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## **1 Introduction**

This Year End Tax Bulletin summarises the most significant tax developments in the Benelux in 2011 and highlights the main legislative changes announced for 2012. 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.

## **2 The Netherlands**

### **2.1 Main changes 2012: companies / corporate income tax**

#### **2.1.1 Further restriction of interest deduction in respect of acquisition debt**

The 2012 Tax Bill includes expanding the interest deduction limitation in respect of loans (whether third-party loans or related-party loans) taken up to acquire (or increase) an investment in a (Dutch) target company to situations where the target company (i) is included in a corporation tax consolidation (fiscal unity) with the acquirer, or (ii) 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 (i) 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 € 1,000,000, and (ii) annual interest expenses (on acquisition debt) to the extent of excessive acquisition debt. A 'transaction based' test is used to determine whether or not the acquisitions of a particular year are financed with excessive debt. A 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.

#### **2.1.2 Limitation on deductibility of interest on loans for the acquisition of participations**

The 2012 Tax Bill does not include the anticipated further restriction of interest deduction in respect of loans used to acquire or capitalise shareholdings qualifying for the participation exemption. However, the Dutch State Secretary of Finance has announced that the Dutch Government endeavours releasing a tax bill, which will include such further restriction, in the course of 2012.

#### **2.1.3 Elimination of immediate deductibility of non-Dutch permanent establishments losses**

The 2012 Tax Bill includes changing the method for the avoidance of international double taxation for qualifying non-Dutch permanent establishments ("PEs"). As of 2012, profits and losses of qualifying PEs are excluded from the Dutch taxable base (object exemption), with the exception of final losses upon permanent wind-up of a PE. Under the current rules, losses of a non-Dutch PE are included in the Dutch taxable income and immediately reduce the Dutch taxable base. According to Parliamentary documents, the introduction of the object exemption does not intend changing the calculation method of profits allocable to a PE.

#### **2.1.4 Currency differences and the participation exemption**

The Dutch participation exemption provides for a full exemption of all profits and losses derived from investments in subsidiaries, including currency results. Ever since the Deutsche Shell judgment was handed down by the European Court of Justice ("ECJ") (decision of 28 February 2008, case C-293/06), it has been debated whether the reasoning in that case would also apply to currency translation results under the Dutch participation exemption. If the Deutsche Shell argument would be applied to the participation exemption, losses which arise in connection with a decline in the exchange rate of the currency in the country of the subsidiary should be allowed as a deduction against Dutch taxable income on the grounds that by their very nature such losses are invisible in the local currency books of the subsidiary and therefore cannot be taken into account in the other country. Under current Dutch law a corresponding translation gain in case of an appreciation of the local currency in a later year would still qualify for the participation exemption. The preemptive legislative measures announced in April 2011 aim to eliminate the imbalance between a possible deduction of currency losses and the exemption of currency gains. Taxpayers who have successfully claimed a deduction of their Deutsche Shell losses will no longer qualify for the participation exemption on their currency gains. To prevent taxpayers from locking in their losses by transferring the subsidiary to an affiliated entity, the new rules will enter into force with retroactive effect to 17.00 on Friday 8 April 2011.

#### **2.1.5 Expansion of research and development facilities**

The 2012 Tax Bill includes a research and development ("R&D") deduction to reduce direct costs of R&D (other than employment costs that relate to R&D, which currently benefit from a (wage) tax incentive). Such R&D deduction will apply in addition to the so called 'innovation' box and R&D wage tax incentive.

#### **2.1.6 Limitation of taxation of non-Dutch entities with a 'substantial interest' in a Dutch resident entity**

The 2012 Tax Bill includes a limitation of the circumstances under which a non-Dutch resident entity is subject to corporate income tax in respect of an interest in a Dutch resident entity. A non-Dutch resident entity with a so called 'substantial interest' (as a general rule, 5% or more) in a Dutch resident entity will not be subject to corporation tax if (i) its substantial interest can be attributed to a business enterprise carried on by the non-Dutch resident entity (the existing rule) or, alternatively, (ii) the substantial interest is not held with the main purpose (or one of the main purposes) to avoid Dutch individual income tax and/or Dutch dividend withholding tax of another person. If the substantial interest is held only to avoid dividend withholding tax (i.e., not to avoid individual income tax), the corporation tax liability is effectively limited to a 15% rate over dividend distributions.

