

Topics covered by this Newsletter

This edition of the Oil & Gas Newsletter addresses the 2012 Tax Bill.

Introduction

In our [Oil & Gas Newsletter of 16 September 2011](#), we addressed the main legislative amendments as proposed in the 2012 Tax Bill, which was published on 15 September 2011. Today, the Second Chamber of Dutch Parliament approved the 2012 Tax Bill with certain amendments. The 2012 Tax Bill still needs to be approved by the First Chamber of Dutch Parliament before its entry into force as per 1 January 2012.. However, no further amendments are expected.

In this edition of the Oil & Gas Newsletter, we summarize the most important amendments in the area of corporation tax that are of relevance to the E&P industry. In that light, the following topics are addressed below.

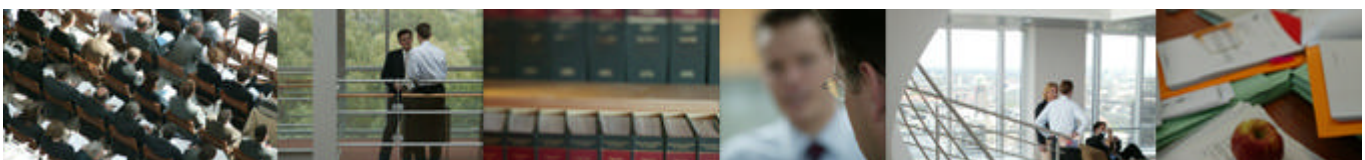
1. Further restriction of interest deduction in respect of loans used for leveraged acquisitions
2. Elimination of immediate deductibility of non-Dutch permanent establishment losses
3. Introduction of research and development deduction

As mentioned in the Oil & Gas Newsletter of 16 September 2011, the 2012 Tax Bill includes certain other amendments in relation to corporate taxation (i.e. corporation tax and dividend tax), such as the following topics

- (a) Limitation of taxation of non-Dutch resident entities with a so-called 'substantial interest' in a Dutch resident entity
- (b) Anti-abuse provision to subject certain distributions by Dutch cooperatives to dividend tax
- (c) Extension of dividend tax refunds to qualifying non-EU portfolio investors

As it is unlikely that such amendments will have a material bearing on many parties in the E&P industry, we do not address such amendments in further detail in this Oil & Gas Newsletter. For more information regarding these proposals, we refer to our [general Tax Flash](#) (you may use the hyperlink or visit our website at www.loyensloeff.com).

Finally, in paragraph 4 we briefly touch on the termination of the Depreciation-at-Will (DAW) regime that applied in 2009, 2010 and 2011.



1. Further restriction of interest deduction in respect of loans used for leveraged acquisitions

The 2012 Tax Bill further restricts the limitation of interest deduction in respect of loans (whether third-party loans or related-party loans) taken up to acquire a (Dutch) target company in situations where the interest on the acquisition loan is applied to erode the Dutch tax base of the target company. In particular, the following situations are affected:

- (i) The target company is included in a corporation tax consolidation (fiscal unity) with the acquirer, and
- (ii) The target company enters into a legal (de)merger with the acquirer as a result of which the acquisition loan and the assets of the target company are held by the same entity.

Interest deduction is limited to the amount of the profits of the (fiscal unity of the) acquirer excluding profits of the target company. The limitation only applies to the lower of (a) annual interest expenses (on acquisition debt) in excess of the amount of the 'own profits' of the acquirer plus a further (deductible forfait) amount of EUR 1,000,000 and (b) annual interest expenses (on acquisition debt) to the extent of excessive acquisition debt. It is noted that the method for determining the excessive acquisition debt differs from the method as included in the initial 2012 Tax Bill as published on 15 September 2011. Rather than annually applying an equity:debt ratio test of 1:2 on the taxpayer on a tax consolidated basis, as was originally proposed, it is now proposed to apply a more 'transaction based' test to determine whether or not the acquisitions of a particular year are financed with excessive debt. For more detailed information on this topic, we refer to our [general Tax Flash](#).

Grandfathering applies for leveraged acquisitions that resulted in the inclusion of the Dutch target company in a fiscal unity (or a legal (de)merger) with the acquirer before 15 November 2011.

Impact on E&P industry

In general, the limitation of a deduction of interest expenses in relation to 'take-over holdings' could be of importance for Dutch-based (E&P) companies (Acquirer) that acquire Dutch-based companies (Target) and whereby after the acquisition, the Target will be included in a fiscal unity (or whereby, for example, the Target will be merged into the Acquirer). The specific impact on the E&P industry will be limited, as the fiscal unity regime does not apply for State Profit Share (SPS) purposes.

