The Dutch Dividend Withholding Tax Act 1965: retain or refrain?

An economic and juridical analysis

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1. Introduction

1.1 Motivation of study

The Dutch Supreme Court recently submitted preliminary questions to the European Court of Justice (hereinafter: ECJ) in three proceedings regarding Dutch dividend withholding taxes.\(^1\) The scope of the preliminary questions in the three cases that are referred to the ECJ is similar. The Dutch Supreme Court essentially asks whether the Dutch Dividend Withholding Tax Act 1965 (hereinafter: DWTA ‘65) restricts the free movement of capital, as laid down in article 63 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), in a discriminatory manner. It is not the first time that the alignment of the DWTA ‘65 with the European Union (hereinafter: EU) Treaty freedoms is the center of attention. Many authors have already discussed the potential non-compatibility of the DWTA ‘65 with EU law and some authors even suggest to completely withdraw from levying withholding taxes in the Netherlands.\(^2\) In 2005 the, at that time, State Secretary of the Ministry of Finance also stated that he did not see a future for the DWTA ‘65 in the long run.\(^3\)

The DWTA ‘65 is a prelevy for residents, whereas for non-residents it normally is a final tax. However, in the residence country of the foreign dividend recipient a possibility to credit the withholding taxes can exist based on the national law of the respective country or due to an international agreement, like a tax treaty for the avoidance of double taxation.\(^4\) An important element of the DWTA ‘65 is furthermore the fact that the levy is not influenced by where the revenues are generated. If profits are generated abroad but are paid via a Dutch company in principle withholding taxes will be levied.\(^5\)

In this research I will focus on the economic and juridical justifications for levying withholding taxes in the Netherlands. Previous Dutch research reviewed dividend withholding taxes mainly in a juridical\(^6\) and

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\(^1\) HR December 20, 2013, nr. 12/03235, 12/02502 and 12/04717.


\(^3\) Ministerie van Financiën, 16-11-2005, nr. WT05-11-16.


\(^5\) Except if for example article 11, DWTA ‘65 is applicable.

\(^6\) For example: J.J.A.M. Korving, ‘Dividendbelasting: Hoe lang moeten we (ons) nog inhouden?’, *Weekblad Fiscaal Recht* 2012/1120.
sometimes economical\(^7\) manner. In this thesis both views will be combined, to make a comprehensive analysis of the DWTA ‘65 possible. By combining both perspectives all important elements to discuss the potential abolition of, or adjustments to be made to, the DWTA ‘65 will be highlighted.

1.2 **Research question**

The main research question is:
Should the Dutch government retain the Dividend Withholding Tax Act 1965 in its current form, based on its core elements, judged from both an economical and a juridical perspective?

1.3 **Methodology**

The research will be conducted primarily via a literature review. For the economic analysis I will include information about dividends provided by “De Nederlandsche Bank”. Next to that, the two leading views with regards to the influence of dividend taxes on economic decisions as developed in public finance literature will be addressed. Furthermore, I will compare empirical research on withholding taxes conducted in three different countries: the United States\(^8\), the United Kingdom\(^9\) and Norway\(^10\). I chose to study those three countries, due to the fact that the empirical research is relatively recent and country specific.

With respect to the juridical analysis I will limit myself to, at the time of writing (April 2014), recent court cases that revolve around the elements of the DWTA ‘65 that are potentially non-compatible with EU law. I will show that some of the primary elements of the DWTA ‘65 are still potentially discriminatory. Fiscal journals, books and online publications will serve as the sources for this analysis.

By comparing and analyzing both economical and juridical sources I aim to conclude whether or not a rationale for continuing to levy Dutch withholding taxes in their current form exists, and what the influences of the EU Treaty freedoms are in this respect. I will provide my recommendations for tax policy makers accordingly.

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1.4 Outline

In the second chapter of this research I will start by describing the aim and purpose of the DWTA ‘65 to provide a basic understanding of this part of the Dutch tax law. Furthermore, I will shortly address the international aspects of dividend taxation: both the influence of EU law and the tax treaty policy of the Netherlands in this respect will be explained.

The third chapter revolves around the rationale to levy withholding taxes on dividends. Next to that, I will summarize different justifications mentioned in the literature for taxing profit distributions in the Netherlands, both in a national and international context. Also reasons to potentially refrain from taxing dividends will be addressed. Furthermore, I will give an overview of the most important suggested options for reform.

The fourth chapter consists of a review of dividend taxation from an economic point of view. An estimation of the amount of revenues generated by the DWTA ‘65 will be given and the potential distortions caused by dividend taxation will be described.

Chapter five describes dividend taxation from a juridical point of view. European law limits the legislative powers of national governments. Consequently, considering the influence of the EU Treaty freedoms, the boundaries for the Netherlands with respect to levying withholding taxes will be discussed. The analysis in this chapter will focus on one of the unresolved issues regarding the DWTA ‘65 and its potential discriminatory elements. The main components to be discussed are therefore the recent preliminary questions asked by the Dutch Supreme Court.

The sixth and final chapter of this research contains the main conclusions. Considering these conclusions and based upon other suggestions made in the literature to improve the dividend taxation in the Netherlands, I will provide my recommendations for the legislator with regards to the DWTA ‘65. Moreover, a summary of this thesis will form the last part of the chapter.
2. Taxing dividends

2.1 Introduction

The Oxford English Dictionary describes a dividend as “a sum of money paid regularly (typically annually) by a company to its shareholders out of its profits (or reserves).” In most European countries, including the Netherlands, withholding taxes are levied on dividends. The ECJ defines three elements for a tax to be considered a withholding tax: (1) the time of the distribution is the taxable moment; (2) the tax base consists of the income from shares; and (3) the tax payer is the one holding the shares.

The main aim of this chapter is to provide a basic understanding of the current rules with respect to taxing dividends, both in a national and international context. The second paragraph addresses the Dutch rules with respect to dividend taxation. To be able to describe the rationale of the DWTA ‘65 I will start with describing its legislative history. Additionally, the neutralization of dividend taxes in a domestic and cross-border situations will be described. The third paragraph revolves around the influence of the EU on dividend taxation. In paragraph four I will elaborate on the Dutch tax treaty policy with regards to dividend distributions. The fifth and last paragraph of this chapter will consist of a conclusion.

2.2 The Dutch Dividend Withholding Tax Act 1965

Profit distributions are in the Netherlands taxed via the DWTA ‘65, which prescribes a direct levy at source. The term ‘dividend’ is not explicitly defined in the Dutch tax law. Article 1, paragraph 1, DWTA ‘65 refers to income from shares in companies, profit-sharing certificates and so-called participating loans, if these are issued by Dutch private or public companies, open limited partnerships or other companies of which the capital is completely or partly subdivided in shares. If such a company in which the shares are held is incorporated under Dutch law its residence is, for dividend withholding tax purposes, deemed to be in the Netherlands irrespective of the activities of the company. Additionally, a company distributing dividends is required to withhold taxes under the DWTA ‘65 if the company is established in the

\[11\] Normally this levy also includes returns on profit-sharing certificates and participating loans. For readability I will only refer to dividends/profit distributions in the remainder of this thesis.

\[12\] ECJ June 26, 2008, Case C-284/06, Finanzamt Hamburg – Am Tierpark v Burda GmbH, formerly Burda Verlagsheteiligungen GmbH. These different elements were already specified in ECJ October 4, 2001, Case C-294/99 Athinaiki Zithopia AE v Elliniko Dimosio (Greek State) and ECJ December 12, 2006, Case C-446/04 Test Claimants in the FII Group Litigation. However, whether or not the third mentioned aspect was a real requirement was not immediately clear.

\[13\] Article 1, paragraph 3, DWTA ‘65.
Netherlands based on an assessment of the facts and circumstances of the case at hand.\textsuperscript{14}

The distributing company is obliged to withhold tax\textsuperscript{15} on the amount of income as defined in article 2 and article 3, paragraph 1, DWTA ‘65. This amount includes, apart from profit distributions, also for example liquidation proceeds and ‘interest’ payments on participating loans. Consequently, the name Dividend Withholding Tax Act does not entirely cover the scope to which the law is applicable.

The one required to withhold taxes on a profit distribution under the DWTA ‘65 remains to be the distributing company, even if the actual payment is made by an intermediary. If the intermediary is for example a financial institution, this institution is not required to withhold any taxes.\textsuperscript{16}

Any economic benefit received from a Dutch company by a shareholder as such is taxable in the Netherlands. The financial result of the company does not play a role in this respect. If a corporation, despite the fact that there are currently no corporate earnings, makes a distribution from excess capital this is considered to be a dividend and taxed accordingly.\textsuperscript{17}

The tax on dividends is a prelevy for both the Dutch Income Tax Act 2001 (hereinafter: ITA ‘01) and the Dutch Corporate Income Tax Act 1969 (hereinafter: CITA ‘69).\textsuperscript{18} If the receiver of the dividend is subject to a final levy (he is considered to be a domestic or foreign taxable person for Dutch income- or corporate income tax purposes) the dividend tax withheld can be offset against the final levy in order to avoid double taxation. Furthermore, if a predefined amount of shares in a dividend distributing company are held, an exemption with respect to the dividend distribution applies in corporate income tax situations.\textsuperscript{19}

For a foreign tax payer, who is not a taxable person for Dutch income- or corporate income tax purposes, the aforementioned offsetting mechanism is not available. In principle the levy of withholding taxes on dividends is then a final levy with double taxation as a result (a withholding tax on dividends in the source state of the dividend and corporate income tax or income tax on the worldwide income of the dividend receiver). More details in this respect will be discussed in paragraph 2.2.2.2.

\textsuperscript{14} Article 1, paragraph 1, DWTA ‘65 and article 4, paragraph 1, General Law on Taxation 1959.
\textsuperscript{15} Article 7, paragraph 2, DWTA ‘65.
\textsuperscript{18} See article 15 General Law on Taxation 1959, article 9.2 ITA ‘01 and article 25 CITA ‘69.
\textsuperscript{19} Article 4, DWTA ‘65.
Dividend distributions are subject to tax according to Dutch law since the introduction of the “Wet op het Patentregt” in 1819. Profit distributions to both foreign and domestic shareholders were treated the same under this law. In 1914 the levy was integrated as part of the “Wet op de inkomstenbelasting”. Apart from a tariff change the tax continued to be levied in a similar manner.\textsuperscript{20} The independent character of the levy revived in 1917 under the “Wet op de Dividend- en Tantièmebelasting”.\textsuperscript{21}

In 1941, during the German occupation, withholding taxes on dividends similar to its current form have been introduced in the Netherlands. In 1965 this levy has been maintained under a broader scope of rules.\textsuperscript{22} The reason for the introduction in 1941 was, apart from the fact that Germany wanted to have as much tax revenues as possible, the possibility that levying withholding taxes generates to get revenues earlier on.\textsuperscript{23} Article 1 of the Decree Dividend Taxation 1941 stated that dividend taxes were levied by a prelevy on the proceeds from shares, profit certificates and profit-sharing securities from public companies and limited partnerships established within the Netherlands. Both in 1941 and in 1965 no explanation of the fundamental grounds to levy withholding taxes on dividends has been given.\textsuperscript{24}

During the parliamentary review of the bill that was the starting point for our current DWTA ‘65, reference has been made to the independent character of the dividend tax law next to the corporate income tax. Whenever a company established in the Netherlands distributes a dividend, even if the underlying profit has been generated abroad, a Dutch dividend claim is levied. The levy is therefore not limited to Dutch sourced profit. In comparison to the corporate income tax the levy is simpler and the required nexus with the Netherlands is lower. Essentially, the levy is based upon a very formal interpretation of the situs principle.\textsuperscript{25} According to Van der Geld this interpretation does not correspond well with the normal, more material, interpretation which is the starting point for the (corporate) income tax.

Initially the tariff for the dividend tax law was set at a rate of 15%; in 1965 the rate was increased to 25%. This increase has been explained as a logical response to changes in international tax standards (see paragraph 2.4). Additionally, it was said to be an attempt to positively influence the treaty negotiation

On January 1, 2007 the rate has been decreased to its initial 15%. The tariff reduction was motivated by referring to an expected positive influence on the fiscal climate.

2.2.2 Neutralization

The Dutch national law neutralizes dividend withholding taxes in most domestic situations. First of all, a dividend tax is a prelevy for domestic and foreign taxable persons under the ITA ‘01 and CITA ‘69. Dividend taxes can be offset against the amount of income- or corporate income tax due.

