The 2019 Dutch tax plan - key takeaways for inbound real estate investments

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2018 was a turbulent year for inbound real estate investments in the Netherlands. The Dutch government announced the possible introduction of a conditional withholding tax on interest and royalty payments to low tax jurisdictions and its plan to abolish the dividend withholding tax. However, due to public pressure, the dividend withholding tax was not abolished in the end. Furthermore, the 2019 Tax Plan contains new interest deduction rules and measures on the depreciation of owner-occupied real estate.

The abolition of the dividend withholding tax in its current form would have had an impact on inbound real estate investment via fiscal investment institutions (FIIs), a Dutch collective investment vehicle that, among other things, functions as the Dutch real estate investment trust (REIT) regime.

This article clarifies the current points of interest from a tax perspective for inbound real estate investments in the Netherlands.

Plans to abolish the dividend withholding tax

The coalition parties included the plan to abolish the Dutch dividend withholding tax in the coalition agreement dated October 10, 2017. As Budget Day takes place on the third Tuesday of September in the Netherlands, the legislative proposal was published on September 18, 2018. Prior to and after the publication of the proposal, various news outlets, opposition parties and lobbying agencies spoke out against the proposed abolition. After Unilever abandoned its plan to move its headquarters to the Netherlands on October 4, 2018, which was a major reason for the abolition of the Dutch dividend withholding tax, the Dutch government announced on October 5, 2018 that it was reconsidering the proposal it had published on Budget Day 2018.

On October 15, 2018, the Dutch government announced that it was no longer abolishing the dividend withholding tax in its current form but was instead going to further lower the Dutch corporate income tax rates, continue to allow direct real estate investments by FIIs and introduce a number of other measures benefitting companies.

The Dutch REIT regime

Dutch REITs (and FIIs in general) can take a number of legal forms. REITs can be set up as Dutch public limited liability companies (NV), private limited liability companies (BV) or open-ended collective investment funds (FGR) or any comparable legal form of EU/EEA Member States or tax treaty jurisdictions. REITs must meet a number of requirements (eg, limited debt financing (60 percent for real estate assets), specific types of shareholders, obligation to distribute all of its profits within eight months after financial year-end, etc.). FIIs may invest in real estate (they may not, however, develop any real estate) directly or indirectly (eg, by owning shares in a REIT) and are subject to Dutch corporate income tax at a rate of 0 percent (viz. they are de facto exempt from Dutch corporate income tax).

In practice, FIIs have subsidiaries that develop real estate, whilst the FIIs own the real estate.

Relationship between the Dutch REIT regime and the Dutch dividend withholding tax

As Dutch REITs generally only have to pay Dutch dividend withholding tax, the abolition of the Dutch dividend withholding tax would mean that Dutch REITs would not be subject to tax at all. As such, the proposal to abolish the Dutch dividend withholding tax was accompanied by a proposal to abolish the Dutch REIT regime (viz. to disallow direct real estate investments by FIIs). The logical consequence of keeping the Dutch dividend withholding tax in its current form was, therefore, to not abolish the Dutch REIT regime.

Recent case law concerning the REIT regime

On November 27, 2018, a decision by the Zeeland-West-Brabant court was published in which a German REIT, known as an “Immobilien Sondervermögen,” investing in Dutch real estate, was allowed to apply the Dutch FII regime. The effect of this decision is that a foreign REIT applying the Dutch FII regime is subject to 0 percent Dutch corporate income tax and is, in principle, not subject to Dutch dividend withholding tax. As such, Dutch real estate investments can be made tax-free.

Debt financing

For inbound real estate investments with a non-REIT structure, the newly introduced interest deduction rule, allowing for the deduction of net interest expense (the net of interest income and interest expense) up to the highest of (i) 30 percent of a taxpayer’s earnings before interest, taxes, depreciation and amortization (EBITDA) or (ii) €1 million, does have an impact. This limitation had to be introduced to comply with EU law, therefore every EU Member State has a similar rule as of 2019.

The EBITDA and €1 million limit apply per taxpayer. Therefore, it may be more efficient to use a separate company for every real estate investment (and to not apply the Dutch tax consolidation regime).

As FIIs are subject to a corporate income tax rate of 0 percent, the complicated Dutch limitations on the deductibility of interest are not relevant for an FII.

Depreciation of owner-occupied real estate

As of 2019, owner-occupied real estate may be depreciated to 100 percent of the value for Valuation of Immovable Property Act purposes. This limitation already applied to non-owner-occupied (eg, investment) real estate.

Conditional withholding tax

In an effort to combat tax avoidance, the Dutch government has announced its plans to introduce a conditional withholding tax on interest and royalties paid to creditors/licensors established in “low tax jurisdictions” and in certain specific abusive situations as of 2021. A low tax jurisdiction is either (i) a jurisdiction listed on the EU list of non-cooperative jurisdictions or (ii) a jurisdiction without corporate income tax or where corporate income tax is levied at a statutory rate of less than 9 percent.

This list of low tax jurisdictions already exists for controlled foreign company (CFC) rule purposes and contains (for 2019): American Samoa, American Virgin Islands, Anguilla, Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Cayman Islands, Guam, Guernsey, Isle of Man, Jersey, Kuwait, Qatar, Samoa, Saudi Arabia, Trinidad & Tobago, Turks and Caicos Islands, United Arab Emirates and Vanuatu.

Conclusion

Although the change of heart over abolishing the Dutch dividend withholding tax is not beneficial for companies listed on a stock exchange (where its investors cannot credit the withholding taxes), it is a blessing in disguise for Dutch REITs, as the Dutch REIT regime may have been abolished alongside the Dutch dividend withholding tax.

We will keep you updated on any further developments concerning the Dutch REIT regime. It is highly likely the Dutch tax authorities have appealed the Zeeland-West-Brabant court's decision. The decision has also not gone unnoticed by the Dutch Ministry of Finance and may lead to future changes in the Dutch REIT regime.

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