### **2.2 Main changes 2012: companies / dividend withholding tax**

#### **2.2.1 Anti-abuse provision to subject certain distributions by cooperatives to dividend withholding tax**

The 2012 Tax Bill introduces an anti-abuse provision targeting distributions by Dutch cooperatives, but only in certain cases. The principal rule will remain that distributions by Dutch cooperatives are not subject to dividend withholding tax. However, an exception is made for structures that the Dutch legislator considers abusive: structures in which the cooperative directly or indirectly holds shares in a company with the main purpose (or one of the main purposes) to avoid Dutch dividend withholding tax or foreign tax of another person.

In the case of such an abusive structure, members in the cooperative whose membership interest cannot be attributed to a business enterprise are subject to dividend withholding tax on all distributions to such members. In the case of such an abusive structure, members in the cooperative whose membership interest can be attributed to a business enterprise are only subject to dividend withholding tax if the cooperative directly or indirectly holds shares in a Dutch company and only to the extent necessary to preserve and collect the dividend withholding tax claim on the profits of a Dutch company held by the cooperative which already existed at the time the cooperative acquired the Dutch company.

### **2.2.2 Extension of dividend withholding tax refunds to qualifying non-EU tax-exempt portfolio investors**

The 2012 Tax Bill extends the existing full refund of dividend withholding tax upon request, as currently applicable to tax exempt Dutch resident entities and comparable tax exempt entities residing in an EU or (designated) European Economic Area (“EEA”) member state, to comparable entities residing in (designated) third states with which the Netherlands has concluded a bilateral or multilateral agreement with exchange of information provisions. This extension only applies to investments which qualify for the freedom of capital movement of article 63 of the Treaty on the Functioning of the European Union (“TFEU”).

## **2.3 Main changes 2012: individuals**

### **2.3.1 Changes in the expat regime (30%-ruling) in wage tax**

The 2012 Tax Bill introduces a number of restrictions on the expat regime (the “30%-ruling”). This 30%-ruling, which is intended to cover the extra expenses incurred as a consequence of the fact that employees work outside of their home countries, allows employees to receive 30% of their employment income free of tax. Employees (including directors and supervisory board members) recruited or assigned from abroad who have specific expertise that is not or scarcely available on the Dutch job market, may qualify for the ruling. The restrictions can be summarised as follows:

- From 2012 onwards, the requirement of specific expertise will be based on a minimum salary level. If the taxable annual salary of the employee exceeds an amount of € 35,000 (exclusive of the 30% allowance), the employee is considered to have specific expertise. For expats under the age of 30 with a Master’s degree, a minimum salary level of € 26,605 will be applicable. Under these new rules, it is still required to check whether the specific expertise is scarce on the Dutch job market.
- Employees from the foreign frontier zone will no longer be entitled to the ruling. Under the new rules, the employee must have lived at a distance of more than 150 km from the Dutch border during more than two-thirds of the 24-month period prior to the start of the employment in the Netherlands, in order to qualify for the ruling.
- Other restrictions concern the maximum period of validity of a 30%-ruling (which will be reduced from 10 years to 8 years) and the verification period for the limitation rule (which will be extended from 10 years to 25 years). The latter entails that the period of validity of the ruling will be reduced by periods of presence or employment in the Netherlands which ended during the past 25 years.

Transitional rules apply to employees who are entitled to the ruling before 1 January 2012.

## **2.4 Developments in 2011: withdrawal legislative proposal, degree and case law**

### **2.4.1 Withdrawal legislative proposal on partnerships**

In September 2011, the Dutch Minister of Security and Justice announced that he intends to withdraw the legislative proposal on partnerships.

