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Brazil Desk Email Bulletin

This email bulletin is issued by the Brazil Desk of Loyens & Loeff. It is intended to provide you on an ad hoc basis with news flashes or background information on topical corporate, finance and tax law issues in the Benelux.

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Loyens & Loeff is an independent Benelux law firm with over 900 lawyers and offices in the main financial centres around the world. Loyens & Loeff combines an integrated corporate law, regulatory and tax practice.

In order to be able to give the best advice possible to our clients, Loyens & Loeff formed the Brazil Desk.

The members of the Brazil Desk strongly focus on Brazilian clients that invest or trade in Europe or other regions, as well as on international companies and financial institutions that want to expand their businesses to Brazil. In many cross border (including cross Atlantic) transactions, benefits can be derived by investing through the Benelux (Belgium, Netherlands and Luxembourg).

The team comprises members from various Loyens & Loeff practice groups. Members of the Brazil Desk visit Brazil three to four times a year.

Members of the Brazil Desk speak the Portuguese language.

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Loyens & Loeff N.V.

Fred. Roeskestraat 100
1076 ED Amsterdam
T: +31 20 578 57 85
F: +31 20 578 58 20

Blaak 31
3011 GA Rotterdam
T: +31 10 224 62 24
F: +31 10 412 58 39

Introduction

This Year End Tax Bulletin summarises the most significant tax developments in the Benelux in 2010 and highlights the main legislative changes announced for 2011. The focus is on developments and changes with relevance for internationally operating enterprises. Given the general nature of this Year End Tax Bulletin, the information contained in this publication should not be regarded as a substitute for detailed legal advice. You are, however, most welcome to contact us if you would like to receive more information on any of the below topics.

The Netherlands

Corporate income tax rates for 2011

The Dutch corporate income tax rate for taxable amounts exceeding € 200,000 will be reduced from 25.5% to 25% as of 2011. Taxable amounts up to € 200,000 will remain taxable with 20% corporate income tax.

Taxable amount		Rates for 2010	Rates for 2011
-	€ 200,000	20%	20%
€ 200,000	-	25.5%	25%

Extension of carry back period

The Dutch government previously introduced the option for corporate income taxpayers to extend the loss carry back period from one to three years for losses incurred in the 2009 and 2010 taxable years. The 2011 Tax Budget extends this option to losses realised in the 2011 taxable year. The option to extend the carry back period is made in the corporate income tax return and is subject to two conditions: (i) if a taxpayer opts for the extension, the loss carry forward period will be reduced from nine to six years, and (ii) the maximum amount of tax losses to be carried back to the second and third year preceding the loss year will be limited to € 10,000,000 for each year.

Changes in rules on forfeiture of tax losses in case of change of ownership

As a general rule, a substantial change (30% or more) in the ultimate interest in the taxpayer results in forfeiture of Dutch tax losses from years prior to the year in which the change of ownership occurred, unless certain asset- and activities-tests are fulfilled.

As of 2011, the loss forfeiture rule will be extended to *taxable results realised in the year of the change* in the ultimate interest in the taxpayer:

(i) taxable results realised *prior* to the change in the ultimate interest in the taxpayer may only be offset against results in the years preceding the year of the change; and
(ii) likewise, taxable results realised after the change in the ultimate interest in the taxpayer may only be offset against results in the years after the year of the change.

European Commission – Dutch rules on exit taxes and substantial interests held by foreign companies

On 24 November 2010, the European Commission ("EC") decided to refer the Netherlands to the EU Court of Justice ("ECJ") after having formally requested the Netherlands to change tax rules which impose an immediate exit tax when companies transfer their seat or assets to another EU Member State. These rules are considered contrary to the right to freedom of establishment by the EC.

In September 2010, the EC requested the Netherlands to change legislation that exempts domestic companies from tax on their income from substantial interests in Dutch resident companies, but which taxes companies established elsewhere in the EU and EEA on income from substantial interests not forming part of a business enterprise. The EC considers this rule contrary not only to EU law on the free movement of capital, but also to the freedom of establishment, as well as the EU Parent Subsidiary Directive.

