LOYENS & LOEFF

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.

Brazil Desk Email Bulletin # 10a
18 December 2009

Year End Tax Bulletin: the Netherlands

Content:

- Applicable Dutch corporate income tax rates for 2010 and 2011
- Extension of accelerated and random depreciation
- Changes to the tonnage tax scheme
- New innovation box regime
- Changes in carry forward and carry back of tax losses
- Changes to the Dutch participation exemption
- Amendments to the Dutch dividend tax
- Status of the Consultation Document
- An increase of fines for the failure to file a Tax Return
- New social security rules for international labour

Applicable Dutch corporate income tax rates for 2010 and 2011

The Dutch corporate income tax rates for 2009 and 2010 were temporarily adjusted (with retroactive effect to 1 January 2009) to 20% for a taxable amount up to € 200,000 to provide companies a cash benefit during the economic crisis. As of 2011, this measure will be reversed and the pre-2009 rates should again be applicable.

Taxable amount (€)		*Rates for 2009*	*Rates for 2010*	*Rates for 2011*
-	40,000	20.0%	20.0%	20.0%
40,000	200,000	20.0%	20.0%	23.0%
200,000	-	25.5%	25.5%	25.5%

Extension of accelerated and random depreciation

In 2009, the Dutch government decided to temporarily reintroduce the possibility for accelerated and random depreciation of business assets to stimulate investments. Investments in most assets made between 1 January 2009 and 31 December 2009 may be depreciated in two years, with a maximum of 50% in 2009 and 50% in 2010. The 2010 Tax Budget extends this regime for one additional year, i.e. investments made between 1 January 2010 and 31 December 2010 can benefit from accelerated and random depreciation in 2010 and 2011.

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.

Although this email bulletin has been prepared with great care, Loyens & Loeff accepts no responsibility for the consequences of any reliance upon this email bulletin without the further involvement of Loyens & Loeff.

Unsubscribe from this newsletter mail to: brazil.desk@loyensloeff.com

Loyens & Loeff N.V.

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

Millenniumtoren
Weena 690
3012 CN Rotterdam
T: +31 10 224 62 24
F: +31 10 412 58 39

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).

Changes to the tonnage tax scheme

Currently, the tonnage tax scheme can be applied to profits derived from the exploitation of a ship in international traffic by sea, which is generally interpreted as transport by sea. The Dutch government has proposed to broaden the scope of the tonnage tax scheme as per 1 January 2010 (provided approval will be obtained from the European Commission) by including profits derived from the exploitation of a ship that transports people and/or objects for the purposes of (i) laying cables and pipelines, (ii) exploration of the sea-bed or (iii) heavy lifting at sea. Please note that only profits relating to the transport fall within the scope of the tonnage tax scheme, i.e. profits derived from the laying of cables and pipelines, the exploration or the heavy lifting itself are explicitly excluded.

New Innovation box regime

One of the eye-catching measures in the 2010 Tax Budget is the improvement of the current patent box. Since 1 January 2007, companies can opt to include their net proceeds from self-developed, patented intangibles in the patent box where the proceeds are effectively taxed at a reduced corporate income tax rate of 10%. In 2008, the patent box was extended to also include net proceeds from intangibles for which a so-called R&D statement (see below) was obtained. As of 1 January 2010, in addition to renaming the patent box "innovation box", the following three improvements will be made:

- The effective tax rate for the box is reduced from 10% to 5%.
- The total net proceeds taxable at the innovation box rate is no longer capped (previously amongst others a cap of four times the total amount of R&D expenses of the intangible assets applied).
- Where in a certain year the net proceeds from qualifying intangible assets are negative, the loss is deductible from the taxable profit against the regular rate. However, such loss must first be recaptured against the regular tax rate before the reduced innovation box rate is applicable again.

In addition to these improvements, the facility for R&D wage tax credits is extended enabling companies to claim a larger wage tax credit. To be eligible for an R&D wage tax credit, a so-called R&D statement needs to be obtained with SenterNovem (which is part of the Dutch Ministry of Economic Affairs). To qualify for such R&D-statement, a project should focus on e.g. the development of technically new products or production processes.

