



Our annual shipping update summarizes the most relevant Netherlands and international tax developments for the shipping & offshore sector during the past year.

This edition of the update provides you with a brief overview of relevant corporate tax, value added tax and wage tax/social security developments in the Netherlands. It also highlights some relevant EU and international developments for the shipping & offshore sector.

## 1. Corporate tax

### 1.1 CIT rates

The Dutch corporate income tax rates for 2021 are as follows:

Taxable amount	2021
≤ EUR 245,000	15%
> EUR 245,000	25%

The threshold of EUR 245,000 will be extended to EUR 395,000 in 2022. Contrary to earlier plans of the Dutch government to lower the top rate, the Dutch government maintains the top rate at 25%.

### 1.2 Withholding tax on interest and royalties as of 2021 and additional withholding tax on dividends to low-taxed or EU-blacklisted jurisdictions as of 2024

As of 1 January 2021, a withholding tax on interest and royalty payments to related entities (in general, > 50% of voting rights) in certain low-taxed or EU-blacklisted jurisdictions ('LTJs') applies. Additionally, payments to certain hybrid entities or payments in 'abusive situations' may also be covered, even if the payment is made to an entity not resident in an LTJ.

The rate of the withholding tax is the top corporate income tax rate (25% in 2021). From a practical perspective, it is important to note that there are several situations that may be covered by the withholding tax that are less straightforward. These include, for instance, interest-free loans from related companies in LTJs, certain lease payments to LTJs (N.B. a lease of a vessel which qualifies as a financial lease or a hire-purchase ('huurkoop') may be covered) and payments not made directly to an LTJ but indirectly (e.g. a 'back-to-back' situation). Furthermore, the presence of substance (either at the level of the Dutch entity or the LTJ entity) is not relevant for the withholding tax.

The Dutch government announced that it intends to implement an additional withholding tax on dividends as of 1 January 2024 and published a draft legislative proposal for consultation on 25 September 2020. The additional withholding tax will entail a surcharge for dividend payments made directly or indirectly to shareholders in an LTS. It will only apply for dividends paid to related companies (in general >50% of voting rights).

### 1.3 Proposed changes of the loss compensation rules

As part of the Dutch Budget 2021, the Dutch government has proposed amending the loss compensation rules as laid down in the Dutch Corporate Income Tax Act. This proposal has been approved by Dutch Parliament. The entry into force date will be determined by a royal decree and is expected to be 1 January 2022. Outstanding carry forward losses, which are still available in 2022 pursuant to the existing legislation, will no longer be restricted by the current six-year term. The one-year carry back term remains unchanged. On the other hand, losses can be offset in a certain year only up to a maximum of 50% of the taxable profit realised in that particular year. An exception applies with respect to the first one million euro of annual taxable profit which can be fully offset by losses. Hence, losses should generally not expire in time, but especially for multinationals it could take longer to utilize them, which may have an impact on the valuation of deferred tax assets.

### 1.4 Possible new group regime

In June of 2019, the Ministry of Finance issued a public consultation on the alternatives to replace the existing fiscal unity regime by another regime. In the consultation paper four alternatives were presented:

- i. Continuation of the existing system (with full consolidation of group companies into the parent company) including the newly introduced [anti-abuse rules](#);
- ii. Abolishment of the present fiscal unity regime;
- iii. Introduction of a "UK-style" profit- and loss pooling system (without consolidation for tax purposes);
- iv. Extension of the existing system also to foreign qualifying group companies (including the extension/tightening of the object exemption for foreign PE-profits).

The outcome of the public consultation document has been published on Budget Day (15 September 2020). Most support is available for alternatives (i) and (iii). The introduction of alternative (iii) may have significant impact on Dutch fiscal unities that benefit from the Dutch tonnage tax regime where the ownership and management of vessels are separated between different legal entities, because they would no longer qualify for the requirements for the tonnage tax requirements on a stand-alone basis. For that reason, the Royal Dutch Shipping Association ('**KVNR**') issued a position paper to react on the consultation document stressing the need for amendments to the Dutch tonnage tax regime if alternative (iii) would be implemented. It follows from the outcome of the public consultation document that the State Secretary of Finance is (now) aware of this issue. The State Secretary of Finance leaves the decision to submit a draft legislative proposal to the next Dutch government (N.B. on 17 March 2021 there are elections in the Netherlands for the Lower House of Parliament) and also indicated that it will take a couple of years before a new group regime will be implemented (if it will be implemented at all).

