The Principle of Equality in Taxation

Sub theme 3: Equality and special income tax regimes for businesses
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Chapter 1: Introduction

This master thesis is written as a part of the eighteenth Eucotax Wintercourse, which had as its theme the ‘Principle of Equality in taxation’. The subtheme assigned to me was: “Equality and special income tax regimes for business”. Looking back at this theme, because as a rule you save writing the introduction for last, one word pops out for me, which is ‘special’. It did not really stand out for me at the beginning of the project because there was a lot to do, and I had to get started to get it done. But re-reading the subtheme made me realize that the word ‘special’ defines this years’ Wintercourse. We all want to be treated equally except when we are unequal or there are special circumstances. The assignment of the Wintercourse week was to compare the legal systems of the different Eucotax countries and find commonalities and differences within those systems. What we were actually doing was finding out what those countries thought special enough to grant an activity or business a different tax treatment. Furthermore what those countries thought special enough to encourage other businesses to be special. Everyone or every business is special, businesses have to distinguish themselves from other businesses or they would not have a place in the market. People are different because of genetics and upbringing; even identical twins are different from one another. To create a different tax system for every business is impossible, partly because businesses come and go and partly because such a system would be impractical. It is, however, interesting to see when a government chooses to treat certain businesses different from others, and thus consider them special, and if the difference in treatment can be deemed proportional.

The research question of this thesis is as follows:

*Do the Dutch special income tax regimes for businesses conflict with the principle of equality in taxation (represented by state aid regulations), should they remain in existence and how can these regimes be compared and evaluated with the other EUCOTAX countries?*

In trying to answer this question I will, in the following chapter, first determine the framework by which to test the special income tax regimes in existence to principle of equality. Chapter three describes and analyzes (by the way the framework has determined) the special income tax regimes (and related incentives in the inheritance tax) currently in existence within the Dutch system. Chapter four contains the comparison and analyses with the other Eucotax countries, in the next chapter followed by the conclusions if this thesis.
Chapter 2: Framework

To determine whether or not the special income tax regimes conflict with the principle of equality the regimes they are tested against four superior national and international sets of rules that try to promote equality and to which the national legislation has to conform.

Equality in the Dutch constitution

As an assignment to the legislator to incorporate equality in Dutch legislation article one of the Dutch constitution prohibits unequal treatment of equal cases. The article states that everyone that is on Dutch soil shall be treated equally in equal circumstances. Discrimination based on religion, philosophy of life, political convictions, race, and gender or in any other way are prohibited. The courts are, however, not allowed to test laws created by the main legislator against article one of the constitution. Judicial review of laws created by the main legislator, the government in concurrence with parliament, is explicitly forbidden in article 120 of the constitution. Because article 104 of the constitution states that tax laws can only be created by the main legislator there is no direct way of nullifying tax legislation because of unequal treatment embedded therein. Because of the monistic approach laid down in art. 94 of the constitution, laws created by the main legislator can, however, be tested against treaties the Netherlands has concluded. Relevant in this respect are the European Convention of Human Rights (hereafter: ECHR)\(^1\) and International Convention on Civil and Political Rights (hereafter: ICCPR)\(^2\) both of which have articles that prohibit unequal treatment. The European Court of Human Rights, the court that presides over the execution of the ECHR, has decided that when it comes to tax legislation the legislator has a ‘wide margin of appreciation’\(^3\), when creating tax legislation that treats certain taxpayers different from others. The legislation must however have a reasonable foundation for the difference in treatment. Ever since the before mentioned ruling the high court in the Netherlands has not ruled tax legislation in breach based on the principle of equality\(^4\). The legislation discussed in this paper will therefore not explicitly be tested against the Dutch constitution.

The principle of equality in the Treaty on the functioning of the European Union

The main rules on non-discrimination in the Treaty on the functioning of the European Union (hereafter: TFEU) can be found in part two of the treaty. The principle of equality can also be found in the four freedoms the treaty guaranties to citizens of the union\(^5\). Legislation in any of the member states that distinguishes between residents of a member states and non-residents may constitute a hindrance and is therefore prohibited when there is no justification. The four freedoms therefore ensure equal treatment up until a certain level. Article 26 of the TFEU states that there is an internal market within

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1. The principle of equality is laid down in article 14 of the ECHR. Relevant when it comes to taxation is article 1 of Protocol No. 1 to the Convention.
2. The principle of equality is laid down in article 26 of the ICCPR.
4. See comments on case BNB 2010/3c by R.H. Happé, first paragraph
5. The four freedoms are the free movement of persons (art. 45 TFEU), services (art. 56 TFEU), capital and payments (art. 63 TFEU), and establishment (art 49 TFEU).
the union. To ensure a level playing field within the internal market rules concerning aid by states to activities, people or businesses are in place. These state aid rules can be of great consequence to tax legislation across Europe. In granting tax relief for certain activities, and thus providing an incentive for businesses to pursue those activities, legislation on which the tax relief is based may be incompatible with the internal market and has to be eliminated. Because this paper focuses on tax incentives that are of positive nature testing against the principle of equality from a European perspective will be centered around these state aid rules.