Furthermore, in domestic situations in which the participation exemption is applicable, or if a fiscal unity is formed between a parent and its subsidiary, the distributing company is exempted from withholding dividend taxes. Thirdly, the receiver of the dividend may apply for a refund based upon article 10, DWTA ‘65. This provision is mainly aimed at providing a refund for entities that are not subject to corporate income tax in the Netherlands because the aforementioned offsetting mechanism does not provide relief if there is no corporate income tax payable to be set off against.

A fourth common neutralization possibility in the Netherlands is described in article 11a, DWTA ‘65 and is specifically aimed at providing relief for fiscal investment institutions (under the rules of article 28, CITA ‘69). The Dutch national law requires fiscal investment institutions to redistribute dividends received within a time span of eight months. The specific provision in the DWTA ‘65 grants a tax credit with respect to these redistributions of dividends. Any dividend taxes withheld on the distribution to a company may be credited against the amount that should be withheld when the redistribution takes place.

Moreover, in case the dividend receiver redistributes the dividend to its shareholders, via article 11, DWTA ‘65 a credit might be available.

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27 Kamerstukken II 2005/06, 30572, nr. 3, p. 17.
28 Article 13 CITA ‘69. A shareholding is qualified as a participation when there is 5% or greater stock interest in the subsidiary company.
29 Article 15 CITA ‘69.
30 Article 4, paragraph 1 DWTA ‘65.
2.2.2.1 Dividend inflows

Dutch residents are in principle subject to tax on their worldwide income. Insofar as the tax relates to foreign income, tax relief might be applicable in order to avoid double taxation. The Netherlands makes in this respect a distinction between active and passive foreign source income. Active foreign source income, such as business profits and income from employment, is normally exempt under the Dutch tax law. With regards to foreign source income classified as being active, the Netherlands pursues a capital import neutral policy. Capital import neutrality is generally defined as: “capital funds originating in various states should compete on equal terms in the capital market of any state, irrespective of the investor’s place of residence.”

For passive foreign source income, such as interest and dividends, a tax credit method is applicable. For these income streams a credit is normally granted for the tax already paid abroad. This is in line with a capital export neutral policy. Capital export neutrality is normally given the following meaning: “the investor should pay the same total (domestic plus foreign) tax, irrespective of whether he receives a given investment income from foreign or from domestic sources.”

Dividend income can be either active or passive. A dividend paid out by a subsidiary that meets the minimum ownership requirement in the Netherlands is seen as active income and is therefore exempt from taxation in the Dutch corporate income tax law. If such a shareholder relationship does not exist, the foreign source dividend income is seen as passive and consequently the credit method is applicable.

In intra-EU situations, in which the minimum ownership requirement is met, no tax at source has to be withheld. This is due to the Parent-Subsidiary Directive (hereinafter: PSD) and its implementation in Dutch tax law. Additionally, under most treaties the withholding tax on dividends is decreased towards a rate of 0% or 5% in case the beneficial owner of the dividend is a company that holds a certain amount of the shares in the dividend distributing company. In other situations the rate under a tax treaty is normally 15%, which is in line with the standard rate of the Netherlands.

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33 Article 13, CIT A ‘69. The parent company should have a 5% or more shareholding in the subsidiary.
35 Article 4, paragraph 2-4 DWTA ‘65.
If the dividend receiving company does not have access to the PSD and the two states in the case at hand also did not conclude a treaty, the source country will levy a tax at source. The rate that is levied depends upon the domestic tax law; especially developing countries tend to levy very high withholding taxes. A Dutch dividend receiver in principle cannot credit the foreign tax withheld against its (corporate) income tax. Under article 9.2, ITA ‘01 and article 25, CITA ‘69 only Dutch dividend taxes can be offset against taxes payable via article 15, General Law on Taxation 1959. The aforementioned credit is however available if there is a treaty applicable or if the source country is one of the developing countries mentioned in article 2, Implementing Regulation for the Unilateral Decree on the Avoidance of Double Taxation 2001. If the dividend is not subject to a final levy, due to the application of the participation exemption or if the receiver is a non-taxable person as such, it is not possible to credit any potential foreign withheld source tax. A tax treaty applicable in the aforementioned situation would not change this outcome. If there is no final levy in the Netherlands, there is nothing for the tax to be offset against.

2.2.2.2 Dividend outflows

The state of residence of the dividend receiver does not influence the way dividends are taxed via the DWTA ‘65. If the dividend distributing company is established under Dutch law, or if the company is considered to be established in the Netherlands based on the facts and circumstances, a dividend tax claim will be levied. For a dividend receiver located outside the Netherlands, who is not considered to be a taxable person in the Netherlands, it is not possible to offset the tax withheld against any Dutch (corporate) income tax payable. The tax withheld on the profit distribution is therefore in principle a final levy.

If a natural person, who resides outside the Netherlands, is a foreign taxable person and holds a substantial interest in the distributing company the tax withheld can be credited against the amount of income tax payable. The same holds if the natural person is an entrepreneur and the shares are part of the Dutch business property or if the shares are part of the property used to generate income for other activities. Companies non-resident in the Netherlands that hold shares in a distributing company might also be subject to a final levy under the CITA ‘69. This is the case for entrepreneurs of which the shares in the distributing company form part of a permanent establishment or a permanent representative located in the

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38 Article 1, paragraph 3, DWTA ‘65.
39 Article 1, paragraph 1, DWTA ‘65 and article 4, paragraph 1, General Law on Taxation 1959.
40 Article 7.5, ITA ‘01.
41 Article 7.2, paragraph 2, part a, ITA ‘01.
42 Article 7.2, paragraph 2, part c, ITA ‘01.
Netherlands. Additionally, the same holds for non-resident companies that have a substantial shareholding in a Dutch company which does not form part of their business property. Furthermore, the aforementioned PSD completely eliminates withholding taxes in intra-EU situations for associated companies. A tax treaty might also lower the burden with respect to withholding taxes on profit distributions to foreign shareholders.

2.3 Dividend taxation under EU law

With respect to dividend taxation there is currently only one single legislative measure applicable within the EU. The Council Directive of July 23, 1990 prescribes a common tax system if a parent company is established in one Member State (hereinafter: MS) whereas the subsidiary is located in another MS. The Directive is designed to eliminate economic and juridical double taxation with regards to profit distributions within the EU. Under the applicable rules no withholding tax may be levied at the level of the subsidiary company. Furthermore, at the level of the parent company an exemption or taxation followed by a credit should be available. The Directive is based upon the idea that in order to achieve the ideal of an internal market, no tax obstacles should hinder the dividend payments. In principle, the Directive only provides benefits for tax payers. The European Commission proposed amendments to the PSD on November 25, 2013. The European Commission wants to include a General Anti-Avoidance Rule and wants to end tax avoidance by tax payers who benefit from hybrid mismatches. At this point in time the European Parliament already gave their approval with regards to the proposal.

Next to this Directive, the general principles of Community law as laid down in the treaties of the EU are relevant. With regards to dividend taxation the non-discrimination principle and two of the fundamental freedoms (the freedom of establishment and the freedom of capital) are the main important elements. The freedoms require Member States to exercise their powers with respect to direct taxation in

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43 Article 17, paragraph 3, part a, CITA '69.
44 Article 17, paragraph 3, part b, CITA '69.
45 If the shareholding amounts to 10% or more.
47 Economic double taxation occurs when one single taxable item is subject to tax in the hands of two different tax payers. A tax payers that is taxed twice for one single taxable item suffers from juridical double taxation.
52 Article 49, TFEU (ex Article 43 TEC).
53 Article 63, TFEU (ex Article 56 TEC).
correspondence with Community law. The ECJ interprets EU law and makes sure that different Member States consistently apply the rules. The ECJ distinguishes two important principles in the field of direct taxation. In line with the non-discrimination principle it is not allowed for Member States to impose rules that are discriminatory on nationals of another MS. The ‘barriers’ principle requires Member States to refrain from using tax rules that impose a barrier with regards to the Treaty freedoms, or which have a negative influence on the attractiveness of the four fundamental freedoms.

2.4 Dutch tax treaty policy

Since the publication of the Dutch Standard Convention in 1987 (hereinafter: DSC ‘87) article 10 of this convention serves as the starting point with respect to treaty negotiations in the field of dividend taxation. Article 10 DSC ‘87 does not fully correspond with article 10 of the standard tax convention as designed by the Organisation for Economic Co-operation and Development (hereinafter: OECD). The main difference is the tariff that should be applied in the case of intragroup dividend payments. For participations exceeding 25% the DSC ‘87 prescribes a zero rated levy at source. The OECD Model Tax Convention (hereinafter: MTC) advises a 5% rate in a similar situation. Additionally, the DSC ‘87 requires the recipient of the dividend to have share capital. Next to that, the subdivision in paragraphs in article 10 is slightly different when comparing the DSC ‘87 and the OECD MTC. Furthermore, the scope that is given in the Netherlands to the dividend article is not completely in line with the definition that the OECD MTC carries out. In the Netherlands interest on participating bonds is classified as a dividend, whereas according to the OECD this should be seen as interest.

The Dutch government has, since 1987, published four memorandums regarding Dutch tax treaty policy. The first note describes that, due to the international orientation of the Dutch economy and the amount of dividends that consequently flow via the Netherlands, it is certainly relevant to discuss dividend taxation in an international context. Furthermore, the memorandum outlines the international standard practice with respect to dividend taxation. It used to be general practice that profit distributions were only taxable

56 The fundamental freedoms are laid down in Title IV of part three of the TFEU. They are: the free movement of workers, the freedom of establishment, the freedom to provide services and the free movement of capital.
57 Redactie Vakstudie, Vakstudie Nederlands Internationaal Belastingrecht, art. 10 OESO-modelverdrag 1992, paragraph 1.6.3 (online, last review: 2012).
58 The last two sentences of article 10, paragraph 2 OECD MTC form the separate paragraphs 4 and 5 in the DSC ‘87.
in the country of the recipient. However, this practice changed; the country of the distributing company should also have a certain right to tax the dividend flows according to the changed view. As a result of the switch in international standards the Netherlands changed its policy accordingly. Dutch tax treaty policy with regards to intra-group dividends is aimed at decreasing dividend taxes to zero, whereas the OECD MTC prescribes a rate of 5% in a similar situation. The reduction to 0% for participation dividends is in line with the in 1990 implemented PSD for intra-EU situations. The reason the Netherlands wants to reduce withholding taxes on intragroup dividends to zero can be traced back to the domestic treatment of these dividends. Via the participation exemption (article 13, CITA ‘69) these dividends will normally be exempted from corporate income tax. Due to this exemption there will be no possibility to offset the foreign withheld tax against corporate income tax payable at the level of the parent company.

The second memorandum on Dutch tax treaty policy (1996) does not specifically mention dividends. The general idea is to continue the policy conducted so far. The Netherlands distinguishes active and passive income in describing its treaty policy (see also paragraph 2.2.2.1). With respect to active income the Netherlands strives for capital import neutrality, whereas with regards to passive income capital export neutrality is aimed at. Accordingly, the note from 1998 repeats the aim to decrease withholding taxes on participation dividends in line with a policy based on capital import neutrality.

Portfolio dividends, revenues from shareholdings in non-intercompany situations or shareholdings that do not exceed a certain percentage, are seen as passive income. The Dutch aim is to conduct a capital export neutral policy for portfolio dividends. The foreign source income will be taxed according to the normal rules of the ITA ‘01 or CITA ‘69. Furthermore, the note from 1998 describes that the Dutch treaty network consists of relatively many treaties that foresee in lower withholding taxes on dividends. If the treaty partner does not levy taxes on dividend outflows, the Netherlands includes a specific anti-abuse provision.

The most recent memorandum with respect to Dutch tax treaty policy has been published in 2011. In line

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62 Kamerstukken II 1987/88, 20 365, nr. 2, p. 16. This is also reflected in the difference between the DSC ‘87 and the OECD MTC.
63 Kamerstukken II 1996/97, 25 087, nr. 1, p. 2.
64 Kamerstukken II 1997/98, 25 087, nr. 4, p. 20/41.
66 Kamerstukken II 1997/98, 25 087, nr. 4, p. 43.
with previously stated policy the aim is to solely have source state taxation for intragroup dividends.\textsuperscript{67} In principle, due to the requirement, as laid down in most of the tax treaties, that dividends have to be paid to the beneficial owner in order to benefit from the lowered rate the possibilities for treaty abuse are already restricted. In order to prevent treaty abuse in situations that are not covered by the beneficial owner requirement, the Netherlands plans to propose to include a specific provision in the respective tax treaty.\textsuperscript{68} With respect to portfolio dividends the Netherlands aims to stick to the national tariff of 15\%.\textsuperscript{69}

Considering the above, the Netherlands pursues a steady course with respect to its tax treaty policy in the field of dividend taxation. The distinction between intragroup and portfolio dividends remains important. Intragroup dividends are in intra-EU situations normally, due to the PSD, only taxed in the source state. The Netherlands already pursued this policy before the implementation of the PSD and wishes to conclude tax treaties with non-Member States in a similar manner with respect to this specific element. For portfolio dividends the Netherlands sees more abuse possibilities and therefore the tax treaty policy is more restrictive.

