LOYENS & LOEFF

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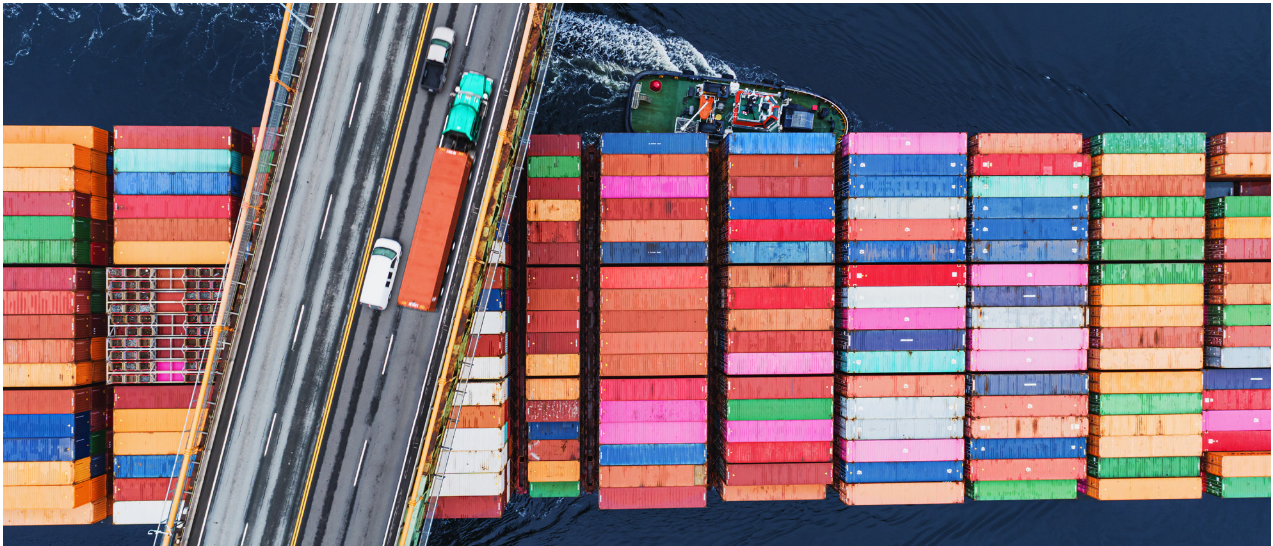

Our annual shipping update summarizes the most relevant Dutch and international tax developments for the shipping & offshore service industry during the past year.

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 service industry.

1. Corporate tax

1.1 Corporate income tax rates

The Dutch corporate income tax rates for 2022 are as follows:

Taxable amount	Rate
≤ EUR 395,000	15%
> EUR 395,000	25.8%

1.2 Loss compensation rues

As of 1 January 2022, the new Dutch loss compensation rules for corporate taxpayers have entered into force. As a result of these new rules, corporate income tax losses can be carried forward indefinitely, while the carry back period remains one year. However, in contrast to the previous loss compensation rules, the annual loss compensation will be limited to EUR 1 million plus 50% of the taxpayer's annual taxable profit exceeding EUR 1 million. The new rules will apply to both losses incurred after 1 January 2022 and existing losses which were still available to taxpayers at the time the new rules entered into force.

1.3 No general exception to the EEA flag requirement in 2022

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.[1] The general exception applied in 2021, but does not apply in 2022. This means that vessels added to the fleet during this calendar year are required to fly an EEA flag, unless the taxpayer can invoke one of the other two exceptions to the EEA flag requirement (i.e. the 'non-decrease' test or the '60% test'). 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.

1.4 Coalition agreement

On 15 December 2021, the policy roadmap of the new Dutch coalition agreement was published. Several fiscal measures have been proposed that will be brought into Parliament in the period 2021 to 2025. One of the proposed measures is an amendment of the so-called 'Controlled Foreign Company' (CFC) rules following recommendations by the advisory committee on taxation of multinationals. Under the existing CFC-regime, income from entities in certain low-tax countries is included in the Dutch taxable income. In 2020, the advisory committee proposed to tighten the current CFC-regime, for example by abolishing the currently existing exception for interim distributions of profits and by increasing the threshold of the 'real economic activities-exception'. The coalition parties also confirm that they will implement the Pillar Two proposal of the OECD[2] (see hereafter under 4.1), however the exact implementation is presently unknown. The aim is to have the Pillar Two proposal enter into force as from 2023.

