Shell’s Unification in 2005 and the Dutch Dividend Withholding Tax

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1. INTRODUCTION
The recent Dutch government’s announcement to abolish dividend tax from 2020 has caused a stir in Dutch society. Never before has a tax policy proposal been so controversial.1

Obviously, there are a number of reasons for this controversy. One of them is the impression that the Netherlands has yielded to years of lobbying by two British/Dutch multinationals. From the recently published internal dividend tax memos drawn up by officials of the Ministry of Finance, it can be derived that in recent years there have been various discussions at official and political level with both Unilever and Shell about the dividend tax they regard as problematic.2 The memos mention that Unilever’s and Shell’s share issues differ in one key respect: Unilever has a dual listed company structure, while Shell has a single parent company structure with two classes of shares. This share structure was set up by Shell in the context of the unification in 2005, in which the British parent company and the Dutch parent company were merged under one central – Netherlands-based – parent company. The straightforward purpose of creating the share structure is to prevent Dutch withholding taxation on dividends paid to former shareholders in the British parent company. The share structure, which is referred to as the dividend access mechanism, turns out to have become an important incentive for the lobby by Shell to abolish the existence of dividend withholding taxation in the Netherlands. At a public hearing held by the Dutch Parliament at the end of 2017, Shell stressed its interest in abolishing the dividend tax as follows: ‘Dutch dividend withholding tax has brought considerable complexity to our capital structure, complicates major strategic transactions such as acquisitions, and hinders us in the internal financing of our dividend and the purchase and issue of own shares.’3

Now that Shell seems to be a key player and stakeholder in relation to the proposed abolishment of the Dutch dividend withholding tax, Shell’s dividend tax position deserves a closer look. In a settlement agreement (tax ruling) concluded between the Dutch tax authorities and Shell (on 26 October 2004, and subsequently amended on 25 April 2005 and 9 November 2015), the tax authorities confirmed that no Dutch dividend tax is due on the dividends paid out on the class B shares via the dividend access mechanism. In this article, it will be analysed whether refraining from dividend tax is in accordance with the Dutch Dividend Withholding Tax Act 1965.4 The tax ruling issued by the tax authorities to Shell is, like any other individual tax ruling in the Netherlands, not public.5 It should be stressed that the analysis is exclusively based on public sources, including the articles of association of the companies concerned and the deed of the trust in force. The creation and operation of the dividend access mechanism can be determined with a great deal of detail on the basis of those public sources. This detailed determination seems sufficient to examine the dividend access mechanism for tax purposes. Unlike in the case of corporate income tax, for example, the taxable event of the dividend tax is fairly straightforward. However, it cannot be ruled out that other non-public details played a role, if not a decisive role, in the tax autho-

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1 The plan to abolish dividend tax is part of the coalition agreement of 10 Oct. 2017 between four political parties, namely VVD (conservative liberal party), CDA (Christian democratic party), the D66 (social liberal party) and the CU (socially conservative Christian democratic party).

2 Finally, in 2017, the Dutch State Secretary for Finance asked his officials to investigate ways of solving Shell’s and Unilever’s ‘equity problems’. The memos are included in Dutch Parliamentary Papers II, 2017–2018, 34 700, no. 58 (Appendices).


5 A request under the Dutch transparency legislation for (partial) disclosure of the settlement agreement between the Dutch tax authorities and Shell was rejected by the District Court of Amsterdam on 1 Nov. 2007, no. AWB 05-3577 WOB, on the grounds of the economic interests of the State. The Dutch Ministry of Finance has not published in a decree or otherwise any approval for a situation comparable to the dividend access mechanism.


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2. THE UNIFICATION OF SHELL IN 2005 IN A NUTSHELL

The complex share structure was created by Shell as a result of the unification of the Shell group in 2005. This unification put an end to the dual-listed company structure that has existed since 1907, in which the Dutch parent company N.V. Koninklijke Nederlandsche Petroleum Maatschappij (hereinafter: Koninklijke Olie) held 60% and the British parent company The ‘Shell’ Transport and Trading Company plc (hereinafter: Shell Transport) held 40% of the shares in the group companies. This structure with two listed parent companies, each with its own management, came under fire in the sequence of the 2004 oil reserve scandal, which attracted a great deal of media attention. This scandal then formed the prelude to a radical change in the group structure. In the same year, the Boards of Koninklijke Olie and Shell Transport agreed on a unification procedure, which resulted in an implementation agreement in the spring of 2005 under which Koninklijke Olie and Shell Transport would be placed under one new central parent company, Royal Dutch Shell (single parent company structure). It had already been agreed in the unification protocol – presumably because of its sensitivity – that the new parent company would have an legal form according to UK company law (plc), but would have its residency for tax purposes in the Netherlands.

