

Legal Alert

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New Hong Kong - Netherlands tax treaty to enter into force in 2012

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New treaty to enter into force in 2012 – Tax planning opportunities

The new double taxation treaty between Hong Kong SAR and the Netherlands (“**DTA**”) signed in 2010 will take effect in the Netherlands from 1 January 2012 and in Hong Kong from 1 April 2012.

Tax planning opportunities

This DTA will further improve the economic ties between the Netherlands, Hong Kong and Mainland China and offers tax planning opportunities in all three jurisdictions.

The combination of this DTA with the Dutch participation exemption regime and extensive tax treaty network makes the Netherlands a tax-efficient gateway into Europe and, indeed, the rest of the World for companies and individuals from Hong Kong and Mainland China.

Likewise, the DTA provides a favourable basis for Dutch companies to enter the growing Hong Kong and other Asian markets.

Key features

The DTA generally follows the OECD Model Convention and has the following special features:

No liable to tax requirement for Hong Kong companies

Any company incorporated or normally managed and controlled in the Hong Kong SAR is considered a resident of Hong Kong for the DTA and entitled to the benefits of the DTA. It is not required that such company is actually liable to tax in Hong Kong.

No withholding on dividends to qualifying Hong Kong shareholders

Dividends paid by a Dutch resident company to a Hong Kong shareholder are fully exempt from Dutch dividend withholding tax (instead of the 15% Dutch domestic rate) if:

- The Hong Kong shareholder is a company that holds directly at least 10% of the capital of the Dutch company, provided that:

- (i) the shares of the Hong Kong company are regularly traded on a recognised stock exchange; *or*
 - (ii) at least 50% of the shares of the Hong Kong company are held by a Hong Kong or EU resident company that is regularly traded on a recognised stock exchange; *or*
 - (iii) the Hong Kong company is a bank or insurance company established and regulated in Hong Kong; *or*
 - (iv) the Hong Kong company is a headquarters company of a multinational corporate group; *or*
- the Hong Kong shareholder is a government body or institution created by a government body or a pension fund; *or*
 - the Dutch authorities determine that the main purpose of establishing, acquiring or maintaining the Hong Kong company was not the securing of this exemption under the DTA.

In other cases, the Dutch withholding tax rate is reduced to 10%.

No withholding on interest

Under the DTA, no withholding tax on interest payments is allowed. Currently, there is no such withholding tax in either jurisdiction.

3% withholding on royalties

For royalty payments, Hong Kong has agreed to reduce its withholding tax to 3%. The Hong Kong domestic rate is 4.95%. There is no withholding tax on royalty payments in the Netherlands.

Capital gains

The right to tax capital gains is generally allocated to the jurisdiction of the company realising the gain, but the other jurisdiction may – subject to certain limited exceptions - tax capital gains on the shares in a company deriving more than 50% of its asset value directly or indirectly from real estate situated in that other jurisdiction.

Exchange of information

This DTA is Hong Kong's first agreement adopting international standard exchange of information provisions. These provisions require the tax authorities in both jurisdictions to provide information that is foreseeably relevant for taxation purposes in the other jurisdiction. Exchange of information will only occur upon request of the authorities in the other jurisdiction and no automatic or spontaneous exchange of information will be required.

To avoid “fishing expeditions”, the requesting authorities (typically, the Netherlands) must identify the target person, the specific information requested and specify why that information is foreseeably relevant. Also, the DTA does not provide for mutual assistance in the collection of taxes.

Arbitration

A taxpayer in either jurisdiction may submit its double taxation matters to arbitration if the competent authorities have been unable to resolve double taxation, e.g. resulting from deviating interpretations of the DTA, by mutual agreement.

Contact

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