For state aid to be incompatible with the European common market the following criteria have to be met:

- The aid needs to contain a benefit. Possible benefits in case of a tax incentive may include:
  - Reduction of the taxable base by deviation of general deduction, accelerated depreciation, the entering of reserves on the balance sheet.
  - By complete or partial exemption of the amount of tax (by exemption or a tax credit).
  - Deferment, cancellation or rescheduling of tax debt.
- The advantage must be granted by the member state or through state resources. A loss of tax revenue is equivalent to the consumption of state resources in the form of fiscal expenditure.
- The measure must effect competition and trade between member states. The mere fact that the aid strengthens the company’s position is enough to conclude that intra-community trade is affected. Size or relative size of the company is of no importance, nor does the fact that the company does not carry out exports.
- The measure must be specific or selective in that it favors certain undertakings or certain production. Not deemed specific are tax measures of a purely technical nature or measures pursuing general economic policy through reduction of the tax burden related to certain production costs. The fact that some companies benefit more from these measures does not make them selective.

When a measure qualifies as state aid it can be justified according to article 107 EU Treaty paragraphs 2 or 3. By the nature of the tax incentives for business and the scope of this paper the paragraph 2 has no influence here because it is aimed at consumers, natural disasters and certain parts of Germany. Furthermore from paragraph 3 only subsections c or e are applicable because there are no territorial incentives in the Dutch income tax system, the tax incentives discussed are not temporary and cannot be aimed at facilitating a project and cultural and heritage conservation is not the aim of any of the incentives of Dutch taxation.

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6 Title VII, Chapter 1, section 2 of the TFEU
7 Criteria derived from the commission notice on the application of the state aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3-9)
The principle of equality and the World Trade Organization

Since the World Trade Organization is build up of many multilateral agreements there are, like with the TFEU, different provisions that promote equal treatment. Because of the scope of this paper, whether or not tax incentives are in conflict with the principle of equality, legislation will be tested against the Agreement on Subsidies and Countervailing Measures (hereafter: ASCM). Embedded within this agreement are rules that determine whether or not an incentive constitutes state aid in the sense of the ASCM.

According to the ASCM there are three forms of state aid in the form of subsidies, prohibited subsidies, actionable subsidies and non-actionable subsidies. In case of a direct tax incentives a subsidy can be exemption, remission or deferral of taxation. Prohibited are subsidies related to export performance or the use of domestic goods over imported goods. In case of direct tax incentives a subsidy can be exemption, remission or deferral of taxation. Actionable subsidies may exist when a subsidy is specific and causes adverse affects to the interest of other WTO members. Specificity does not exist if eligibility for a subsidy is there whenever a company fulfills the objective criteria and conditions as spelled out in regulations. In some situations the subsidies may still be actionable. The following indicators may tell if this is the case:

- The subsidy is predominantly used by limited number of certain enterprises.
- Granting of disproportionately large amounts of subsidy to a certain enterprises.
- The manner in which discretion has been exercised in the granting of a subsidy.

Apart from specificity the measure has to adversely affect other WTO member states. Three tests are in existence to determine whether this is the case, which are:

- Material injury test, which includes the treat of material injury to a WTO member state.
- The impairment or nullifying of benefits accruing to WTO members under GATT.
- Presence of serious prejudice.

Because these test require a large amount of data of a factual situation, I will only assess whether an adverse effect might be present.

Non-actionable subsidies are all non-specific subsidies, for as far as they are not prohibited subsidies. Three kinds of subsidies, that if they were determined to be specific and therefore actionable are in fact non-actionable, they are:

- Assistance for research activities.
- Assistance to disadvantaged regions.
- Assistance to promote adaptation to new environmental requirements imposed by law or regulation, which results in greater constraints and financial burden to companies.

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8 Descriptions derived from “R.H.C. Luja, WTO Agreements versus the EC fiscal Aid Regime on Direct Taxation, INTERTAX, Volume 27, Issue 6-7”
9 Article 8.2(a) of the ASCM
10 Article 8.2(b) of the ASCM
With every incentive a brief analyses will be included based on these criteria.

*The principle of equality and the OECD model convention.*

Most if not all the treaties to prevent double taxation in the world are based on the OECD model convention. Main use of such a convention is to divide the right to levy taxes between the states that have concluded such a treaty. Article 24 of the model convention, however, deals with non-discrimination. The provision prohibits discrimination based on the nationality of the taxpayer, individuals, legal persons, partnerships and associations, that are in same circumstances from the point of view of the application of ordinary taxation laws and regulations\(^\text{12}\). A national that is not a resident of either contracting states is considered different from a national that is a resident of contracting state. The prohibition also applies to stateless persons. Also prohibited is discriminating when it comes to permanent establishments of residents of a contracting state in the other contracting state. In general this means that the taxable base of the permanent establishment must be the same as that of a resident company, especially when it comes to methods of depreciation, forming of certain reserves and carrying forward or backward losses. Furthermore discrimination based on residence of the stakeholders in a company is prohibited. Because all of the Dutch special income tax regimes are applicable to both resident and non-resident companies, the regimes will not be explicitly tested against the non-discrimination provision in the OECD model convention.

\(^{11}\) Article 8.2(c) of the ASCM  
\(^{12}\) Paragraph 7 of the commentary on article 24 OECD models convention
Chapter 3: Dutch special income tax regimes

Listed, described and tested against state regulations from both the EU and the WTO in this chapter are the Dutch special income tax regimes currently in existence. A distinction is made between objective and subjective incentives. Objective incentives are incentives that are granted to every taxpayer independent of the legal form through which the business is carried out. Subjective incentives are only granted to certain subject predominantly based on their legal form. While in the Dutch system the distinction between the different types of incentives is not always clear, the distinction and order of the incentives was upheld to conform to the Wintercourse questionnaire on which this part of the thesis was based.

