

Tax and the Environment: a world of possibilities

Netherlands

A - Direct Taxation

2. Exemptions for profits related to primary-sector activities

There are several exemptions for profits related to primary-sector activities (these activities include agriculture, mining, livestock and fishing). These exemptions include:

- forestry exemption;¹
- agricultural exemption;² and
- grant schemes exemption.³

2.1. Forestry exemption

Profits derived from a forestry business in the Netherlands are tax exempt. Corresponding losses are not deductible. Use of the exemption is optional. Upon request, an entrepreneur may opt not to use the exemption for a period of (at least) 10 years.

The terms “forestry” and “business” are open to broad interpretation (e.g. a group of trees around a farm or trees at the roadside may qualify as a forest).

Case law of the Supreme Court indicates that a forestry business exists when an entrepreneur conducts a business with the intention of maintaining forestry.⁴ The forestry exemption is not applicable for entrepreneurs in the wood industry or real estate business.⁵

2.2. Agricultural exemption

Profits derived from an agricultural business are partly tax exempt. Losses corresponding to tax-exempt profits are not deductible.

Art. 3.12(2) of the PITA defines an “agricultural business” as a business devoted primarily to the production of agricultural goods through cultivation of crops on arable land (e.g. the growing of trees, flowers, bulbs and mushrooms), grassland farming, breeding and raising livestock, and fishing.

Agricultural income is in general treated the same way as “regular” business income. However, capital gains on agricultural land are tax exempt and not part of the annual

1. Art. 3.11 PITA.

2. Art. 3.12 PITA.

3. Art. 3.13(1)g PITA.

4. HR 19 November 1969, No. 16 221, BNB 1970/24.

5. HR 17 November 1982, No. 20 481, BNB 1983/17.

profit calculation, unless the capital gains are a result of a change in use of the land (no longer agricultural) or a result of regular activities of the business.

2.3. Grant schemes exemption

Amounts received from certain grant schemes regarding development and maintenance of forestry and nature are partly tax exempt (90%). The exemption is applicable when the recipients of this yearly grant scheme (individuals) reach a long-term agreement with the government concerning management of the development and maintenance of forestry and nature, or - in the case of other types of grant schemes - when the grant schemes are listed in a decree of the Ministry of Finance.

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4. Fiscal incentives (tax credits or exemptions) with respect to investments in energy-efficient and/or environmentally friendly assets

4.1. Energy investment allowance (EIA)

The EIA (*energie-investeringsaftrek*) scheme laid down in Art. 3.42 of the PITA offers a fiscal advantage for investing in sustainable energy and certain types of energy-saving assets. The Dutch tax authorities and SenterNovem (an agency under the Ministry of Economic Affairs) are responsible for implementing the EIA scheme.

Every entrepreneur liable to personal income tax or corporate income tax in the Netherlands and investing in qualifying assets can apply for EIA tax relief.

EIA tax relief is granted in the fiscal year in which the investment is made. The EIA scheme offers an extra deduction from profit before tax of 44% of the total amount of qualifying energy investments in a calendar year.

The energy investment deduction is available if a separate qualifying corporate asset costs at least EUR 450 and the total amount of energy investments per calendar year exceeds EUR 2,100. Maximum deduction is reached if the qualifying investments amount to a total of EUR 111 million per calendar year. In the case of a partnership, the sum of all qualifying investments of the partnership as a whole is taken into account to determine which percentage is applicable.

In addition to the above-mentioned thresholds, several other conditions need to be met, including:

- the energy investments must be made in new corporate assets that enhance energy saving. Used assets do not qualify. The energy investments must be listed in the so-called Energy List or meet certain energy performance criteria as set out in the Energy List;
- the energy investment must be reported timely to the Investment Schemes and Arbitrary Depreciation Office of the Dutch tax authorities (i.e. within 3 months from entering into obligations);
- the EIA tax relief is only available upon request. An application form has to be filled out and sent to the Dutch tax authorities; and

- a statement of the Minister of Economic Affairs that the investment qualifies for EIA tax relief is required.

The EIA tax relief is recaptured if the asset is disposed of within 5 years after the beginning of the calendar year in which the investment was made.

