

### Topics covered by this Newsletter

This Newsletter addresses the following topics:

- a. Improvement of the depreciation-at-will regime;
- b. Amendments to social security regulations; and
- c. EU carbon taxation.

### Introduction – General elections

Last week, general elections were held in the Netherlands. Over the weekend, VVD-senator Uri Rosenthal was appointed as *informateur* to investigate the possible coalitions to form the government. The votes are widely spread over the parties, which makes it difficult to predict the outcome of the formation of the government. Therefore, for now the impact of the elections on the energy industry remains uncertain.

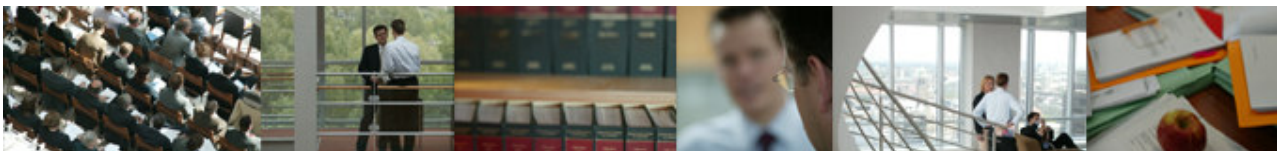
In particular, the question arises whether the elections will have a bearing on certain amendments to the corporate tax system as contemplated by the Dutch State Secretary of Finance. As we indicated in our Oil & Gas Newsletter of December 2009, the State Secretary of Finance indicated to consider introducing a measure which entails that losses of a foreign permanent establishment are no longer immediately deductible. Instead of an immediate deduction against Dutch source taxable profits, any net loss incurred in respect of a foreign permanent establishment would only be deductible upon the termination of such permanent establishment. The State Secretary of Finance installed a study committee (i.e. the Study Committee Tax System) to review the Dutch corporate tax system. In April, last, the Study Committee published a report regarding their findings. In such report it was noted that the Study Committee supports the intention as expressed by the State Secretary of Finance. The limitation on deductibility of foreign branch losses could especially have an adverse impact on the E&P industry. At this stage, it is uncertain whether a new government will pursue the same amendments.

In addition to the above deliberations, in this edition of our Oil & Gas Newsletter we would like to inform you about other recent legislative developments that may be of relevance to the E&P industry.

### Improvement of Depreciation-at-Will Regime

As part of the anti-crisis measures introduced by the Dutch government earlier, the depreciation-at will (“DAW”) regime applies for investments made in 2009 and 2010. Recently, the flexibility of the DAW regime was further improved. Under the DAW regime as it applied until recently, taxpayers were allowed to depreciate qualifying investments made in 2009 or 2010 over a period of two years, up to a maximum of 50% of the invested amount in the year of the investment and 50% in the subsequent year. Furthermore, a second limitation applied in that the amount of the DAW in the year the investment was contracted, was limited to the amount actually paid, in the event that the investment was not yet taken into use in that year.

The changes to these limitation can be best described by way of an example. Therefore, let's assume that a taxpayer concludes an agreement for the construction of an installation in 2010. The installation will first be taken into use in 2011. In 2010, the taxpayer will only pay 20% of the total amount of the investment in the installation. The remaining 80% of the investment will be paid in 2011.



The DAW regime only allows the taxpayer to depreciate in 2010 50% of the investment, up to a maximum of the amount that is actually paid in that year (in this example: 20%). Until recently, the amount of the depreciation in 2011 was limited to 50% of the investment as well. As a result, in the example, the taxpayer could only depreciate 20% in 2010 and 50% in 2011, despite the fact that the full investment was paid by the end of 2011.

Pursuant to the recent amendments, the amount of the DAW in the year after the investment (i.e. 2011) is no longer limited to 50% of the investment. Under the amended DAW regime, the taxpayer is allowed to depreciate in 2011 the full amount of the investment, to the extent it has not been depreciated in 2010 yet.

We welcome this amendment. Given the nature and the amounts of investments typical for the E&P industry, the improvement to the DAW regime may be a beneficial feature of Dutch corporation tax law for this industry. It should be noted that the DAW regime also applies to the computation of the depreciation for state profit share purposes, as in the Mining Act reference is made to the relevant articles of the Dutch 1969 Corporation Tax Act.

