

Tokyo Tax Newsletter July 2009

Introduction

This is the July 2009 edition of our periodical Tokyo Newsletter Tax. This Newsletter is intended for Japanese businesses investing in or through the Netherlands, Belgium, Luxembourg, Switzerland and the EU. It provides a summary update of tax developments in the Kingdom of the Netherlands and touches on developments in Belgium, Luxembourg, Switzerland and the European Union.

The Netherlands

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The Netherlands

Temporary relaxation of loss carry back rule

A tax loss realised in 2008 (in case of a broken book year the year 2008/09) may be carried back on basis of a preliminary calculation. So it is not required for the taxpayer to have filed a 2008 tax return nor is it required that a final assessment has been imposed with regard to the year that the 2008 loss will be carried back to. A preliminary assessment is sufficient. The aforementioned could result in a significant cash flow benefit for taxpayers.

As is currently also the case, such loss can only be taken into account for 80%. The preliminary calculation of the loss should be substantiated by for instance the (preliminary) annual accounts. After reviewing the request to carry back, the tax inspector shall issue an assessment of the preliminary carry back of the loss.

In case the preliminary carry back turns out to be excessive, interest will be due over the excess part.

No preliminary carry back shall be given if the tax return of the respective year is already filed and the final assessment with regard to the year that the carry back applies to is expected to be imposed on short term.

Reduction of air tickettax to nil

July 2009

Loyens & Loeff is an independent provider of corporate legal services. Our close cooperation with prominent international law and tax law firms makes Loyens & Loeff the logical choice for large and medium-size companies operating domestically or internationally.

The Tokyo Newsletter provides a summary update on recent tax law developments in the Netherlands, Belgium and Luxembourg, with a particular focus on topics that may be interesting for Japanese businesses investing in or through these countries. The Tokyo Newsletter also covers the major developments in EU Law. It is published both in English and Japanese.

In view of its summary nature, the Newsletter does not form a substitute for advice. Although this Newsletter has been compiled with great care, we cannot accept any liability for the consequences of making use of this issue without our cooperation.

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As per 1 July 2008, the so-called tickettax was introduced on airline tickets as a measure to discourage people to fly in an effort to help preserve the environment. As part of the package introduced by the Dutch government to fight the current crisis, the Dutch tax imposed on air tickets is reduced to nil as per 1 July 2009.

VAT; from monthly to quarterly VAT returns

Another measure to help fight the current crisis is the possibility for entrepreneurs to file quarterly VAT returns in stead of monthly returns. Also VAT due (if any) would then be payable on a quarterly basis.

New social security convention between Japan and the Netherlands

The Netherlands has signed a convention and an administrative arrangement with Japan concerning statutory social security. The convention entered into force on 1 March 2009, it prevents double insurance obligation and insurance premium payment, which makes it attractive for Japanese investors in the Netherlands and for Dutch investors in Japan. The convention clearly states in which country an expatriate must pay mandatory social security contributions. It also determines in which country airline staff, sailors and diplomats are insured under an employee scheme.

Treaty update

- Earlier this year, the new treaty between the Netherlands and the UK was ratified. Amongst others an anti-abuse provision is included.
- On 29 May 2009, the Netherlands and Luxembourg signed a new tax treaty. Details will follow shortly.
- Recently, the protocols to the tax treaties with Austria and Estonia entered into force.
- Recently, the Netherlands signed exchange of information agreements with Bermuda and Guernsey.

Belgium

Amendment participation exemption

As stated in an earlier TNL Tax, on 12 February 2009, the ECJ rendered its decision in the Cobelfret case (C-138/07) concerning the Belgian dividend participation exemption regime that was introduced when implementing the Parent-Subsidiary Directive.

The question is whether or not the Parent-Subsidiary Directive precludes Belgian legislation which provides that dividends received by a parent company from its subsidiary are first included in the taxable basis of the parent company and can subsequently be deducted from this taxable basis in the amount of 95%, but only insofar as the parent company still has a positive profit balance after deduction of the other exempted profits (e.g. tax losses of the same tax period).

On 8 May 2009, the participation exemption rules were amended such that Belgian companies will be permitted to carry forward the dividends received deduction that they were unable to carry forward in the past. The amendment applies retroactively as per 1992.

Notional interest deduction regime

According to unconfirmed reports, the EU Commission has sent Belgium a letter of formal notice requesting it to extend the scope of its notional interest deduction ('NID') regime.