Unification was effected by means of two share mergers:
- The shareholders of Koninklijke Olie exchanged their shares for class A shares in Royal Dutch Shell following a public offer; and
- The shareholders of Shell Transport exchanged their shares – by means of a scheme of arrangement under English company law – for class B shares in Royal Dutch Shell.

The figure below shows the situation before and after unification:

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6 In this article, the following questions will not be addressed (1) whether the tax authorities were authorized to conclude the settlement agreement in view of the requirements of private and administrative law, (2) whether the settlement agreement is (un)valid on the basis of contract law, (3) the amount of any budgetary loss for the Dutch treasury and (4) whether there is unlawful state aid granted by the Netherlands to Royal Dutch Shell within the meaning of the TFEU.

7 This structure was based on a joint venture agreement between Koninklijke Olie and Shell Transport concluded in 1907.

8 In 2004, Shell was found to have overestimated its oil and gas reserves by 20%; see Ch. E. Honée, Reserves bij de corporate governance structuur van Shell? [Reserves in Shell’s Corporate Governance Structure?] 108 (Ondernemingsrecht 2004), for a reconstruction of the turmoil.

9 See M. C. M. Brandjes & J. Vegter, Een Koninklijke Plc Royal Dutch Shell [A Royal Plc Royal Dutch Shell], NJB 2006/7, blz. 370.

10 See about the unification protocol of 28 Oct. 2014 and the implementation agreement of 18 May 2005 extended Ch. E. Honée, De Koninklijke is niet meer: lang leve Royal Dutch! (?) [The Royal is No Longer. Long Live Royal Dutch! (?)] 153 (Ondernemingsrecht 2005).

11 For a notion of this sensitivity, see Honée, supra n. 10, para. 2.
Shortly after the unification, a number of reorganizations were carried out that are not relevant to the analysis in this article. For example, the cross-links (60%:40%) between Koninklijke Olie and Shell Transport in the group companies have been cleared up. In addition, Koninklijke Olie merged into the group company Shell Petroleum NV (hereinafter Shell Petroleum) with the aim of eliminating minority shareholders who had not responded to the public bid.12 At present, Royal Dutch Shell holds all the shares in Shell Petroleum13 and Shell Petroleum in turn holds all the shares in Shell Transport. It goes without saying that the aim of the unification operation to create a transparent and simple capital and management structure has only been partially achieved. In order to prevent the former shareholders of Shell Transport from being confronted after the unification operation with the levying of Dutch dividend withholding tax on the dividends received by them on the class B shares in Royal Dutch Shell, a complex dividend access mechanism was set up. As explained in section 3 below, the trust shown in the figure has a certain role within that mechanism.

It should be acknowledged that the agreement reached between Shell and the Dutch tax authorities on the tax treatment of the dividend access mechanism was reached in a turbulent period for the Shell group, in which various interests were at stake and played a role in the background. For example, a confrontation with the Dutch dividend tax would probably have made Shell Transport shareholders less inclined to agree to a unification operation whereby the head office would be located in the Netherlands. In response to recent media attention in the Netherlands for Shell’s dividend tax position, Shell’s Dutch CEO Mrs. Van Loon stated categorically and unreservedly that without the tax ruling, the company would simply not have chosen the head office location to be based in the Netherlands.14

According to Mrs. Van Loon, the consequence would have been that the Netherlands would have lost tax revenue on the class A shares as well as direct and indirect employment. She added that the settlement agreement between the Dutch tax authorities and Shell in 2004 was ‘a good deal’ for the Netherlands. However, it should be stressed that these kind of interests are not relevant to the application of tax laws and regulations, which is why they are not included in the analysis below.

