

NewsAlert

Real Estate Tax Services



The Netherlands

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New Dutch policy on the application of tax treaties 2011

The new Dutch policy on the application of tax treaties 2011 has now been published. The amendments which are relevant for the RE industry include amongst others, the extension of the application of tax treaty benefits to (i) entities that are not subject to tax, and (ii) asset pools.

Extension of the application of tax treaty benefits

Tax treaty benefits are in principle only available for residents of a contracting state. In general, an entity is regarded as resident for tax treaty purposes if it is subject to tax in that state. However, tax exempt entities that have explicitly been referred to in the tax treaties as tax residents may also claim tax treaty benefits.

Based on a Resolution of the Dutch State Secretary of 18 July 2008 tax treaty benefits were – on the basis of the principle of reciprocity – already available for foreign tax exempt pension funds and non-profit organizations, as well as for governmental institutions, to the extent that these entities have not been appointed explicitly as tax residents under the tax treaty concerned.

Inspired by the Report on “The Granting of Treaty Benefits with respect to the Income of Collective Investment Vehicles”, which was

adopted in the Commentary on the OECD Model Tax Convention last year, the Dutch government announced its new Treaty Policy in which it takes the position that, it is not only tax exempt entities which have previously been explicitly referred to as resident for tax treaty purposes that may claim tax treaty protection. The Dutch Ministry of Finance announced in its new policy that it would explicitly include in tax treaties an extended scope for tax treaties to apply to the following:

- tax exempt pension funds,
- non-profit organizations,
- foundations and associations (irrespective of whether they conduct an active enterprise or not),
- Exempt Investment Institutions (in Dutch: “Vrijgestelde Beleggingsinstellingen” or “VBIs”) and,
- Fiscal Investments Institutions (in Dutch: “Fiscale Beleggingsinstellingen” or “FBIs”).

In the light of this, the Dutch government is undertaking to include in new tax treaties a provision to set out the basis on which such entities (as set out above) will be a resident. This would be provided that the entity is governed by the laws of that state, or that it has its place of effective management in that state.

Based on the above, Exempt Investment Institutions will be able to benefit from the tax treaties that the Netherlands conclude with other states, provided that parties to the treaty have not specifically agreed that certain tax benefits cannot be claimed for. As a result, a reduction of dividend withholding tax could in principle be available on dividends distributed for example by a company resident in a contracting state to an Exempt Investment Institution in the Netherlands. Conversely, by explicitly agreeing in a tax treaty that an Exempt Investment Institution is a treaty resident, the Netherlands further ensures that the right to tax dividends is also allocated to the Netherlands. Based on Dutch domestic law this would be the case where the shares in such a vehicle are held by a foreign private individual.

This amendment nevertheless suggests that the Exempt Investment Institution will be an interesting alternative to the Fiscal Investment Institutions (“FBI”) and similar foreign tax-exempt investment vehicles (such as the Luxembourg SICAV).

With regard to Sovereign Wealth Funds (“SWFs”) – i.e. state-owned investment funds – the Netherlands shall decide on a case by case basis, whether such entities can claim for tax treaty benefits, taking into account the facts and circumstances.

Asset pooling

Another development with regards to the former Treaty Policy of 1998 is in respect of closed funds for mutual account (in Dutch: “fonds voor gemene rekening” or “FGR”). Institutional investors, including pension funds, use this type of collective investment vehicle for asset pooling. Such a closed fund is transparent for Dutch tax purposes, therefore, in order to claim tax treaty benefits, such funds should also qualify as

fiscally transparent according to the laws of the other jurisdiction.

Based on the policy regarding the application of tax treaty benefits described above, fiscally transparent entities will be likely explicitly excluded from fiscal residency. However, the Dutch government undertakes to conclude “Competent Authority Agreements” to grant tax treaty benefits to investors investing through a transparent Dutch mutual fund (“FGR”), under the so-called “look-through” approach mentioned in the updated Commentary on the OECD Model Tax Convention. By doing so, the investors will enjoy the same benefits as if they had invested directly. Recent examples of states with which the Netherlands has concluded such agreements are the United Kingdom, Canada and Denmark.

Our View

The new Dutch Treaty Policy means that the Exempt Investment Institution may be an interesting alternative to the Fiscal Investment Institutions (“FBI”) and similar foreign tax-exempt investment vehicles (such as the Luxembourg SICAV). In addition, with Competent Authority Agreements in place, the transparent Dutch mutual fund (“FGR”), is an attractive vehicle for asset pooling which would not diminish the treaty benefits available to its investors.

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