The NID regime is applicable to companies that are subject to the Belgian resident or non-resident corporate income tax. Essentially, a notional interest expense is deductible from the taxable basis. This interest expense is calculated as a percentage of the company's aggregate equity amount at the end of the previous financial year, taking into account some adjustments. The equity amount is, amongst others, reduced with the net book value of assets attributable to permanent establishments situated in other Member States and the net book value of immovable property situated in other Member States. It appears that the Commission considers these adjustments dissuasive for Belgian companies to invest in permanent establishments or immovable property situated in other Member States. Accordingly, the Commission has requested Belgium to abolish these adjustments.

Again, according to unconfirmed reports, Belgium is already preparing a technical amendment of the NID regime in order to meet the Commission's requirements. If this is indeed the case, the Belgian NID regime might become even more attractive than it is today.

Exchange of information on EU savings account

On 12 March 2009, the Belgian Minister of Finance announced that as from 2010, under the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments ('Savings Directive'), Belgium will exchange information with other Member States with respect to savings accounts kept in Belgium by residents of other Member States.

The aim of the Savings Directive is to enable savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State. This aim has to be achieved through the automatic exchange of information between Member States. Belgium, however, has been allowed not to exchange information during a transitional period, provided that a withholding tax ensured the minimum level of effective taxation of the savings income covered by this Directive.

As from 2010, this withholding tax will thus be abolished and Belgium will exchange information with respect to savings accounts kept in Belgium by residents of other Member States.

Treaty update

- Recently, a tax treaty between Belgium and Tunisia entered into force. Under conditions, the treaty provides for 5% dividend withholding tax, 0% interest withholding tax and 11% royalty withholding tax.

Luxembourg

Clarification of IP regime

On 5 March 2009 the Luxembourg tax authorities published a circular on the Luxembourg IP regime (the 'Circular'). It aims to provide some guidance regarding the interpretation of this partial exemption regime pursuant.

The Luxembourg IP regime that came into force on 1 January 2008 exempts 80% of the income and gains derived from copyrights on software, patents, trademarks, designs, models and domain names.

Through this partial exemption, the effective tax rate for such IP income is 5.7%. As per 1 January 2009 the IP regime was completed with a full exemption of net wealth tax, levied at a rate of 0.5%, for net wealth contained in IP rights.

The Circular sets out to provide descriptions of each of the categories of IP. It further takes position on certain conditions for the application of the regime, on its limits on foreign tax credits in connection with IP income and on how to value IP for the purposes of the IP regime.

Treaty update

- On 29 May 2009, the Netherlands and Luxembourg signed a new tax treaty. Details will follow shortly.

Switzerland

Free trade agreement between Switzerland and Japan

The governments of Japan and Switzerland have decided to conclude a Free Trade Agreement ('FTA'). Based on the FTA, Japan and Switzerland will eliminate or reduce their customs duties on imports on products originating in the customs territory of Switzerland and Japan. The origin must be proven with a certificate, issued by an appointed authority. Companies that export goods on a regular basis can be authorised to produce certificates of origin themselves.

In order to achieve the reduced rate of import duty, the goods must be transported directly from Japan to Switzerland or Switzerland to Japan. If the goods entered the territory of another

country, the preferential tariff can only be applied if it was for the purpose of transit or temporary storage in warehouses, provided that the goods do not undergo operations other than splitting up of the consignment, and unloading, reloading and any other operation designed to preserve it in good condition.

EU

Commisson adopts a report on the functioning of the Interest and Royalty Directive

On 17 April 2009, the Commission sent to the Council a report on the functioning of the Interest and Royalties Directive. The aim of the Interest and Royalties Directive is to eliminate double taxation on cross-border interest and royalty payments between associated companies.

The survey covers only 20 Member States, thus excluding five Member States benefiting from transitional derogations, Greece, Latvia, Lithuania, Poland and Portugal, since no obligations yet exist for these Member States to fully implement the Interest and Royalties Directive. Although the survey was completed before the accession of Bulgaria and Romania to the European Union, it should be noted that those Member States also benefit from transitional derogations.

The report concludes that the overall implementation of the Interest and Royalties Directive has been satisfactory. However, suggestions for more uniform interpretation and legal certainty are proposed. The report also looks at improvements to the existing text, including broadening the scope of the Interest and Royalties Directive. Discussions on the findings of the report at Council level should provide guidance to the Commission for a future amending legislative proposal.

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