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Impact of new Dutch legislation on Luxembourg holding-Dutch propco real estate holding structures

As part of the 2016 Budget, the Dutch government has prepared a number of tax proposals which, as from 2016, may affect the structuring of Dutch companies for real estate investments through a combination of Luxembourg and Dutch companies.

- Generally, the new rules seek to implement further anti-abuse provisions in accordance with the revised Parent Subsidiary Directive by introducing a business reasons concept that would need to be met in this context. More stringent conditions are imposed on foreign companies owning shares in a Dutch subsidiary if they want to continue to be exempt from Dutch corporate tax on dividends and capital gains realised (and interest earned) from a Dutch subsidiary. Especially relevant in this context are the nature of the activities of the Dutch company, its shareholder(s) and the larger group.
- In particular, the new rules introduce specific substance requirements for foreign shareholders which affect current holding structures of a more passive nature, eg a Luxembourg holding company owning shares in a Dutch entity that has invested in real estate.

Follow-up and structuring alternatives in respect of Luxembourg holding-Dutch propco structure

As a result of the above there is a risk that, in the case at hand, dividend payments made by the Dutch BV to Luxco could become subject to Dutch corporate taxation, which under the application of the Netherlands-Luxembourg tax treaty, could be mitigated to an effective rate of 2.5% on dividends paid by the Dutch BV to Luxco. Furthermore, note that under the application of the treaty, the sale of the shares in the Dutch BV should not be subject to Dutch corporate taxation.

If in respect of the current Dutch propco structure no (material) amounts of dividend distributions are envisaged by the client, there should not be a reason for any immediate concern. For example, it could be that the current income of BV is already offset against interest payments under the loans. If however, dividend distributions are anticipated, then additional restructuring steps could be considered. There seem to be two practical ways to accommodate for avoiding an exposure to 2.5% Dutch dividend withholding taxation:

i. A cross-border upstream merger of the Dutch BV into the Luxembourg holding entity.

ii. Transferring/emigrating the Dutch BV from the Netherlands to the jurisdiction of Luxembourg: in practice this can be achieved by transferring the effective management of the BV to Luxembourg, with subsequent re-incorporation of the Dutch BV in a Luxembourg SARL.

Our Amsterdam corporate tax team is happy to further discuss the implications and implementation of the abovementioned structuring alternatives.

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