Revised guidance on entity classification rules
Late 2009, the Dutch Ministry of Finance published revised entity classification rules. The revised entity classification rules apply for purposes of Dutch income tax, corporate income tax and dividend withholding tax. They cover all entities, including companies and partnerships, but excluding foundations, associations, funds for joint account, trusts and comparable entities. Reference is made to the Tax Flash of 4 January 2010 for a detailed description of the revised classification rules.

The new rules apply as from 11 December 2009. A two year grandfathering period applies where the new rules result in a classification that is different under the old rules. Furthermore, the Dutch Ministry of Finance has published a list with entities that are already classified. This list will be updated on a regular basis. The list is, however, of an “indicative” nature only.

Extension of accelerated and random depreciation
The Dutch government previously introduced a temporary possibility for accelerated and random depreciation of business assets in order to stimulate investments. Investments in most assets made between 1 January 2009 and 31 December 2010 may be depreciated in two years, with a maximum of 50% per year. The 2011 Tax Budget extends this regime for one additional year, i.e. investments made in the 2011 calendar year can benefit from accelerated and random depreciation in 2011 and 2012. The accelerated and random depreciation is applicable to most business assets (exceptions apply to amongst others buildings, certain infrastructure projects, immaterial fixed assets and assets acquired to be leased to third parties).

Again an improvement of the innovation box
Income from qualifying patents and research & development activities is taxed in the Dutch innovation box at an effective rate of 5%. The reduced rate applies to income exceeding the production costs incurred in relation to the patent or research & development activities. The innovation box has been extensively improved since its introduction in 2007. The 2011 Tax Budget again provides for an improvement. Presently, the innovation box only applies for income from patents, once the patent is actually granted. As from 2011, income arising in the period in which a patent is pending, may be deducted from the production costs. Effectively, this means that more income is taxed at the reduced rate of 5% after the patent is granted.

Amendments of the wage cost facility for research & development
Dutch law provides for a wage tax incentive for qualifying research & development activities, which is effectuated through a reduction of the payroll tax and social security contributions payable by the employer. For 2011, a deduction of 46% will apply for the first € 220,000 of payroll costs that relate to research & development. The deduction for payroll costs above € 220,000 amounts to 16%. The rebate is maximized at € 14,000,000. As of 2012, the deduction will amount to 45% of payroll costs relating to research & development for an amount of up to € 150,000. A deduction of 14% applies for the excess payroll costs. The rebate will be maximized at € 8,500,000 in 2012.

Employment costs regulation
As of 1 January 2011, a new employment costs regulation will enter into effect. This regulation replaces existing rules in the area of (tax-free) allowances and provisions. The main aspects of this regulation are the following:

- The definition of wage for statutory payroll tax will be extended with ‘that which is reimbursed or provided in the framework of the employment’. This way, there is no discussion as to whether allowances and provisions which are strictly for business purposes under the employment costs regulation are also regarded as wage.

- All current statutory regulations concerning tax-free allowances and provisions will be abolished. A large part thereof will return as ‘zero valuation’ or as ‘specific exemption’.
- The rules for the valuation of pay / salary in kind are adjusted. In principle, the taxable amount of benefits in kind is set at the acquisition price for the employer, including VAT. Provisions which are used or consumed in full or in part at the workplace are valued at zero, or at a low amount.
- Allowances and provisions can be brought under the so-called final wage tax levy regime, which means that the wage tax is levied from the employer rather than the employee. Of the total of those allowances and provisions, up to an amount of 1.4% of the payroll cost is exempted from tax (the ‘employment costs budget’). Any allowances and provisions brought under the final tax levy regime in excess of the employment costs budget are taxable at a (grossed up) rate of 80% wage tax.
- Certain allowances and provisions brought under the final levy do not count for the 1.4% test and are exempted, such as commuting allowances up to € 0.19/km.

A transitional election regime will apply. On the basis thereof, employers may decide not to apply the employment costs regulation and to make use of the current rules instead. As of 2011, this choice may be made annually. From 2014 onwards, the employment costs regulation will be applicable to all.

Tightening of real estate transfer tax rules on real estate companies
The acquisition of a substantial interest of shares (1/3 or more) in real estate companies is subject to 6% Dutch real estate transfer tax. Presently, a real estate company is defined as an entity (i) the assets of which, on a consolidated basis, consist for 70% or more of Dutch real estate at the time of the share transfer or at any point in time in the 12 months preceding the share transfer (the "Asset-test"), and (ii) if (at least 70% of) the Dutch real estate is used for acquisition, sale and exploitation (the "Purpose-test").