12 This squeeze-out merger has been given a venomous corporate tail in the court ruling of Hof Amsterdam (Dutch Enterprise Chamber) on 13 Dec. 2005, no. 1852/05, JOR 2006, at 64; see S. Bartman, A. F. M. Doresteijn & M. Olaerts, Van het concern [About Groups of Companies] 86 (Kluwer, Deventer 2006).
13 This made it possible to form a fiscal unity for Dutch corporate income tax purposes between Royal Dutch Shell and Shell Petroleum.
15 See Art. 12(2)(b) of Shell Transport’s Articles of Association.
16 Initially, an absolute maximum payment of EUR € 3.3 billion per annum was applicable, but this maximum was removed from Shell Transport’s Articles of Association in 2009. The idea behind this (initial) cap may have been to limit the tax free distribution of dividends through the access mechanism to some kind of (deemed) ‘normal’ or ‘standard’ annual profit capacity of Shell Transport at the time of unification in 2005. However, such a maximum is not relevant for a review of the dividend access mechanism for tax purposes. Following the acquisition of British Gas in 2016, a relative ceiling was introduced; see s 3.2.
17 See Art. 12(2)(c), (d) and (f) of the Articles of Association of Shell Transport.
18 See Art. 12(2)(d) of the Articles of Association of Shell Transport.
19 See Art. 12(3) of the Articles of Association of Shell Transport.
Royal Dutch Shell and a trustee,\textsuperscript{20} the primary object and purpose of the trust is for the trustee, in short, to receive as a trustee for the class B shareholders by the trustee the (super) dividend on the dividend access share in Shell Transport, followed by the payment of this (super) dividend to the class B shareholders in Royal Dutch Shell in proportion to their shareholding in Royal Dutch Shell.\textsuperscript{21} For this purpose, the Trustee will hold the (super) dividend received on the dividend access share in Shell Transport on trust for the class B shareholders in Royal Dutch Shell in accordance with their respective holdings of class B shares in Royal Dutch Shell.\textsuperscript{22} The trust deed explicitly states that the trustee undertakes that it will pass on the (super) dividend received on the dividend access share to the class B shareholders in Royal Dutch Shell.\textsuperscript{23} In addition, it is stated in the trust deed that all amounts payable to the class B shareholders shall be paid mutatis mutandis in accordance with the provisions of the Articles of Association of Royal Dutch Shell as if a payment out of the trust to a class B shareholder were a dividend on the class B shares.\textsuperscript{24} Furthermore, the trust deed stipulates that class B shareholders in Royal Dutch Shell have not been granted any direct rights vis-à-vis Shell Transport. For example, class B shareholders cannot enforce the payment of a dividend declared by Shell Transport on the dividend access share. Such right shall be reserved solely to the trustee.\textsuperscript{25}

The part of the dividend access mechanism included in the Articles of Association of Royal Dutch Shell entails for a class B shareholder that the entitlement to be paid a dividend declared by Royal Dutch Shell is automatically reduced by the amount that has been paid by the trustee to the class B shareholder.\textsuperscript{26} This reduction facility is the only exception to the otherwise equal treatment of the class A shareholders and class B shareholders in the Articles of Association of Royal Dutch Shell.\textsuperscript{27} In addition, the board of Royal Dutch Shell may terminate the reduction facility at any time, with the result that no longer any distinction between the class A shares and class B will exist and thereafter the shares will be known as ordinary shares.\textsuperscript{28} It is, for the record, pointed out that no distinction is made between class A shares and class B shares for the purposes of determining the dividend.

According to Royal Dutch Shell’s Articles of Association, the dividend is declared by the shareholders at a maximum of the amount recommended by the board, whereby all dividends are declared and paid in proportion to the capital paid up on the shares.\textsuperscript{29} All this applies without distinction between the (holders of) class A shares and the class B shares. The only difference between the two share classes is therefore that a class B shareholder sees his right to payment of the dividend vis-à-vis Royal Dutch Shell reduced by the amount he received through the dividend access mechanism. If the amount received were lower than the dividend declared by Royal Dutch Shell, Royal Dutch Shell would continue to have a full and unconditional obligation to pay the remainder to the class B shareholder, in which case this would be subject to dividend tax.\textsuperscript{30}

\textbf{3.2. The Settlement Agreement Between the Dutch Tax Authorities and Shell}

