

Tax update 2010 for The Netherlands

Topics of this summary are:

- ▶ Amendment to improve the participation exemption as of January 1, 2010
- ▶ Other corporate and related tax measures as of January 1, 2010
- ▶ Tax treaty developments

Amendment to improve the participation exemption as of January 1, 2010

Old regime

Under 2009 Dutch tax law, investments in a 'low-taxed passive investment subsidiary' are not subject to the participation exemption. For this, two requirements had to be met simultaneously:

- ▶ The 'assets test': more than 50 percent of the direct and indirect (lower tier) subsidiaries are of a passive nature
- ▶ The 'subject-to-profits-tax test': the effective profits tax rate, calculated on the basis of Dutch tax principles is less than 10 percent

The 'motive test'

The 2010 amendment reintroduces the pre-2007 motive test, although in a slightly amended form. Under the new rules, the participation exemption will not apply to domestic and foreign subsidiaries (in which an interest of at least five percent is held) which are held as passive investments (if the taxpayer's objective is to obtain a return that may be expected from normal active asset management). In the event that the taxpayer has both an active and a passive motive for investment in a subsidiary, the predominant motive is decisive.

A subsidiary is not held as a passive investment if the subsidiary is operating in the same line of business as the taxpayer.

The subsidiaries of a 'top holding company' with active management function and subsidiaries (engaged in business) of intermediate holding companies will not be considered as passive investments.

The motive test is not fulfilled if more than half of the subsidiaries' consolidated assets consist of shareholding(s) of less than five percent or if the function of the subsidiaries (or its lower tier subsidiaries) acts as a passive group finance- or group licensing company.

Slightly amended 'subject-to-profits-tax test' and 'assets test'

In the event that the new 'motive test' is not met, the participation exemption still applies if either the amended 'subject-to-profits-tax test' or the amended 'assets test' is met.

The new 'subject-to-profits-tax test' requires that the subsidiary is subject to a 'realistic levy', based on Dutch corporate tax principles with a statutory tax rate of at least 10 percent. Tax base differences caused by tax holidays, tax deferral until profit distributions are made, and a significant broader foreign participation exemption regime, do not qualify, whereas deviations from different depreciation rules, special investment deductions, loss compensation rules or tax consolidation rules do qualify.

With regard to the 'assets test' the following investments do not qualify as passive investments as of January 1, 2010: real estate, assets used in active leasing business and assets subject to a profits-based tax resulting in a 'realistic levy'. As is the case under current law, intra-group

receivables from active group finance companies or receivables financed for 90 percent or more by third party debt, or subject to a 'realistic profits-based tax levy' do not qualify as being passive.

In the event that the participation exemption does not apply, a tax credit system still applies.

Other corporate and related tax measures as of January 1, 2010

The 2010 corporate tax rate

The general 2010 corporate tax rate amounts to 20 percent of the first EUR 200,000 taxable profit and 25.5 percent for profits exceeding that amount.

Innovation box (previously: patent box)

As of January 1, 2010, the nominal tax rate on income from patented intangibles developed by the taxpayer will be reduced from 10 percent to five percent. Other new measures include an unlimited size of the innovation box and operational losses becoming deductible against normal rates (20 percent - 25.5 percent), subject to recapture upon profits realised.

Optional loss carry back of three years

Regarding 2009 and 2010 losses, an optional carry back period of three years (2008: one year) will be introduced. Two limitations apply:

- ▶ The loss carry forward period upon election is limited to six years (2008: nine years)
- ▶ The maximum amount of loss carry back to the second and third preceding year is limited to EUR 10 million per year

Dividend withholding tax

Dividends paid to parent companies resident in the EEA Member States Norway and Iceland holding an interest of at least five percent in a Dutch subsidiary are exempt from Dutch dividend withholding tax as of June 11, 2009.

Significant increase of fines

As of January 1, 2010, the fines for several administrative requirements under Dutch tax law will increase significantly. For instance, the fine for failing to file or late filing of the corporate tax return will be EUR 2,460 (2009: EUR 567). A maximum fine of EUR 4,920 (2009: EUR 1,134) will be imposed for repeated offences.

Tax treaty update

In 2009, The Netherlands concluded several tax information exchange agreements (TIEAs) and protocols to existing tax treaties for the purpose of exchanging information for tax purposes.

As of January 1, 2010 new tax treaties signed with Azerbaijan, Bahrain and Qatar and a protocol to the treaty with Mexico (amending the right to levy capital gains tax and the tax residence paragraph for dual resident companies) came into force.

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