The rules on real estate companies will be severely tightened as of 2011, as a result of which more often real estate transfer tax will be due. The main changes can be summarised as follows:

- The 70%-threshold of the Asset-test will be reduced to 50% and also non-Dutch real estate is taken into account. As of 2011, the Asset-test is fulfilled if the entity’s assets, on a consolidated basis, consist for more than 50% of real estate and for at least 30% of Dutch real estate at the time of the share transfer or at any point in time in the 12 months preceding the share transfer. The Purpose-test remains unchanged.
- Consolidation for purposes of the Asset-test is more often required. Presently, the assets of entities in which 1/3 or more are held, are (proportionally) consolidated at the level of the relevant company. As of 2011, (proportional) consolidation is also required if the relevant company together with group companies holds 1/3 or more in another entity, or if an individual that holds at least 90% in the relevant company, holds 1/3 or more in another entity.
- Certain assets will be excluded for purposes of the Asset-test to avoid the artificial creation of non-real estate assets (with the goal to remain below the 50% (and/or 30%) threshold):
    - Receivables on the acquirer of the shares in the company and related parties thereto;
    - Receivables of the company on related parties;
    - Other assets than real estate up to the amount of debt granted by the acquirer or related parties thereto;
    - Other assets than real estate up to the amount of debt granted by related parties to the company.
- As of 2011, real estate transfer tax is also due if an existing substantial or non-substantial interest of shares in a real estate company is extended or converted into a substantial interest without the acquisition of shares, for example if preferred shares (the lack of a right to dividend/profit does not give these shares an economic interest in the real estate company) are converted into normal shares (which give the shareholder a right to the profits and therefore an economic interest in the real estate company).

Quarterly VAT-returns
Whether an enterprise files VAT-returns on a monthly or quarterly basis in principle depends on the size of the turnover of the respective enterprise. As part of the 2010 measures to combat the economic crisis, quarterly filing was allowed for enterprises that are normally required to file VAT-returns on a monthly basis. This option will be made permanent from 2011 onwards. This measure will reduce the administrative burden and increase the liquidity position for business and industry.

Tax treaties
The Netherlands continued to expand its extensive tax treaty network and signed new tax treaties and additions or revisions to existing treaties in 2010 with: Hong Kong (22 March 2010), Slovakia (7 June 2010), Japan (25 August 2010), Tunisia (8 September 2010) Panama (6 October 2010), and Switzerland (26 February 2010).

The new tax treaty with the United Kingdom, signed in 2008 and ratified by the United Kingdom in 2009, is currently in the process of being ratified by the Dutch parliament. It is expected that the tax treaty with the United Kingdom will enter into force on 1 January 2011.

Belgium

Minimum participation: increase of alternative threshold
In order to qualify for the Belgian participation exemption regime for dividends received, the parent company must have held (or commit to hold), at the time of the dividend payment, a minimum participation for an uninterrupted period of at least 12 months. The threshold for the minimum participation is either 10% of the subsidiary's share capital, or an acquisition value of, from 2010 onwards, at least € 2.5 million (previously € 1.2 million).

Carry forward recorded in law
Further to the decision of the ECJ in *Cobelfret* (C-138/07 dated 12 February 2009), a system of carry-forward of the unused portion of the participation exemption for dividends received, is introduced in the law. In the Cobelfret-case, the ECJ had held that the Belgian participation exemption was incompatible with the EU Parent Subsidiary Directive to the extent that it was limited to the positive taxable basis of the parent company (see the Year End Tax Bulletin 2009). The carry forward of the unused portion is now thus explicitly provided in the income tax code.

Ruling commission: Luxembourg Sicar can qualify
One of the conditions of the Belgian participation exemption regime is the so-called subject-to-tax requirement. In Belgian law, this condition is defined in a negative way by enumerating five cases in which the participation exemption regime does not apply. One of these five exclusions targets investment companies which benefit from a special tax regime in their country of residence. The law, however, also provides for an exception to this exclusion rule. Targeted investment companies continue to qualify if their articles of association provide in the annual distribution of at least 90% of the obtained income (after deduction of fees, commissions and expenses) if and to the extent that this income consists of dividends and capital gains which would themselves qualify for the participation exemption. This type of investment companies is referred to in Belgian practice as "DBI/RDT investment companies".

