

Colombia and the Netherlands signed a double tax treaty

On February 16, 2022, Colombia and the Netherlands signed a double tax treaty (DTT). Please also see the [previous announcement](#) by Atlas in this respect.

Now that the text of the DTT has been published, we can update you as follows.

Permanent Establishment (“PE”)

Unlike most Dutch and Colombian tax treaties, the DTT includes a very extensive PE provision. In particular, the service PE stands out and is recognized when an enterprise furnishes services through employees or other engaged personnel (for the same or connected project) for periods aggregating more than 183 days within any 12-month period.

The dependent and independent agent definition is in line with the latest OECD and UN definitions and includes persons that play the principal role leading to the conclusion of contracts.

From the Colombian perspective, the DTT includes an atypical provision that includes activities carried out for 30 days or more days in any 12 months in the territorial sea of the State or in other areas beyond and adjacent to the territorial sea within which the state exercises sovereign rights.

Dividends

A 0% withholding tax rate has been agreed for dividends paid to a recognized pension fund. Further, a 5% withholding tax applies for dividends to companies that hold at least 20% of the capital in the paying company (throughout a 365-day period that includes the day of the payment of the dividend). In all other cases, the dividend withholding tax rate is 15%. These limits do not reduce the recapture tax that Colombia can impose on the distribution of dividends made out of profits that were not taxed at the corporate level.

Interest

The DTT provides for a 0% withholding tax rate for certain interest payments (e.g. payments involving the Government of one of the contracting states, political subdivision or local authority thereof, central bank, financial institutions, pension funds, and other specific payments). Besides, a 5% rate has been agreed for interest paid in connection with a loan granted by a financial institution for infrastructure projects with a term of at least three years. In all other cases, a 10% withholding tax rate is in place.



Royalties

A withholding tax of 5% applies for royalties for the use or the right to use industrial or scientific equipment. For all other royalties, the rate will be 10%. For the sake of completeness, we note that the royalty definition (like other Colombian tax treaties) does not cover technical services, technical assistance or consultancy services.

Capital gains

In most DTTs, the taxing rights on capital gains realized on the disposal of shares are allocated to the resident country of the alienator. It is therefore good to realize that under the DTT between Colombia and the Netherlands, capital gains from the alienation of shares of a company that is a resident of the other country may also be taxed in the source state. This may be the case if, during the 365 days preceding the alienation, the resident held 20% or more of the company's capital. However, this taxation should not exceed 10% of the net amount of such gains.

Capital gains realized on the disposal of shares (or comparable interests, such as interests in a partnership or trust) may be taxed in the resident country if, at any time during the 365 days preceding the alienation, the shares derived more than 50% of their value directly or indirectly from immovable property.

Income from employment

The DTT includes the 183-days rule on income from employment, which should be applied in any twelve-month period commencing or ending in the fiscal year concerned in accordance with the OECD model convention.

Pensions

Following with the Dutch tax treaty policy, pensions may be taxed in the source country. In this respect, the treaty differs from the OECD model convention, which provides that pensions may be taxed in the resident country.

Anti-abuse provisions

The DTT contains a comprehensive limitation-on-benefits-provision and a principal purpose test to prevent the treaty from being used to avoid taxation. This provision allows for denying treaty benefits if a company funnels funds through the Netherlands or Colombia to lower its tax burden. The dividend, interests and royalties provisions also contain specific anti-abuse rules that require the payee of these items to be its beneficial owner.

Closing remarks

The introduction of the DTT between the Netherlands and Colombia is a very welcome development that is expected to advance mutual investments between the two countries.



The Netherlands is the first country Colombia has made arbitration agreements with. This ensures that any dispute on the presence of double taxation can be submitted to a permanent group of experts if Colombia and the Netherlands fail to resolve it. In case of an impasse, this designated group of experts may take a binding decision. For Colombia, this supposes a constitutional challenge, as the Colombian courts have been traditionally reluctant to accept arbitration in tax matters.

The DTT shall be subject to an approval process in both countries. In Colombia, it must be approved by the Colombian Congress and pass the constitutionality trial before the Constitutional Affairs Court. In the Netherlands, ratification will take place via the Second and First Chamber of Parliament. Once the procedures above have been exhausted, the countries will proceed to exchange the respective diplomatic notes, reporting that they have completed the required internal procedures. We estimate that this process may take around two years.

To date, Colombia has signed DTTs with 19 countries, 12 of which are currently in force. The Netherlands has a more extensive DTT network and counts over a hundred DTTs. Currently, the DTT with Chile, Cyprus and Colombia are subject to the process parliamentary approval before they will enter into force.

Further developments will be reported as they occur.

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