### **2.4.2 Decree on attribution of profits to permanent establishments**

In January 2011, the Dutch Ministry of Finance published a Decree providing the Dutch preferences with respect to the recently amended Article 7 of the OECD Model Convention on the attribution of profits to permanent establishments. By following these preferences, taxpayers may reduce the risk of disputes with the Dutch tax authorities on the attribution of profits between head office and permanent establishments. The Decree also indicates that taxpayers are free to take positions that deviate from the Dutch preferences, provided that these positions are in conformity with Article 7 of the OECD Model Convention, i.e. one of the Authorized OECD Approaches, and the end result is at arm's length.

### **2.4.3 Dutch Supreme Court provides further guidance on non-businesslike loans**

In November 2011, the Supreme Court issued rulings concerning 'non-businesslike loans' ("*onzakelijke geldleningen*"). The main aspects of the Supreme Court decisions are that (i) besides an upstream non-businesslike loan, a downstream non-businesslike loan is also possible, (ii) a non-businesslike loan is not re-qualified into fiscal equity, and (iii) a write-off on a downstream non-businesslike loan may ultimately be deductible upon liquidation of the debtor-participation. In the rulings of 25 November 2011, the Supreme Court elaborates on its decision of 9 May 2008. In 2008, the Supreme Court ruled that a write-off on a loan is not tax deductible to the extent that a company provides funds for the benefit of its shareholder under such conditions and circumstances that it runs a credit risk that independent parties would not have accepted. The 2008 ruling created controversy in fiscal literature and has resulted in ambiguous jurisprudence of lower courts. This has caused several uncertainties to arise, some of which the Supreme Court addresses in its rulings of 25 November 2011.

### **2.4.4 Dutch Supreme Court rules that the restriction of loss compensation for holding and finance companies is not in breach of EU law**

In June 2011, the Supreme Court ruled that the Dutch restriction on loss compensation for holding and finance companies as laid down in article 20 (4) of the Dutch corporate income tax act is compatible with article 49 of the TFEU. The Supreme Court observed that, with reference to the ECJ's judgment in X Holding (decision of 25 February 2010, case C-337/08), it is not a breach of EU law that a Dutch holding company is not able to enter into a fiscal unity with its non-resident subsidiary, whereas a fiscal unity is possible with a Dutch resident subsidiary. By entering into a fiscal unity the aforementioned restriction on loss compensation for holding and financing companies can be prevented. With its ruling the Supreme Court seems to reject the 'per element approach', according to which a taxpayer should be able to invoke per element the advantages of the fiscal unity regime.

#### **2.4.5 Dutch Supreme Court expands the scope of the real estate transfer tax exemption to acquisition of shares in real estate entities**

In the real estate practice, it was assumed on the basis of earlier case law that the exemption from real estate transfer tax which may be applicable to the acquisition of immovable property prior to, or at the latest, two years after the moment of the first taking into use of a building site, did not apply to the acquisition of shares in a real estate entity with such immovable property. On 10 June 2011, the Supreme Court, however, ruled that the exemption from transfer tax may also be applied to the acquisition of shares in a real estate entity, insofar as this concerns new, immovable property not yet in use in the construction and trading stages.

### **3 Belgium**

#### **3.1 Announced tax reform**

In the beginning of December 2011, the political parties forming a large majority in Parliament reached an agreement on the 2012-2014 budgets. Based on the currently available information, the main tax issues dealt with in this agreement are summarised below, but details of how they will be implemented are not yet known. Since a draft Tax Bill has not yet been released, the information below is subject to further modifications and precisions.

##### **3.1.1 Capital gains on shares**

For individuals, the situation remains unchanged, meaning that capital gains on shares sold in the context of an individual's normal management of his/her personal assets, are tax exempt. Other capital gains remain subject to taxation at 16.5% or 33%.

For companies, the full exemption of capital gains on shares which qualify for the participation exemption regime (conditions remaining unchanged, meaning no minimum holding requirement) is confirmed – although the original proposal would have limited the exemption to 95%. However, capital gains on shares sold within the first year of acquisition will now be subject to a separate taxation at a rate of 25% (and not at the standard rate of 33.99%).

