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RECENT DEVELOPMENTS IN THE NETHERLANDS IN 30% RULING AND PRIVATELY OWNED COMPANIES, FLEX BV

Two new legislative proposals were accepted this year that are of importance to expats in the Netherlands and their 30% ruling and to owners of a privately held company in the Netherlands, the BV. Often the 30% ruling is applicable to the employment agreement between an expat and his or her own BV.

CHANGES IN DUTCH 30% RULING IN 2012, ALSO AN EFFECT ON EXISTING RULINGS.

On the 1st of January 2012, new conditions were introduced with respect to the favourable 30% ruling in the Netherlands. These new conditions can under circumstances also apply to existing rulings.

The 30% ruling is an advantageous ruling that can be applied for by expats. If an employee who has special skills that are scarce on the Dutch labour market, is recruited from outside the Netherlands by a Dutch employer, the employer and employee can jointly apply for the 30% ruling. Under this ruling, 30% of the salary of the employee can be paid out tax free. Furthermore, a partial exemption from tax is available, since the employee can be considered a partial foreign taxpayer. This results in a very limited personal income tax liability in box 2 and box 3. Basically, the only items of income that are taxable in the Netherlands if the 30% ruling is applicable, are employment income, income from shares in a company factually managed in the Netherlands and income from Dutch real estate.

These general rules remain applicable. However, new additional rules were introduced on 1 January 2012.

The most important changes in the rules for new cases are:

- > the minimum gross salary must be at least € 50,000 before and € 35,000 after the application of the 30% ruling
- > for individuals younger than 30 years old studying for their PhD lower salary conditions apply
- > for part-time employees, the same salary conditions apply, without recalculation to a full-time salary
- > for more than two-thirds of the 24 month period prior to applying for the 30% ruling, the employee must have lived more than 150 kilometres from the closest border of the Netherlands
- > the maximum duration of the 30% ruling has been changed from ten to eight years
- > the special skills and scarcity of employees who want to claim the 30% ruling is tested by the salary condition
- > the salary condition must constantly be met to keep the ruling.

Even though these conditions apply to new rulings as of 2012, they can also have an effect on existing rulings. Transitional arrangements have entered into force.

If an employee has used the 30% ruling for more than five years on January 1st 2012, nothing changes. The old ruling can be applied under the old conditions for the full term of in principle ten years.

If an employee has used the 30% ruling for less than five years on January 1st 2012, the transitional arrangements state that he or she can keep the ruling until the end of the first five year period, without changing anything. After this five year period, the employee must constantly meet the new conditions to keep the ruling, with the salary requirement of € 50,000 as the most important one. The ruling will remain applicable for the full term of in principle ten years.

This means that if a 30% ruling was in place before 1 January 2007, nothing changes. The ruling was applicable for more than five years and the old conditions apply.

However, if the ruling first applied on or after 1 January 2007, for the first five years, the old ruling remains the same. After that five year period, so during the second term of five years, the new conditions have to be met. Therefore, the

salary test of € 50,000 is applicable in the last five years.

Please note that the date that the ruling actually started is not always the relevant date. According to the explanations to the new legislation, the five year period starts counting on the day that the employee first came into the Netherlands and was entitled to the ruling. Even if the ruling was granted later than this first arrival date. So for example, one of our clients came to the Netherlands and was told by her employer that she would not qualify for the 30% ruling. The employer was wrong and we obtained the ruling for her after all. The starting date was however not the date she came to the Netherlands, but 2,5 years later. For the transitional rules, we have to look at the first date.

This happens very often, the situation that an employee is told that the 30% ruling cannot be applicable, where it can be applicable. Considering the enormous advantages the ruling has to offer for international tax planning purposes, this should be prevented at all times. It is advisable to check whether not applying the 30% ruling was correct in retrospect.

THE NEW DUTCH FLEX BV IN 2012, ALSO AN EFFECT ON EXISTING BV'S.

On the 1st of October 2012, new rules regarding Dutch BV's will enter into force. The BV, a privately held company with limited liability, is the most commonly used vehicle in Dutch business structures. BV's are often used by expats as well in order to maintain the 30% ruling. The individual is employed by his own BV in that case and the 30% ruling is in place between the company and the employee. This is explicitly accepted by the Tax Authorities.

As of 1 October 2012, new legislation with respect to BV's will enter into force. The so called flex BV will be introduced. The most important changes are that it will be possible to issue shares with or without voting rights and shares with or without profit rights. Furthermore, the minimum capital of € 18,000 will no longer be required and the so called bank statement and accountant statement will not be necessary any more when a BV is incorporated. It is still a requirement to use a notarial deed to incorporate a BV under this new legislation.

The new voting and profit right shares may lead to questions and restructuring for income tax law and corporate income tax law purposes with respect to fiscal unities (requirement is 95% of the paid up share capital), the participation exemption (5% of the paid up share capital) for corporations and substantial interest shareholdings for individuals (5% of the issued share capital) if these special new kinds of shares are issued. What exactly is considered a share or shareholding in these definitions and how do the new kinds of shares fit in? It is the expectation that the new Flex BV will also be used for business succession structures.

Furthermore, under the new Flex BV rules, dividends are not allowed to be 'excessive'. Excessive means basically that as a result of the dividend distribution, third parties may no longer be able to collect their claim on the company. If the dividends are excessive, the shareholder and director of the company can be personally liable for repayment of debts to these third parties.

This new personal liability for directors and shareholders enters into force immediately on 1 October 2012, regardless of whether items of the new Flex BV are used in the structures or not. All dividends by any BV fall under the scope of the new legislation as of 1 October 2012. One should be aware of this possible liability in case of an (intended) dividend distribution in 2012.