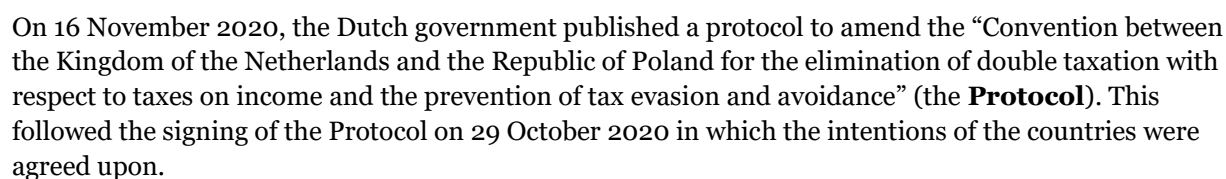
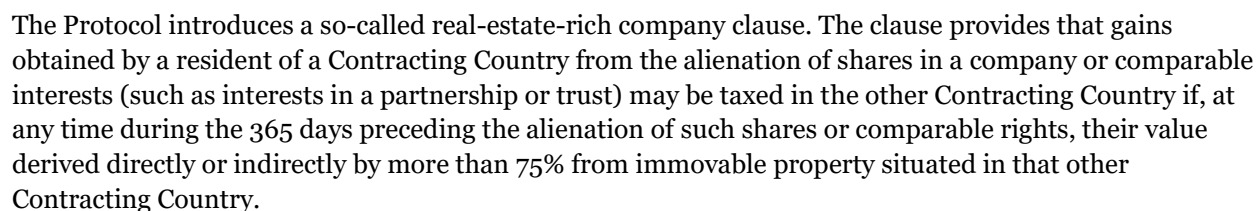


The date 'December 2020' in a gold serif font, positioned in the upper right area of the page.The main title of the article, 'Polish-Dutch Protocol to Revise Income Tax Convention', in a large, bold, black serif font.The section header 'Introduction' in a bold, gold serif font.A paragraph of text in a black serif font, providing an overview of the protocol's purpose and signing date.A single sentence in a black serif font, stating that the alert summarizes the protocol's contents.The section header 'A Real Estate Clause' in a bold, gold serif font.A paragraph of text in a black serif font, detailing the specific provisions of the real-estate-rich company clause.

Changes Concerning Permanent Establishments

The Protocol amends the definition of a permanent establishment by implementing a number of BEPS (Base Erosion and Profit Shifting)-oriented solutions to prevent the avoidance of a permanent establishment status by non-residents.

The Protocol clarifies that the convention's examples of activities that are not covered by the permanent establishment definition must all be of a preparatory or auxiliary character in order not to result in constituting a permanent establishment.

Additionally, a permanent establishment is deemed to exist when a person acts on behalf of an enterprise in a Contracting Country and by undertaking these actions concludes contracts or habitually exercises a major role in concluding contracts without significant changes made by the enterprise, and these contracts are concluded:

- on behalf of that enterprise; or
- for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or
- for the provision of services by that enterprise.

The Protocol further provides that profits of a permanent establishment are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.

Implementation of a Principle Purpose Test

The Protocol introduces a principle purpose test, which focuses on preventing abuse of agreements on the avoidance of double taxation. In short, the principle purpose test says that a benefit under this convention shall not be granted in respect of an item of income if it is reasonable to conclude, weighing all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this convention.

Introduction of a Definition of a Recognized Pension Fund

A "recognized pension fund" of a country means an entity or arrangement established in that country that is treated as a separate person under the tax laws of that country and that is established and operated exclusively or almost exclusively to administer or provide retirement benefits and ancillary or incidental benefits to individuals, or has been created and operates exclusively or almost exclusively to invest funds in such entities.

In accordance with the Protocol, dividends or interest will not be taxed if a recognized pension fund is a beneficiary of such payment. Furthermore, gains realized by a recognized pension fund from the alienation of shares as stipulated in the real estate clause (see above) will also not be taxed in the state where the real estate property is situated.

A Transparent Entity Clause

The Protocol provides that income obtained by or through an entity or arrangement that is treated as wholly or partly tax transparent under the tax laws of either Contracting Country is considered income of a resident of a Contracting Country, to the extent that the income is treated, for purposes of taxation by that country, as the income of a resident of that country.

Rules for Determining Tax Residence of Persons Other Than Natural Persons With Double Tax Residence

In line with the MLI (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) provisions and the 2017 OECD Model Tax Convention, the Protocol introduces new rules for tackling dual tax residence situations. It provides that, if a person other than a natural person is a resident of both Contracting Countries, the competent authorities of the Contracting Countries determine by mutual agreement the Contracting Country of which such person is a resident for the purposes of this convention based on its place of effective management. Should such an agreement be absent, then the person shall not be entitled to any relief or exemption from tax provided by this convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting Countries.

Conclusion

The Protocol will come into force when both Contracting Countries that have ratified the Protocol conform national constitutional procedures; this may not occur until 1 January 2022.

** This GT Alert is limited to non-U.S. matters and law.*

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