##### **3.1.2 Withholding taxes on dividends and interest**

The standard rate for dividends remains 25%. The 15% rate applicable to interest and certain dividends is increased to 21%; however, liquidation surpluses would remain subject to 10%. An additional 4% taxation will apply, as a crisis contribution, to all income from movable assets in excess of € 20,000 (liquidation surpluses and exempt interest on saving deposits not included). This additional taxation would either be applied at source (i.e. 25% withholding tax) or through the yearly income tax return.

##### **3.1.3 Notional interest deduction**

This innovative measure, intended to support capital-intensive companies and SME's and to reduce discrimination between equity-funding and debt-funding, has once again been maintained. Its rate, however, will be capped at 3% (3.5% for SME's) and no carry-forward will be allowed. Existing carried-forward of excess NID remains deductible, but subject to a yearly cap.

#### **3.1.4 Thin-cap rule**

The existing 7:1 thin capitalisation rule, whose scope of application is limited to “tainted” loans, would be extended and increased to a 5:1 debt-to-equity ratio.

#### **3.1.5 Stock options**

The taxation of stock options will be increased; no details are yet known, but it has been reported that the rate to determine the benefit in kind might be raised from 15% to 18% (or 7.5% to 9%).

#### **3.1.6 General anti-abuse measure**

The conditions to apply the general anti-abuse measure would be softened.

### **3.2 Developments in 2011**

#### **3.2.1 Participation exemption regime for dividends received – abolishment of the requirement of fixed financial assets**

One of the conditions for the application of the participation exemption regime was that the dividends had to be received on shares which had the nature of fixed financial assets. In a reasoned opinion sent to the Belgian Government, the European Commission (“EC”) considered this condition to be a violation of the Parent-Subsidiary Directive, as it added a condition which was not provided for in the Parent-Subsidiary Directive. This condition has therefore been abolished from 1 January 2011 onwards.

#### **3.2.2 Participation exemption regime for dividends received – expansion to EEA countries**

In certain provisions regarding the participation exemption regime for dividends received, the reference to the EU has been replaced by a reference to the EEA (the EEA consists of all EU countries plus Iceland, Liechtenstein and Norway). This is for example the case in the provision with respect to the right to carry forward excess dividend deductions.

#### **3.2.3 Emigration of companies**

Belgian companies transferring their seat abroad are subject to an exit tax consisting of the immediate taxation of latent capital gains and tax free reserves, with the notable exception of the S.E. provided the assets of the S.E. remain allocated to a permanent establishment in Belgium. In a reasoned opinion sent to the Belgian Government, the EC considered this exit tax to be a violation of the freedom of establishment. The Belgian legislation has therefore been amended – now allowing a transfer of seat to another Member State in tax neutrality provided the company’s assets and tax free reserves remain allocated to a permanent establishment in Belgium – from 1 January 2011 onwards.

## **4 Luxembourg**

### **4.1 Main changes 2012: SPF**

#### **4.1.1 Abolition of the SPF Low Taxed Dividend Cap announced**

In 2007, Luxembourg introduced the “Société de gestion de patrimoine familial” (the “SPF”), which was designed to meet the need for Luxembourg based private asset management companies after the abolition of the Holding 1929 regime. On 15 July 2011, the Luxembourg Government sent the Lower House (“Chambre des Députés”) a draft law which proposes the abolition of the Low Tax Dividend Cap under which the SPFs lose the advantage if they receive at least 5% of its dividends from non-resident companies not listed on a stock exchange and not subject to comparable taxation. The draft law has been prepared as a direct result of a letter sent by the EC to the Luxembourg authorities on 9 February 2010, in which the EC argued that the Low Tax Dividend Cap infringes the freedoms as laid down in the TFEU and the Agreement on the EEA. If the draft law is approved, the SPF regime will become more attractive, as it will allow an SPF to receive dividends from entities in low taxed jurisdictions, without any limitation and without jeopardising its tax exemptions for the relevant year.