Objective Tax Incentives

Investments

In order to promote businesses to invest their profits in assets there have been incentives, in one form or another, in place in the Dutch tax system for a long time now. In its current incarnation there are three discernable deductions allowed on the taxable profit based on the investments being made. Namely the deduction on taxable profit when investing in small assets, the deduction on taxable profit when investing in energy efficient assets and the deduction on taxable profit when investing in environmentally friendly assets. The latter two will be discussed in the next section of this paper concerning environmental objective tax incentives. The reason I mention them here is the fact that they are very tightly connected with one another. Therefore I will start with a general discussion of profit deductions based on the investments done by businesses and then focus on the profit deduction allowed when investing in small assets. I will be referring to this general part on investment deductions in the upcoming sections.

Profit deductions when investing - general

The deductions allowed on taxable profit are dealt with in the Dutch personal income tax system but are, through the routing paragraph in the law governing the corporate income tax system, also applicable to corporate entities. It can therefore be classified as an objective tax incentive because the legal form in which a business is carried out has no influence.

The investment incentives dictate that a deduction on the taxable profit is allowed when the business has invested in assets and the costs related to these investments are borne by the business. This deduction does not interfere with normal depreciation on the asset. The applicable regime is determined by time the investment was done. This, however, does not determine when the actual deduction may take place; this is determined by the moment when the actual payment was made or the moment

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13 Source for the text in the section on profit deductions is “Curses Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.23”
when assets are first used. To facilitate real investments and to prevent abuse of the regime the advantage of the investment deduction will be taken back whenever an asset is sold or no longer qualifies as an asset within a certain period. The incentives are not part of a superior principle of the Dutch tax system but are actually conflicting with certain principles because not the total profit of a business is taxed. In the following sections I will now go deeper into the different concepts mentioned.

**Qualifying Assets**

Assets in the Dutch system are tangible and intangible active’s that are used to generate profits and are intended to remain on the balance sheet, which excludes stock items. Because there are different investment deductions specific requirements for an asset to qualify for an investment deduction will be dealt with when discussing the specific incentives. In general the deduction allowed is dependent on the expenditures related to the investment. Expenditures qualifying for the investment deduction when acquiring an asset from a third party include all expenditures related to the purchase of that asset. When an asset is created in-house all the costs related to this asset qualify, including the costs to make the asset operational.

Investment deduction can also be claimed when improving existing assets, assets that are already on the balance sheet of the business. There is, however, a fine line between normal maintenance and real improvements to an asset. Jurisprudence dictates that maintenance is making sure that an asset remains operational. Improving on asset, according to jurisprudence, requires the following properties:

- A worn out part is replaced with an improved part.
- Costs of improvement are substantial in relation to the original costs of acquisition or creation.
- Costs are not mainly (70% or more) the cause of use by the business that improves the asset.

**Excluded Assets**

By law there are some assets that do not qualify for an investment deduction. An asset can be excluded because of the nature of the asset itself or because of the intended use of the asset within the business.

The following assets are excluded because of their nature:

- Investments that cost less than €450. This is an exclusion of a practical nature. It is to help the entrepreneur to distinguish a genuine investment with everyday expenses. In some occasions, however, a large number of in itself small investments can form a group and still qualify for an investment deduction. When an in itself qualifying investment is done but it is to small to qualify for a deduction it is allowed to depreciate this investment in a single fiscal year.
- Investments in land. Investments in the development of land, when and if general practice allows for depreciation on this development, do qualify for an investment deduction. In the considera-

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14 Article 3.45 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
tions concerning this legislation the reason for this exclusion was that allowing an investment de-
duction clashes with the goal of the incentive, which is to lessen the risk when investing. Since in
general the value of land remains constant or goes up, an incentive was not deemed necessary.
The exclusion also covers rights of usage of land.

- Investments in dwellings. This exclusion, according to historical context, was included to dimin-
  ish the difference in treatment between businesses and individuals; an individual can never claim
  an investment deduction. According to jurisprudence a dwelling is a structure that because of pur-
  pose and layout are dwellings and are intended to be just that for long-term use. The intended
  purpose of a structure is the predominant factor in determining if the structure qualifies as dwell-
  ing. This exclusion is also covers the rights to use a dwelling.

- Investments in vehicles that can mainly be used for personal transportation. The exclusion is
  again aimed at diminishing the difference in treatment between businesses en private individuals.
  Of importance is not the intended use of the vehicle but the possibility for mainly transporting
  things other than persons.

- Investments in ships that are used for representative purposes. This exclusion is an extension on
  an exclusion that prevents deduction of costs related to ships use for representative purposes.

- Investments in stocks, claims, goodwill and permits etcetera given out by government agencies.
  - Investments in stock, when they qualify as an asset, are excluded because they are seen as an
    intermediary between an actual business and the one who holds the stock. As such the stock
    in itself is not an asset for the investment deductions.
  - Investments in claims mainly seem to be in excluded to cover all the bases. It is hard to ima-
    gine that a claim can be qualified as an asset. If however one is, it does not qualify for an in-
    vestment deduction.
  - Investments in goodwill are excluded because purchased goodwill, while being an asset, is
    not actually used in production.
  - Investments in permits are excluded because they are given out by the government to regulate
    a certain field. Granting an investment deduction for these clashes with the very nature of
    such assets.

- Investments in animals. There is no real motivation for this exclusion, it seems to be based on
  moral grounds.

- Investments in individuals. There is no written law that excludes investments in individuals but
  since a court ruled that expected performances, for example by professional athletes, could not be
  an asset, investing in for example buying off the contract of a professional athlete does not qualify
  for an investment deduction.