The Belgian Ruling Commission rendered an important ruling on the application of the participation exemption regime on dividends received from a Luxembourg Sicar (ruling nr. 2010.061 dated 30 March 2010). Pursuant to this ruling, a Luxembourg Sicar which in principle falls under the aforementioned exclusion rule, can under circumstances qualify as an DBI/RDT investment company for purposes of the participation exemption regime. Consequently, if the articles of association of the Luxembourg Sicar stipulate that at least 90% of the net income must be redistributed, the participation exemption can be granted for the dividends distributed by the Sicar, if and to the extent that the dividends consist of dividends and/or capital gains which would themselves qualify for the participation exemption. It is the first ruling in which the qualification as an DBI/RDT investment company for purposes of the participation exemption regime is attributed to a foreign company.

Payments to companies established in a tax haven
As from 1 January 2010, direct or indirect payments made by Belgian companies to companies established in a tax haven (see below), have to be reported in a separate form attached to the resident and non-resident corporate income tax return. The reporting obligation is limited to payments of € 100,000 or more, per tax year. Failure to report payments to tax havens that qualify as professional expenses for the Belgian taxpayer, will lead to the refusal of the (tax) deductibility of these expenses. In a worst case scenario, an additional fine and tax increase could be imposed. On the other hand, the fact that the new reporting obligation has been observed does not necessarily imply that the Belgian tax authorities will accept that the payments are tax deductible as professional expenses. The taxpayer must indeed still prove that such payment was motivated by sound business reasons (i.e. the non - artificial character of the parties involved and of the transaction giving raise to the payments). Under the new regulation, tax havens are defined as: (i) countries where the nominal tax rate is less than 10% or (ii) countries not respecting the minimum OECD standard on transparency and information exchange.

EU Savings Directive: exchange of information implemented
Further to the EU Savings Directive, Belgium was, during a transitional period, allowed not to exchange information, but instead to levy an additional withholding tax (20% from 1 July 2008 until 30 June 2011 and 35% thereafter). However, Belgium decided to switch to the exchange of information procedure as from 1 January 2010. Consequently, Belgium does no longer impose an additional withholding tax on the interest payments concerned, but now exchanges information with the tax authorities of the other EU Member States.

Tax treaties
In 2010, Belgium further extended its already extensive tax treaty network and initialled new tax treaties with the following countries: Macedonia (FYR) (6 July 2010), Botswana (7 May 2010), Barbados (11February 2010), Colombia (19 February 2010), Uruguay (27 January 2010), Panama (15 January 2010).

Also, the following treaties entered into force in 2010: treaty with Chile, signed on 6 December 2007, entered into force on 5 May 2010 and treaty with Rwanda, signed on 16 April 2007, entered into force on 6 July 2010. Both treaties generally apply from 1 January 2011 onwards.

Luxembourg

Main changes announced for 2011: companies
On 2 December 2010, a bill was approved by the Chamber of Deputies to introduce changes in tax law as per 2011 with the view to stimulate the economy and increase the tax revenue.The *Conseil d'État* is to decide on 7 December 2010 whether to give dispensation for a second vote. The changes are the following:

- Increase of the surcharge for the employment fund from 4% to 5%. This increase would result in a combined corporate tax rate for the City of Luxembourg of 28.80% (instead of 28.59% currently), which rate includes the corporate income tax of 21%, the 5% surcharge and the 6.75% municipal business tax.
- Introduction of a minimum fixed corporate income tax levied on Luxembourg holding and finance companies (SOPARFIs), defined as companies that are exempt from any regulation and the assets of which are comprised of at least 90% financial assets. The minimum tax amounts to € 1,500 before application of the surcharge. For SOPARFIs constituting a fiscal unity, only the parent company will be subject to the minimum tax rule. Note that due to a reform of the Chamber of Commerce fee system, SOPARFIs will also be confronted with a further fixed charge of € 350.
- Increase of the tax credit for investment (*bonification d'impôt pour investissement*) from 12% to 13% for certain categories of assets and from 6 and 2%, respectively to 7 and 3 %, respectively on certain other categories of assets.
- Limitation on deductibility of golden handshakes and similar payments to € 300,000 per case.