## 1.5 General exception to the EEA flag requirement in 2021

One of the conditions for applying the Dutch tonnage tax regime to a vessel that is owned, co-owned or held in bareboat charter is that the vessel flies an EEA flag. A general exception to this flag requirement applies if it has been determined by ministerial regulation that the percentage of net tonnage of self-owned vessels that qualify for the tonnage tax regime and that fly an EEA flag with respect to the total net tonnage of vessels qualifying for the tonnage tax regime in a certain period has not decreased compared to the previous period<sup>1</sup>. The general exception did not apply in 2016 - 2020 but does apply in 2021. This means that vessels added to the fleet during this calendar year do not necessarily have to fly an EEA flag in order to fall within the scope of the tonnage tax regime provided that the shipowner / ship manager already owns /manages at least one EEA-flagged vessel. Since the introduction of the flag requirement in 2006, the general exception to the flag requirement applied for the years 2006, 2007, 2008, 2012, 2014, 2015 and 2021.

## 1.6 Impact Brexit on application of the tonnage tax regime

The UK left the EU on 31 January 2020. A transition period started thereafter and lasted until 31 December 2020. During this transition period the UK and Gibraltar flag were still considered to be an EU flag. As of 1 January 2021, the UK and Gibraltar flag do not qualify as EU flag anymore. This may have adverse consequences for the application of the tonnage tax regime since the EEA flag ratio of a taxpayer's fleet is (also) relevant when determining whether a non EEA flagged vessel that is added to the fleet can benefit from the tonnage tax regime. Due to the general exception to the EEA flag requirement in 2021 (see 1.5 above) the adverse consequences might be limited in 2021.

## 1.7 Evaluation fiscal incentives for the shipping industry

The Dutch fiscal incentives for the shipping industry (tonnage tax, accelerated and random depreciation and seafarer's wage tax relief) are evaluated every few years. The Minister of Infrastructure and Water Management indicated on questions raised by members of the Lower House of Parliament that the outcome of the current evaluation will be published in the first half year of 2021. The Minister recognizes that certain aspects of the Dutch tonnage tax regime are stricter compared to other countries but indicated that the government first wants to await the outcome of the current evaluation before commenting on the desirability and possible amendment of the Dutch tonnage tax regime.

## 2. Value added tax

### 2.1 Brexit

#### 2.1.1 General

The UK is treated as a third country as of January 2021 for VAT. This should not result in significant changes in the VAT-treatment of transport services performed by shipping companies.

It is however noted that due to the Brexit, it is no longer possible for UK companies to act as exporter of record on the EU export declaration, as the exporter should be established in the EU. In order to export goods from the EU, UK companies will have to appoint an EU established company, i.e. a logistic service provider, that acts as the exporter of record.

#### 2.1.2 B2B transport of goods

B2B transport services of goods (i.e. transport provided to VAT taxable persons) will remain VAT taxable in the country of establishment of the customer. If the shipping agency is not established and does not have a permanent establishment in that country of the customer, the reverse charge mechanism applies to these services.

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<sup>1</sup> Please note that the exceptions do not apply to tugs and dredgers.

This means that the shipping company has to issue invoices without VAT. The VAT due in the country of the customer is due by the customer, who can deduct the reverse charge VAT due in the same VAT return.

The company should not include the outgoing or incoming services as ICSales. Rather, the services subject to UK VAT in the UK will not be included in the NL VAT returns at all.

If the services are subject to VAT in the Netherlands, i.e. the customer is established in the Netherlands, then the 0% VAT rate could apply in case of transportation of goods that have not been imported in the EU (yet) or goods that will be exported from the EU.

### **2.1.3 B2C transport of goods**

B2C transport services (i.e. transport provided to a customer that does not qualify as VAT taxable person) are VAT taxable:

- in the country where the transport starts, in case of transport of goods between two EU countries;
- in the country or countries where transport physically takes place, proportionate to the distances covered, in other cases of transport of goods.

If the services are subject to VAT in the Netherlands, then the 0% VAT rate could apply in case of transportation of goods that have not been imported in the EU (yet) or goods that will be exported from the EU.

### **2.1.4 B2B and B2C passenger transport**

Passenger transport is subject to VAT in the country or countries where the transport takes place, proportionate to the distances covered.