From recent discussions we had with the tax authorities and practical experience with the patent box, it follows that the tax authorities will apply a very pragmatic approach when considering applications for the innovation box. In essence, the amount of profit allocable to the box can be determined on the basis of a profit split of the commercial EBIT. In view of the improvements and the pragmatic approach from the tax authorities, the Dutch innovation box has become an attractive tax planning tool for international businesses.

Changes in carry forward and carry back of tax losses

To increase the cash position of companies, two changes were made to the carry forward and carry back of tax losses:

- Taxpayers can claim loss relief on the basis of a reasonable estimation of their losses for the current tax year. This means that taxpayers no longer have to first file a tax return and have to wait until the tax authorities issue a final tax assessment before relief (e.g. through carry back of the loss to prior years) can be granted.
- In their annual corporate income tax return, taxpayers can opt for an extension of the loss carry back period from one to three years. This option is available for losses incurred in the taxable years 2009 and/or 2010. Election is subject to two limitations: (i) if you elect for this extension the maximum 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 to the Dutch participation exemption

General

The Dutch participation exemption does not apply to "low-taxed investment participations". Under current rules, this regards (in brief) participations in a subsidiary of which the directly and indirectly owned assets consist of more than 50% portfolio investments (the "**Asset Test**") and which is taxed in its state of residence at an effective tax rate of less than 10% (the "**Tax Test**"). The Asset Test and the Tax Test will remain in place in slightly amended form and, in addition, the 2010 Tax Budget reintroduces a motive test (as defined below) that was abolished as per 2007. As of 2010, the Dutch participation exemption will be applicable to a participation if it fulfils at least one of these three tests.

The Motive Test

As of 2010, the main rule will be that the participation exemption applies to a participation of at least 5% in a subsidiary, unless such participation itself is held as a portfolio investment (the "**Motive Test**"). The rather open-ended description of the Motive Test, as developed in Dutch case law prior to 2007, requires a determination as to the taxpayer's objective of owning the participation. The Motive Test is not satisfied if the taxpayer only aims at earning a yield that is similar to the yield that can be expected from normal, active portfolio asset management. If the taxpayer has more than one motive (e.g. the subsidiary is partly held as a portfolio investment and partly for business reasons), the predominant motive is decisive.

The Motive Test is generally satisfied when the business carried on by the subsidiary is similar or complementary to the business carried on by the Dutch taxpayer. In the past, Dutch tax authorities also accepted that the Motive Test was satisfied when the taxpayer did not carry on a business of its own, but instead played an essential role in the business of the group because of its activities in terms of management, strategy or finance. Further, the Motive Test was satisfied if the Dutch taxpayer was an intermediary holding company that acted as a link between the ultimate parent and operating subsidiaries. The legislative change means a return to this practice.

The Motive Test is deemed not to be met if (i) more than half of the subsidiary's consolidated assets consist of shareholding(s) of less than 5% or (ii) the predominant role of the subsidiary – together with the roles performed by its lower tier subsidiaries – is to put cash or assets at the disposal of other group entities, for example to act as a group finance company.

The Asset Test

The Asset Test will not change substantially. As under current law, the Asset Test will be met if the taxpayer demonstrates that less than 50% of its directly and indirectly held assets consist of low taxed portfolio investments. Here, group receivables are still deemed to be portfolio investments, unless (i) the participation qualifies as an active group finance company, (ii) the receivables are mainly financed (90% or more) from third party debt, or (iii) income of the receivables is subject to sufficient taxation (same meaning as for purposes of the Tax Test – see below). An improvement to the current Asset Test is that real estate and assets used in an active leasing business are no longer deemed to be portfolio investments.

The Tax Test

The Tax Test will not change substantially either. The current condition that a participation is considered sufficiently taxed if it is subject to an effective tax rate of at least 10%, calculated according to Dutch tax standards, will be replaced by the condition that the participation is subject to a "realistic levy" in its state of residence. It was indicated in parliament that an effective tax rate of at least 10% is sufficient for passing this test. However, the revised Tax Test means that a full recalculation to Dutch tax standards of the taxable profits of the participation in principle is no longer required.

