



Potential Additional Burdens on Taxation of Dividends paid from Ukraine to the Netherlands



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Recently the State Tax Administration of Ukraine (“STAU”) made publicly available one of its explanatory letters addressed to the tax administrations and inspections as guidance/the approach to be practically followed: the letter was issued on October 31, 2008 under No.22302/7/12-0117 (“the Letter”) in respect of taxation of dividends paid by Ukrainian tax payers to the Netherlands.

In the Letter the STAU particularly refers to paragraph 2 and paragraph 3 of Article 10 of the effective Double Tax Treaty (“the Treaty”) between Ukraine and the Netherlands and also clauses VI - VIII of the Protocol thereof.

The Letter generally confirms that dividends paid from Ukraine to the Netherlands shall be taxable at source at the respectively 0%, 5%, and 15% rates provided the corresponding conditions of the Treaty are met. For reference, the Letter particularly confirms that, pursuant to the Treaty, dividends paid from Ukraine to the Netherlands shall be subject to 0% withholding tax in Ukraine if they are paid to a company (other than partnership) that holds directly at least 50 percent of the capital of the payer of the dividends and has made an investment in the capital of the dividends payer of at least US\$300,000 or the equivalent in the currency of Ukraine.

Further in the Letter the STAU addresses the issue of investment (i.e. the definition thereof) which, according to the Letter, is not defined in the Treaty. In particular, the STAU, referring to the provisions of the Ukrainian Corporate Profits Tax Law, states that for purposes of the Treaty application the qualifying investment shall be made explicitly in the monetary

form (i.e., not e.g. as a contribution in kind) and in the amount of US\$300,000 or its equivalent in hryvnia. It should be noted that such approach is not new one from the side of the Ukrainian tax authorities who used to sometimes adhere to it in practice.

However, in the Letter the STAU expands that the qualifying investment, in addition to the above, shall also:

- ▶ Comprise not less than 50% of the capital of a Ukrainian company paying the dividend,
- ▶ Be made by a resident of the Netherlands in one/single instalment, and
- ▶ Not be formed/paid at the expense of investments of the former shareholders of a Ukrainian company paying the dividend or at the expense of its several (current) shareholders jointly.

Furthermore, in the Letter the STAU also states that in order to be eligible for application of the provisions of the Treaty, the Ukrainian company paying the dividend shall submit a certificate to the respective local tax authority under the form established in the Resolution No.928 of August 7, 1996 of the Cabinet of Ministers of Ukraine (“the CMU”) confirming the relevant investment aspects together with (i) the excerpts from the register of the shareholders, and (ii) the structure of the share capital indicating the share (percentage thereof) of each of the shareholders as of the date of investment contribution.

According to the Letter the above documents shall be submitted in addition to the residency certificate normally required pursuant to the Resolution of the CMU No.470 of May 6, 2001.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.