1.5 Update Decree on profit from maritime shipping

On 9 March 2021 an updated version of the Decree of the Dutch State Secretary for Finance on the determination of profit from maritime shipping (Decree) was published. The Decree includes several new elements, as well as certain minor amendments to improve readability of the Decree. The new elements include the State Secretary's view on the commencement year of the tonnage tax regime, the allocation key used by the Dutch tax authorities for determining the qualifying operational time for dredgers and a description on the so-called 'asset/crew split' which is used in practice for the profit split of cable and pipelaying companies.

There has been some discussion as to the State Secretary's view on the commencement year of the tonnage tax regime. This is important as a request for the tonnage tax regime must be submitted in the first year in which there is a profit from maritime shipping. Otherwise, a request can only be submitted after the tenth year or a multiple of that. According to the State Secretary, the first year in which there is a profit from maritime shipping is the year in which the first costs are incurred for implementing the intention to operate a vessel (such as the costs made in respect of the order of the vessel). As this moment is already at a very early stage, Dutch taxpayers intending to request for application of the tonnage tax regime should be mindful to submit their request on time. If there is uncertainty as to the commencement year, it is possible to request advance tax certainty with the tax inspector.

1 Please note that the exceptions do not apply to tugs and dredgers.

2 On 22 December 2021, shortly after the publication of the coalition agreement, the European Commission published the Pillar Two Implementation Directive which is aimed at implementing most of the OECD Pillar Two rules within the EU.

1.6 Evaluation fiscal incentives for the shipping industry

The Dutch fiscal incentives for the shipping industry (tonnage tax regime, accelerated and random depreciation and seafarer's wage tax relief) are evaluated every few years. In a letter from the Minister of Infrastructure and Water Management of 9 October 2020 it was indicated on questions raised by members of the Lower House of Parliament that the outcome of the current evaluation was expected to 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. Although the evaluation has not yet been published as per the date of this update, we understand that the evaluation has been completed internally by the Ministry of Infrastructure and Water Management but is still waiting for the reaction of the Ministry of Finance. It is expected that with the start of the new Dutch government, the evaluation will be published in the course of 2022.

1.7 ATAD 2 – Reverse hybrid entities

As from 1 January 2022, reverse hybrid entities organised under Dutch law or established in the Netherlands (typically, Dutch limited partnerships) will under circumstances become subject to corporate income tax in the Netherlands. A reverse hybrid entity is an entity that is considered tax-transparent in its resident state, but non-transparent (i.e. opaque) from the perspective of the residence state of a related (indirect) participant in such entity. ATAD 2 obliges EU Member States to introduce and apply a subject-to-tax rule to reverse hybrid entities as from 2022.

Pursuant to the adopted legislation, a reverse hybrid entity is subject to Dutch corporate income tax if it is considered non-transparent by at least 50% of its related (indirect) participants. Furthermore, distributions made by a reverse hybrid entity that is a taxpayer for Dutch corporate income tax purposes are in principle subject to Dutch dividend withholding tax, unless eligible for an exemption. Finally, interest, royalty and dividend payments made by such reverse hybrid entity have been brought in scope of the conditional withholding tax on interest and royalties (2022) and dividends (2024).

1.8 Case law

1.8.1 Application of tonnage tax regime to premium- and frequency discounts

A Dutch limited company (X BV) participated in several ship-owning limited partnerships (LPs) and solicited insurance policies on behalf of these LPs. As X BV solicited insurance policies for several vessels via the same insurance broker, X BV received a discount on the premium. In addition, X BV received a frequency discount, because of the frequent sailing of the insured vessels on the North Sea Canal. In dispute was whether X BV can apply the tonnage tax regime to the received premium discount and the frequency discount.

The Court of Appeal of Arnhem - Leeuwarden ruled that the tonnage tax regime also applies to the premium discount and the frequency discount. According to the Court of Appeal it was not relevant that the payments of the insurance broker were made to X BV directly. The Court of Appeal ruled that the payments should in principle be attributed to the LPs as a result of the exploitation of the vessels, but X BV argued convincingly that the partners of the LPs agreed to attribute the benefits of the payments to X BV as an additional profit entitlement of X BV in the LPs.

1.8.2 Dutch tonnage regime applies despite outsourcing of crew management activities

In dispute was whether a Dutch limited company (X BV), participating in several ship-owning limited partnerships (LPs) and responsible for the crewing management of the ships, correctly applied the tonnage regime to its profits. According to the tax inspector, the tonnage tax regime should not apply, as X BV outsourced the crewing management activities to a crewing agency. Based hereon, the tax inspector took the position that one of the conditions for X BV to apply the tonnage tax regime (X BV should perform the "full" crewing management) had not been met.