Amendments to the Dutch dividend tax

As a consequence of the decisions of the European Court of Justice in Commission v. the Netherlands (Case C-521/07) and Aberdeen Property Fininvest Alpha Oy (Case C-303/07), the 2010 Tax Budget extends the current dividend tax exemption. The exemption can now also apply to dividends paid to companies resident in Iceland and Norway that have a shareholding of at least 5% in the Dutch distributing company. Even though Liechtenstein has recently entered into an Exchange of Information Treaty with the Netherlands, shareholders resident in Liechtenstein are still excluded from the dividend tax exemption. Furthermore, for application of the dividend tax exemption it is no longer required for shareholders established in the European Union or the European Economic Area (i) to have a legal form listed in the Annex to the EU Parent Subsidiary Directive or (ii) to be subject to a profit-based tax as listed in the EU Parent Subsidiary Directive. However, the dividend tax exemption remains inapplicable if the shareholder is subject to a tax regime similar to the Dutch fiscal investment institution or Dutch tax-exempt investment institution regime.

Status of the Consultation Document

On 15 June 2009 the Dutch Ministry of Finance published a consultation document proposing changes to the Dutch Corporate Income Tax Act 1969, amongst others into the tax treatment of interest (the "**Consultation Document**"). The Consultation Document suggests the introduction the idea of a mandatory group interest box and two alternative interest deduction restrictions. It invited interested parties to provide comments to the proposals.

On 2 September 2009, the State Secretary of Finance indicated that 87 reactions to the consultation document had been received by the Ministry of Finance. In a second letter dated 26 October 2009, the State Secretary of Finance indicated that he would soon present legislative proposals regarding the topics of the consultation document.

On 5 December 2009, the State Secretary of Finance sent a third letter to Parliament in which he announced that his intention to abandon the plans to introduce a long anticipated mandatory group interest box and certain measures to restrict the deductibility of interest in the near future. The feasibility of these measures will be taken into account in a broader study of the Dutch tax system, which is currently set up by a specific Study Committee. The government proposes to proceed only with a measure to limit the deductibility of interest incurred by acquisition holdings (please also refer to Email Bulletin # 9). In addition, the government considers introducing a limitation on the deductibility of losses of foreign permanent establishments. According to an accompanying press release, a legislative proposal is expected in the first half of 2010.

An increase of fines for the failure to file a Tax Return

As from 1 January 2010 the fine for the late filing (or not filing at all) of a corporate income tax return (the "**Tax Return**") will be further increased from an amount of € 567 to an amount of € 2,460. The amount of € 2,460 is a fixed amount and does not depend on the number of times the Tax Return has been filed too late in the past, nor the amount of the taxable result. However, in case a taxpayer persists in late filing (or in not filing at all) of Tax Returns, a maximum fine of € 4,920 can be imposed.

The fine of € 2,460 can be imposed for Tax Returns that are filed late (or not at all) on, or after, 1 January 2010. Please note that this new fine does not only apply to Tax Returns for the year 2009 and following years (as the term for filing of these Tax Returns expires after 1 January 2010). It also applies to Tax Returns for years prior to 2009 for which an extension for filing was granted, which extension expires after 1 January 2010.

New social security rules for international labour

Employees who work internationally within the European Union and the European Economic Area ("**EEA**") or in Switzerland will be faced with a number of changes when the current Regulation (EEC) No 1408/71 will be replaced by the new Regulation (EC) No 883/2004 on 1 May 2010. The new Regulation provides new rules and conditions to determine which social security system applies to an internationally working employee. In light hereof, existing situations may need to be reassessed. The basic principle of the new Regulation is that an employee is subject to the social security legislation of only one Member State and, as a main rule, this should be the State where the employee pursues his activities (physical presence). The new Regulation contains specific rules for persons who are employed or self-employed in more than one Member State. We note that there will be a transitional period of ten years during which the old regulation will continue to apply for existing situations and the new regulation can be applied upon request.

LOYENS LOEFF

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
michiel.van.kempen@loyensloeff.com

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

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

Peter Adriaansen
T: +31 10 224 62 32
peter.adriaansen@loyensloeff.com

For more information about the Loyens & Loeff Brazil Desk please see:

www.brazildesk.nl