Pursuant to a settlement agreement (tax ruling) concluded between the tax authorities and Royal Dutch Shell (on 26 October 2004, and subsequently amended on 25 April 2005 and 9 November 2015), dividends received by holders of class B shares under the dividend access mechanism are not subject to the Dutch dividend withholding tax. The documentation underlying the unification operation shows that the objective is to maintain the tax treatment of the dividends received by Shell Transport shareholders prior to the share merger with Royal Dutch Shell.\textsuperscript{31} The unification documentation states, as a general remark, the following: ‘To facilitate the preservation of the current tax treatment of dividends paid to Shell Transport Ordinary Shareholders (…), dividends to be received by holders of B Shares are intended to have a UK source. This will be achieved by paying dividends to which they are entitled through the Dividend Access Mechanism.’ The Dividend Access Mechanism has been approved by the Dutch Revenue Service.\textsuperscript{32} Specifically with regard to the settlement agreement the following is mentioned: ‘The Dividend Access Mechanism has been approved by the Dutch Revenue Service pursuant to an agreement (settlement agreement) with Royal Dutch Shell and Royal Dutch dated 26 October 2004 as supplemented and amended by an agreement between the same parties dated 25 April 2005. The agreement states, among other things, that dividend distributions paid on the Dividend Access Share by Shell Transport will not be subject to Dutch dividend withholding tax provided that the Dividend Access Mechanism is structured and operated substantially as set out above.’\textsuperscript{33}

\textsuperscript{20} I.c. Computershare Jersey Ltd.
\textsuperscript{21} See Art. 4.1 of the trust deed (2005).
\textsuperscript{22} See Art. 3.2 of the trust deed (2005). It should be noted that the trustee holds the dividend access share, excluding the (super) dividend received on it, on trust for a wholly-owned subsidiary of Royal Dutch Shell. See Art. 3.1 of the trust deed (2005). This wholly-owned subsidiary is SST (DAS Beneficiary) Ltd.
\textsuperscript{23} See Art. 3.3(A) of the trust deed (2005).
\textsuperscript{24} See Art. 13.2 of the trust deed (2005).
\textsuperscript{25} See Art. 4.2(A) of the trust deed (2005).
\textsuperscript{26} See Art. 5(A) of the Articles of Association of Royal Dutch Shell.
\textsuperscript{27} See Art. 4 of the Articles of Association of Royal Dutch Shell.
\textsuperscript{28} See Art. 5(E) of the Articles of Association of Royal Dutch Shell. In the unification documentation, Shell noted that the board may terminate the dividend access mechanism, e.g. as a result of a relevant change in tax law.
\textsuperscript{29} See Arts 115 and 117 of the Articles of Association of Royal Dutch Shell.
\textsuperscript{30} See Art. 5(B) of the Articles of Association of Royal Dutch Shell.
\textsuperscript{31} See Royal Dutch Offer Document and Listing Particulars (2005), at 74.
\textsuperscript{32} Ibid., at 13.
\textsuperscript{33} Ibid., at 72.
It also follows from the unification documentation that the Dutch tax authorities have imposed restrictions on the issue of new class B shares. For example, it is noted that new class B shares will only be issued after consultation with the Dutch tax authorities.\footnote{Ibid., at 17, 32, 48 and 419.}

The amendment to the settlement agreement on 9 November 2015 relates to the acquisition by Royal Dutch Shell of the shares in BG Group plc (British Gas). This take over took place in 2016, with Royal Dutch paying the purchase price (in part) with newly issued class B shares. The existing dividend access mechanism for the class B shares has been extended to allow the dividends to be paid through this mechanism to be taken from British Gas’ profits. In concrete terms, British Gas’s has issued a dividend access share with a nominal value of twenty-five British pennies to the trustee that already holds on trust, for the class B shareholders, the dividend access share in Shell Transport.\footnote{See Art. 149 of the Articles of Association of British Gas.} In addition, the board of British Gas has been given discretionary powers to determine that – by way of (super) dividend – British Gas’s profits are distributed on the dividend access share. It has also been arranged that the trustee will pass on the dividend received on the British Gas dividend access share to the class B shareholders in Royal Dutch Shell.\footnote{See inter alia, Art. 2.1(B)(ii) of the amended trust deed.} It has not been changed that the right of a class B shareholder to payment of the dividend declared by Royal Dutch Shell will be reduced by the amount that the trustee has channelled to the class B shareholder in question.\footnote{This is done in proportion to the amount of class B shares before and after the acquisition of British Gas by Royal Dutch Shell; see Art. 149(4) of the Articles of Association of British Gas.} Following the extension of the dividend access mechanism to British Gas, this reduction facility embedded in the Articles of Association of Royal Dutch Shell, is automatically applicable to the dividends paid by the trustee to British Gas. It is worth noting that the dividend to be declared on the dividend access share in Shell Transport and British Gas respectively is capped at a pro rata share of the total dividend declared by Royal Dutch Shell on the class B shares over a given period.\footnote{See Art. 5(A) of the Articles of Association of Royal Dutch Shell.} In the offering circular, Royal Dutch Shell states that the Dutch tax authorities have confirmed, among other things, that dividend payments by Shell Transport and British Gas on the dividend access shares are not subject to Dutch dividend withholding tax.\footnote{See Royal Dutch Shell’s issue prospectus of 22 Dec. 2015, at 361.}