If the budget available for the EIA scheme threatens to be exceeded, the Minister of Finance may decide to limit the scheme or even close the scheme (temporarily).

Non-qualifying investments include land, dwelling houses, private cars, vessels, securities, debt claims, goodwill and licences (Art. 3.45 PITA). The acquisition of (part of) an enterprise in exchange for shares is excluded from the investment deduction. Transactions between related parties are also excluded. For the purposes of the energy investment deduction, companies are related if a company had a direct or indirect participation of at least 33.33% in another company at any moment in the past 5 years or both companies had the same shareholder for at least 33.33% at any moment in the past 5 years (Art. 8(8)(a)(b) and (c) CITA).

Investments in assets that will be mainly used by non-resident parties or permanent establishments outside the Netherlands generally do not qualify (Art. 3.45(3) PITA).

The costs of obtaining advice may qualify (Art. 3.42a(4) and (5) PITA), provided that certain conditions are met, e.g. the advice regards small or medium-sized companies⁶ and results within a period of 12 months in an investment in the environment. Investments in the improvement of land may qualify (Art. 3.45(1)(c) PITA).

The deduction is granted in the fiscal year in which the investment is made. An investment is deemed to be made at the moment the contract is concluded or, with respect to self-produced assets, when the expenses are made. If the asset is not put into use at the end of the calendar year, however, the deduction is limited to the amount actually paid; any excess is carried over to the following year.

The energy investment allowance is recaptured if the asset is disposed of within 5 years after the beginning of the calendar year in which the investment was made. The recapture applies only if the total disposal price of such assets amounts to at least EUR 2,100 and is computed as a percentage of the disposal price per asset. The percentage for the recapture is equal to the percentage of the initial energy investment deduction. The recapture is limited to the amount of the initial deduction (Art. 3.47 PITA).

A change in nature or use of the asset in a way that the asset no longer qualifies for the investment deduction is deemed to be a disposal, which may result in the recapture (Art. 3.47(3) PITA).

In addition, the deduction is recaptured if the asset is not put into use within 12 months after the investment was made and less than 25% was paid, or if the asset is not put into use within 3 years of the investment (Art. 3.47(6) PITA).

6. Arts. 2:396(1) and 2:397(1) Civil Code (*Burgerlijk Wetboek*).

If the budget available for the EIA scheme threatens to be exceeded, the Minister of Finance may decide to limit the scheme or even close the scheme (temporarily).

The energy investment deduction is not available to investment institutions.

4.2. Environmental investment allowance (MIA)

The MIA (*milieu-investeringsaftrek*) scheme offers a fiscal advantage for investing in certain types of environmentally friendly assets (Art. 3.42a PITA). The Dutch tax authorities and SenterNovem (an agency under the Ministry of Economic Affairs) are responsible for implementing the MIA scheme.

Every entrepreneur liable to personal income tax or corporate income tax in the Netherlands and investing in environmentally friendly assets can apply for MIA tax relief.

The MIA scheme offers an extra deduction from profit before tax of a certain percentage of the cost price of each qualifying investment in a calendar year. Examples of eligible investments are given in the MIA/Vamil List.

Qualifying assets are divided into various categories, based on the extra costs for investing in environmentally friendly assets, compared to a more conventional solution. The percentages are 40%, 30% and 15% for Categories I, II and III, respectively. The percentages of the deduction will become 60%, 50%, 40%, 30% and 15% for Categories I, II, III, IV and V, respectively, after approval by the European Commission.

The conditions that need to be met in order to obtain the MIA tax relief are similar to the conditions for obtaining EIA tax relief (see 4.1.).

Non-qualifying investments include land, dwelling houses, private cars, vessels, securities, debt claims, goodwill and licences (Art. 3.45 PITA). The acquisition of (part of) an enterprise in exchange for shares is excluded from the investment deduction. Transactions between related parties are also excluded. For the purposes of the environmental investment deduction, companies are related if a company has had a direct or indirect participation of at least 33.33% in another company at any moment in the past 5 years or both companies had the same shareholder for at least 33.33% at any moment in the past 5 years (Art. 8(8)(a)(b) and (c) PITA). Investments in assets that will be mainly used by non-resident parties or permanent establishments outside the Netherlands generally do not qualify (Art. 3.45(3) PITA).