### **4.2 Main changes 2012: exchange of information**

#### **4.2.1 Implementation of the mutual assistance Directive**

On 16 March 2010, the European Council adopted a Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. This Directive repeals the Directive 2008/55/EC codifying mutual assistance for the recovery of claims relating to taxes, duties and other measures. The Directive 2010/24/EU will ensure that the assistance procedure for the recovery of said claims is in line with the OECD standard on the exchange of information. The most significant change of this Directive is that it will prevent a Member State from refusing assistance concerning a taxpayer of another Member State on the sole grounds that the information is held by a bank or other financial institution. A bill implementing the above mentioned directive into Luxembourg law, Bill of Law no 6326, has been introduced on 27 September 2011 in front of the Luxembourg Parliament.

#### **4.2.2 Implementation of the tax administrative cooperation Directive**

On 15 February 2011, the European Council adopted a Directive aimed at strengthening administrative cooperation in the field of direct taxation so as to enable the Member States to better combat tax evasion and tax fraud. The Directive will ensure that the OECD standard for the exchange of information on request is implemented in the EU. It will especially prevent a Member State from refusing to supply information concerning a taxpayer of another Member State on the sole grounds that the information is held by a bank or other financial institution. This provision will have direct impacts for Luxembourg. The Directive identifies certain details that must be specified in requests for information, namely the identity of the person under investigation and the tax purpose for which the information is sought. In addition, the Directive provides for mandatory automatic exchange of information with respect to an exhaustive list of incomes (including employment income, pension, director's fees). Since the deadline for transposition of the Directive into the national laws of the member states is 1 January 2013, the draft law which proposes the abolition of the modified law of 15 March 1979 on international administrative assistance in the field of direct taxes will be introduced before the Luxembourg Government Council during the first six months of 2012.

#### **4.3 Developments 2011: companies / corporate income tax**

##### **4.3.1 Circular on transfer pricing for group financing companies**

In January 2011, the Luxembourg direct tax authorities issued Circular 164/2, which clarifies the tax treatment of Luxembourg group financing companies and sets out the framework for granting Advance Pricing Agreements (“APA”) concerning them. Since the abolition in 1996 of the digressive table of margins, the Luxembourg authorities had published no further guidance, and taxpayers therefore continued to rely on those margins or, more recently, to base the remuneration of their Luxembourg financing companies on a transfer pricing analysis, without real guidelines from the authorities. The Circular gives now a clear guidance to multinational groups wanting to locate their financing activities in Luxembourg. These new regulations refer to the OECD transfer pricing methodology and apply only to group companies whose principal activity other than holding activities consist of intra-group financing transactions. The APA procedure is only available for intra-group financing companies which have sufficient substance in Luxembourg and bear the risks linked to the financing activities. If granted, the APA should be valid for a maximum of five years (without major changes in the transaction features) and will be renewable.

##### **4.3.2 Investment tax credit expansion**

The investment tax credit is laid down in article 152bis of the Luxembourg income tax law and grants a tax credit to qualifying entities and individuals operating industrial, commercial, handicraft or mining companies for investment in assets made by an establishment situated in Luxembourg. In order to be in line with EU case law, the Luxembourg tax administration issued Circular 152bis/3 dated 31 March 2011 to expand the scope of the tax credit, i.e. making it applicable to assets used in any Member State of the EEA.

##### **4.3.3 Case law: compatibility of the conditions of Luxembourg net wealth tax reduction with EU law**

A net wealth tax (“NWT”) of 0.5% is levied on all Luxembourg resident companies, but the tax may be reduced if the taxpayer creates and maintains a specific reserve in its commercial accounts for five tax years. This tax reduction amounts to a fifth of the reserve and cannot exceed the amount of the corporate income tax liability before imputation of tax credits. In 2004, a Luxembourg resident company had created the specific reserve in its accounts to benefit from the NWT reduction for the years 2004, 2005 and 2006. After its migration to Italy in 2006 and its merger with a local company located there, the Luxembourg tax authorities challenged the NWT reduction granted from 2004 to 2006 since the company had breached the five years condition at the moment of its migration. In order to know if the residence condition to benefit from the reduction is not incompatible with the EU principle of the freedom of establishment, the Administrative Tribunal has requested to the ECJ for a preliminary ruling.