4. \textbf{EXAMINATION OF THE DIVIDEND ACCESS MECHANISM FOR PURPOSES OF THE DUTCH DIVIDEND WITHHOLDING TAX ACT 1965}

4.1. Reference Framework

For the examination of the dividend access mechanism for tax purposes, it is important that the taxable event of the Dutch Dividend Withholding Tax Act 1965 refers to proceeds from shares in an entity established in the Netherlands.\footnote{See Art. 1(1) and 7(2) of the Dutch Dividend Withholding Tax Act 1965.} The person who – directly or by means of certificates – is entitled to such proceeds is deemed to be the taxpayer, while the entity that pays the proceeds must withhold the dividend tax.\footnote{Retroactive to 1946; see Art. 16 of the Dutch Dividend Withholding Tax Act 1965.} As Royal Dutch Shell is a company resident for tax purposes in the Netherlands, the question to be answered is whether the dividends distributed by means of the dividend access mechanism should be regarded as proceeds of the class B shares in Royal Dutch Shell, to which the class B shareholder is entitled either directly or by means of certificates. In this context, it should be pointed out that, in the case of an international share merger in which a Dutch company acquires a foreign company, the occurrence of a Dutch dividend tax claim on the existing profit reserves of the foreign company is prevented by Article 3A(1), second sentence, of the Dutch Dividend Withholding Tax Act 1965. In short, this provision classifies for Dutch tax purposes the share premium account, which occurs after an international share merger at the level of the acquiring Dutch company (also referred to as merger reserve), as paid-up capital for tax purposes. In the case of the unification of the Shell group, this merger reserve amounts to the difference between the nominal value of the class B shares issued and the fair value of the shares in Shell Transport. The same applies to the extent that Royal Dutch Shell acquired British Gas in 2016 with the issue of its own shares. Under certain conditions, this merger reserve can be repaid to the shareholder free of tax (see section 4.2).

For the sake of clarity, it is noted that although Article 3a(1), second sentence, of the Dutch Dividend Withholding Tax Act 1965 was incorporated on 1 January 2008,\footnote{Retroactive to 1946; see Art. 16 of the Dutch Dividend Withholding Tax Act 1965.} there is no doubt that immediately after its unification in 2005 – and therefore also in the years 2006 and 2007 – Royal Dutch Shell could potentially already benefit from a step-up of the paid-up capital for tax purposes. Approximately two weeks before the shares in Royal Dutch Shell were first traded on the financial markets, the Dutch Ministry of Finance approved in a Decree of 30 June 2005, no. DGB2005/3722M, V-N 2005/33.17 that in the event that the shares in a foreign company are paid-up on shares in a Dutch company, the fair value of the former shares at the time of the share merger will unconditionally qualify as paid-up capital for tax purposes, except in cases of abuse.\footnote{This approval granted by the tax authorities also applied to share mergers of the past, in so far as the merger reserve is still present.} The strict conditions that applied under the predecessors of
4.2. Do the Amounts Paid Out Through the Dividend Access Mechanism Qualify as Proceeds of the Class B-shares?

Art. 115/117 of the Articles of Association of Royal Dutch Shell entitles class B shareholders to the dividend in proportion to the nominal paid-up capital on their class B shares. Subsequently, pursuant to Article 5(A) of the Articles of Association of Royal Dutch Shell, the right of a class B shareholder to be paid any declared dividend is reduced by the corresponding amount that the class B shareholder receives through the dividend access mechanism. As will be explained below, there is no reasonable doubt that the amounts paid to the class B shareholders by means of the dividend access mechanism can be considered as proceeds from the class B shares in Royal Dutch Shell, to which the class B shareholders are directly entitled. In particular, these amounts qualify as indirect profit distributions, which are for Dutch tax purposes treated as taxable proceeds from shares on an equal footing with direct profit distributions. A classic example of an indirect distribution of profits concerns the figure where a parent company has a distribution made by its own (sub)subsidiary to its own shareholders. In the case of Royal Dutch Shell, such an indirect distribution of profits is in fact made through the dividend access mechanism. In order for an indirect distribution of profits to be made via a (sub)subsidiary, it is necessary for that distribution of profits to be attributable to a controlling parent company. In other words: The parent company must be in a controlling position to claim the profit reserves of its (sub)subsidiaries, but refrains from doing so for the benefit of its own shareholders. On the basis of the following facts and circumstances, among others, the (1) the dividend distribution by the (sub)subsidiaries Shell Transport and British Gas to the trust and (2) the subsequent transfer by the trust to the class B shareholders are attributable to Royal Dutch Shell (see section 3.1):