Main changes announced for 2011: funds
On 6 August 2010, a bill was submitted to restate the Luxembourg law as per 2011 in relation to undertakings for collective investments and implementing the UCITS IV directive. The main changes are:

- Exemption of the annual subscription tax (*taxe d'abonnement*) of 0.05% on the net asset value of exchange traded index-tracking funds in the form of a UCITS or UCI.
- Introduction of an exemption of non-resident capital gains tax for holdings of non-residents in UCITS or UCIs, to facilitate *inter alia* feeder funds holding stakes in Luxembourg funds. Without such exemption, non-residents face capital gains tax if they would (be deemed to) alienate a shareholding of more than 10% in a UCITS or UCI.
- Introduction of an explicit exemption for corporate income tax, municipal business tax and net wealth tax of UCIs established abroad, but managed from Luxembourg or having their central administration in Luxembourg. The purpose of the exemption is to avoid that where a Luxembourg-based investment manager or administrator is managing or administering a foreign UCI, the latter would be deemed to be subject to Luxembourg taxation.

Self assessment
The new assessment procedure, in place as of February 2010, allows the tax authorities to issue an assessment following the corporate tax returns submitted by the taxpayer without review ("self assessment notice"). The company can, prior to the end of the fifth fiscal year following the year in question, be re-assessed. The new rules do not replace the old procedure (being the issue of a final assessment that can be amended only as a result of new facts), but introduce an alternative procedure that the tax authority can discretionarily use. The taxpayer does not have the option to choose between the two procedures. The new procedure enables the tax administration to more timely collect corporate taxes, but increases uncertainty for the taxpayer during the assessment period as the self assessment notice cannot be regarded as final. Since its introduction, the self-assessment notice is frequently used for all open financial years in relation to SOPARFIs.

Clarifications on the tax treatment of Islamic Finance instruments
In January 2010, the tax authorities issued Circular L.G.-A n. 55, which not only describes the general principles and instruments of Islamic finance, but also clarifies the Luxembourg tax treatment of *murabaha* financing and of *sukuk* transactions. In June 2010, Circular n. 749 was issued, which clarifies the VAT and transfer tax regime applicable to murabaha transactions. Reference is made to the Tax Flash of 27 January 2010 and the Tax Flash of 24 June 2010 for a detailed description of the two circulars.

BTP World
The BTP World case referred to the deductibility in Luxembourg of a foreign exchange loss realized by a Luxembourg company on the endowment capital of a Swiss permanent establishment ("PE"). Resident taxpayers are liable to income tax in Luxembourg on their worldwide income, unless a double tax treaty restricts the taxing rights of Luxembourg. The treaty in force between Luxembourg and Switzerland (the "Treaty") provides that Luxembourg shall exempt the income derived by a resident taxpayer through a Swiss PE, even though such foreign income may be considered for the purpose of computing the tax rate applicable in Luxembourg on the other business income of the same taxpayer (so-called "exemption with progression").

In its decision on the BTP World case the Administrative Tribunal held that currency losses due to an appreciation of the head-office currency on the PE currency are necessarily attributable to the head-office, as they do not exist – and therefore could not have tax relevance – at the PE level. The currency loss at stake was therefore considered deductible in Luxembourg. The Administrative Tribunal further mentioned in an additional remark that in similar cases currency gains on the endowment capital would be taxable in spite of a tax treaty. The case is therefore directly relevant to many Swiss and indeed other branches of Luxembourg companies. Note, however, that, depending on the circumstances, it is doubtful whether the reasoning of the Administrative Tribunal can be upheld under a tax treaty in case of currency gains.

Trade in loss companies
In Luxembourg, net operating losses may be offset indefinitely against the future business income of the same taxpayer. The Luxembourg tax administration generally applied such provision extensively, thereby denying the use of previous losses not only when the legal identity of the taxpayer changed, but also when in its view, a change in its economic identity occurred (so-called "*Mantelkauf* doctrine"). Accordingly, in the case at hand the tax administration refused the deductibility of past losses to a company whose shares were sold to a new shareholder and whose activities, both statutory and real, were partially extended before the previous losses could be offset.