\textit{2.5 Conclusion}

Dividend taxes are levied at source. The levy should be withheld by the distributing company, whereas the receiving company is the one liable to pay the tax. The DWTA ‘65 serves as a prelevy for the ITA ‘01 and the CITA ‘69. In an international context the tax is usually a final levy. Normally an exemption from withholding a tax on the dividend distribution is applicable with respect to participation dividends.

Within the EU the PSD is the only legislative measure in the field of dividend taxation. The main aim of this Directive is to eliminate tax obstacles that could hinder the proper functioning of the internal market. The PSD ends both the juridical and economical double taxation of cross-border intra-EU dividend flows. Furthermore, the fundamental EU freedoms and the interpretation by the ECJ in essence limit the scope of the DWTA ‘65.

The Netherlands tries to make sure no taxes are levied on intragroup profit distributions which relate to active businesses in line with a capital import neutral policy. For portfolio dividends a capital export neutral policy is pursued; consequently, the corresponding income will be taxed via the normal Dutch tax laws.

\textsuperscript{67} Ministerie van Financiën, \textit{Notitie Fiscaal Verdragsbeleid 2011}, p. 45.
\textsuperscript{68} Ministerie van Financiën, \textit{Notitie Fiscaal Verdragsbeleid 2011}, p. 46.
\textsuperscript{69} Ministerie van Financiën, \textit{Notitie Fiscaal Verdragsbeleid 2011}, p. 47.
Chapter 3. A rationale for levying dividend withholding taxes?

3.1 Introduction

The fundamental reason(s) to account for something are called ‘rationale’. Normally, at the time of introduction of a part of the tax law the legislator describes the general ideas and reasons that are at the heart of this law. Next to that, those reasons, and other reasons that potentially justify such a levy, are normally analyzed in the literature. As already discussed in the previous chapter, with regards to the taxation of dividends no insight is given by the legislator about the underlying ideas of the levy. Rompen\(^{70}\) even asks the inverted question: if there would have been no DWTA ‘65 at this moment, would the introduction of such a levy be accepted by parliament at this point in time? Van der Geld states that a lack of debate with respect to the justifications for dividend taxation might be induced by the fact that the levy mainly affects non-resident tax payers.\(^{71}\) This chapter gives an overview of the arguments that are mentioned in Dutch literature in favor of continuing to levy withholding taxes on dividends and the arguments that are against this part of the tax law.

To start of positive, first I will discuss the rationale for the existence of the DWTA ‘65. I will critically assess the validity of the different arguments mentioned in the literature. In paragraph 3.3 I will address the potential reasons to refrain from levying dividend withholding taxes. Next to that, a number of reform ideas will be summarized. The last paragraph will give an overview of my conclusions in this respect.

3.2 Rationale for levying dividend withholding taxes

First of all, inherent to taxation, is the fact that levying dividend taxes generates revenues for the government. This budgetary argument justifies taxation, but does not justify a specific form of taxation.\(^{72}\) Remarkable in my opinion is the fact that apparently it is not possible to provide a clear indication of the amount of tax revenues generated by the DWTA ‘65. For an overview of the estimated revenues in this respect I refer to chapter 4.

\(^{70}\) J.W. Rompen, ‘Niet afschaffen van dividendbelasting vormt een steeds groter risico voor Nederland’, Weekblad Fiscaal Recht 2013/1009.
Another potential justification can be seen in line with the direct benefit principle. A company incorporated in the Netherlands that receives dividends can benefit from Dutch fiscal facilities, for example the broad treaty network. However, a company established under Dutch law is normally also required to pay corporate income tax, except for fiscal investment institutions or companies in a loss making position. Specifically for fiscal investment institutions under the rules of article 28, CITA ‘69, that invest in Dutch real estate, the levy seems justifiable. Those investors take part in the economic life in the Netherlands, but do not pay any corporate income taxes. However, via article 11a, DWTA ‘65 they can claim a reduction. Additionally, companies in a loss making position will normally not distribute dividends, so in that respect this argument in favor of the dividend tax law does not hold as well.

Considering the above, in my view it remains questionable whether an additional levy is required based on this principle. On the other hand, for companies that are non-residents in the Netherlands but receive dividend distributions and indirectly take part in the economic life in the Netherlands, it seems logical that they contribute to the government that makes this economic life possible.

Brandsma distinguishes three reasons for the existence of a withholding tax on dividends. Firstly, it is, especially in international situations, easier to levy taxes at source instead of taxing the beneficiaries of the income. It will be, for example, more difficult to tax the owners of shares of companies on the stock exchange due to the fact that the whereabouts of these shareholders are often unknown. A government that levies taxes on profit distributions at source has to deal with a relatively limited group of tax payers, which normally are professional organizations from which a certain degree of expertise can be expected. Van den Hurk and Korving point in this respect to the fact that withholding a tax on profit distributions is an efficient manner to generate revenues.

Second, the recovery of the tax due is generally assured better. The limited group of tax payers to deal with requires less government action. Furthermore, the levy at source implies that the tax payer does not receive the entire amount of taxable income. Overall, less risk with respect to the collection of taxes by the

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74 Article 6a and 28, CITA ‘69.
tax authorities is to be expected.\textsuperscript{80} I doubt that an abolition of the DWTA ‘65, and an increase of the tax rate for the CITA ‘69 to fill the budgetary gap, would increase the level of necessary government action.

Third, the fact that a withholding tax is normally a prelevy in domestic situations has another advantage.\textsuperscript{81} It means the government will receive its tax revenues earlier on. The levy takes place almost immediately after the occurrence of the taxable event and is based upon information from ‘third parties’. Marres and Wattel call this the pay-as-you-go principle.\textsuperscript{82} The idea behind this principle is to tax the tax payer as much as possible directly at the moment he receives his income. They immediately question this reason for existence by stating that this is solely a budgetary argument for the government who would like to receive its revenues earlier. The same outcome could for example be achieved by making more use of preliminary tax returns. Hence, this argument is not convincing.

According to Van den Hurk and Korving, via the prelevy the government has a higher degree of certainty with respect to the amount of tax revenues to be generated.\textsuperscript{83} Feteris sees the prelevy as an advantage for tax payers as well, because they do not have to save sums of money to be able to pay future tax bills.\textsuperscript{84} A disadvantage in the Netherlands in this respect is the fact that the tax basis for the prelevy of the DWTA ‘65 does not correspond with the ITA ‘01 and the CITA ‘69.\textsuperscript{85} In essence this leads to an inefficient situation by requiring double work.

The prevention of fraud is another element mentioned in literature: what has been paid via a prelevy cannot be evaded anymore.\textsuperscript{86} Amounts that have been reported at the company level may also have a positive impact on the compliance of the shareholder with respect to its income tax return. An increased level of information exchange might weaken this argument.\textsuperscript{87} Another element in this respect is the idea to levy dividend taxes to decrease profit shifting.\textsuperscript{88} The tax levied could decrease the amount of profits

\textsuperscript{81} R.P.C.W.M. Brandsma, \textit{Cursus Belastingrecht Dividendbelasting}, Alphen aan den Rijn: Kluwer 2013, chapter 0.0.0.
\textsuperscript{87} Information exchange is currently an important topic at the OECD. See for example the Discussion Draft on Transfer Pricing Documentation and CbC Reporting (2014), part of the OECD Base Erosion and Profit Shifting (BEPS) Action Plan (July 19, 2013).
distributed towards companies established in a tax haven. However, if the initial financing of the company is changed due to the dividend tax levied, debt financing might be more attractive and the percentage of equity financing within a company could be lower to start with. There is in the Netherlands no withholding tax on interest payments, so I do not believe the government would necessarily encourage such a development.

Feteris points at the convenience for tax payers.\(^8^9\) Normally, the taxable amount, the taxable event and the tax rate are clear when it comes to dividend taxation.\(^9^0\) Additionally, the tax payer will have in principle no administrative obligations with respect to withholding taxes on dividends during the fiscal year. Withholding taxes impose only a limited burden on tax payers process wise. Feteris immediately addresses a downside of this limited burden; if a government wants people to feel involved, it might be better if they have an idea about how much they contribute to society.

Another reason to levy taxes at source refers to the influence of a dividend withholding tax act on the negotiation position countries have with respect to the conclusion of tax treaties.\(^9^1\) Countries can promise to lower withholding taxes on dividends (in case of payments from one of the contracting states to the other state) in exchange for concessions of the other state. Marres and Wattel state that the Netherlands in essence did not have an option other than levying withholding taxes on profit distributions considering future treaty negotiations.\(^9^2\) Bartel sees the better bargaining position in treaty negotiations as the only justification for levying withholding taxes on profit distributions. He states that the only value the DWTA ‘65 has, is that it makes it possible to ‘bully’ other states.\(^9^3\) Snel does not regard the influence on the negotiation position as a strong argument.\(^9^4\) First of all, the Netherlands already has a treaty with all the countries that play a substantial role in the Dutch economy. Furthermore, within the EU the PSD eliminates under certain conditions\(^9^5\) all cross border tax obstacles with respect to dividend payments. Additionally, the fact that the Netherlands does not levy a tax at source with respect to interest, royalties and capital gains does not mean that the existing tax treaties are unfavorable regarding those elements. At the time the dividend tax rate was increased in 1965 explicit reference was made to the treaty negotiation possibilities. Van der Geld points at the ignorance of treaty negotiation partners which is implicitly assumed by this potential justification to levy withholding taxes on dividends; as if these partners would

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95 The minimum shareholding required is 10%, the legal form should be one that is listed in Annex I, part A, to the PSD and both the parent and subsidiary should be subject to corporate income tax.
not be aware of the fact that normally this autonomous levy is decreased significantly when a treaty is conducted.96

The principle of source might provide a rationale for levying withholding taxes in an international context. It can be seen “as an elaboration of the principle of location of wealth”.97 In line with this principle countries may claim that the source state has the right to tax both the income produced in its state and levy a tax at source on the part of the income after tax which will not be reinvested but will be transferred abroad.98 This viewpoint essentially requires a country to levy taxes at source, due to the fact that other countries will do the same because the view is accepted internationally.99 With respect to the principle of source the question can be asked whether this can really provide a rationale to levy withholding taxes on dividends. Essentially, due to the normal corporate income tax applicable to profits generated by a company, a tax in line with the principle of source has already been levied. Striking in this respect is also the fact that a redistribution of profits via for example the Netherlands can already trigger dividend withholding taxes, even though those profits might not have any link with the Netherlands whatsoever. Correspondingly, Kemmeren only sees a justification to levy withholding taxes on dividends if there is a link between the substantial income producing activity and the levy.100 On the other hand, Nijkeuter notes that the different objections against the principle of source as a rationale for levying dividend withholding taxes are in his opinion less convincing due to the increasingly lower tariff of the CITA ‘69.101

Additionally, the tax withheld can be seen as a compensation for capital contributed to a company located in the Netherlands in line with a formal approach of the source principle.102 Under the October 1, 2012 implemented ‘Wet vereenvoudiging en flexibilisering bv-recht”103 this justification can, in my opinion, no longer be upheld in the Netherlands. The aforementioned law abolishes the minimum capital requirement of €18.000,- which used to hold for public and private companies in the Netherlands. Furthermore, if such an approach is extended, there should also be a withholding tax on interest and royalties to generate a compensation for contributing debt and patents.

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101 E. Nijkeuter, Belastingheffing van dividend en de interne markt, Den Haag: SDU 2011, chapter 2.5.
103 Staatsblad 2012/301 Besluit van 29 juni 2012 tot vaststelling van het tijdstip van inwerkingtreding van de Wet vereenvoudiging en flexibilisering bv-recht en de Invoeringswet vereenvoudiging en flexibilisering bv-recht.
Because dividend withholding taxes only become due when profits leave a company, investments are stimulated indirectly.\textsuperscript{104} So, another reason to levy withholding taxes on dividends in an international context could likewise be found in levying an additional profit tax on profits that flow out of the company due to the fact that no reinvestments in the Dutch economy will take place.\textsuperscript{105} Two additional advantages of an economic policy that stimulates refraining from distributing profits can be distinguished. First, reinvestments might have a positive influence on the profit potential of a company and hence on the tax revenues generated by the government. Second, the additional retained earnings of a company might be beneficial in an economic downturn. According to Kemmeren this can strengthen the entire Dutch economic infrastructure.\textsuperscript{106} In chapter 4 I will further elaborate upon the implications dividend taxes have for economic decisions. In essence my conclusion will be that the effect is rather limited, which is not in line with the aforementioned arguments.