- Royal Dutch Shell holds, with the exception of a dividend access share, (in)directly all the shares in both Shell Transport and British Gas;
- The dividend access shares held by the trust do not carry voting rights and are only entitled to a (super) dividend from Shell Transport and British Gas if and to the extent that the board of Shell Transport and the board of British Gas respectively has exercised its discretionary power to decide so;
- The trustee is obliged to pass on the (super) dividend received on the dividend access shares to the B-shareholders in proportion to their shareholding;
- Royal Dutch Shell, as the holder of more than 75% of the shares in Shell Transport and British Gas, has the power to change the rights attached to the dividend access share at any time;
- The board of Royal Dutch Shell has the power to terminate the dividend access arrangements at any time, after which the class B shares will no longer be class B shares but will be labelled together with the class A shares as ordinary shares. One consequence of such termination is that the board of Shell Transport and the board of British Gas will no longer be able to allocate a (super) dividend on the dividend access shares.

The fact that the payment of a (super) dividend on the dividend access shares depends on the use of discretionary decision-making power by the boards of Shell Transport and British Gas does not prevent the attribution to Royal Dutch Shell. After all, it is Royal Dutch Shell that has control over whether or not the dividend access mechanism should be continued. By not terminating the dividend access mechanism, Royal Dutch Shell (intendedly) allows the profits of its (sub)subsidiaries Shell Transport and British Gas to flow via the dividend access mechanism to the class B shareholders rather than to itself. In addition, it is Royal Dutch Shell that activates the discretionary power every year. The boards of Shell Transport and British Gas can only exercise their authority to declare a (super) dividend on the access shares within the framework of a dividend resolution taken by Royal Dutch Shell as an (in)direct shareholder of Shell Transport or in British Gas respectively, and on the condition that Royal Dutch Shell has declared a dividend on the class B shares for the same period. By accepting (year after year) that the two British (sub)subsidiaries use the dividend access mechanism to withdraw profit reserves in favour of the class B shareholders, Royal Dutch Shell distributes (year after year) an indirect dividend to the class B shareholders.

It is pointed out that the essential characteristic of the taxable event of the Dutch Withholding Tax Act 1965 according to Dutch case law, namely a transfer of assets from the company to

45 Including the condition that for a tax free repayment of the share premium, always first the ‘old’ foreign profit reserves must be distributed by the foreign subsidiary to the Dutch parent company. In this contribution the question is ignored whether the step-up in case of an international share merger fits in with the system of dividend taxation (in case of a national share merger no step-up applies): for fierce criticism, see the advice of the Dutch Council of State in Parliamentary Papers II, 2005–2006, 30 322, no. 5 and J. C. K. W. Bartel, Belastingaspecten van de opbrengst van (beurs)aandelen [Tax Aspects of the Proceeds of (Stock) Shares] 73–74 Fiscale Monografie nr. 29 (Kluwer, Deventer 2014).
46 See Art. 3(1)(a) of the Dutch Dividend Withholding Tax Act 1965.
47 See R. P. C. W. M. Brandsma, Cursus Belastingrecht (Dividendbelasting) [Tax Law Course (Dividend Tax)] para. 2.0.2. B.c2 and P. G. H. Albert & E.C.C.M. Kemmeren, Middelbare winstuitdelingen [Indirect profit distributions], MBB, 1990, no. 9, at 230–236.
49 Partly because of this control, it is not relevant that the share of dividend access was created strictly speaking just before the unification transaction (see s. 2).
50 The general meeting of shareholders of, e.g. Shell Transport must therefore first determine the total dividend, after which the board of Shell Transport has the discretionary power to allocate a (certain part of) this profit on the dividend access share; see Arts 12 and 94 of the Articles of Association of Shell Transport.
the shareholder, also arises in this case.\textsuperscript{51} Typical of an indirect profit distribution is the indirect decline in assets that occurs at the level of Royal Dutch Shell as a result of Shell Transport and British Gas distributing a (super) dividend – via the trust – to the class B shareholders. The indirect decline in assets consists of the value reduction of the (in)direct participation of Royal Dutch Shell in Shell Transport and British Gas.\textsuperscript{52} Royal Dutch Shell de facto waives its right to the proceeds of these participations for the benefit of its shareholders. As a result, the profits of the two British (sub)subsidiaries are transferred to the class B shareholders as such. The right of class B shareholders to receive a proportionate share of the (super) dividend paid by Shell Transport and British Gas to the trust, must simply be considered as part of their entitlement to the proceeds of the class B shares in Royal Dutch Shell.\textsuperscript{53} For example, the right can only arise to the extent that Royal Dutch Shell has declared a dividend on the class B shares, the right replaces the payment of the dividend by Royal Dutch Shell and the right cannot be traded separately from a class B share. Moreover, no right has arisen either of the class B shareholders or of the trust in respect of the distribution of profits by the British (sub)subsidiaries. The payment of a (super) dividend by the British (sub)subsidiaries depends entirely on the discretionary power of the board of the British (sub)subsidiaries, which can be abolished at any time by the board of Royal Dutch Shell. Neither a class B shareholder nor the trust has a conditional or unconditional right to a payment from the British (sub-) subsidiaries.\textsuperscript{54} Logically, there is no corresponding obligation on the part of the British (sub)subsidiaries either. Finally, it is technically relevant to determine when the taxable event occurs, i.e. the indirect distribution of profits by Royal Dutch Shell. This moment can be set at the moment when Shell Transport and British Gas make the (super)dividend available on the dividend access shares.