The Administrative Court of Appeal held that, neither the wording, nor the underlying rationale of the domestic provision at stake suggest that a mere change in the economic ownership of the taxpayer should lead to the non-deductibility of previous losses. A different treatment could only be justified when, from an analysis of the overall economic nature of the reorganization performed, the change in the economic ownership of the company can be qualified as part of a broader artificial arrangement exclusively aimed at avoiding taxes and the reorganisation therefore constitutes an abuse of law.

The tax authorities followed up by issuing a circular on 2 September 2010 in which it recognises that a partial or full change in shareholders in combination with an extension of the company's object clause does not imply that the loss carry forwards of a company vanish. They would refuse the use of loss carry forwards, however, if they can conclude from the circumstances that the acquisition of a loss company is abusive. As examples of such circumstances are mentioned: the cessation of the business that generated the losses, a lack of assets in the company and a change of business almost concomitant with the transfer of the shares.

End of grandfathering period of the Holding 1929
The Holding 1929 (together with the so called *Holding Milliardaire*) regime was abolished previously. A grandfathering period for Holding 1929s (and *Holding Milliardaires*) already in place is applicable until year-end 2010. As of 1 January 2011, this regime will no longer exist for any company.

Tax treaties
Luxembourg has now 60 tax treaties in force. The tax treaties with Azerbaijan, Georgia, India, Moldava and United Arab Emirates, entered into force in 2009, became effective in 2010. In 2010 the tax treaties with Armenia, Liechtenstein, Monaco and Quatar entered into force: they will be effective as of January 2011.

In 2010 Luxembourg signed protocols to the existing tax treaties with Japan, Portugal and Sweden, providing for an "exchange of information upon request" clause in line with the OECD standards, and six of these protocols, signed in 2009, entered into force.

<u>Relevant for all EU countries</u>

Zwijnenburg ruling on compatibility of the Dutch merger exemption with the EU Merger Directive
On 20 May 2010, the ECJ rendered its decision in the Zwijnenburg case (C-352/08). The question concerned was whether the tax neutral treatment provided for by the EU Merger Directive could be refused in the context of a merger on the sole ground that a principal objective of the merger is to avoid real estate transfer tax, a tax not covered by the EU Merger Directive.

The ECJ ruled that the favourable arrangements which a directive introduces may not be withheld from a taxpayer who has sought, by way of a legal strategy involving a company merger, to avoid the levying of a tax such as a transaction tax, where that tax does not come within the scope of the application of the EU Merger Directive.

X-Holding ruling on the restriction of cross-border loss relief
On 25 February 2010, the ECJ delivered its judgment in the X-Holding case (C-337/08). The ECJ ruled that the fact that the Dutch tax regime makes it possible for a parent company to form a fiscal unity for corporate income tax purposes with its resident subsidiary, but does not allow a fiscal unity with a non-resident subsidiary, is not in conflict with EU law.

The ECJ ruled that the fact that only domestic subsidiaries may be included in a fiscal unity and foreign subsidiaries not, in principle constitutes a restriction on the freedom of establishment. However, the ECJ ruled that – due to the fact that the parent company is at liberty to include or exclude a subsidiary in the fiscal unity – acceptance of the possibility to include non-resident subsidiaries in the fiscal unity would offer the parent company the opportunity to choose freely in which EU member state the subsidiary's losses would be taken into account. For that reason, the ECJ rules that refusal of a cross-border fiscal unity is justified in view of the need to safeguard the allocation of the power to impose taxes.

We trust to have fully informed you. Should you have any questions, please do not hesitate to contact us.

Michiel van Kempen
T: +31 10 224 63 96
E: michiel.van.kempen@loyensloeff.com

Jeroen Janssen
T: +31 20 578 54 00
E: jeroen.janssen@loyensloeff.com

Juliana Dantas (Portuguese speaker)
T: +31 20 578 51 67
E: juliana.dantas@loyensloeff.com

Bart le Blanc
T: +31 10 224 66 53
E: bart.le.blanc@loyensloeff.com