If the services are subject to VAT in the Netherlands, then the 0% VAT rate applies in case of transport from or to a destination outside the Netherlands. This Dutch 0% VAT rate also applies to means of transports (cars and/or motorcycles) that are transported along with the passengers.

## **3. Wage tax / social security**

### **3.1 Seafarer's wage tax relief update**

#### **3.1.1 General**

Shipowners might be eligible for a wage tax facility called the seafarer's wage tax relief ('afdrachtsvermindering zeevaart') if certain criteria are met. This facility grants these owners a rebate on the wage tax and employee's social security contributions that must be paid to the tax authorities. Its aim is to enhance the international competitive position of the Dutch shipping industry and preserve the (employment in) the shipping industry by decreasing the employment costs.

To be eligible for this facility as shipowner, the following criteria should be met:

1. the employees must be employees within the meaning of the Wage Tax Act 1964;
2. the shipowner must be a withholding tax agent within the meaning of the Wage Tax Act 1964;
3. the employees must be qualifying seafarers;
4. certain criteria's regarding the ship on which employment activities are performed should be met:
  - a. the ship should fall within the scope of the Seafarers Act;
  - b. the ship should have a Dutch sealetter ('zeebrief') and Dutch flag;
  - c. the ship should be exploited within a business context;
  - d. the exploitation of the ship should take place at sea for at least 50% of the time and
  - e. the ship should be used for one of the following activities: a) the transport of goods or persons in international traffic by sea, b) the transport of goods or persons by sea for the benefit of the exploration or exploitation of natural resources at sea, c) certain types of towing and rescue work and d) dredging activities.

### **3.1.2 Tax audits – position paper**

The Dutch tax authorities ('**DTA**') have conducted several tax audits in recent years where it came apparent that they hold some disputable opinions regarding certain application criteria which mostly affect Dutch shipowners with offshore support vessels. For instance, the tax authorities are of the opinion that:

- goods or individuals have to leave the ship in port or at an offshore location, otherwise there is no 'transport' within the meaning of the seafarer's wage tax relief;
- transport activities should be the core activity of the ship;
- transport between offshore locations outside the Dutch territorial waters but within the Dutch EEZ is not a form of 'international transport';
- the seafarer's wage tax relief can only be applied on the crew that keeps the ship running (captains, officers and sailors).

The KVNR has discussed these positions with Loyens & Loeff after which, as joint effort, a position paper was prepared that discusses the scope of seafarers wage tax relief, addresses some of the discussion items and provides potential solutions. This position paper has been shared with the Dutch government for purposes of the evaluation of the fiscal incentives for the shipping industry (see 1.7).

### **3.1.3 Impact COVID-19**

In addition to the above, the COVID-19 pandemic has made it more difficult for shipowners to utilize this facility, because ships are forced to spend longer periods in port than originally planned and expected. Consequently, the requirement of 50% of activity at sea per payroll period is difficult to meet. We understand that the KVNR has discussed this issue with the Ministry of Finance in the first half of 2020. Based on these discussions the KVNR expects that the tax authorities will approach any problems regarding the 50%-criterium in a pragmatic way. Please note that this will likely only be the case with respect to additional waiting days or when the ship remains operational in port, not when ships are out of use for a longer period of time. Cases can be discussed with the tax authorities in case of doubt or if certainty in advance is desired.

## **3.2 Temporary job-related investment incentive (BIK)**

In order to retain and to create more jobs, a job-related investment incentive has been introduced in the form of a tax credit as per 1 January 2021 ('**BIK**'). This tax credit can be set off against the payment of payroll tax (i.e. wage tax and national insurance contributions). As a result, this subsidy can also be effectuated if a company does not have taxable profits. It can only be claimed if sufficient wage tax and national insurance contributions are due. If a shipowner cannot redeem the full amount of seafarers' wage tax relief because the withheld wage tax is less than the relief, the BIK can effectively not be claimed.

The investment subsidy is only available to companies who are subject to both Dutch payroll tax and Dutch corporate income tax. For the time being awaiting approval of the European Commission the BIK can only be applied at the level of the company, not at CIT fiscal unity level.

