

Potential right to full refund of Dutch dividend withholding tax for EU shareholders

VastNed Retail N.V. and VastNed Offices/Industrial N.V. are required to withhold 15% Dutch dividend withholding tax on dividend distributions. Shareholders resident in the Netherlands are, generally, effectively entitled to a full credit for, or refund of, this withholding tax. Foreign shareholders are, generally, not entitled to a full credit or full refund in the Netherlands. As the statutory dividend withholding tax rate in the Netherlands has been reduced as of 1 January 2007 from 25% to 15%, in most cases, there will be no additional refund of withholding tax to shareholders residing in an EU Member State under the double tax treaties concluded with the Netherlands.

On 14 December 2006, the European Court of Justice ("ECJ") ruled in the *Denkavit Internationaal* case that dividends distributed to a foreign shareholder of a French company may not be taxed more heavily than dividends distributed to a French shareholder. Based on the freedom of establishment provision under the EC Treaty, France was required to grant the foreign shareholder the same withholding tax treatment (i.e. zero withholding tax) it granted to a French shareholder. Aforementioned decision of the ECJ also applies under the free movement of capital provisions of the EC Treaty, meaning that this case law, in principle, also applies to portfolio investments in companies resident in the EU.

With the decision in the *Denkavit Internationaal* case, the ECJ has confirmed the earlier landmark decision of the EFTA Court of 23 November 2004 (*Fokus Bank* case), wherein it was decided that dividends distributed to foreign shareholders of a Norwegian bank may not be taxed more heavily than dividends distributed to Norwegian shareholders under the free movement of capital provisions under the EFTA treaty.

On the basis of the *Denkavit Internationaal* case, *Fokus Bank* case and other case law, the view can be upheld that the Netherlands taxes dividend distributions by Dutch companies to foreign shareholders more heavily than dividend distributions to Dutch shareholders. Dutch shareholders are entitled to a full credit for, or refund of, the Dutch dividend withholding tax, whereas foreign shareholders are not. Although not entirely clear yet, it might be relevant whether such foreign shareholder is entitled to a credit or refund in its state of residence. If the foreign shareholder is indeed entitled to a credit or refund in its state of residence, then the less favourable treatment in the Netherlands is compensated in the other state. This could mean that, in such a case, the Netherlands may not be obliged under EU-law to grant a credit or refund of the Dutch dividend withholding tax.

VastNed Retail N.V. and VastNed Offices/Industrial N.V. have been advised by its Dutch tax counsel that non-resident shareholders residing in an EU or EFTA Member State may – under the free movement of capital provisions – be entitled to a full refund of Dutch dividend withholding tax in the Netherlands and should consider filing a claim with the Dutch tax authorities for such refund. For shareholders residing in other States, there might also be a possibility for a full refund, as the EC Treaty also contains provisions on free capital movements

to third States. However, more exceptions may apply in such situations. In both cases, it is assumed that these shareholders are the ultimate beneficiaries of the dividend distributed.

Based on new Dutch tax legislation effective as of 1 January 2007, provided certain conditions are met, pension funds and some other tax exempt legal entities resident in the EU have the possibility to file a request in the Netherlands for full refund of Dutch dividend tax withheld. The request should be filed within three years after the calendar year in which the dividend has been made available.

VastNed Retail N.V. and VastNed Offices/Industrial N.V. consider it important to inform its shareholders properly. VastNed Retail N.V. and VastNed Offices/Industrial N.V. intend hereby to provide guidance to its non-resident shareholders to safeguard their interests. Each non-resident shareholder should, however, make his or its own decision as to whether or not to file objections to the distinction in treatment of non-resident and domestic shareholders under Dutch tax law. VastNed Retail N.V. and VastNed Offices/Industrial N.V. cannot accept any liability in this respect.

Non-resident shareholders wishing to object to the distinction in treatment of non-resident and domestic shareholders under Dutch tax law, may consider seeking advice from Loyens & Loeff N.V., Yves Landheer (tel.: +31 20 578 5526, e-mail: yves.landheer@loyensloeff.com) or Alexander Fortuin (tel.: +31 20 578 5769, e-mail: alexander.fortuin@loyensloeff.com). The statutory term for filing objections with regard to the Dutch dividend withholding tax due in respect of a distribution to a non-resident shareholder is in principle six weeks after the date of the dividend note issued by VastNed Retail N.V. and VastNed Offices/Industrial N.V. Under certain specific circumstances, with respect to prior year dividend distributions, objections may still be filed with regard to dividend tax withheld in the past three years.