As said before some investments in assets can be excluded for an investment deduction because of the
intended use of the asset. The following investments in assets are excluded because of this:
• Investments in assets that would otherwise qualify but made by businesses that have opted for the forestry exemption. The forestry exemption will be dealt with in later segment but in short it exempts profit derived from the exploitation of a forest. Taxpayers can, however, choose for these profits to be taxed. When a taxpayer opts to be exempt the related profits generated by the asset will never be taxed, to keep a coherent system the asset does not qualify for an investment deduction.

• Investments in assets that are intended to mainly be used in a part of the business that is driven in a foreign nation through a permanent or a spokesperson. This exclusion is connected to the way the Dutch system deals with foreign profits. The method of prevention of double taxation for profits is exemption. Profits generated with the acquired asset will therefore never be taxed in the Netherlands. Since the asset generates profits in another country it is for that country to decide whether or not to stimulate further investments. The exclusion is not in effect when an asset is intended to be used in the Netherlands Antilles or Aruba.

When calculating the exempted amount of profit when a business has a permanent establishment in the before mentioned countries the investment deduction is left out of the profit attributable to the foreign country. This is to prevent that some of the advantage of the investment deduction would be taken away by the way the exemption is calculated. For the determination of the amount of deduction given, the permanent establishment is seen as separate business. In some circumstances the state secretary of finance is authorized to make an exception when some of the profits generated by the assets in other countries are taxed in the Netherlands.

• Investments in assets that are intended to mainly be at the disposal of a third party. This exclusion is not in effect for investments in environmentally friendly assets and energy efficient assets. In previous incarnations of the profit deduction regime there were complicated regulations to prevent misuse of the investment deductions. They were replaced by this general exclusion.

Obligations (to pay)

For an asset to qualify for investment deductions there has to be obligation to pay a certain amount. Most commonly this obligation to pay is caused by an agreement between the business and a third party. This agreement has to entail mutual obligations; most commonly this means that there has to be a contract between two or more parties. In Dutch law a contract has no formal requirements, and a verbal contract is just as binding as a contract that has been written down.

There are, however, contracts excluded by law\textsuperscript{15} that prevent a business from qualifying for an investment deduction. This is the case when:

• A contract is signed between two or more parties that belong to the same household. It is not defined in law when persons belong to the same household. From considerations given when creating this piece legislation and from jurisprudence it can be derived that it is a material test, mean-

\textsuperscript{15} Article 3.46 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
ing that just being registered to the same address is not enough for the tax authorities to deny the investment deductions. Persons generally belong to the same household when there is a communal fund for keeping up the house and providing for food. There are, however, other factors that can make people belong to the same household.

- A contract is entered into between relatives of the person who carries out a business and the persons belonging to the household of the relative. To determine if a contracting party falls within this group the starting point is always the person who carries out the business. A relative only falls within the group if kinship exists within an ascending or descending line from the person who carries out the business. This includes grandparents, parents, children and so on. Also taken into account are relatives in an ascending or descending line of the spouse of the person who carries out the business, when there is no civil union those people will, however, not be taken into account.

To clarify, when the person who carries out a business enters into a contract with his brother who still lives at home with his parents the contract does not qualify for an investment deduction, since there is kinship in an ascending line between the person who carries out the business and his father. The brother qualifies because he, we assume, belongs to the household of this qualifying relative. From the moment the brother lives on his own he is no longer a qualifying party. This, however, has no retrospective action on contracts that were entered into during the time he was still living at home.

- A contract is entered into that is the result of an inheritance. An example of a contract that would not qualify for the investment deduction is a contract between two brothers one of whom continues to carry out the business his father left him and compensation is paid to the brother who has nothing to do with the business. This would be different when a business or asset is bequest to a person or entity with the condition that the surviving relatives have to be compensated.

- A contract is entered into between two parties with at least one of them being an entity in which the other party has an interest of at least one third. As an example one could think of a person who is the sole stakeholder in an entity and separately carries out a business. When these parties enter into a contract concerning an asset the contract will not qualify for the investment deductions. This provision was instituted to prevent businesses from claiming the investment deduction twice for the same asset.

For every one of these excluded contracts the state secretary is authorized to make exceptions in certain situations.

Besides these, by law, excluded contracts there are a number of situations were jurisprudence has ruled that there are no mutual obligations or there is no obligation to pay. In the following situations businesses cannot claim an investment deduction:

- The asset is acquired through inclusion in a community of property.
• When an asset is acquired as a gift or inherited, apart from the situation where there is a condition stating that surviving relative must be compensated.

• Inclusion of an asset in the property of the business when this asset was previously a part of the personal property of the one who carries out the business.

• Moving an asset from one business to another business owned by the same person.

• Joining a joint venture as long as there is no obligation to compensate the other partners for acquiring part of their assets.

This is merely a selection of situations but it illustrates when a contract entails an obligation to pay and thus allowing the business to claim an investment deduction. There are situations when there is no obligation to pay but when the asset in question still qualifies for an investment deduction. This is the case when a previously non-qualifying asset becomes a qualifying asset. A very good example of a situation is a previously excluded asset because it was mainly used in a foreign nation through a permanent establishment that is moved to the Netherlands. When this happens the business can apply for an investment deduction. It is, however, not clear what should be the basis value for the deduction. In jurisprudence concerning a purely national situation it was determined that the base value should be the value for which the asset is in the books. However, when the economical value of that asset is lower than the balance sheet value the economical value is leading.

In the opposite situation when a qualifying asset becomes a non-qualifying asset, the advantage of the investment deduction will be taken back.