#### **4.4 Developments 2011: VAT**

##### **4.4.1 Luxembourg VAT-free zone**

In July 2011, Luxembourg implemented a regime for a VAT-free zone in order to develop the country as a logistics site and to attract high-value asset storage in its country. The entry of goods, the storage, the maintenance and improvement services carried out in this zone are VAT-free whatever their geographic origin (Luxembourg, other Member States or third countries).

However, the exit of the goods from the free zone may constitute a taxable event for VAT purposes. Foreign buyers and sellers of goods in the VAT-free zone are not obliged to register for VAT in Luxembourg, but only authorised operators (registered as such) are allowed to manage VAT-free zones.

#### **4.4.2 New VAT rules for entertainment, education and exhibition activities**

As of 1 January 2011, further changes to the place of supply rules for business-to-business transactions are introduced through the VAT package. Under the new rules, business-to-business transactions including the supply to participants at cultural, artistic, sporting, scientific, educational, entertainment and similar services (conferences and training events) will now be subject to VAT in the Member State where the customer is located, rather than where the event is held. However, supplies of admission to spectators at an event (including services ancillary to admissions) will still be taxed where the event takes place (i.e. granting right of entry in return for a ticket to an event).

### **4.5 Developments 2011: individuals**

#### **4.5.1 Circular introducing expatriate regime for highly skilled employees**

On 31 December 2010, the Luxembourg direct tax authorities issued Circular 95/2, which introduces a special regime for highly skilled workers who are seconded to a Luxembourg entity belonging to an international group or are recruited from abroad by a Luxembourg company. This expatriate regime consists of an exemption from Luxembourg personal income tax on certain expenses and allowances paid to or on behalf of employees due to their expatriation and applies to those who moved to Luxembourg as from 1 January 2011. The tax regime takes the form of a tax relief applicable for a maximum of 5 years, following the year of the employee's arrival in Luxembourg and is subject to a number of conditions (concerning the worker, his status and activity and the Luxembourg entity). In addition, these qualifying expenses and allowances remain deductible from the Luxembourg company's taxable basis for corporate income tax and municipal business tax purposes.

#### **4.5.2 Repurchase of leased company cars regarded as fringe benefits**

Company cars belong to a great extent to the salary package of employees or executives in numerous Luxembourg companies. Most of the time, cars are leased by the employer from a leasing company with a call option under which the repurchase price is fixed at 10% of the historic vehicle price, i.e. in most of the cases less than the fair market value of the vehicle at the end of the contract. Since 2011, the Luxembourg tax authorities have decided to consider that the repurchase of a car as from 1 January 2009 at a price below market value constitutes a fringe benefit which is taxable in the hands of the employee as non-recurring income. In order to determine the taxable basis of the benefit, the tax authorities have issued a guideline setting average market values depending on the age of the vehicle (45% for 36 months old cars, 35% for 48 months old cars and 25% for 60 months old cars).

## **5 Relevant for all EU countries**

### **5.1 European Commission proposes Common Consolidated Tax Base**

On 16 March 2011, the EC released a proposal for a Council Directive on a Common Consolidated Corporate Tax Base ("CCCTB"), accompanied by an impact assessment. The CCCTB purports to reduce existing inefficiencies and distortions resulting from the co-existence of twenty-seven different regimes by offering a single set of rules which taxpayers operating within the EU can use to calculate their taxable profits.

Under the proposal, the application of the CCCTB is optional for taxpayers. However, once opted into the system, the consolidation with group entities is mandatory. Taxpayers that opt for the CCCTB regime and form a group will have to file a single tax return with the tax authorities of one Member State for their activities in the entire EU (one-stop-shop system). A single consolidated tax return will be used to establish the corporate tax base and all Member States in which the company or CCCTB group is active will be entitled to tax a certain portion of that base, according to a specific formula based on three equally-weighted factors (assets, labour and sales). This formulaic apportionment is one of the more sensitive aspects of the proposal, not only for the taxpayers concerned, but also for the Member States involved. The EC aims for the current proposal to be approved unanimously by the European Council in 2013, after consultation with the European Parliament, which assembles on 27 April 2012 to discuss the proposal on the CCCTB. For further information we refer to [www.ccctb.nl](http://www.ccctb.nl).