Within an international context political pressure to continue to levy withholding taxes on profit distributions has also been mentioned as an argument in favor of dividend taxation.\textsuperscript{107} Whether this statement is viable is uncertain; there are other European countries that levy no or almost no withholding tax on dividends.\textsuperscript{108}

All in all, the reasons for the existence of a withholding tax on dividends seem to be more practical than principle based. According to Snel, due to the fact we are used to the dividend tax law, this status quo will not easily be changed.\textsuperscript{109} In an attempt to make progress, it might be better to refrain from levying withholding taxes on dividend distributions. The arguments in line with this statement will be discussed in the next paragraph.

3.3 Reasons to refrain from levying dividend withholding taxes

A number of disadvantages of levying dividend withholding taxes can be distinguished. The aforementioned advantage of a lower administrative burden for the tax payer implies on the other hand a...
higher administrative burden for the company responsible for withholding the tax.\textsuperscript{110} This seems strange, especially because the ones non-liable to tax are facing a huge burden instead of the actual tax payers. An advantage of the abolition of the DWTA ‘65 would be the reduction in administrative burden both companies and the tax authorities face.\textsuperscript{111} According to research conducted in 2007 the annual compliance costs for companies that try to fulfill their administrative obligations with regards to the DWTA ‘65 exceed €1,- million euro.\textsuperscript{112} In this same research there are no tax administration costs for the tax authorities specified that are directly attributable to dividend taxation.\textsuperscript{113}

Another disadvantage can be the discouragement of foreign investments.\textsuperscript{114} According to Rompen\textsuperscript{115}, the abolition of the DWTA ‘65 would positively influence the competitiveness of the Dutch fiscal climate. He argues that almost each advisor specialized in international taxation will have concrete examples in which, due to the DWTA ‘65, an external (holding) company outside the Netherlands is added to the company structure. If part of the returns on capital flow to the government, investors might be inclined to look for another investment location. Abolishing dividend taxation might increase the chances a company will consider to conduct certain activities in the Netherlands.\textsuperscript{116} Within the EU action has already been undertaken to eliminate the harmful effects of taxes on dividends. Via the PSD\textsuperscript{117} tax obstacles on intra-EU profit distributions are eliminated to improve the functioning of the internal market. Snel adds to the aforementioned argument the fact that the higher tax due for foreign companies because of the withholding tax on dividends might indirectly be reflected in higher financing costs and lower prices for shares in Dutch companies.\textsuperscript{118}

An additional argument to levy no dividend withholding taxes in an international context might be found in the different treatment of subsidiaries and permanent establishments.\textsuperscript{119} Transferring profits from a

\begin{itemize}
\item \textsuperscript{110} M.W.C. Feteris, *Heffing van belasting door middel van betaling op aangifte*, Deventer: Kluwer 2005, p. 156.
\item \textsuperscript{111} J.W. Rompen, ‘Niet afschaffen van dividendbelasting vormt een steeds groter risico voor Nederland’, *Weekblad Fiscaal Recht* 2013/1009.
\item \textsuperscript{112} Studiecommissie Belastingstelsel, *Continuïteit en vernieuwing: Een visie op het belastingstelsel*, Den Haag: 2010, p. 56.
\item \textsuperscript{115} J.W. Rompen, ‘Niet afschaffen van dividendbelasting vormt een steeds groter risico voor Nederland’, *Weekblad Fiscaal Recht* 2013/1009.
\item \textsuperscript{116} F.P.J. Snel, ‘Dividendbelasting afschaffen?’, *Nederlands Tijdschrift Fiscaal Recht* 2009/1982.
\item \textsuperscript{117} Parent-Subsidiary Directive (1990) 90/435/EEC.
\item \textsuperscript{118} F.P.J. Snel, ‘Dividendbelasting afschaffen?’, *Nederlands Tijdschrift Fiscaal Recht* 2009/1982.
\end{itemize}
permanent establishment to the head office will normally\textsuperscript{120} not trigger any withholding taxes; essentially this transaction takes place within a single legal entity. However, if a subsidiary distributes profits to its parent company withholding taxes become due in situations in which a double tax convention or the PSD do not provide for an elimination of these taxes.

Furthermore, at the moment the DWTA ‘65 and its implications are a heavily debated topic in courts due to potential non-compatibility with EU law (this specific element will be analyzed further in chapter 5). Refraining from levying withholding taxes on profit distributions would put an end to these court cases.\textsuperscript{121} Additionally, there is an increasing risk that the amount of dividend withholding taxes levied has to be repaid due to incompatibility of the DWTA ‘65 with EU law. This possibility imposes a high financial risk on the Dutch government.\textsuperscript{122} The amount to be paid by the Dutch government under certain conditions would also include compensation in the form of interest.\textsuperscript{123}

A rather old adagium gives another potential reason to refrain from withholding taxes on dividends: “no taxation without representation”.\textsuperscript{124} The idea behind this saying is that a state can tax those that can influence the tax law. Because a big part of the burden of the dividend tax law is borne by non-residents, this democratic principle is not fulfilled.

3.4 Ideas for reform

Snel\textsuperscript{125} acknowledges the fact that for politicians it will be important that a potential abolition of the DWTA ‘65 would be budget neutral. Consequently, other levies should be increased or the amount of spending by the government should be lowered. Such proposals would normally not be beneficial for politicians during elections. Therefore, Snel suggests different manners to further limit the scope of the DWTA ‘65. First of all, he suggest to refrain from levying withholding taxes in situations in which the foreign company (irrespective of whether it is an EU or non-EU company and irrespective of whether the company is liable to tax), if he would have been established in the Netherlands, would have benefited from the Dutch participation exemption. Second, he would be in favor of giving natural persons living

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\textsuperscript{121} J.W. Rompen, ‘Niet afschaffen van dividendbelasting vormt een steeds groter risico voor Nederland’, \textit{Weekblad Fiscaal Recht} 2013/1009.

\textsuperscript{122} J.W. Rompen, ‘Niet afschaffen van dividendbelasting vormt een steeds groter risico voor Nederland’, \textit{Weekblad Fiscaal Recht} 2013/1009.

\textsuperscript{123} Hof ’s-Hertogenbosch, March 9, 2012, nr. 11/00451, LJN BV9630.


outside the Netherlands the possibility to claim a refund if the amount of dividend taxes due would exceed their income tax liability (calculated as if they are Dutch residents). This could similarly apply to legal persons established abroad.

Another alternative would be to follow the Spanish example.\textsuperscript{126} Based upon the Spanish tax law, dividends distributed from so-called ‘foreign profit’ (this includes profits relating to foreign subsidiaries, receivables on foreign entities and profits relating to foreign permanent establishments or foreign immovable property) are exempted from dividend taxation.

Van der Geld\textsuperscript{127} suggests to grant tax jurisdiction to the situs state, after considering both the corporate income tax and the dividend tax. All in all, dividend taxation should in cross-border situations be seen as an indirect taxation of the shareholder based upon the situs principle. Actually, this justification is similarly applicable to the corporate income tax. Next to that, he is in favor of requiring a sufficient nexus with the Dutch territory to be able to levy a withholding tax on dividends. This sufficient link should be reflected in the fact that the distributed profit has already been subject to Dutch corporate income tax. According to this point of view it is also logical to refrain from levying withholding taxes on dividends which fall under the participation exemption regime.

At this point in time there is no ‘exit tax’ with respect to the DWTA ‘65 when a company emigrates, neither are there dividend tax consequences when a company immigrates to the Netherlands. This provides tax planning opportunities for companies with a huge dividend tax claim. A cross-border merger (potentially fiscally facilitated under the EU Merger Directive\textsuperscript{128}) or a change in the place of effective management of a company are well known possibilities to ‘get rid of’ a dividend tax claim.\textsuperscript{129} If emphasis would be placed on the source of income for dividend tax purposes, a logical development would be the introduction of ‘exit taxes’ for emigration and a ‘step-up’ for immigration.\textsuperscript{130}

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\textsuperscript{128} Merger Directive (1990) 90/434/EEC.
Marres\textsuperscript{131} presented some alternatives for levying withholding taxes on dividends as well. The first alternative, similar to what Van der Geld suggested, implies an exemption for redistributed foreign profits. Furthermore, Marres suggested to extent the exemption of article 4, paragraph 2, DWTA ‘65. Another idea might be to lower the tariff of the DWTA ‘65. Additionally, the NOB has proposed to abolish the DWTA ‘65 for treaty residents. This would limit the scope of the DWTA ‘65 merely to targeting tax avoidance or tax evasion structures.

An additional element which might influence the existing provisions of the DWTA ‘65 are the outcomes from the Action Plan on Base Erosion and Profit Shifting\textsuperscript{132} currently the center of attention at the OECD. This Action Plan aims to address the current flaws in the international tax rules and the threat of “global tax chaos”. In essence, the report is part of the international fight against tax evasion and tax fraud. It has already been suggested in Dutch literature to decrease the exemption from withholding taxes under tax treaties in an attempt to combat the use of hybrid mismatches.\textsuperscript{133}

3.5 Conclusion

Parliamentary history gives no insight on the potential justifications the tax law designers had in mind with respect to levying taxes on dividends. In the literature different reasons and justifications for levying withholding taxes on profit distributions are specified. In a domestic context mainly the budgetary argument seems to be important. Questionable is the estimation of the generated revenues. On the other hand, the potential economic distortions caused by levying dividend taxes seem to be a reason to refrain from levying withholding taxes on profit distributions. These two elements will be further analyzed in chapter 4.

In an international context often reference is made to the principle of source to justify withholding taxes on dividends. Such a levy seems only justifiable if the source of income is indeed in the country which levies withholding taxes. A requirement like that is not part of the DWTA ‘65. However, this principle seems to be accepted internationally. A reason to refrain from levying withholding taxes on dividends in the Netherlands might be found in the potential incompatibility of the DWTA ‘65 with EU law. Chapter 5 will revolve around this issue.

\textsuperscript{133} In the note to: ‘OESO-discussiestuk over het neutraliseren van ‘hybrid mismatches’ in relatie tot “Base Erosion and Profit Shifting” (BEPS) aan het publiek voorgelegd voor commentaar’, \textit{Vakstudie Nieuws} 2014/18.7.
A number of reform ideas have been suggested in the Dutch literature throughout the years. Based upon the following chapters I will conclude which option is in my view preferable.
4. Dividend taxation in an economic perspective

4.1 Introduction

Within the public finance literature there is an ongoing debate regarding to what extent distortions are caused by taxes on dividend distributions. There are two leading views in this respect: the old and the new view. These views, based upon a different starting point, claim a completely opposite effect of dividend taxes. Proponents of the old view believe that imposing a withholding tax on dividend distributions influences economic decisions by companies. In contrast, the new view carries out that under certain conditions no influence of dividend taxes is to be expected.

This chapter revolves around the economic implications that are induced by levying withholding taxes on profit distributions. As concluded in chapter 3, the budgetary argument seems to be the main remaining reason for the Dutch government to levy a withholding tax on dividends. Strikingly in this respect is the fact that the total amount of revenues remains uncertain. First, I will provide an overview of the total estimated amount of government revenues generated by taxing dividends in the Netherlands. The next paragraph of this chapter describes the potential economic distortions caused by the levy. I will further elaborate upon both the old and the new view. In paragraph four the conclusions from empirical studies in three different countries researching the impact of a change in dividend taxation are summarized. Paragraph five describes the conclusions that can be drawn for the Netherlands, and consequently the DWTA ‘65, from the in this chapter discussed literature.

4.2 Tax revenues generated by levying withholding taxes on dividends

According to the last publicly available numbers the tax revenues generated via dividend taxation in 2013 amount to €2.390 million.\textsuperscript{134} This amount partly consists of the prelevy which is eventually credited against (corporate) income taxes payable. Furthermore, to put this number in perspective, the tax revenues from corporate income taxation and value added taxation amount to €12.275 and €43.148 million respectively. The estimated total revenues generated in 2013 via taxation and insurance contributions is €173.433 million. Consequently, without taking into account the amount of dividend tax revenues that reduce (corporate) income taxes payable, around 1,38% of the total 2013 Dutch tax revenues are contributed by the DWTA ‘65.