**Moment of investment**

As said before the moment of investment is the factor that determines what regime is applicable and therefore the amount that may be deducted from the taxable base. In general the moment of investment is the moment the contract was signed or the order finalized.

When a contract contains certain conditions that can make the agreement become void or defer the obligations agreed upon in the contract, the moment of investment is still the moment the agreement came into existence. However when it is entirely in the power of the business to fulfill the conditions in the contract that either make the contract void or never invoke the mutual obligations, the moment of investment is the time the agreement becomes peremptory. The main factor in this is that the business has to run a real economical risk because of the agreement. Whenever a business has the power to back out of a deal, without financial consequence, there is no real risk.

In case the acquisition of an asset is made up out of several contracts the moment of investment is different for every contract. This can mean that for a single asset different regimes are applicable. The moment of investment when creating an asset in-house is the moment the business actually pays for the components the asset is made up from. The moment of investment in case of a non-qualifying asset into a qualifying asset is the moment the change in qualification takes place. The moment of investment is very important since the allowable deductions are based on a percentage of the expendi-
tures. These percentages can be changed by the minister of finance when, for example, the number of claims is higher than expected and the budget doesn’t allow for the extra expenses. This way of working can cause uncertainty for businesses that, when deciding to invest, had taken the percentages of the day into account.

**Moment of deduction**

The moment of deduction determines when the investment deduction can be claimed. In general the deduction can be claimed when the asset is first used. However, when the business has already paid for the asset, in part or whole, it is allowed to claim the deduction at that moment. When not the entire sum is paid the deduction may never surpass the amount paid. The moment of payment is not the date on the bill but the moment the funds have left the business and cannot be reclaimed. So if the total expenditure of an asset contains several contracts with separate bills the deduction can be claimed if of one of those bills have been paid, but the deduction can never surpass the amount paid. Not qualifying as a payment for the investment deduction are payments for a part of the asset that does not for the investment deduction. When a building, a qualifying asset, is set to be build on a piece of land the, the investment deduction cannot be claimed when the land is paid for but the building itself is not. When an investment is not paid for at least twenty-five percent within twelve months after the moment of investment the claimed deduction will be taken back.

**Borne by the business**

In order to calculate the amount of investment deduction that can be claimed only costs that are borne by the business are taken into account. As such government grants and grants from third parties have to be deducted. If, however, those grants are there to help exploitation of an asset they do not have to be deducted. Insurance money that is awarded in case of the destruction of an asset does not have to be deducted. The insurance money has no relation to the asset bought but to the one that was destroyed. This is different if the contract with the insurance company stipulates that funds awarded are to be used for the purchase or creation of a new asset, which is comparable with the one that it replaces. The insurance money can also be taxable profit when the amount paid out is higher than the book value of the asset that was destroyed. Taxation on this profit can be deferred with the reinvestment reserve, an incentive I will discuss in the next segment.

Expenditures in the sense of the investment deduction regimes are all expenditures related to the purchase or creation of the asset. When financing the purchases with a loan interest paid on that loan can also be taken into account, against market value. In jurisprudence it was decided that when using the reinvestment reserve, a way to defer taxation on profits made when alienating assets, the investment deduction can only be calculated over the expenditures minus the applicable reserve. In consequence the disinvestment profit would be calculated not based on the selling price but on the book value. The state secretary of finance has, however, allowed that the entire purchasing price qualifies for the calculation of the investment deduction, with the provision that de disinvestment profit has to
be calculated based on the selling price. The business is allowed to choose between these two methods and it can be advantageous to choose one over the other. The decision of the state secretary has, however, caused businesses to manipulate the purchasing price in a way that it would maximize the investment deduction. For example by trading in an old asset for a price that is too high instead, creating a discount on the new asset that is not on the invoice. To discourage this kind of behavior the state secretary has decided that, when found out, the business is no longer allowed to use the purchasing price as the base for the investment deduction for the duration of five years.

When acquiring an entire business an investment deduction can only be claimed for qualifying assets. As such the business capital has to be split into qualifying and non-qualifying parts.

*Disinvestment profit*

The disinvestment profit is the mirror image of the investment deduction and its main reason for existence is the prevention of misuse of the investment deductions. When an asset is sold, no longer qualifies as asset or otherwise leaves the business within five years after the moment of investment, the advantage of the investment deduction will be taken back, in whole or in part. The period of 5 years is measured by calendar year, so if an asset is alienated in December of certain year the actual period will be 4 years and a few days. As a rule the amount of disinvestment is related to the amount the asset is sold for but will never surpass the initial deduction claimed. So if in the past an investment deduction was claimed of five percent, the disinvestment profit is five percent of the price the asset was sold for unless the asset is sold for a price that is higher than the asset was initially bought for. In that case the percentage would be lower because disinvestment is never higher than the deduction claimed in the past.

The alienation of assets will only qualify for the disinvestment profit when the alienation is the will of the business. There has to be an agreement or contract that stipulates that the business has to deliver or make the asset available for a third party. When an asset is expropriated or is destroyed by a fire it is against the will of the business and thus the investment deduction will not be taken back. The following forms of alienation of property warrant a disinvestment profit:

- The sale of property.
- Exchange of property.
- Sale of property because impending expropriation.
- Sale of property when in a state of bankruptcy.
- Executorial sale of an asset after having been impounded.
- Donating an asset.
- Moving a personal enterprise into an entity. When the move happens without taxation on book profits and preservation of the balance sheet values of the personal enterprise there is no disin-

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16 Article 3.47 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
vestment profit at that time. All the conditions under which the investment deduction was given are still in effect, and if the business sells an asset for which an investment deduction was claimed within five years a disinvestment profit has to be added to the taxable profit of the entity.

