 50 70 or + 31 20 333 92 80.

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