\textsuperscript{134} Kamerstukken II 2013/14, 33 750, nr. 2, p. 13.
On April 7, 2010 the Tax System Study Committee shared its views on inter alia the future of the Dutch dividend withholding tax law. The Committee estimated the structural net revenues generated by the DWTA ‘65 to be €2,- billion per year. Net revenues in this respect means after deducting the tax administration costs. The further elaboration with respect to the costs relating to the different taxes levied in the Netherlands shows no specific tax administration costs caused by dividend taxation.

Consequently, there seems to be no big difference between the total tax revenues generated by dividend taxation and the net revenues in this respect. Furthermore, no additional explanation of the estimation was provided by the Tax System Study Committee. They expected that the tax revenues would be slightly lower for 2009 and 2010, and potentially the following years, due to the financial crisis.

The Study Committee acknowledged the fact that the impact of the DWTA ‘65 is limited in purely domestic situations. Due to the earlier explained system of dividend taxation in the Netherlands (prelevy for domestic shareholders versus a final levy for foreign shareholders) the net amount of dividend tax revenues is almost solely contributed by foreign shareholders. Those non-residents consist mainly of foreign (portfolio) investors and big listed companies.

The estimation of net revenues of the DWTA ‘65 amounting to €2,- billion per year by the Tax System Study Committee has been criticized by Hofland and Lorié. Based on publicly available numbers they made their own estimation. According to their analysis the net revenues attributable to the DWTA ‘65 should range between €1,1 and €1,2 billion per year for the period 2004 to 2009. In this respect it is important to note that the definition of net revenues according to Hofland and Lorié differs from the one as outlined by the Tax System Study Committee. The former refer with the word net-revenues to the dividend taxes that cannot be credit against (corporate) income taxes payable, whereas the latter reason from the total tax revenues minus the tax administration costs.

135 Studiecommissie Belastingstelsel, Continuïteit en vernieuwing: Een visie op het belastingstelsel, Den Haag: 2010, p. 92. This committee was asked to investigate different scenarios for a possible revision of the Dutch tax system.
### Table 1. Dividends on effects of foreign shareholders and net received dividend tax 2004-2012

<table>
<thead>
<tr>
<th>Year</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividends (euro, million)</td>
<td>6.540</td>
<td>11.150</td>
<td>13.450</td>
<td>16.163</td>
<td>15.246</td>
</tr>
<tr>
<td>Net dividend tax</td>
<td>1.236</td>
<td>1.630</td>
<td>1.855</td>
<td>1.538</td>
<td>1.560</td>
</tr>
<tr>
<td>Net dividend tax/dividends</td>
<td>19%</td>
<td>15%</td>
<td>14%</td>
<td>10%</td>
<td>10%</td>
</tr>
<tr>
<td>Statutory dividend tax rate</td>
<td>25%</td>
<td>25%</td>
<td>25%</td>
<td>15%</td>
<td>15%</td>
</tr>
<tr>
<td>Charging ratio</td>
<td>76%</td>
<td>58%</td>
<td>55%</td>
<td>63%</td>
<td>68%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividends (euro, million)</td>
<td>10.935</td>
<td>11.683</td>
<td>10.691</td>
<td>11.914</td>
<td>11.975</td>
</tr>
<tr>
<td>Net dividend tax</td>
<td>624</td>
<td>843</td>
<td>979</td>
<td>960</td>
<td>1.247</td>
</tr>
<tr>
<td>Net dividend tax/dividends</td>
<td>6%</td>
<td>7%</td>
<td>9%</td>
<td>8%</td>
<td>11%</td>
</tr>
<tr>
<td>Statutory dividend tax rate</td>
<td>15%</td>
<td>15%</td>
<td>15%</td>
<td>15%</td>
<td>18%</td>
</tr>
<tr>
<td>Charging ratio</td>
<td>38%</td>
<td>48%</td>
<td>61%</td>
<td>54%</td>
<td>58%</td>
</tr>
</tbody>
</table>

Table 1 summarizes the paid dividends to foreign shareholders for stock tradable shares in the period 2004-2012. Only the numbers with regards to stock tradable shares are included, due to the fact that dividend taxes are normally in the end mainly levied upon foreign holders of stock tradable shares. Additionally, the net revenues of the total levied dividend taxes on foreign shareholders is included. The

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141 Table 12.4 - 5.2.1 - Uitgaande inkomens - Inkomens uit effecten - Dividen - Publicly available through: [http://www.statistics.dnb.nl](http://www.statistics.dnb.nl) (last viewed on March 14, 2014).


143 Preliminary data.

144 Preliminary data.

charging ratio is calculated by dividing the ‘net dividend tax/dividends’ by the statutory tax rate.

The table shows a few notable elements. First of all, the amount of net dividend tax revenues has decreased a lot over the last years. The main explanation for this decrease can of course be found in the decrease in statutory tax rate in the DWTA ‘65 applicable from January 1, 2007 onwards. However, after the sharp decrease a small increase is again noticeable the last two years of which data is available. Second, the charging ratio is on average, over the period 2003 to 2012, 58%. This 58% charging ratio implies that the rest of the foreign shareholders, thus 42%, are exempted from dividend taxation, receive a tax credit or avoid the levy.

The above data suggest that the net dividend tax revenues for 2012 amount to approximately 960 million euro. The reason for the difference between this amount and the by the Tax System Study Committee estimated €2 billion of dividend tax revenues is twofold. First, due to the financial crisis the dividend tax revenues could have decreased. Second, the calculation presented above aims to provide the total dividend taxes levied that cannot be offset against (corporate) income taxes payable. The Tax System Study Committee gave an overview of the total revenues reduced with the tax administration costs. In my opinion the calculation presented above gives more insights with regards to the effects of the DWTA ‘65 due to the fact that the part of the levy that can be credited would otherwise have been generated under a different name (via the (corporate) income tax). All in all, the exact amount of tax revenues generated by the DWTA ‘65 remains uncertain. Dividend tax revenues amounting to 960 million euro for 2012 contribute 0.56% of the total tax revenues for that year.

For multinational companies the DWTA ‘65 might have a negative impact on the fiscal climate when deciding where to establish a subsidiary. Foreign parties will be more inclined to invest in a country where no withholding tax on dividends is levied. Important in this respect is the fiscal position of the shareholder. If the foreign shareholder can benefit from an exemption of dividend taxes due to for example fulfilling the requirements of the PSD there will, in principle, be no negative influence of the DWTA ‘65. Dutch multinational enterprises see the abolishment of the DWTA ‘65 as an important step in improving

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146 Unfortunately there is no specification of the estimation by the Study Committee available.
149 Except in situations in which the PSD is not applicable, for example due to the November 25, 2013 proposed changes to the PSD with regards to the introduction of an anti-hybrid instruments provision and a General Anti-Abuse Rule. European Commission Proposal COM(2013) 814.
the fiscal climate. The Tax System Study Committee concludes its review of the DWTA ‘65 with the remark that a comparison should be made between the positive effects on the fiscal climate of abolishing the DWTA ‘65, and the negative effects which would be triggered if the rates for other taxes are increased to fill the budgetary gap.

4.3 Dividend taxation in a public finance perspective

4.3.1 The old view

In the public finance literature two different leading views with respect to the taxation of dividends can be distinguished: the old and the new view. According to the so-called old view, first a distinction should be made between equity and debt. Returns in the form of dividends on newly issued shares are in this view compared with the potential returns a shareholder could have generated by investing money in bonds. This comparison makes it possible to determine the costs of capital. In this view the household sector is seen as the provider of equity. The decision of the amount of capital a shareholder is willing to invest is impacted by taxes that are levied. Furthermore, personal taxes on the capital gains of a shareholder are not levied until realization. In contrast, dividends paid out to shareholders are taxed immediately. This induces corporations to generate capital gains for shareholders instead of paying out dividends. Due to the fact that interest payments are deductible from the taxable basis, debt financing is in many cases preferable for corporations. The aforementioned elements influence economic decisions.

Research conducted by Harberger can be seen as the basis for the old view. Dividend taxes are seen as a distortionary element influencing the investment decision of firms. Additionally, the free allocation of capital in the economy might be hindered due to the distortionary effect. New share issuance can be seen as the marginal source of funds upon which firms rely. Withholding taxes on dividend in this view are discriminatory with respect to investments in the corporate sector and drive capital towards the non-corporate sector. In the end this will result in a welfare loss because of an inefficient allocation of resources. Additionally, the founding of new firms might be discouraged. Dividend tax cuts, according

to the old view, stimulate investments due to the fact that the marginal cost of capital is reduced.\textsuperscript{154}

4.3.2 The new view

According to the new view on dividend taxation (outlined by King\textsuperscript{155}, Auerbach\textsuperscript{156} and Bradford\textsuperscript{157}) investment decisions of firms are not necessarily affected by a double tax (dividend taxes in combination with corporate income taxes) on dividend distributions. The new view does not, like the old view, reason from the idea that the source of finance is found in issuing new shares. This old view-assumption does not normally hold in practice, due to the fact that the biggest part of corporate equity capital is contributed via internal investment instead of issuing new shares. In essence, companies do not solely seem to rely on equity generated by shareholders.\textsuperscript{158}

Retained earnings are seen as a replacement of new shares issued as a source of equity finance in the new view. If it is more expensive to issue equity than to retain profits, dividend distributions should always be minimized. A company’s residual cash is used to pay dividends. In this view a change in the tax cost with respect to paying dividends will not affect the company’s decisions.\textsuperscript{159} Because dividend taxes do not become due when earnings are retained, later levies on dividend distributions are seen as a deferred payment of the taxes avoided initially. When viewing these taxes as deferrals, there is no such thing as an additional tax on investment earnings.\textsuperscript{160}

According to the new view, dividend tax cuts under certain circumstances do not influence investment decisions by firms. The reduction in tax does not lower the cost of capital related to marginal investments.\textsuperscript{161} Under the assumption that the dividend tax rate remains constant and investments are at the margin financed by retained earnings, the net costs of the dividend tax to the shareholder is reduced by

the levy at a rate equal to the rate at which the corresponding return will be taxed in the future.162

There is an exception to the aforementioned reasoning (which led to the conclusion that dividend taxes do not affect investment decisions) to the extent that a firm issues new equity. A mature firm with enough retained earnings available would not choose to transfer untaxed capital gains in dividends by exchanging new share issues for retained earnings. With respect to raising new equity capital the dividend tax can affect the investment decisions of a firm and can be seen as distortionary.163 Consequently, the new view puts a clear emphasis on the constant equity finance by using retained earnings versus the primary capitalization of a company.164

4.4 Review of empirical literature

At this point in time no empirical literature with respect to the distortionary implications of dividend taxation has been conducted to study the influence of the DWTA ‘65. However, in other countries the implications of changes in the dividend tax law have been researched. This paragraph outlines research conducted in the United States165, the United Kingdom166 and Norway167. Over the years there has been done a lot of research to analyze the influence of dividend taxes on the financial policy of firms, but most of them are not specifically focused on a certain country. I chose to limit my review to relatively recent and country specific papers describing the impact of dividend taxation. By reviewing the outcomes, the potential implications for the Dutch tax system will be analyzed.

4.4.1 United States

Desai and Goolsbee inter alia researched the influence of the 2003 sharp decrease in dividend tax rate in the United States (hereinafter: US).168 The maximum dividend tax rate for US individuals was decreased

from 38.6% to a maximum of 15%. The argument brought up by proponents of this tax cut was that it would have a positive influence on business investments. It was estimated that the reduction in revenues due to the decrease would amount up to more than hundred billion dollars for the period 2003 until 2008.  

The marginal source of funds available for investments by firms is crucial to be able to determine the impact of taxes on dividends. In general, if investments are financed by retained earnings, levying dividend taxes does not have an impact on the investments conducted by a firm. However, if the marginal source of funds consists of new equity, investment decisions will be influenced by dividend taxes. This is the already explained difference between the old and new view with regards to dividend taxation.

Notwithstanding the high cost associated with the tax cut the evidence shows that the tax cut has little, or even no impact at all, on the cost of capital. This outcome is in line with the new view on dividend taxation. Essentially, the marginal investment incentives of firms are negligible or not at all impacted by the tax cut.