2. Elimination of immediate deductibility of non-Dutch permanent establishment losses

The 2012 Tax Bill amends the method for the avoidance of international double taxation for qualifying foreign permanent establishments (PEs). The proposal as now adopted by the Second Chamber of Parliament does not differ from the proposal as laid down in the initial 2012 Tax Bill. The main characteristics were summarized in the previous edition of our Oil & Gas Newsletter. For your convenience, however, we include such summary below.



Under the current rules, a taxpayer's Dutch taxable base in principle includes its worldwide profits, which includes profits attributable to a PE. The resulting Dutch corporation tax could – by virtue of tax treaties or unilateral measures – be subject to relief for international double taxation for qualifying PEs, generally through a (pro-rata) tax exemption. As a result of the principle of taxation on a taxpayer's worldwide profits, losses of PEs could be immediately set off against (other) profits of the Dutch taxpayer (albeit that such losses are subject to future recapture if the PE becomes profitable).

The 2012 Tax Bill changes the tax treatment of PEs and aims to curb that losses of PEs could be set off against profits of the Dutch home offices. Based on that principle, the profits of PEs would be excluded from the Dutch taxable basis (object exemption). An exception to the object exemption applies if a taxpayer entirely ceases its activities in the PE country if and to the extent that the activities overall have resulted in a loss (PE liquidation losses) (comparable to the deductibility of a liquidation loss on a participation).

The 2012 Tax Bill includes various transitional rules, including the rule that existing obligations to recapture PE losses that have been deducted from the Dutch taxable base need to be recaptured before the object exemption can be applied.

Impact on E&P industry

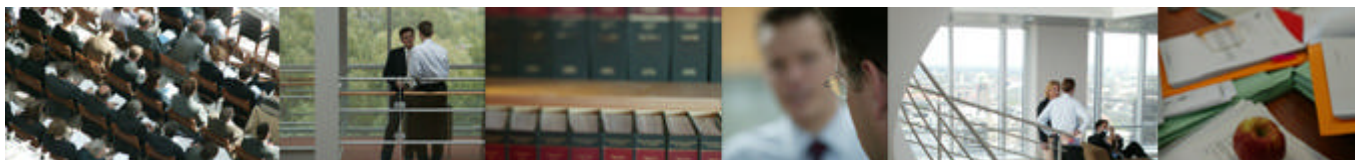
Under the current rules for the avoidance of double taxation, E&P companies with both Dutch activities and foreign PE activities are able to offset their foreign (exploration) costs against Dutch taxable income until the moment that the foreign PE becomes profitable. Under the amended rules, such E&P companies will only be able to offset foreign losses if the foreign activities are unsuccessful and the PE is terminated. As a result of the amendment, the timing benefit of the current system will be abolished. For E&P companies with merely foreign activities the introduction of the measure will have no material impact.

3. Introduction of research and development deduction

The 2012 Tax Bill does not yet include details on the tax incentive for investments in research and development (the so-called RDA). The details will be set out in a Ministerial Decree, the final version of which is anticipated to be released before the end of 2011. However, since the release of the previous edition of our Oil & Gas Newsletter, some more information has become available. In brief, the RDA will be determined as the product of the so-called RDA-base and the RDA-percentage. The RDA-base will comprise the R&D expenses – other than wages – and R&D investments. The RDA-percentage depends on the budget that will be made available in a given year. As such, the percentage will vary over time. For 2012, the RDA-percentage is expected to be set at 40%. It is anticipated that the percentage will increase over the coming years, but this is still to be confirmed.

Impact on E&P industry

As a result of the above mentioned method for determining the RDA, the actual benefit for a corporation taxpayer will be the product of the RDA-base, the RDA-percentage and the corporation tax rate.



Taxpayers that are subject to SPS will equally benefit from the RDA, as the RDA is not taken into account for the computation of the 'fictitious' corporation tax that is deductible for SPS purposes.

4. Termination of the DAW regime

As a measure to counter the economic crisis, Dutch tax law allowed the depreciation-at-will for certain investments made in 2009 and 2010 (subject to certain conditions and restrictions). Such DAW regime has been extended to 2011. The 2012 Tax Bill did not propose a further extension of the DAW regime. However, in the past week, a majority of the Second Chamber of Parliament carried a motion to extend the DAW regime to 2012. The State Secretary of Finance responded that the extension of the DAW regime was not possible for budgetary reasons and that, therefore, he did not intend to adopt such motion. The 2012 Tax Bill as now adopted by the Second Chamber of Dutch Parliament does not provide for an extension of the DAW regime. It is recommended to consider whether qualifying investments can be made before year-end to benefit from the current DAW regime.

Should you wish to receive more detailed information regarding any of these topics, please do not hesitate to contact any of the members of the Loyens & Loeff Energy Team.

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