The temporary subsidy is aimed at new business assets of which the investment commitment is entered into on or after 1 October 2020. The investment must be paid in full in 2021 or 2022 and must be taken into use no later than 6 months after the last payment has been made. The investment incentive can coincide with other current investment incentives. Submissions are possible as from 1 September 2021. Certain business assets are excluded from the scope of the temporary investment subsidy. Based on the current wording of the legislation investments that entirely fall within the scope of the Dutch tonnage tax scheme seem to be excluded for the BIK. However, we wonder whether this is what is intended given the remark during the parliamentary history that the BIK can coincide with other investment incentives and also because investments in vessels for which a profit split is prescribed for purposes of the tonnage tax regime do seem to qualify for the BIK.

Business eligible for the investment incentive can deduct 3.9% of their investments up to EUR 5 million per calendar year from their payroll tax and 1.8% of their investments in the excess of this amount. The minimum investment for which the tax credit can be claimed is EUR 20,000, whereby the investment per business asset must be at least EUR 1,500.

The law contains a possible adjustment of the aforementioned rates to 5% for investments up to € 5 million, resp. 2.08% for the portion above. This part of the law is not yet in force. The entry into force is dependent on the approval of the European Commission to be able to apply the BIK within the fiscal unity for corporate tax purposes. In case of approval, the adjustment will be in force with retroactive effect to 1-1-2021.

## 4. International and EU shipping tax developments

### 4.1 OECD BEPS 2.0: Pillar 1 and Pillar 2 Blueprints published

In May 2019 the OECD published its program of work for developing a solution to the tax challenges arising from the digitalisation of the economy. The program is divided in two pillars (Pillar 1 and 2). **Pillar 1** seeks to allocate more profits to the ‘market jurisdictions’ (new taxing rights) for certain digital activities. **Pillar 2** aims at ensuring that profits are subject to a minimum level of tax on a worldwide basis. In October and November 2019 the OECD issued a first round of consultation on Pillar 1 respectively Pillar 2. The ECSA reacted for both consultations with a request for a carve-out for the shipping industry both under Pillar 1 and Pillar 2 changes based on the special tax status of the shipping industry (residence taxation of shipping income under article 8 OECD Model Convention and special tax regimes applicable in almost all maritime countries). In October 2020 the OECD issued two Blueprints on the Pillar 1 and 2 project, followed by a second consultation round during October and November 2020. Both the Pillar 1 and 2 Blueprints contain a shipping carve-out, however, the shipping carve-out for the Pillar 2 – project is not approved yet by the OECD/G20 Inclusive Framework on BEPS (**‘IF’**). The ECSA (together with WSC, ICS and CLIA) again filed a **submission** with the request to approve the Pillar 2 shipping carve-out. Also our colleague Ton Stevens filed a **scientific article** as a submission on a private basis.

Without such carve-outs the shipping industry may face rather huge tax and administrative challenges under both Pillar 1 and 2 changes. The coming half year it will become more clear whether and to what extent (i) the OECD-countries will approve the proposed Pillar 1 and 2 changes and (ii) a special carve-out for the shipping industry will be approved for also with respect to Pillar 2.

### 4.2 EU state aid: General Court decides on Spanish Tax Lease

On 23 September 2020 the General Court of the EU finally decided – after a long-lasting EU court proceedings – that the Spanish tax system applicable to certain finance lease agreements (the so-called Spanish Tax Lease; “**STL**”) for newbuilt vessels constitutes unlawful state aid and has to be repaid by the beneficiaries of this tax scheme. The General Court based its decision for the major part on the discretionary authority of the Spanish tax authorities to set the parameters (mainly accelerated and early depreciation possibilities) of the applied tax scheme. After the initial start of the EU state aid proceedings the Spanish government adapted the STL and abolished this discretionary authority (so-called STL 2.0, which introduction was approved in advance by the EU Commission). Therefore, this decision by the General Court on the STL 1.0 does not seem to have a major impact on the STL 2.0 – scheme. In its decision the General Court pointed out that the investors into the scheme (which was set up through a fiscally transparent EIG) are the beneficiaries of the unlawful state aid and, therefore, are the tax subjects that have to repay the unlawful state aid (regardless of the fact that the tax advantages are commercially shared with other subjects (e.g. the shipowners that leased the newbuilt vessels)).

## Contact

Should you require any assistance in this respect, please contact your trusted advisor at Loyens & Loeff. For more information about the Loyens & Loeff Shipping & Offshore team, click [here](#).

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