4.4.2 United Kingdom

Research conducted by Bond, Devereux and Klemm suggests that an increase in dividend taxes only in specific circumstances influenced the form in which the payment of dividends was made. The research focused on a change in taxation of company dividends within the United Kingdom (hereinafter: UK). Pension funds and insurance companies managing pension-related assets, who held shares and were established in the UK, were prior to July 1997 subject to a tax system that treated capital gains less favorable than dividend income. With respect to dividends a tax credit was available which provided for a reduction of the personal income tax for shareholders. These tax credits were repaid to the pension funds. A change in tax law in July 1997 made an end to the repayment of the tax credit provided for dividends to pension funds and insurance companies. The taxpayer kept its tax credit, but for the pension fund the

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situation changed considerably. The change in tax law essentially provided for an equivalent treatment of dividend income and capital gains for tax purposes.

UK companies that chose to pay dividends after the reform showed a different behavior than prior to the change. Important in this respect is the fact that the UK provided a specific form in which dividends could be paid out. So-called Foreign Income Dividends (hereinafter: FIDs) contained a tax saving for profits earned by UK multinationals in foreign countries. However, these FIDs were not eligible for a tax credit refund up until the aforementioned change in law in July 1997. The number of firms distributing dividends in the form of FIDs and the proportion of FIDs over total dividends paid rose strongly after July 1997. The authors conclude that the dividend policies of UK pension funds are influenced by the tax reform.\textsuperscript{174}

The next step in the analysis is to see whether the change in tax law affected the size of the dividend distribution or the number of investments. There was a group of firms that switched to paying FIDs after the reform in tax law. This enabled the firms to save taxes. Results show that the level of dividends distributed increased, which indicates that the dividend tax law in the UK influenced the dividend policies of pension funds at least a bit. For the other group no evidence of a change is found. Furthermore, the level of investment is not significantly affected. In general, the researchers conclude that dividend taxes, according to this study, seem to have a limited impact on the level of both investments and dividend payments. These outcomes support the new view on dividend taxation.\textsuperscript{175}

4.4.3 Norway

Norway levies since the beginning of the nineties taxes based upon a dual income tax system. This system replaced a global system which taxed aggregated income from all sources at the same rate.\textsuperscript{176} Labour income and capital income are treated differently in a dual income tax system. Labour income is subject to a progressive tax rate whereas capital is normally taxed at a flat rate. The different treatment of the two sources of income provided incentives for tax payers to reclassify labour income into capital income.

In 2006 the Norwegian tax system was reformed. In an attempt to prevent income shifting, via a reclassification of the source of income, a shareholder income tax was introduced. Alstadsaeter and

Fjaerli\textsuperscript{177} investigated the effects of the introduction of this tax. The dual income tax in Norway provided a tax exemption for dividend receipts via an imputation system. Due to this exemption double taxation of dividends was avoided. The reform imposes a partial double tax on dividends which are paid to domestic shareholders. In the new system only the equity premium is taxed. Any normal returns on shares are tax exempt via the Rate-of-Return-Allowance.

As a response to the change in system companies adjust the timing of their dividend payment. Prior to the reform the pay-outs increased, while they sharply decreased shortly after the reform. There is significant evidence that the timing of dividend payments is affected by the announcement of the future change in tax law. This indicates that the Norwegian companies definitely took the effect of those changes into consideration and that their actions were influenced accordingly.

4.5 Conclusion

The amount of revenues generated via the DWTA ‘65 is, according to the Tax System Study Committee, structural around €2,- billion. According to estimations based on publicly available data, this number is substantially lower and amounts to €960,- million for 2012. The levy contributes 0,56\% of the total revenues generated by the Dutch government via taxation and insurance contributions. The revenues generated via dividend taxation are thus relatively limited, and there are also compliance costs associated with the levy. In fact, research should be conducted to determine to what extent the potential negative influences on the investment climate would outweigh the tax revenues generated by this levy.

The so-called old view with respect to dividend taxation carries out that dividend taxes distort investment decisions of firms. In contrast, the new view does not relate a change in dividend taxes to the investment decisions of firms. The different starting point for both views, new share issuance or retained earnings as a source of financing respectively, are at the heart of this difference in view. Basically, for the DWTA ‘65 and its potential economic distortions it is important to determine which view will most likely apply to the Netherlands. The new view would imply that the economic distortions caused by the current DWTA ‘65 are limited.

The outcome from empirical research conducted in the US and the UK is both in line with the new view. The Norwegian research provides insights with respect to the effect of an announced amendment of the

law on companies’ actions. The timing of dividend distributions is affected by the announced change in tax law. Rather logically, for the Netherlands this would imply that in calculating the influence of a change in the DWTA ‘65 on dividend tax revenues such effect would have to be taken into consideration as well.

The debate within the public finance literature with regards to the potential distortionary implications of dividend taxation is still unresolved. The only way to see the impact for a country is to conduct empirical research. Therefore, to be able to judge what the effect of the DWTA ‘65 is on the decision-making processes of firms, a thorough analysis based on Dutch data would be necessary. All in all, the new view seems to be the leading view the last years, which suggests that dividend taxation is not distortionary for companies already established in a certain country as long as there are enough retained earnings available to finance investments.
5. Dividend taxation in a juridical perspective

5.1 Introduction

The taxation of cross-border dividends is an often recurring topic at the ECJ. From 1983 until 2011 in total 47 out of the 192 completed ECJ court cases dealt with dividends. For these court cases a distinction is made between so-called inbound and outbound dividends. An inbound dividend is a dividend that a resident company receives from a non-resident company. On the other hand, when a resident company distributes dividends to a non-resident shareholder this is called an outbound dividend. If these cross-border dividends, in comparison to purely domestic dividend distributions, are treated less favorable by a MS of the EU this might cause problems under Community law.

As a result of the different judgments by the ECJ, the last years already a number of adjustments to the DWTA ‘65 have been made. For example, the exemption and refund rules have been broadened to include residents of EU- and European Economic Area-countries (hereinafter: EEA) inside their scope. Therefore, the most obvious discriminatory elements of the DWTA ‘65 have been revised at this point in time. An important potential discriminatory element, which has not completely been adjudged yet, is the fact that the DWTA ‘65 serves as a prelevy in domestic situations, whereas for cross-border situations it is a final levy. In the latter situation it depends upon an unilateral relief mechanism of, or a treaty with, the residence state to what extent the levy can be set off against other taxes payable. If the dividend withholding tax levied cannot be offset completely, there exists a difference in treatment compared to domestic shareholders for who the tax is not a final levy. To be able to answer this discussion point, on December 20, 2013 the Dutch Supreme Court asked preliminary questions to the ECJ in three different cases.

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180 At this point in time, the EU consists of 28 Member States: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.
181 Article 4 and article 10, DWTA ‘65.
182 The European Economic Area consists of all EU Member States, Iceland, Liechtenstein and Norway.
184 HR December 20, 2013, nr. 12/03235, 12/02502 and 12/04717.
This chapter will give an overview of the key elements of the three aforementioned court cases, which all deal with outbound dividend taxation. I will focus on these recent court cases, due to the fact that the outcomes of (most of) the older cases have already been implemented in Dutch tax law. Furthermore, I discuss these court cases mainly to give an example of the possible, from an EU law perspective, discriminatory elements that are inherent in the way the system of dividend taxation currently works in the Netherlands.

I will start off with shortly introducing the different court cases. After that I will describe the general framework used to determine whether the DWTA ’65 infringes EU law. I will discuss the questions asked and the potential answers to be expected in this respect. Based upon this overview I will draw my own conclusions by providing a prediction for the answers to be given by the ECJ. The implications for the Netherlands will be discussed in the penultimate paragraph of this chapter. In the fourth paragraph I will summarize my conclusions.

5.2 The Supreme Court asks preliminary questions

A national court can decide to ask preliminary questions to the ECJ if it believes that some elements of EU law require further interpretation. Article 267 of the TFEU provides the legal basis for the preliminary ruling procedure. Whenever a question is raised before any of the courts of a MS, that court has the possibility to request the ECJ to give a ruling if the court of the MS considers that a decision with respect to the question is needed to be able to render a judgment.

In the following paragraphs I will further elaborate upon the three cases currently pending at the Dutch Supreme Court which gave rise to the preliminary questions referred to the ECJ.

5.2.1 Supreme Court December 20, 2013, nr. 12/03235

A bank, established in France, traded in line with its business activities share packages consisting of less than 5% in Dutch listed companies during the years 2000 to 2008. The dividends relating to these share packages were distributed from one company to another; it is thus a case within the scope of the Dutch corporate income tax law. On the dividends received in this respect, a dividend withholding tax at a rate of

\[185\] HR December 20, 2013, nr. 12/03235.
25% was levied until 2007 and from 2007 onwards at a rate of 15% by the Netherlands. The amount withheld can, in theory, not fully be credited against the corporate income tax due in France. This outcome is a result of the fact that there is only a small trading spread with regards to the activities conducted. There was thus not enough taxable income in France to offset the dividend tax withheld. Furthermore, in the year 2008 there were negative results from other transactions, leading to an overall negative balance for the French bank. Surprisingly, the amount of dividend taxes withheld in the Netherlands, according to the judgment, were credited fully in France in the end, except for the taxes withheld in the year in which the French bank was loss making (2008). How this mechanism exactly works is not explained in the court case.

The tax payer claims there is a restriction of the free movement of capital (article 63, TFEU) because of a difference in treatment via the mechanism of a prelevy for domestic shareholders versus a final levy for foreign shareholders. Basically the bank argues that, if he had been a Dutch resident company, the tax burden with regards to the dividend distributions would have been lower than 25% and 15% respectively. To get a clarification from the ECJ in this respect, the Supreme Court decided to ask preliminary questions.

In essence, the Supreme Court would like an explanation with regards to the following topics:
1. Should, while determining whether a dividend tax withheld infringes EU law, the concurrence of the dividend tax law with the corporate income tax be taken into consideration or should solely the dividend tax withheld be the center of attention?
2. When the aforementioned question is answered affirmatively, should relating economic costs be taken into account as well?
3. If the answer to the first question is confirmatory, is it enough to provide for a reduction of dividend taxes at the level of the residence state in line with a tax treaty for the avoidance of double taxation?

The first question relates to the fundamental difference in character of the end result of the levy for domestic in comparison to foreign shareholders. The second question asks for a more detailed interpretation with regards to the system that should be applied according to the ECJ. Furthermore, additional clarification with respect to the potential neutralization of the breach of EU law in the residence state of the shareholder is requested.

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186 On January 1, 2007 the DWTA ‘65 was changed and the applicable rate has been lowered from 25% to 15%.
The other two cases adjudged by the Dutch Supreme Court on December 20, 2013 dealt with Belgium natural persons which have a shareholding in a Dutch company. These cases are within the scope of the Dutch income tax. The dividends received from the Dutch company were subject to a withholding tax of 15%. As a result of Belgium internal law, it was not possible to offset the Dutch dividend tax withheld against the personal income tax that was levied in Belgium. The shareholdings both did not exceed 5%, so the substantial shareholding rules (box 2) were not applicable. Rather, the income, if the shareholders would have been Dutch residents, would have been part of their box 3 income. The fictitious character of box 3 leads to extra difficulties with regards to determining the proper basis for a comparison. The Dutch income tax does not cover income from shareholdings of natural persons that do not reside in the Netherlands and who own shares in a Dutch company that are held as an investment. As such the dividends were not part of the Dutch income of the foreign shareholders for the ITA ‘01 and consequently the dividend taxes withheld could not be credited.

In the first case a resident of Belgium owned shares in three Dutch listed companies in the year 2007. The dividends distributed did not exceed the total fictitious box 3 levy. The tax payer claims a partial reduction of dividend taxes withheld, based upon a comparison between the dividend tax withheld and the amount of income tax payable by a Dutch resident with a similar shareholding. The individual takes the position that, if he would have been a Dutch resident, the final levy with regards to the dividend distribution would have been below 15%.

The Supreme Court essentially asks the following in the first case:
1. Should, to determine whether the freedom of capital is hindered by the dividend tax law, both the dividend tax and the income tax laws be taken into account, in which the latter provides an offsetting possibility for domestic shareholders?
2. When the aforementioned question is answered affirmatively, should, to determine whether the effective tax burden differs, a comparison be made between the dividend tax withheld from the dividend distribution to a foreign shareholder and the amount of fictitious box 3 income?