4.3. What If Royal Dutch Shell Treats the Amounts Paid Out Through the Dividend Access Mechanism as Repayments of Paid-in Share Capital for Tax Purposes?

The outcome of the examination in section 4.2 that there is no reasonable doubt that the amounts paid out through the dividend access mechanism on the class B shares qualify as indirect profit distributions by Royal Dutch Shell, obviously raises the question whether the non-taxation agreed upon in the settlement agreement is in accordance with Dutch tax law. It is repeated at this point that the tax agreement between the Shell Group and the tax authorities does not form part of the public domain, so it is not known why, and under what conditions, the Dutch tax authorities have confirmed that the withholding of dividend tax is not required. One possibility could be that in the settlement agreement it is agreed that Royal Dutch Shell will treat the amounts paid out through the dividend access mechanism as a partial repayment of paid-up capital for tax purposes. Such an agreement would mean that there is a natural maximum to the possibility of making payments without withholding dividend tax via the dividend access mechanism, i.e. the total amount of paid-up capital that is recognized for tax purposes including the so-called merger reserve (see section 4.1).\textsuperscript{55} The possibility to tax-free repay paid-up capital is a direct consequence of the basic concept underlying the Dutch Dividend Withholding Tax Act 1965, according to which only the distribution of profits is taxed (and not a capital repayment). It should be noted that Royal Dutch Shell's annual reports do not refer to the amount of capital paid-up for tax purposes, so that a possible decrease in this aggregate cannot be publicly traced.\textsuperscript{56}

However, it is doubtful whether a treatment of amounts paid out through the dividend access mechanism as tax-free capital repayments from the merger reserve would be in line with the Dutch Dividend Tax Act 1965. Article 3(1)(d) of the Dutch Dividend Withholding Tax Act 1965 imposes the following two strict conditions on the use of the possibility to make a tax-free distribution by means of a repayment of capital: (1) a resolution of the general meeting of shareholders to make such repayment and (2) an amendment to the articles of association reducing the nominal share capital by the same amount.\textsuperscript{57} Thus, under Dutch tax law, only a tax-free repayment of 'officially' paid-up nominal capital is permitted. The fact that a repayment of capital without following this two formal route, leads to taxation has been explicitly accepted by the Dutch legislator.\textsuperscript{58} According to parliamentary papers, the formal route was introduced to prevent a practice whereby a company repays capital instead of distributing a taxable dividend, while this capital repayment is perceived as a dividend from the perspective of society.\textsuperscript{59} Longstanding Dutch case law strictly adheres to these two conditions. It is settled case

\textsuperscript{51} For this characteristic see already the decision of the Dutch Supreme Court 18 Feb. 1959, no. 14 763, BNB 1959/124.

\textsuperscript{52} See the decision of the Dutch Supreme Court of 14 Mar. 1979, no. 19 023, BNB 1979/153 for such an indirect decline in assets.

\textsuperscript{53} See the decision of the Dutch Supreme Court of 14 Mar. 1979, no. 19 023, BNB 1979/153, in which the Dutch Supreme Court even seems to regard the subscription rights as part of the rights by virtue of the shares.