The deduction is granted in the fiscal year in which the investment is made. An investment is deemed to be made at the moment the contract is concluded or, with respect to self-produced assets, when the expenses are made. If the asset is not put into use at the end of the calendar year, however, the deduction is limited to the amount actually paid; any excess is carried over to the following year.

The environmental investment allowance is recaptured if the asset is disposed of

within 5 years after the beginning of the calendar year in which the investment was made. The recapture applies only if the total disposal price of such assets is at least EUR 2,100 and is computed as a percentage of the disposal price per asset. The percentage for the recapture is equal to the percentage of the initial environmental investment deduction. The recapture is limited to the amount of the initial deduction (Art. 3.47 PITA). A change in the nature or use of the asset in a way that the asset no longer qualifies for the environmental investment deduction is deemed to be a disposal, which may result in a recapture (Art. 3.47(3) PITA). In addition, the deduction is recaptured if the asset is not put into use within 12 months after the investment was made and less than 25% was paid, or if the asset is not put into use within 3 years of the investment (Art. 3.47(6) PITA).

If the budget available for the MIA scheme threatens to be exceeded, the Minister of Finance may decide to limit the scheme or even close the scheme (temporarily).

The environmental investment deduction is not available to investment institutions.

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7. Emission rights

There are two emissions trading systems in the Netherlands, one for emissions of carbon dioxide (CO₂) and one for emissions of nitrogen oxides (NO_x). The Dutch government allocated emission allowances to licensed companies (Emission Allowance Units, EAUs).

EAUs are treated as stock for CIT purposes. At year-end, EAUs appear on the balance sheet of a company at the lowest of cost or market value. It is not possible to write off EAUs. Results from trading emission rights are taxed with CIT. The initial allocation of EAUs by the government is free of charge and does not constitute taxable income. Consumption of EAUs constitutes taxable income via usage and the profit and loss account. It is possible to make a provision for a shortfall of EAUs.

There are no special tax regulations or reliefs available for emission trading.

Regular transfer pricing rules apply to transfers of emission rights to related companies. This means, for example, that a company should document its transactions in such a way that it is clear from these documents that the transactions are based on arm's length principles.

Administrative penalties by the Dutch Emissions Authority are laid on certain key offences (e.g. not reporting emissions to the Dutch Emissions Authority, not turning in emission allowances and emitting without a permit). Penalties are treated as business expenses but are not tax deductible.

It is possible for companies to use certified emission reductions (CERs) deriving from clean development projects (CDM projects) and emission reduction units (ERUs) deriving from joint implementation projects (JI projects), to comply with their emissions obligations. CDM projects are sustainable projects in developing countries that have no obligations to reduce emissions. JI projects are projects in countries

that are obliged to reduce emissions under the Kyoto protocol.

In principle, CERs and ERUs are treated the same way as EAUs for CIT purposes and are thus classified as stock.

8. Other environmental tax measures

Some other measures and tax legislation (including e.g. non-fiscal grant schemes and “green investment financing”) that impact on preservation of the environment are available.

The amount of money individuals invest in approved “green investments” is exempt from personal income tax up to EUR 54,223 per person (2008; Arts. 5.14 and 5.15 PITA); tax is replaced by a rebate of 1.3% per year. Qualifying “green investments” include investments in green funds that invest at least 70% in environmentally friendly projects (e.g. nature protection projects and sustainable construction programmes).

Individuals and companies investing in green projects may under certain conditions apply for non-fiscal grant schemes, including the Green Funds Scheme and the so-called *Stimuleringsregeling Duurzame Energieproductie* (an incentive scheme for sustainable energy production) and *Stimuleringsregeling Duurzame Warmte*.

The Green Funds Scheme has been set up to encourage projects that have a positive effect on the environment. The Dutch government supports these projects, for example, by making funding of green projects attractive. Since the government offers a tax advantage to “green” savers and investors, banks can offer loans at lower interest rates for projects such as sustainably built houses, wind farms or organic agricultural businesses.