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Highest Dutch court opens door to dividend withholding tax refund for foreign shareholders

Following the recent ECJ decisions in *Miljoen*, *Société Générale* and *X*, the Dutch Supreme Court recently provided further guidance on how to calculate the Dutch dividend withholding tax refund for foreign portfolio shareholders. The ECJ had ruled that levying Dutch dividend withholding tax on foreign shareholders is incompatible with European law if the levy exceeds the effective tax rate of comparable Dutch resident shareholders. For foreign individual shareholders, the Supreme Court confirmed that the value of all portfolio shareholdings in Dutch companies forms the basis of the comparison. For foreign corporate shareholders, the Supreme Court followed the ECJ's instruction that only costs and expenses directly related to the collection of dividends should be taken into account. Foreign corporate and individual portfolio shareholders should investigate whether they can claim a refund of Dutch dividend withholding tax based on these rulings.

Dutch companies generally must withhold 15% dividend withholding tax from distributions to both domestic and foreign shareholders. But where Dutch individuals and corporate shareholders benefit from a full credit or exemption, the dividend withholding tax is a final levy for non-residents.

Dutch individuals effectively pay income tax at a rate of 1.2% of the fair market value of their portfolio investments minus related debt, insofar as this net amount exceeds a tax-free threshold of almost EUR 25,000 (twice this amount for partners). Dutch corporate portfolio shareholders are subject to Dutch corporate income tax on their net profits calculated for tax purposes at rates up to 25%. This could lead to a different effective tax rate for foreign and domestic individual portfolio shareholders.

In its rulings, the ECJ gave somewhat ambiguous instructions to the Dutch Supreme Court in how to compare tax paid by foreign and domestic shareholders. The recent Dutch Supreme Court decisions provide some further guidance based on these instructions.

Individual shareholders

For foreign individual portfolio shareholders, the Supreme Court confirmed that the value of all portfolio shareholdings in Dutch companies forms the basis of the comparison to be reduced by the full amount of the tax-free threshold. Both elements are beneficial because they restrict the taxable base for calculating the tax due if the foreign shareholder were

taxed under the rules applicable to domestic shareholders.

For instance, one could also argue a pro rata allocation of the tax-free threshold on the basis of the overall net value of portfolio investment held by the individual. This would result in a higher taxable base. If a French individual shareholder holds portfolio investments with an aggregate value of EUR 100,000, of which EUR 50,000 is attributable to Dutch shares, the taxable base is just over EUR 25,000 and the tax due is EUR 300 under the rules for domestic taxpayers. Hence, if the shareholder receives a gross dividend of EUR 5,000 reduced by EUR 750 dividend withholding tax, the shareholder is entitled to a refund of EUR 450.

Unfortunately, the Supreme Court rulings are silent on other important aspects of comparing individual portfolio shareholders, including (i) how to deal with the allocation of debt incurred for portfolio investments to the Dutch part of that portfolio, and (ii) whether the rules for Dutch real estate investments held by foreign individuals are applicable in the same way as they are to domestic shareholders.

Corporate shareholders

For foreign corporate shareholders, the Supreme Court followed the ECJ's instruction that only costs and expenses directly related to collecting dividends should be taken into account for calculating the taxable net profits that serve as a basis for determining the corporate income tax as due under the rules applicable to Dutch corporate shareholders. This rather restricted approach towards taking into account related costs is to the disadvantage of foreign shareholders.

Finally, the Supreme Court did not clarify the ECJ's comments of how tax credits provided by the shareholder's country of residence, based on double taxation treaties, could justify the incompatibility and remove the need to refund Dutch dividend withholding tax.