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187 The amount of taxes payable are not based upon actual income received. In the ITA ‘01 (article 5.2, ITA ‘01) in box 3 a 30% tax on a fixed presumed gain of 4% is levied, which leads to an effective tariff of 1.2%.
188 Article 2.1, part b and article 7.7, paragraph 2, part c, ITA ‘01.
189 HR December 20, 2013, nr. 12/02502.
The second case\textsuperscript{190} is in many respects comparable to the first one. However, the amount of dividend taxes levied was higher than the fictitious levy in box 3. Due to this relatively high dividend, even if the amount of dividend taxes withheld could have been offset against income taxes payable for the box 3 levy, in the end the shareholder would still be in a worse position than shareholders that can completely offset dividend taxes withheld. In this respect the potential neutralization at the level of the residence country of the dividend recipient is important. According to the shareholder, his effective tax burden with regards to the dividend distribution would have been lower if he would have been a Dutch resident tax payer.

The questions asked in the second case are similar in scope as the questions in the first case. Furthermore, with regards to a potential neutralization at the level of the residence state the following additional question was raised by the Supreme Court:

3. If the answer to the first question is confirmatory, can such a potential discriminatory withholding tax be neutralized on the basis of the tax treaty for the avoidance of double taxation with the residence state of the recipient?

5.2.3 Outbound dividend taxation – a framework

The three aforementioned cases clearly have a different scope. The preliminary questions referred to the ECJ are however rather similar. According to Lambooij\textsuperscript{191} three different elements should be addressed to be able to conclude whether or not the DWTA ‘65 infringes EU law with regards to the taxation of these outbound dividends. The first question is whether, solely at the level of the withholding tax, there is a different treatment of resident and non-resident tax payers. This could for example be the case if a dividend distribution to a resident tax payer is exempted from dividend withholding taxes, whereas on such a payment to non-residents a tax is levied. Another discriminatory element could be a difference in withholding tax rate for domestic and cross-border dividend payments. If such a discrimination is currently into place, the law should be changed.\textsuperscript{192} The DWTA ‘65 does not include these kinds of discriminatory elements; a tax at a rate of 15\% is withheld irrespective of the place of residence of the dividend recipient.

\textsuperscript{190}HR December 20, 2013, nr. 12/04717.
\textsuperscript{191}M.V. Lambooij, ‘Discriminerende heffing over dividenden?’, Nederlands Tijdschrift Fiscaal Recht - Beschouwingen 2014/8.
\textsuperscript{192}To be complete, such an infringement could in theory be justified, for example by overriding reasons of public interest (Futura C-250/95, Marks & Spencer C-446/03, Cadbury Schweppes C-196/04 and Thin Cap Group Litigation C-524/04), effectiveness of fiscal supervision (Futura C-250/95), cohesion of the tax system (Bachmann C-204/90, Commission v Belgium C-300/90, Manninen C-319/02, Keller Holding C-471/04 and Thin Cap Group Litigation C-524/04), balanced allocation of taxing powers (Marks & Spencer C-446/03) or the prevention of abusive practices (Marks & Spencer C-446/03, Cadbury Schweppes C-196/04 and Thin Cap Group Litigation C-524/04).
The second matter is the fact that Dutch tax laws give a possibility to credit or refund the prelevy whereas for foreigners this is a final levy. This fundamental difference in system might be seen as an infringement of EU law. Lambooij describes two different points of view which could be defended in this respect.

The aforementioned credit or refund possibility for domestic shareholders and the fact that DWTA ‘65 has the character of a final levy for foreign shareholders, could as such lead to the conclusion that the whole levy for foreigners is discriminatory. This is in line with the view advocated by Korving: the calculation of the total effective dividend tax burden as the basis for comparison. In his view the total tax burden on a dividend distribution in a domestic situation (from the point of view of the source state) should be compared with the total tax burden in a cross-border situation. A higher tax burden in a cross-border situation would lead to the conclusion that the current rules are incompatible with EU law. In a purely domestic situation the effective tax burden would amount to zero under this calculation method; the amount withheld can be set off against (corporate) income taxes payable. In a cross-border situation there would be an effective tax burden of 15%. This clearly would render the conclusion that the current rules infringe EU law. This point of view would probably lead to a necessary abolishment of the DWTA ‘65.

At first sight this outcome seems in line with the ECJ judgment in the case Commission v. Germany. In this case the ECJ came to the conclusion that the difference between a prelevy for domestic situations and a final levy for foreigners is a discriminatory difference. However, the facts in this case were different from the Dutch court cases. Germany levied a withholding tax on dividend distributions irrespective of whether the country in which the receiving party was established was Germany, or any of the EU Member States. The dividends were distributed in intercompany situations although the minimum holding requirement for the PSD to be applicable was not met. For domestic dividend distributions the German law provided an exemption or the possibility to claim a refund at the level of the party that received the dividend distribution, whereas in cross-border situations only via a tax treaty a partial refund of taxes withheld could be claimed. This difference in treatment was found to be incompatible with EU law.

According to the Supreme Court the situation in Commission v. Germany should be distinguished from the situation at hand in the current Supreme Court proceedings, due to the fact that the latter deal with

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194 ECJ October 20, 2011, Case C-284/09 Commission v Germany.
195 HR December 20, 2013, nr. 12/03235, paragraph 3.4.2.
investment dividends instead of intra-group dividends. Korving\textsuperscript{196} sees a difference in situation because in the cases currently pending at the Supreme Court the dividend recipient, if he would have been a domestic shareholder, would have been liable to pay (corporate) income taxes. Under the German laws an exemption or refund system would have been applicable in a similar situation. All in all, the ECJ’s ruling about the German tax system is not one-on-one applicable to the Dutch situation.

Another point of view reasons from the idea that the basis for comparison should be a hypothetical final levy in the source state. In this respect it should be adjudged whether the amount of taxes withheld from foreigners is higher than the effective final levy from domestic shareholders for comparable income (in this case investment dividends).

If the latter point of view should prevail, a third issue has to be solved in order to come to a final conclusion.\textsuperscript{197} Judging whether there are differences could be based solely on comparing tariff differences between the (corporate) income tax law on the one hand and the dividend tax law on the other hand. Another possible calculation manner reasons from the true attributable income to the source state, potentially taking into account other, non-related, income and expenses in the residence state to compare the final source state levy with the final levy for foreign shareholders. This makes it possible to determine in each specific situation whether or not there really is a less favorable treatment.

The first mentioned method in most situations would lead to the conclusion that the final levy for domestic tax payers is higher than the burden for foreign shareholders. A combined levy of dividend withholding taxes and for example corporate income taxes would effectively lead to taxation at a rate of 25%. This is more than the final levy in cross-border situations which amounts to 15%. Under this approach foreign shareholders are not treated less favorably than domestic shareholders and there would thus be no breach of EU law.

However, if the costs that are attributable to a dividend should also be included in the analysis there might be situations in which a discriminatory difference in treatment between domestic and cross-border situations can be found. This is a result of the fact that the gross-dividend is taken as a starting point for the DWTA ‘65, whereas the net-dividend determines the taxable basis for the corporate income tax. Depending on costs attributable to the dividend there might still be a less favorable treatment of foreign

shareholders. The amount refundable would only consist of the difference between on the one hand the dividend taxes as a final levy in cross-border situations and the combined levy of dividend taxes and (corporate) income taxes on the other hand.

A different question is whether there is a breach of EU law at the level of the dividend receiver. This question should be answered by the residence country of the dividend receiver. 198 In general, no neutralization for the dividend withholding tax has to be provided by the country of reception. 199 A country of reception that provides for neutralization of withholding taxes on purely national dividend distributions, should extent this neutralization to intra-EU dividends. 200 If a withholding tax cannot be offset in the country of reception in both domestic and cross-border situations, this is a disparity form the receiving country’s perspective. 201 If this would be the conclusion, the less favorable treatment of the recipient results from the parallel exercise of fiscal sovereignty by two Member States. In essence, it should be adjudged whether the receiver of the foreign dividend is treated less beneficial than a receiver of a domestic dividend distribution in the foreign country. In this situation, it is up to the residence state of the dividend receiver, thus not the source state from which the dividend is paid, to neutralize the dividend tax withheld. However, if there is a similar treatment, EU law does not oblige the country of the dividend receiver to provide the opportunity to set off the foreign withholding tax.

5.2.4 Infringement of EU law?

The answer to the first question in line with the in the previous paragraph discussed framework is rather simple. The Dutch tax law levies a dividend withholding tax at a rate of 15% irrespective of the place of residence of the dividend recipient. Both domestic, foreign portfolio shareholders and natural persons that have a shareholding of less than 5% are subject to this rate as a result of the provision in article 5, DWTA ‘65. In this respect there is no difference in treatment between domestic and foreign shareholders.

In line with other ECJ rulings 202 residents subject to the final levy and non-residents that are solely subject to a withholding tax are in an objectively comparable situation. Wattel concludes that the determination whether or not the DWTA ‘65 is restrictive cannot be based solely on reviewing this law, the (corporate)

199 ECI November 14, 2006, Case C-513/04 Kerckhaert and Morres.
201 ECI November 14, 2006, Case C-513/04 Kerckhaert and Morres.
202 Advocate General Wattel in his Conclusions regarding these three cases refered to Biehl (C-175/88), Commission v. Germany (C-284/09), Tate & Lyle Investments Ltd v. Belgium (C-384/11), Commission v. Finland (C-342/10), Truck Center (C-282/07) and X (Football Club Feyenoord) (C-498/10).
income tax should also be taken into consideration in this respect. This outcome seems rather logical in fact: otherwise non-residents could be treated less favorable after an initial similar levy of a tax, by providing a refund for residents under the final levy. I agree with the assessment basis as advised by the Advocate-General. It would seem like comparing apples with oranges if only the initial rate withheld should be assessed.

After the conclusion that the comprehensive situation should be analyzed, the question is in which situations a breach of EU law can be found. The point of reference should, in my opinion, be the combined dividend and (corporate) income tax levied, taking into account costs that are attributable to the dividend. The Case Bouanich\textsuperscript{203} prescribes a comparison with regards to the final effective tax burden within the same tax, for the same person and with an in the aggregate comparable tax base. In this respect the concrete manner in which taxes are levied seems subordinated to the effective tax burden in the source state. Subjecting non-residents to a final withholding tax whereas residents are subject to a levy of (corporate) income tax is according to the ECJ permissible.\textsuperscript{204} In this approach it depends upon the amount of costs that can be attributed to a dividend distribution if a discrimination is in fact in place.

If this is the outcome, the next question to be answered by the ECJ is whether an ordinary credit provided by the residence state of the dividend recipient, based upon a tax treaty for the avoidance of double taxation, could be enough to justify the infringement imposed by the Netherlands. Such an ordinary credit only provides an offsetting mechanism for the amount that would have been accepted in domestic situations. In a purely national situation a full credit would have been given. In line with the ECJ judgment in the Amurta\textsuperscript{205} case, it seems defendable that a full credit would be required. In this case the ECJ ruled that the breach of EU law could be justified if the discrimination is neutralized under a tax treaty.

As mentioned before, dividend taxes are normally withheld on the gross amount of the profit distribution. Another unresolved question in this respect is whether this taxable basis as such is compatible with EU law. Some authors claim that directly related costs should be deductible from dividend payments in the source state to ensure an equal treatment of foreign dividend receivers and domestic dividend receivers.\textsuperscript{206} According to this point of view, the source state should take into account costs attributable to the dividend distribution.

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\textsuperscript{203} ECJ January 19, 2006, Case C-265/04 Margaretha Bouanich v. Skatteverket.
\textsuperscript{204} ECJ December 22, 2008, Case C-48/07 Truck Center.
\textsuperscript{205} ECJ November 8, 2007, Case C-379/05 Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam.
in order to determine the tax to be withheld on a cross-border dividend distribution.

The ECJ already clarified years ago, with respect to income from employment and services, that a non-resident service provider should be able to deduct related costs in the source state if a resident of the source state would have also had this possibility.\textsuperscript{207} In later case law\textsuperscript{208} the aforementioned principle has been confirmed and specified further. Related costs are the “economically connected business expenses” that are directly linked to the economic activity that generates the taxable income.\textsuperscript{209} “The place and time in which the costs were incurred” is immaterial in this respect.\textsuperscript{210} All the aforementioned cases dealt with active income, so the question is to what extent the cases are applicable to passive income streams. In the Case Bouanich\textsuperscript{211} a withholding tax on a share repurchase was found to be incompatible with EU law. In domestic situations the share repurchase was taxed as a capital gain with deductible acquisition costs. In case of a share repurchase by a non-resident shareholder a withholding tax on the gross dividend was levied. This difference in treatment potentially was found to be discriminatory.\textsuperscript{212} Two letters of the Dutch tax authorities have been published publicly in which they confirmed to accept the net treatment with regards to dividends distributed to foreign portfolio shareholders.\textsuperscript{213} Later on these confirmations have been withdrawn.\textsuperscript{214} According to the Dutch State Secretary of the Ministry of Finance it is not completely clear yet how these situations should be dealt with. In this regard the ECJ judgments are also very interesting, because they might provide more clarity in this respect.\textsuperscript{215}

5.3 Potential implications for the Netherlands

If the ECJ would find a breach with EU law with respect to the treatment of non-resident dividend receivers, companies or natural persons, which have a shareholding in a Dutch company below 5%, this would have a huge impact on the structure and rules of the DWTA ‘65. If the Netherlands wants to continue to levy dividend taxes, something has to be done to be able to neutralize the breach with EU law.