## **Amendments to social security regulations**

### *New European Social Security Regulation*

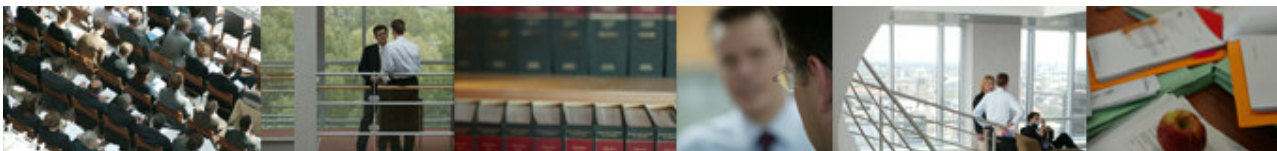
As of 1 May 2010, a new European social security regulation (EC Regulation 883/2004) entered into force. The relevant regulation replaces EC Regulation 1408/71. These regulations appoint the social security legislation that is applicable to an employee. Similar to the former regulation, the new regulation generally provides that a person is covered by the social security legislation of the country in which he works. However, two main differences between the former regulation and the new regulation should be noted.

1. A person that falls within the scope of the EC-regulation will only be covered by one social security system within the EU. Under the former regulation, it was conceivable that more than one social security system applied.
2. Under the former regulation, an employee working in more than one EU member state for one employer was covered in his home country, if he worked in his home country for at least one day per month. The threshold of merely one day made the regulation prone to arbitration. Under the new regulation, that same employee is covered by the social security legislation of his home country only if he carries out substantial work (at least 25%) in his home country.

The new regulation includes transitory rules, including a grandfathering period that applies in certain circumstances. For example, a grandfathering period of 10 years applies to all situations where EEA member states are involved. Furthermore, under certain circumstances, the former EC-regulation remains applicable for a 10 year grandfathering period, unless the employee elects to be covered by the new regulation. It should especially be noted that the date of the election may have an impact on the retroactive effect of the election. The election will only have retroactive effect to 1 May 2010, if it is made before 1 August 2010.

### *Social Security on the Dutch Part of the Continental Shelf*

Recently, a bill was presented to Dutch Parliament, which regards the applicability of the Dutch social security system on the continental shelf. In this bill the Dutch part of the continental shelf will be considered to be part of the Netherlands for purposes of the application of the Dutch social security system. We expect that this change in legislation will enter into force as of 2011.



The amendment in legislation will not affect all situations. Especially when an employee is covered by a social security system of a state with which the Netherlands has concluded a social security treaty, this change in domestic legislation will not generally have a bearing. In all other situations, however, the amendment may have an impact when the work is carried out on the Dutch part of the continental shelf. In such event the employer and/or employees will be required to pay a contribution to the Dutch social security system.

The applicability of the Dutch social security legislation is generally determined on the basis of the aforementioned EC-regulations. For work carried out on the Dutch part of the continental shelf, however, the Netherlands indicated to hold a view that differs from most other EU member states. Where most EU member states apply the EC-regulations to their respective parts of the continental shelf, the Netherlands does not. From the parliamentary discussions regarding the bill it can be derived that the Netherlands intends applying the Dutch social security legislation to all persons working on the continental shelf. At this moment it is not clear what consequences it will have that the Netherlands are unwilling to apply EC-regulations on the Dutch part of the Continental Shelf. We anticipate that in practice the position of the Netherlands will not result in material issues.

## **EU Carbon Taxation**

Earlier, the European Commission announced that it is planning to introduce an EU-wide minimum tax on carbon as part of the EU's green-energy agenda. Previously a taboo, the idea of a direct European carbon tax is now being mentioned more often. The minimum tax would apply to fuel, natural gas and coal. The EU's new Taxation Commissioner, Algirdas Semeta, is working to revise the EU's existing Energy Taxation Directive. He intends to present a proposal before the summer. As the introduction of an EU-wide carbon tax would require the agreement of all 27 EU member states' governments, it remains to be seen whether such carbon tax will be introduced shortly. At this stage, the introduction of an EU-wide carbon tax meets substantial opposition.

For further information with respect to the above topics, please feel free to contact any of the members of the Loyens & Loeff Energy Team.

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