

21 September 2016 - As part of the 2017 budget, Dutch government released proposed legislation for the innovation box regime. The regime, a 5% effective CIT rate on income derived from certain intangible assets, will remain applicable for the majority of the taxpayers and will remain very interesting. However the conditions to have access to the regime are stricter for certain taxpayers and income is limited for outsourced R&D to group companies. The background of this proposal is to align the Dutch innovation box regime with international standards based on the OECD's project "base erosion and profit shifting" (BEPS) Action 5. The Dutch government is determined to maintain the attractive features of the Dutch innovative climate within this new context.

The proposals include the following key changes:

- To qualify for the innovation box regime all taxpayers should have intangible assets from research & development (R&D) activities for which so-called 'R&D wage tax certificates' have been obtained from the competent Dutch governmental agency.
- For taxpayers that are not small and medium sized (SMEs) an extra condition applies: for afore mentioned intangible assets there should also be a patent or another specific 'entrance ticket' below mentioned or should be software.
- a certain level of activity (substance) for application of the innovation box regime is required, the so-called 'Nexus Approach'. R&D partly outsourced to (foreign) group companies can result in a lower benefit of the innovation box regime.
- A grandfathering rule will be applicable till the 1st of July 2021 for qualifying intangible assets which have been developed before 30 June 2016. The 2016 Dutch innovation box regime in principle continues to apply to these assets. (No Nexus and broader qualifying intangible assets).

It is expected that the changes will take effect as of 1 January 2017 (although the proposed changes are in the course of the legislative process and may be amended). Taxpayers currently applying the innovation box should assess whether they can continue to apply the innovation box to intangible assets developed after 30 June 2016. For the majority of taxpayers advance tax ruling for determining the innovation box benefits has been concluded. These rulings will end due to the new legislation clause and if grandfathering is not applicable.

So in our view the innovation box ruling for intangible assets existing at 1st of July 2016 will still be applicable in 2017 onwards, for the period the ruling is concluded. For intangible assets developed in 2017 and subsequent years a new innovation box ruling should be concluded. However for SME's there is an approval to apply the 'old' innovation box ruling for intangible assets from research & development (R&D) activities (without outsourcing).

Innovation box 2017

The proposed innovation box regime will be open for 'qualifying intangible assets' and 'qualifying income'.

Qualifying intangible assets

A distinction is made between (a) small and medium-sized taxpayers (SMEs) and (b) other taxpayers.

SMEs:

SMEs are - in this context - defined as taxpayers

- (i) deriving benefits from qualifying intangible assets of less than € 37,500,000 in the respective financial year and the four preceding financial years combined, and
- (ii) also having a net turnover of less than € 250,000,000 in the respective financial year and the four preceding financial years combined.

If the taxpayer is part of a group of companies the second test is applied to the turnover of the total group. For SMEs, the intangibles that qualify for the revised innovation box regime are self-developed intangible assets from research & development (R&D) activities for which so-called 'R&D wage tax certificates' have been obtained from the competent Dutch governmental agency.

Other taxpayers:

In addition to having obtained R&D wage tax certificates in respect of these intangible assets, the intangible assets should also qualify as one of the following:

1. patents or plant breeder's rights; or
2. intangible assets in respect of which a patent or plant breeder's right is applied for; or
3. software program(s); or
4. intangible assets for which a EU marketing authorizations for medicinal products were granted; or
5. intangible assets in respect of which a supplementary protection certificate was granted by the competent Dutch government agency; or
6. intangible assets in respect of which a registered utility model for the protection of innovation was granted; or
7. intangible assets that are related to intangible assets qualifying under (i) through (vi); or
8. exclusive licenses to use an intangible asset qualifying under (i), (ii), (iii), (iv) or (vi) in a certain way, in a certain area or for a certain period of time.

Qualifying income

The methods used under the current innovation box regime to determine qualifying income will remain applicable: including the commonly used profit split method (..% Ebit-method). Qualifying income can be limited if, and to the extent that, a taxpayer has outsourced part of its R&D-activities to a company within its group. If R&D is outsourced to group companies, the limitation to the qualifying income is based on the proportion of qualifying R&D expenses incurred by the taxpayer in relation to the overall R&D expenses incurred by the taxpayer in respect of the relevant intangible asset. In this respect qualifying R&D expenses are described as the total of R&D expenses minus the R&D expenses related to the outsourcing of R&D to group companies. These qualifying expenses may be multiplied with 1.3, allowing for limited outsourcing of R&D in the group.

Should you be interested in learning more about these proposed changes, please don't hesitate to contact us:

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