The Court of Appeal of Arnhem - Leeuwarden ruled that the tonnage tax regime applied to the profits realised by X BV. Although X BV outsourced the crew management activities, X BV remained (fully) responsible for the crewing management under the management agreement concluded between X BV and the LPs. Hence, X BV meets the condition that it should perform the "full" crewing management.

2. Value added tax and excise duties

2.1 0% VAT rate for sea going vessels not applicable to jack-up drilling rigs as of 2023

As of 1 January 2023, the Dutch 0% VAT rate for sea going vessels will no longer apply to jack-up drilling rigs. Based on amended Dutch VAT policy, as of that date, jack-up drilling rigs will not be considered sea going vessels anymore.

Supplies of sea going vessels and most transactions in connection with sea going vessels are subject to 0% VAT. A sea going vessel is a vessel used for business purposes for navigation on the high seas. In the 'Grup Servicii Petroliere' case, the EU Court of Justice (ECJ) ruled that a sea going vessel is used mostly for navigation on the sea and should therefore not be in a predominantly stationary position. The ECJ therefore ruled that jack-up drilling rigs should not be considered as sea going vessels. The amendment of the Dutch VAT policy is in line with this case law of the ECJ.

The restriction of the 0% VAT rate will enter into force in 2023 in the Netherlands to give market parties time to anticipate on the future changes by identifying the (new) VAT treatment of their transactions and updating their ERP systems. Although the restricting of the 0% VAT rate may result in companies having to charge Dutch VAT in certain instances, no Dutch VAT should still apply in case of export of supplies or services to foreign companies. More requirements and administrative obligations could, however, apply compared to the application of the 0% VAT rate for sea going vessels.

2.2 Change in Dutch excise duty rates on mineral oils

As from 1 January 2022, the excise duty rates for certain mineral oils have changed. In the case of mineral oils, this in principle occurs each year as a result of the adaptation to the price index. The excise duty rates for mineral oils as from 1 January 2022 will be as follows:

Mineral oil	Rate
Leaded light oil	€ 917.31 per 1000 litres
Unleaded light oil	€ 823.71 per 1000 litres
Medium-heavy oil and gas oil	€ 528.46 per 1000 litres
Heavy fuel oil	€ 38.86 per 1000 kg
Liquefied petroleum gas	€ 359.85 per 1000 kg

2.3 Case law – ship hulls cannot be classified as sea-going vessels based on EU customs law

On 24 December 2021, the Dutch Supreme Court decided to maintain the judgement of the Amsterdam Court of Appeal that the ship hulls in question cannot be classified under Combined Nomenclature (**CN**) subheading 8901 9010 as "seagoing vessels", which in principle has a 0% customs duty rate upon release for free circulation in the EU (**import**).

By contrast the hulls are to be classified as “non-seagoing vessels” under CN subheading 8901 20 90, 8901 90 91 or 8901 90 99 with a customs duty rate of 1.7% upon import.

In the case, BV X and BV Y, shipbuilders, had declarations filed in their name and on their behalf for the importation of 27 ship hulls in 2009 and 2010 from China under CN subheading 8901 9010. However, the tax inspector took the view that the hulls of the vessels should be regarded as hulls intended for the building of vessels for inland waterway navigation. Hence, they should not qualify as seagoing vessels.

Central to the discussion, additional Note 1 to Chapter 89 of the CN specifies that ‘seagoing vessels’, only covers vessels designed as seagoing. After an already lengthy judicial route, the Court of Appeal therefore submitted a preliminary question to the ECJ asking them to clarify what was to be understood by ‘seagoing’ in this context.

The ECJ in its judgement answered that vessels which, because of the properties inherent in their construction, are able to sail only about 21 nautical miles off the coast in the event of bad weather do not fall within the concept of ‘vessels, designed as seagoing’.

Based hereon, the Court of Appeal decided the hulls in question did not have the objective characteristics and properties necessary to serve as the hull of a vessel capable of navigation “anywhere at sea”. Therefore, they should not qualify as seagoing vessels. The Dutch Supreme Court has now decided to leave this decision in place.

3. Wage tax / social security

3.1 Case law – Operation of a vessel in international traffic

A seafarer residing in the Netherlands, employed by a Swiss ship owner, worked on an offshore work vessel (lifting and movement of large platforms and pipe laying activities). He took the view that part of his income was taxable in Switzerland based on the special provision for seafarers working on board of vessels operated in international traffic (Article 15(3) of the Dutch tax treaty with Switzerland), so that the Netherlands had to grant him a full tax exemption.

The Dutch Supreme Court ruled in December 2021, however, that the allocation of income based on the special rule of Article 15(3) of the tax treaty only relates to profits that are directly related to the commercial transport of persons and goods by ships operated in international traffic.

