Tax Alert | Changes to the Convention between Poland and the Netherlands on the avoidance of double taxation not before 2023

KPMG in Poland

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A protocol amending the Convention between the Republic of Poland and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (hereinafter: “the Protocol”) was signed on 29 October 2020. The Protocol will introduce major amendments to the provisions of the double taxation treaty concluded between Poland and the Netherlands (“DTT”), impacting in particular investment structures involving Polish and Dutch entities.

Protocol ratification status

According to the Protocol, it shall enter into force on the last day of the third month following the month in which the later of the notifications has been received in which the respective Governments have notified each other in writing that the formalities constitutionally required have been complied with. Its provisions shall have effect for taxable years and periods beginning, and taxable events occurring, on or after the first day of January in the calendar year following that in which the Protocol has entered into force.

On 29 November 2021, the Act ratifying the Protocol has been published in the Polish Journal of Laws. However, according to the available information, the relevant ratification law has not yet been passed by the Dutch parliament.

In practice, this means that the Protocol provisions are to become applicable no earlier than on 1 January 2023, assuming that the Protocol is ratified by the Netherlands by the end of September 2022.

Key changes

One of the most important amendment provided for by the Protocol is implementation of real estate clause.

Under the clause, gains derived by a resident of a Contracting State from the alienation of shares in a company or comparable interests (such as interests in a partnership or trust), may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 75 percent of their value directly or indirectly from immovable property situated in that other Contracting State.

Consequently, the entry into force of the clause will give rise to tax on the disposal of shares (or other similar rights) in a company deriving more than 75 percent of its value from immovable property during the 365 days preceding the sale, payable in the country where the property is located.

Due to this change, transactions of disposal of shares in real estate companies located in Poland by entities seated in the Netherlands should not be taxed in Poland until the end of 2022.

Furthermore, the Protocol is to introduce a solution commonly referred to as the principal purpose test - an anti-abusive clause aimed at preventing cases of abuse of the provisions of agreements on the avoidance of double taxation. Entry into force of the new mechanism may bring, inter alia, the obligation to collect WHT on payments made by Polish tax residents to entities seated in the Netherlands, according to the national rates (and excluding the rates and exemptions provided for by the DTT), should the application of the DTT provisions in given circumstances be considered abusive by the tax authorities.

Significant changes to the definition of a permanent establishment are also to be made. The Protocol brings, inter alia, a revised detailed catalogue of examples of activities which should not result in creating a permanent establishment if they are of preparatory or auxiliary character (such as the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise).

Furthermore, the Protocol introduces the definition of “the recognised pension fund”, meaning an entity or arrangement treated as a separate person under the taxation laws of the State of establishment, which is, (i) established and operated exclusively or almost exclusively to administer or provide retirement benefits and ancillary benefits to individuals or (ii) that is established and operated exclusively or almost exclusively to invest funds for persons covered in point (i).

Finally, the Protocol clarifies that income derived by or through an entity or arrangement that is wholly or partially tax transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.

In case you have any questions or require our support regarding the above, please contact us.

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