The following situations do not warrant the addition of a disinvestment profit to the taxable profit:

• The destruction or loss of an asset due to fire, theft and such.
• Expropriation.
• Exchange of property demanded by law.
• Demolition
• Alienation by the law of succession
• Alienation because of the inclusion in a marital community of property
• Moving an asset from one personal enterprise into another personal enterprise owned by the same person.
• Death of the person running the business.

There are several situations when there is no alienation but by law addition of a disinvestment profit to the taxable profit is still warranted. The following situation cause a fictitious alienation of property en thus a disinvestment profit:

• Withdrawal of an asset from the business. This, for example, happens when the owner of a business starts using an asset for his private affairs or when an asset is donated. The time of the withdrawal is to be determined by the business owner, but with fairness in mind.
• Putting assets at the disposal of a third party after having served as an asset in the business. This fictitious alienation is only applicable to the investment deduction for small assets, since putting assets at the disposal of a third party is only excluded for the investment deduction in this regime.
• Putting assets at the disposal of a third party after having served as an asset in the business, when the third party located in a foreign country. This fictitious alienation is only applicable to the investment deduction for energy efficient and environmentally friendly assets.
• Moving assets to the foreign part of the business. Assets that are mainly used in the foreign part of the business are excluded so changing the location of asset to a foreign nation warrants a disinvestment profit. The base for the disinvestment profit is the normal price a third party would have paid in ideal circumstances.
• Cost reductions of assets where an investment deduction has already been claimed. This fictitious alienation has to do with the provision that costs of an asset have to be borne by the business.
• No longer generating taxable profit. This, for example, happens when a business moves to another country.

The fictitious selling price, and the base for calculating the disinvestment profit, for the mentioned fictitious alienations is the highest price a third party would have paid in ideal circumstances. These are, however, not the only fictitious alienations in place. The following fictitious alienations are there
to prevent misuse of the investment deduction and introduce time constraints. Fictitious alienations are:

- Not utilizing the asset within twelve months after the moment of investment and the amount already paid is less than twenty-five percent of the total cost of the asset.
- Not utilizing the asset within three years after the year of investment.

The minister of finance has the authority to make exceptions when these time constraints’ outcome would be unfair to the business.

The list of fictitious alienations is limitative, meaning that in other situation there will be no disinvestment profit. When for example a previously qualifying asset like a cab no longer functions as such but still remains on the balance sheet of the business there will not be a disinvestment profit.

*State Aid EU*

The profit deductions are aid given out by the state from state resources but are accessible to every qualifying business and is therefore not specific enough to constitute prohibited state aid. The deduction on taxable profit when investing in energy efficient assets and the deduction on taxable profit when investing in environmentally friendly assets are, even if they are considered to be selective, mentioned in commission regulation 800/2008 of 6 August 2008 under articles 21 to 23 and therefore not considered prohibited.

*State Aid WTO*

The profit deductions qualify as subsidies because some tax is forgone. However, the profit deductions are not aimed at export of goods or the use of domestic over imported goods, and are therefore not prohibited subsidies. They can also not be qualified as specific because eligibility is based on objective criteria in law. The profit deductions are therefore not state aid in the sense of the WTO.

*Profit deduction when acquiring small assets*\(^{17}\)

The first and oldest of the investment deductions currently in existence is the profit deduction when acquiring small assets. Its purpose is to stimulate investments by small to medium sized businesses by granting a profit deduction based on the sum invested during the course of the year. When the amount invested in a year grows bigger the relative deduction becomes smaller. As from 1 January 2010 the following percentages apply:

<table>
<thead>
<tr>
<th>In excess of:</th>
<th>But not more than:</th>
<th>The applicable profit deduction is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>–</td>
<td>€ 2 200</td>
<td>0</td>
</tr>
<tr>
<td>€ 2 200</td>
<td>€ 54 000</td>
<td>28% of the investment costs</td>
</tr>
<tr>
<td>€ 54 000</td>
<td>€ 100 000</td>
<td>€ 15 120</td>
</tr>
<tr>
<td>€ 100 000</td>
<td>€ 300 000</td>
<td>€ 15 120 deducted with 7,56% of the costs that surpass € 100,000</td>
</tr>
</tbody>
</table>

\(^{17}\) Article 3.41 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
This is a departure from the system before 1 January 2010. In the previous iteration of this table there were no fixed deductions, merely percentages of the total investment costs in a year. The maximum deduction in a year is €15,120.

Per year

The profit deduction allowed is determined per year and all investments in assets determine the amount that may be deducted. Once a business has chosen to apply for the deduction, every investment is taken into account. As such the moment of investment is of great importance. When a business plans on doing some investments that, for example, cost €200,000 in total it could be advantageous to split the investment in two contracts so the moment investment is spread over two years.

The way of determining the deductible amount is somewhat different when a business’ fiscal or financial year does not coincide with a calendar year. The total amount of the investment costs is determined by fiscal year but the deductible amount is determined by calendar year. When, for example, a business invests €170,000 and has fiscal year that runs from July to June. In the first half of the fiscal year the (fictitious) percentage belonging to this investment is 4% and in the second half 5%. The investments attributable to the first half of the fiscal year amount to €100,000, for which a deduction of 4% can be claimed. The remaining investments are done in the second half and amount to €70,000, for which a deduction of 5% can be claimed.

