

Introduction

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

The Netherlands

Corporate income tax rates for 2011

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

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

Extension of carry back period

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

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

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

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

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

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

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

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

Revised guidance on entity classification rules

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

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

Extension of accelerated and random depreciation

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

Again an improvement of the innovation box

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

Amendments of the wage cost facility for research & development

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

Employment costs regulation

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

- The definition of wage for statutory payroll tax will be extended with 'that which is reimbursed or provided in the framework of the employment'. This way, there is no discussion as to whether allowances and provisions which are strictly for business purposes under the employment costs regulation are also regarded as wage.
- All current statutory regulations concerning tax-free allowances and provisions will be abolished. A large part thereof will return as 'zero valuation' or as 'specific exemption'.
- The rules for the valuation of pay / salary in kind are adjusted. In principle, the taxable amount of benefits in kind is set at the acquisition price for the employer, including VAT. Provisions which are used or consumed in full or in part at the workplace are valued at zero, or at a low amount.
- Allowances and provisions can be brought under the so-called final wage tax levy regime, which means that the wage tax is levied from the employer rather than the employee. Of the total of those allowances and provisions, up to an amount of 1.4% of the payroll cost is exempted from tax (the

'employment costs budget'). Any allowances and provisions brought under the final tax levy regime in excess of the employment costs budget are taxable at a (grossed up) rate of 80% wage tax.

- Certain allowances and provisions brought under the final levy do not count for the 1.4% test and are exempted, such as commuting allowances up to €0.19/km.

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

Tightening of real estate transfer tax rules on real estate companies

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

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

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

Quarterly VAT-returns

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

Tax treaties

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

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

For more information and background on the content of the changes, please do not hesitate to contact [Marcel Buur](#), [Michiel Beudeker](#) or [Frank van Kuijk](#) in the Loyens & Loeff London office.

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