\textsuperscript{54} The only thing the class B shareholders have (through the trust) is a bare expectation that a distribution of profits will be obtained from the British (sub)subsidiaries.

\textsuperscript{55} For the record, it is noted that reducing the share premium reserve is in any event an obvious course of action to prevent Royal Dutch Shell from making a tax-free capital repayment in the future that corresponds to the same profit reserves that can already be distributed untaxed through the dividend access mechanism.

\textsuperscript{56} Incidentally, more Dutch listed companies have failed to disclose the share premium recognized for tax purposes, see Bartel, supra n. 45, at 301.

\textsuperscript{57} The strict conditions do not apply if there are no net profits (zuivere winst).


\textsuperscript{59} A comparison can be made with the duck test: if something looks like a duck, swims like a duck and looks like a duck, then it is probably a duck.
law, for example, that a tax-free repayment of the share premium under Article 3(1)(d) of the Dutch Dividend Withholding Tax Act 1965 is only possible if the share premium is first converted into nominal share capital. In the case of a Dutch public limited liability company, the Dutch Supreme Court rejected a (practical) approach permitted by a lower court, whereby, in short, a tax-free payment from the share premium reserve was also allowed if the premium reserve was reduced but in the company’s books. For Royal Dutch Shell this means that because of its English legal form (plc) it can only make a tax-free payment from the merger reserve if under English company law the merger reserve is converted into formal share capital followed by a formal capital repayment. The possible fact that this kind of capital reduction under the English Companies Act 1985, which is known to be time-consuming and costly, is not in practice the preferred option, does not seem to alter this.

5. CONCLUSIONS

This article has explored Shell Group’s dividend access mechanism from public sources and has examined the implications for the Dutch Dividend Withholding Tax Act 1965. The core of this mechanism, which was established in the context of the unification operation in 2005 and expanded in the context of the acquisition of British Gas in 2016, is that a class B shareholder in Royal Dutch Shell does not receive the dividend declared by Royal Dutch Shell from Royal Dutch Shell, but by means of a trust, which in turn receives it from (sub)subsidiaries Shell Transport and British Gas. The conclusion is that not levying dividend withholding tax on dividends paid through the dividend access mechanism seems to be contrary to the Dutch Dividend Withholding Tax Act 1965. It is not reasonable to doubt that the amounts paid through the dividend access mechanism could be considered as proceeds from the class B shares in Royal Dutch Shell under Article 2 and Article 3(1)(a) of the Dutch Dividend Withholding Tax Act 1965. The dividend access mechanism is in fact a classic example of an indirect profit distribution where a parent company has a profit distribution made by its (sub)subsidiary to its own shareholders. Although the functioning of the dividend access mechanism and its embedding in the corporate structure of the Shell group can to a large extent be derived from public sources, it leaves open the possibility that there may be other non-public facts and circumstances that could lead to a different conclusion. In particular, it seems that these should be facts and circumstances on the basis of which – despite the statutory (power) relationships within the group – Royal Dutch Shell would not (anyway) have the possibility of allowing itself access to the profit reserves of its British (sub)subsidiaries. Such other facts and circumstances have so far not been suggested in public debate and literature or otherwise.

Although the settlement agreement concluded between the Dutch tax authorities and Shell is not in the public domain, this article has taken the opportunity to speculate on one condition that could have been included in it. The assumed condition would be that the payments through the dividend access mechanism would be treated as tax-free capital repayments from the merger reserve at the level of Royal Dutch Shell. This merger reserve consists of the share premium paid up by class B shareholders as a direct result of the share merger in 2004. Obviously, the consequence of such a condition would be that the tax-free distribution of dividends through the dividend access mechanism would be limited in absolute terms to the amount of this merger reserve. However, given the strict conditions for a tax-free capital repayment under the system of the Dutch Dividend Tax Act 1965, it can be seriously doubted whether the treatment as a repayment of capital could (still) justify not levying Dutch dividend tax on the dividends distributed through the dividend access mechanism.

61 See the decision of the Dutch Supreme Court 14 Jan. 1959, no. 13 775, BNB 1959/81.
62 Due to creditor protection, a payment to a shareholder of any paid-in share capital under UK company law requires, inter alia, a court order, see ss 135 et seq. of the Companies Act 1985.
63 In Shell’s official response to the media reports about the tax ruling, Shell does not discuss the content of the questions raised (see www.shell.nl/media/2018-media-releases/shell-response-to-reporting-on-dividend-tax-and-tax-agreements.html).