#### **5.2 ECJ rules that EU law does in principle not preclude an exit tax on unrealised capital gains (*National Grid Indus BV*)**

On 29 November 2011, the ECJ ruled on *National Grid Indus BV* (case C-371/10). The ECJ holds that a tax charge on unrealised capital gains upon transfer of the place of effective management of a company is not precluded by the freedom of establishment. No deduction has to be allowed for any decrease in value of assets after the date of emigration. However, the company transferring its place of effective management should be provided the choice between immediate payment of the tax due and deferral until the capital gains are actually realized. The ECJ limits the practical effect of its judgment by stating expressly that Member States may charge interest on deferred payment of exit charges and may request the emigrating taxpayer to provide security for the deferred tax payment.

#### **5.3 ECJ considers German rules on taxation of outbound dividends in breach of the free movement of capital (*Commission vs. Germany*)**

On 20 October 2011, the ECJ issued its judgment in the *Commission v Germany* case (C-284/09). The ECJ ruled that the German taxation on outbound dividends is in breach of the free movement of capital. Germany levies 25% withholding tax when dividends are distributed which are paid on shareholdings below the Parent-Subsidiary Directive's thresholds. This levy of withholding tax applies both to domestic and to cross border distributions of dividends to corporate shareholders; however, a domestic dividend recipient is allowed to set off the withholding tax against its own tax burden. This means that a German corporate shareholder de facto does not suffer a withholding tax, whereas a foreign EU/EEA shareholder has to bear the burden of such tax.

#### **5.4 ECJ considers German add-back rules in respect of interest expenses for business tax purposes in line with the Interest and Royalties Directive (*Scheuten Solar*)**

On 21 July 2011, the ECJ ruled on *Scheuten Solar* (case C-397/09). The most important question in the case was whether an add-back rule which prevents the full deduction of interest expenses can qualify as a forbidden levy of tax on interest payments under the Interest and Royalties Directive. The ECJ observed that domestic rules on the basis of assessment of the payer of the interest, such as the rules on the deductibility of certain expenses, are matters left at the discretion of the Member States. Furthermore, the Interest and Royalties Directive aims to avoid legal double taxation of cross-border payments of interest by prohibiting the taxation of interest in the source Member State to the detriment of the actual beneficial owner (i.e. the creditor).

The ECJ continued by stating that the German legislation does not concern taxation to the detriment of the beneficial owner/creditor of the loan. The German legislation only affects the determination of the basis of assessment of the business tax due by the debtor of the loan and is therefore not in breach of the Interest and Royalties Directive.

**5.5 VAT treatment of asset management for pension funds: exempt or taxed? (*Capital International Ltd*)**

The management of assets that are collectively invested through investment funds and investment companies for two or more participants (referred to as “collective investment funds”), is exempt for VAT purposes. The Dutch tax authorities do not consider a pension fund to be a collective investment fund for its participants, but regard it as an individual investor. This means that asset management services rendered to a pension fund are taxable with VAT. In principle a pension fund can only claim a partial refund of input VAT, or no refund at all. As a result, the VAT due on asset management services purchased by Dutch pension funds is a cost for pension funds. In the Netherlands, this is currently disputed in front of a regional court. A similar discussion is currently debated in the United Kingdom. In this respect, a British court on 8 August 2011 referred a case to the ECJ, in which the ECJ is asked whether a pension fund should be considered as a collective investment fund for VAT purposes or rather as an individual investor. This ECJ case is expected to be decisive for the Dutch procedure as well. A final decision of the ECJ is not expected shortly.

Should you wish to receive further information, or should you have any questions concerning the Year End Tax Bulletin 2011, please contact your regular Loyens & Loeff contact person.

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