\textsuperscript{207} ECJ June 12, 2003, Case C-234/01 Gerritse.
\textsuperscript{208} Such as ECJ July 6, 2006 Case C-346/04 Robert Hans Conijn, ECJ October 3, 2006, Case C-290/04 FKP Scorpio Konzertproduktionen, ECJ February 15, 2007, Case C-345/04 Centro Equestro da Lezíria Grande and ECJ October 18, 2012, Case C-498/10 X (Football Club Feyenoord)..\textsuperscript{209} ECJ October 3, 2006, Case C-290/04 FKP Scorpio Konzertproduktionen, paragraph 44.
\textsuperscript{210} ECJ February 15, 2007, Case C-345/04 Centro Equestro da Lezíria Grande, paragraph 25.
\textsuperscript{211} ECJ January 19, 2006, Case C-265/04 Margaretha Bouanich v. Skatteverket.
\textsuperscript{212} It was up to the national court of Sweden to determine whether Bouanich was in fact taxed more heavily.
Lambooij\textsuperscript{216} for example suggests to implement a refund system for non-resident EU dividend receivers.

The three court cases deal with situations within Europe. In the ruling Commission v. Germany\textsuperscript{217} the ECJ considered that article 40 of the EEA-Agreement should have the same legal scope as the almost identical provision of article 63 TFEU. The ECJ thus does not see a reason why their judgments with respect to the freedom of capital should not be applied in a similar manner to situations involving EEA-countries. This broadens the scope of the implications that the outcome of the ECJ ruling regarding the preliminary questions might have.

Like already mentioned in paragraph 3.3, under certain conditions the amount to be repaid if a breach of EU law is found includes compensation via interest.\textsuperscript{218} To determine the total financial consequences for the Netherlands if a comparison has to be made between the amount payable as a result of the Dutch (corporate) income tax act with the final levy for foreign shareholders, it is very important to what extent financing and other costs relating to the dividend should be taken into consideration. If the Netherlands would be obliged to extent the “net-treatment” to foreign shareholders the financial impact might be substantial. This treatment would provide tax planning opportunities to erode the taxable basis of the DWTA ‘65.

Another way to proceed could be to refrain from levying withholding taxes completely. How should the government deal with the financial gap resulting from this potential change in the tax law? Important to keep in mind in this respect is the fact that the abolition probably also has a positive influence on the total amount of tax revenues generated in the Netherlands due to its positive impact on the fiscal climate.\textsuperscript{219}

\section*{5.4 Conclusion}

This chapter revolved around three recent court cases in the Netherlands, in which the Supreme Court decided to ask preliminary questions to the ECJ. The essential issue in this respect is the question whether differences arising due to the fact that the DWTA ‘65 serves as a prelevy for domestic shareholders and a final levy for foreign shareholders should lead to the conclusion that the law is incompatible with EU law. The Dutch Supreme Court asks the ECJ to give guidance at which level the comparison should be made.

\textsuperscript{216}M.V. Lambooij, ‘Discriminerende heffing over dividenden?’, \textit{Nederlands Tijdschrift Fiscaal Recht - Beschouwingen} 2014/8.
\textsuperscript{217}ECJ October 20, 2011, Case C-284/09 Commission v Germany, paragraph 96.
\textsuperscript{218}Hof ’s-Hertogenbosch, March 9, 2012, nr. 11/00451, LJN BV9630.
\textsuperscript{219}J.W. Rompen, ‘Niet afschaffen van dividendbelasting vormt een steeds groter risico voor Nederland’, \textit{Weekblad Fiscaal Recht} 2013/1009.
When solely taking into consideration the tariff of the DWTA ‘65 non-resident and resident shareholders are treated completely the same. The DWTA ‘65 does not prescribe different rules for domestic and for foreign tax payers. As such, the DWTA ‘65 cannot be seen as discriminatory.

However, the point of reference could be a comparison between the effective tax burden of non-resident and resident shareholders with regards to dividend distributions. In this assessment manner the effective tax burden on the dividend distributions would be 0% in domestic situations (due to the prelevey mechanism), whereas the effective tax burden in cross-border situations would be 15%. This would mean that the current rules are incompatible with EU law and adaptations would be necessary in this respect.

From a third point of view, it could also be necessary to compare the combined dividend and (corporate) income tax levied. The combined levy of the DWTA ‘65 and the ITA ‘01 or CITA ‘69 will in many cases be higher than the final levy in cross-border situations. This is the case if you compare the normal Dutch levy, for example 25% for the corporate income tax, with the dividend taxes withheld at a rate of 15% in cross-border situations. Depending upon the costs that can be attributed to the dividend, foreign shareholders might still be treated less favorable. For natural persons normally the amount of dividend taxes withheld are lower than the amount of income taxes relating to the shareholdings that form part of the box 3 income. If the domestic shareholder can get a refund in this respect, a foreign shareholder is in a less favorable position. Both in situations involving natural persons and in inter-company situations only the difference between the combined domestic tax burden and final levy in cross-border situations is potentially refundable in this view. In line with EU case law this third approach has my preference. As such, a comparison should be made between the dividend tax levied as a final levy for foreigners and the hypothetical (corporate) income tax taking into account to the dividend attributable costs.

Irrespective of the eventual outcome of the rulings by the ECJ, in this chapter I gave an example of one of the potentially non-compatible elements currently in place within the DWTA ‘65. More fundamentally, the difference between the pre- and final levy system is inherent to the DWTA ‘65 in its current form. An abolition of the DWTA ‘65 would of course put an end to this fundamental difference. If the dividend tax law would have to be changed to end this difference in treatment substantive adjustments would be required.
6. Conclusion and recommendations

6.1 Conclusion

From an economic perspective there seem to be no clear reasons to either maintain or refrain from levying withholding taxes on dividends. One of the reasons for the Dutch government in favor of retaining the DWTA ‘65 in its current form is the budgetary argument. In my opinion an uncertain amount cannot serve as a convincing argument in this respect. Furthermore, there are also administrative costs related to the DWTA ‘65 both for companies and the tax authorities. With regards to the Dutch fiscal climate and in that respect the initial choice of a firm for the Netherlands, the influence of the DWTA ‘65 cannot be measured precisely. However, probably no one will argue that the levy provides benefits in this respect. On the other hand, in line with the new view on dividend taxation, the distortionary implications of the DWTA ‘65 seem limited for companies already located in the Netherlands, especially when there are sufficient retained earnings that can serve as a source to finance investments.

From a juridical perspective, in my opinion the principle of source cannot serve as a justification for the DWTA ‘65 in its current form due to the fact the DWTA ‘65 does not require a link between the income producing activity and the possibility to levy withholding taxes on dividends.

Apart from that, the Dutch government clearly runs a risk with regards to the manner dividend withholding taxes are currently levied in the Netherlands. The fundamental difference in the way resident and non-resident shareholders are essentially taxed does not create an equal level playing field for both parties. This is not in line with the ideal of an internal market within the EU. In my view the comprehensive (corporate) income tax burden (while taking into account costs that are attributable to the dividend) should be compared with the final levy for foreigners in this regard. A comparison based upon these grounds would, depending on the amount of costs attributable to the dividend, potentially render the judgment that the current rules are incompatible with EU law.

It is not completely clear what the basis of assessment for the potential inconsistency with EU law will be and therefore it is difficult to predict what the answer of the ECJ to the discussed preliminary questions will be. However, this is not the first time the potential incompatibility of the current Dutch dividend tax rules is the center of attention. If the ECJ would not find a breach in this case, most likely this issue will come back again later. Therefore, in my opinion a fundamental change in the DWTA ‘65 is necessary.
All in all, in my view the Dutch government should refrain from levying a withholding tax on dividends. There are no convincing justifications for the DWTA ‘65 as it is currently into place. This conclusion is based upon the fact that there are no principle based reasons to levy a withholding tax. Furthermore, the revenues are uncertain and the levy negatively influences the fiscal climate in the Netherlands. Next to that, the levy is not in line with the principle of source and potentially incompatible with EU law.

6.2 Recommendations

Especially with regards to the potential incompatibility with EU law, which is inherent in the way dividend taxes are currently levied in the Netherlands, I believe a reconsideration for the Dutch government would be advisable. Due to the fundamental difference in treatment between resident and non-resident shareholders I recommend the Dutch government to refrain from levying withholding taxes on dividends in its current form irrespective of the outcome of the ECJ’s judgments in the currently pending court cases. If the ECJ comes to the conclusion that the current rules infringe EU law, huge adaptations would be necessary to be able to comply with the boundaries as set by the ECJ. A refund system for foreigner shareholders would be required in this respect.

In my opinion the different proposals described in paragraph 3.4 can improve the DWTA ‘65 but are no real solutions because they do not address the fundamental questionable elements of the DWTA ‘65. To be able to determine the best way to full the budgetary gap it would be advisable to conduct a thorough analysis of the impact of an abolition of the DWTA ‘65 and for example a higher corporate income tax rate.

Irrespective of the eventual outcome of the preliminary questions asked by the ECJ there is another element within the DWTA ‘65 that certainly requires attention in my view. The DWTA ‘65 does not require a link between the income producing activity and the possibility to levy withholding taxes on dividends. In fact, the levy could thus apply to profits that have no link with the Netherlands whatsoever. This is not in line with the principle of source and should be changed.

Furthermore, under the new view there are no distortionary effects of dividend taxation on economic decisions. As such, there would be no reason to abolish the DWTA ‘65. However, this view has both proponents and opponents, so this conclusion cannot be easily drawn. In fact, to be able to get a good insight in the potential economic distortions caused by the DWTA ‘65 country specific empirical research would be necessary.
6.3 Summary

The DWTA ‘65 prescribes a levy at source with regards to profit distributions, profit-sharing certificates and profit participating loans. The one liable to pay the tax differs from the company required to withhold the tax. Irrespective of the place of residence of the dividend receiver a tax at a rate of 15% is levied upon distributed profits. Normally, dividend withholding taxes are neutralized in purely domestic situations in the Netherlands. However, this is not always true in cross-border (intra-EU) situations. The mechanism applicable for Dutch shareholders differs fundamentally from the mechanism used for foreign shareholders: a prelevy versus a final levy.

In this thesis I gave an overview of the different reasons that are mentioned to levy, or the refrain from levying, withholding taxes on dividends. Parliamentary history gives no insights with regards to the underlying ideas that are at the heart of the DWTA ‘65. In the literature different, mainly practical rather than principle based, reasons to levy a withholding tax on dividends are mentioned. None of these reasons are very convincing in my view. After an initial discussion of the different reasons pro and con the current Dutch dividend tax law I assessed the validity of certain arguments in more detail.

One of the main reasons for the levy is the budgetary argument: the fact that revenues are generated by the DWTA ‘65. According to my calculations 0.56% of the total revenues from taxation and insurance contributions generated by the Dutch government in 2012 is contributed by the tax on dividends. On the other hand, there are administrative costs that relate to the levy and the fiscal climate is affected by the levy. The economic distortions induced by the tax for firms currently established in the Netherlands might be limited in line with the new view on dividend taxation.

A potential reason to refrain from levying withholding taxes on dividend distributions can be found in the fact that the system currently applicable causes problems with regards to the alleged inconsistency with EU law. The ECJ imposes boundaries on the possibilities for the Netherlands to levy taxes on dividends via its judgments. The Dutch Supreme Court for example recently submitted preliminary questions to the ECJ in three distinct cases. Although the facts of the different cases are rather different, the scope of the question asked is comparable. The essential question is whether the DWTA ‘65 in its current form imposes a restriction on the free movement of capital. These court cases are not the first and will probably not be the last cases that deal with this topic.
All in all, I found no justifications for the DWTA ‘65 in its current form. Therefore I recommend to refrain from levying withholding taxes on dividends. A less drastic approach would be to adapt the current system. A refund system for foreign shareholders should then probably be implemented in order to comply with the rules as set out by the ECJ. Furthermore, in my opinion a link between the source of income and the Netherlands should be required as well to be able to levy withholding taxes on profit distributions.
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