Not included in determining the deductible amount are assets or contracts that are excluded for the investment deductions. In some cases, however, the state secretary of finance has the authority to make an exception. The state secretary has allowed tax officials to make exceptions but under the provision that when done every excluded asset is taken into account when determining the deductible amount.

When the order of an asset is undone there actually is a moment of investment and when strictly applying the law the investment expenditures of a single year would grow, and thus diminishing the deductible amount. In practice, however, these instances are ignored in its entirety, although there is no legal basis for it.

Partnerships

In a partnership several entrepreneurs work together to generate profits. To do so they collaboratively invest in assets and have a shared balance sheet. Each partner has a stake in the communal property. For tax purposes every partner pays taxes on his part of the profit and every partner can claim a profit deduction. For the purposes of the profit deduction when acquiring small assets the percentage of the deduction is based on the total amount the partnership invests in a year. After determining the per-
percentage, the investments are split up and divided among the partners according to the amount they themselves have invested. The deductible amount is based on the amount each partner has invested.

It is, however, possible that a partner has an asset that is on his personal balance sheet but is used in the partnership. When a partner invests in such an asset his personal total investment is higher. So when a partnership of three equally invests a total of € 30.000 the percentage is 28%, one of the partners invests an additional € 30.000 his total investment is € 60.000 and the percentage is 25,2% (€ 15.120/€60.000 * 100%). Two of the partners can claim 28% of € 10.000 as investment deduction, the partner who personally invested can claim 25,2% of € 40.000.

It is also possible that an entrepreneur has several businesses or takes part in several partnerships. In that case the investment deduction is calculated per business.

**Reinvestment Reserve**

The reinvestment reserve is a fiscal reserve that allows for deferral of taxation on profits made when alienating assets. The reinvestment reserve is dealt with in the Dutch personal income tax system but is, through the routing paragraph in the law governing the corporate income tax system, also applicable on corporate entities. It can therefore be classified as an objective tax incentive because the legal form in which a business is carried out has no influence.

The purpose of the reserve is to facilitate the continuation of a business by allowing a deferral on taxation of profits related to the alienation of assets, if the business has the intention of replacing that asset within a certain amount of time. The regime was in way developed in jurisprudence and is a direct result of the rules governing the determination annual fiscal profit determination, because the profits are reinvested no real (taxable) profit was realized. The rules created by jurisprudence allowed for the deferral of profit taking when a business had the intention of replacing the asset with an asset that was in economically and functionally the same. Because this did not leave much room for employing the reserve for different assets, the rules were found to be too restrictive and specific rules were implemented through written law.

The current regime allows for businesses to add profits made through the alienation of assets to the reinvestment reserve for as long as the business has the intention to reinvest those profits in new assets. Profits on assets are defined as the difference between the book value of an asset and the selling price deducted with the selling expenditures. When purchasing new assets the book value of the new asset as well as the reinvestment reserve are debited by the same amount. This way the tax claim on the profit is maintained. The reserve may exist for three years, after that the reserve is added to the taxable base of the fiscal year the period ends. The business can choose to form a reinvestment re-

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18 Source for the text in the section on the reinvestment reserve is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.25.C.”

19 Article 3.54 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
serve per asset, so even if the business has the intention to reinvest, creation of a reserve is not compulsory. For the purpose of this regime two types of assets are distinguished:

- Non-durable assets; meaning assets that are generally depreciated to their residual value within ten years of their first use.
- Durable assets; meaning assets that are generally depreciated to their residual value in more than ten years and assets where depreciation is not allowed.

This distinction is made because of difference in treatment between reserves created by the sale of non-durable and durable assets.

**Non-durable assets**

A reinvestment reserve created by the sale of a non-durable asset may be debited against the purchase of any non-durable asset. It is not demanded that the new asset fulfills the same economic function as the one the reserve was created with. When a reserve is created the business is obligated to debit the reserve against any and all future purchases of non-durable assets. A business cannot choose to not use the reserve for a certain asset. It is not allowed to debit the reserve against purchased assets that qualify as durable assets. This is to prevent the deferral of profits made by the sale of non-durable for too long a period of time.

**Durable assets**

A reinvestment reserve created by the alienation of a durable asset may be debited against a new durable asset that fulfills the same economic function within the business. The provision that the new asset must fulfill the same economic function was added to prevent debiting of a reserve that was created by the sale of an asset that allows for depreciation against a new asset where depreciation is not allowed, and thus preventing unlimited deferral of profit taking. A business is not obligated to debit the reserve created by the sale of a durable asset against the purchase of a durable asset. The business can choose to use the reserve to debit against non-durable assets. The reason for this is that there is no danger of infinite deferral of profit taking.

**Qualifying Assets**

A reinvestment reserve may, in principle, be created for every asset that is alienated. Alienation includes loss, damaging or theft of an asset. The amount added to the reserve in those situations is the difference between the book value of an asset and the insurance money received. Creating a reserve is also possible in case of voluntary loss of an asset. An example is the voluntary demolition of an asset brought on by a government scheme that promises a subsidy when doing so.

A reserve can also be created for the alienation of immaterial assets, including goodwill. When alienating part of an enterprise goodwill can be a part of the price that was agreed upon. When there is an intention to reinvest the profits generated by the sale it is allowed to create a reinvestment reserve. Goodwill will, in most cases, qualify as a non-durable asset.
The following assets are, however, excluded:

- Immaterial assets, like stocks and bonds, which are kept as an investment.
- Assets that are worth less than € 450.
- Assets that have undergone a change of qualification and are at the moment they’re sold stock items. A reinvestment reserve cannot be created for profits that are attributable to the period when the item was still an asset.