Since the offshore work ship is intended for lifting and movement of large platforms and laying of pipelines for oil and gas transport, the possible transport of persons and goods on the ship is incidental to the main activity. Therefore, it cannot be said that the results of the operation of the ship are directly related to commercial transport of persons and goods by a ship in international traffic as foreseen in the tax treaty. Therefore, the seafarer was taxable in the Netherlands only.

4. EU and international developments

4.1 OECD Pillar One and Two

In May 2019 the OECD published its program of work for developing a solution to the tax challenges arising from the digitalization of the economy. This program is divided into two pillars (Pillar One and Pillar Two). Pillar One seeks to allocate more profits to ‘market jurisdictions’ (new taxing rights) for certain digital activities. Pillar Two aims at ensuring that profits are subject to a minimum level of tax on a worldwide basis. As the scope of Pillar One is limited to multinational groups (**MNEs**) having both a global turnover above EUR 20 billion and a pre-tax profit margin above 10%, the shipping and offshore service industry will mostly be affected by the implication of Pillar Two, which will – in short – apply to MNEs with a

turnover above EUR 750 million. The Pillar Two rules and the implication for the shipping and offshore service industry will be discussed in more detail below. For further information on the detailed rules of both Pillar One and Two we refer to our tax flashes of 2 July 2021, 13 October 2020, 11 October 2021, 21 December 2021 and 7 February 2022.

Pillar Two will consist of four different rules enforcing a minimum 15% effective tax rate on profits earned by MNEs in each jurisdiction where they realise profits:

i. the income inclusion rule (**IIR**), allocating top-up taxing rights to the ultimate parent entity (**UPE**) of the group;
ii. the undertaxed payment rule (**UTPR**, and together with the IIR, the Anti Global Base Erosion or 'GloBE' rules), which serves as back-stop to the IIR and allocates top-up taxing rights to the constituent entities in the jurisdictions that have implemented the UTPR;
iii. the switch-over rule (**SOR**) to facilitate the application of the IIR in a treaty context; and
iv. the subject-to-tax rule (**STTR**).

The entry into force of the GloBe rules is targeted for 2023. The members of the IF have, however, agreed that the GloBE rules will not apply to international shipping income. For determining whether income qualifies as "shipping income", the definition of such income under the OECD Model Tax Convention (Article 8) is used as a basis (transportation of passengers or cargo by ship in international traffic). The scope is, however, tightened by introducing certain new "substance" rules (e.g. the condition that the constituent entity must demonstrate that the strategic or commercial management of all vessels concerned is effectively carried on from within the jurisdiction where the constituent entity is located). Currently, no Pillar Two carve-out is made for the offshore industry or for ship management companies. The four international shipping associations (CLIA, ECSA, ICS and WSC) are further pressing the IF/OECD/EU Commission to broaden the scope of the shipping income carve-out and liaise this carve-out with the OECD and EU approved shipping tax regimes (such as TT-regimes).

The European Commission has also responded to the publications of the OECD in relation to Pillar Two rules by publishing a directive implementing Pillar Two within the European Union (**EU Pillar Two Implementation Directive**). In the draft EU Pillar Two Implementation Directive almost the same wording is included for the shipping carve-out as under the OECD Pillar Two rules. Although the shipping carve-out is an important step in the right direction, the overall framework of Pillar Two seems still in development. Therefore, a lot of uncertainties remain for instance in relation to the scope of the carve-out provisions and the exact impact of Pillar Two on the shipping and offshore service industry. Hopefully, some further clarifications and an extension of the scope of the (shipping) carve-out provisions will be published in the first half of 2022. We intend to circulate a separate shipping update focused on the Pillar One and Two rules in relation to the shipping and offshore industry after further guidance is provided in 2022.

4.2 EU own resources supporting the Fit for 55 package

On 14 July 2021 the European Commission adopted the 'fit for 55' (**FF55**) package, adapting existing climate and energy legislation to meet the new EU objective of a minimum 55% reduction in carbon emissions by 2030. The FF55 package is part of the European Green Deal, a flagship of the Von der Leyen Commission that aims to put the EU firmly on the path towards climate neutrality by 2050, as set out in the recently agreed European Climate Law (July 2021).

As part of FF55 package a revision of the EU Emissions Trading System (**EU ETS**) and the introduction of a Carbon Border Adjustment Mechanism (**CBAM**) is proposed. Most revenues from the EU ETS allowances are currently transferred to national budgets. The European Commission proposed that 25% of these revenues are contributed to the EU budget. The European Commission furthermore proposed a contribution of 75% of the revenues generated by the CBAM. In addition, certain contributions by EU Member States proportional to reallocated profits pursuant to Pillar One are proposed.

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