Tax Alert | Protocol amending the Polish-Dutch DTT ratified

KPMG in Poland

March 2022

On 29 October 2020, 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: "**Protocol**") was signed.

Poland took the necessary steps to make the Protocol enter into force already in 2021, while the Dutch government did so at the beginning of March this year. Consequently, provisions of the Protocol are to come into effect on 30 April 2022 and apply to tax years, taxable periods, and taxable events occurring from 1 January 2023.

The key amendments brought by the Protocol are explored below.

What will change?

One of the most important amendments provided for by the Protocol consists in **supplementing the Convention with a 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 alienation of shares (or other similar interests) 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.**

Furthermore, the Protocol is to introduce a solution commonly referred to as the principal purpose test, designed as a tool for counteracting any possible Convention abuse. 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 Convention), should the application of the Convention provisions in given circumstances be considered abusive by tax authorities.

Important amendments were also made to the definition of permanent establishment. The Protocol brings, inter alia, a revised detailed catalogue of examples of activities excluded from permanent establishment activities, stipulating that all examples of this type of activities indicated in the Convention (such as the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise) must be of preparatory or auxiliary character to preclude creation of an establishment.

Furthermore, the Protocol introduces the notion of "the recognized pension fund", meaning an entity or arrangement treated as a pension fund under the taxation laws of the state of establishment, which is, inter alia established and operated exclusively or almost exclusively to administer or provide retirement benefits and ancillary benefits to individuals or that is established and operated exclusively or almost exclusively to invest funds of such entities.

Moreover, under the Protocol, income received in connection with the liquidation of a company or a purchase of own shares by a company is treated as income from shares. This means that income from the above activities is to be treated as derived from dividends and, consequently, subject to 0 percent, 5 percent or 15 percent WHT. The same principle is to apply to income received in connection with distributions on certificates or participating units of an investment fund.

Finally, the Protocol clarifies that income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered 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 (the transparent entity clause).

Who will be affected?

The amendments principally apply to Polish entities entering transactions with companies based in the Netherlands, in particular international groups with such companies. They also affect Dutch entities and their taxable permanent establishments in Poland.

How can we assist you?

The vast array of services provided by KPMG includes:

- analysing the impact of amendments on the Company's/Group's situation,
- preparing the Company/Group for the upcoming changes (training included),
- analysing any possible doubts related to the matter and suggesting the best approach in individual cases.

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