**The intention to reinvest**

As said before a reinvestment reserve can only be created when the business has the intention to reinvest the profit in assets that are new to the business. The provision that there has to be a reinvestment intention has lost part of its importance because for non-durable assets it is no longer necessary to prove that it is the intention to replace the asset with an asset that has the same economic function. For durable assets this is, however, still an important provision. The moment the intention has to exist is at its latest at the end of the financial year.

It is possible to apply the reinvestment reserve to assets that have been purchased before the asset it replaces has been sold, as long as this happens within the same financial year. For durable assets it is allowed to debit the reserve when an asset that was purchased in the previous financial year.

For a corporate entity the intention to reinvest an asset has to exist within the board of directors, with a personal enterprise the owner has to have the intention.

**Transfer pricing**

When an asset is sold to an allied company or related party and the price paid for this item is not at arms length it is not allowed to add the arms length price to investment reserve, according to jurisprudence. This is strange since the arms length dictates principle profit adjustment.

**Three years to reinvest**

After creation of a reinvestment reserve for a certain asset the business has three calendar years counting from end of the financial year the reserve was created. When an asset is sold at the beginning of the financial year this means that almost four years may pass before the reserve has to be used. When not used the reserve is added to the profit at the end of the third year. The reinvestment period may extended for the following reasons:

- Because of the nature of the asset the business wants to replace the old asset with. This could be the case when the new asset still has to be build, which may take several years.
- Because of special circumstance, but only if the business has already undertaken steps to reinvest. There is very limited jurisprudence concerning but what constitutes a special circumstance.

**Book value provision**

Whenever a new asset is purchased or created the book value of the new asset may not be less than the book value of the asset for which the reserve was created. The reason for adding this provision
was that adding a fiscal claim to a new asset is not necessary when the new asset can be financed with just the funds related to the book value of the old asset. The reason for allowing a reinvestment reserve was not to hinder investments because profits are taxed immediately. Whenever an asset can be purchased with funds without a fiscal claim on them it should be done with those funds.

The book value provision can mean that not the entire reserve may be debited. For a reserve created because of the alienation of non-durable assets this is not a problem. The remaining reserve can be used for other assets, as long as there is the intention to reinvest and the investment is done within the period of three years. The book value provision can cause a complicated administration and calculations because for every asset being sold the book value has to be registered, and with every purchase the book value provision has to be taken into account.

In case of durable assets the intention to reinvest has to entail reinvestment in an asset that has the same economical function. Whenever a durable asset has been replaced with such an asset there can no longer be an intention to replace the asset with a similar functionality. When the book value provision does not allow for the entire reserve to be used, the remaining reserve is added to the profit of the year the replacement was done.

*The same economic function*

As said before the created reinvestment reserve in case of durable assets may only be used to debit the book value of a new asset when the asset has the same economic function. The following examples, derived mainly from jurisprudence, illustrate whether or not an asset has the same economic function:

- A reserve created when alienating a factory building used for the welding activities may be debited on the book value of a factory building that is used for production of medicine.
- A reserve created when alienating a building, which was then leased back and after that bought back. The reserve could be debited on the purchase price of the building because the building had the same economic function within the business.
- A reserve created when alienating rented out building that was used for storage. The reserve could not be debited against the purchase of a building that was intended for storage. Renting out a property is not the same economic function as storage, not even when the rented out building was used for storage as well.

These are just a few examples but from jurisprudence it can be distilled that the same economic function is interpreted very flexible.

*Entire business*

When alienating a (personal) business, forming a reinvestment reserve is also possible for the entire business according to the same rules when there is an intention to reinvest in a new business.
State Aid EU
The reinvestment reserve is a facility to defer taxation; eventually the profits will be taxed. Deferral of taxation can be qualified as aid in the sense of article 107 of the EU treaty. However, because the reinvestment reserve available to every business it is not selective and therefore does not qualify as prohibited state aid.

State Aid WTO
Deferral of taxation is a subsidy in the sense of the ASCM, but has nothing to do with the export of goods or the use of domestic over imported goods and is therefore not prohibited. It qualifies as non-actionable because eligibility is automatic when a set of objective criteria is met. The reinvestment reserve is therefore not specific. The reinvestment reserve can, in my opinion, not be considered state aid as specified by the ASCM.

Environmental
Profit deduction when investing in energy efficient assets

The profit deduction when investing in energy efficient assets was introduced in 1997 and behaves very much like the profit deduction when investing in small assets. The rules concerning the moment of investment, the moment of deduction and investing all apply. Both the deductions can be claimed simultaneously according to their own rules. There are, however a number of differences, which I will discus here.

Percentage, threshold & ceiling
The profit deduction when investing in energy efficient assets has only one percentage that determines the amount of deduction that can be claimed. The percentage for 2010 is 44%, in the past it has been as high as 55%. A business is allowed to deduct this percentage of the expenditures related to the asset from their taxable base if the investment costs surpass a threshold of, for the year 2010, € 2200. This means that when the threshold is overcome the entire investment expenditure constitutes the base on which the deduction is calculated. The regime also has a ceiling when it comes to the maximum amount of expenditures related to a single asset that qualifies for the investment deduction. This ceiling has always been quite high and for 2010 it is set to € 115.000.000, which allows for a maximum deduction of € 50.600.000. When the investment surpasses the maximum, the maximum can still be claimed. For businesses that are run by a partnership the ceiling is determined by their part in the investment. When, for example, a partner is entitled to 40% of the profits generated with the asset, the ceiling is 40% of the total ceiling. Excluded from the profit deduction are partners in a partnership that have only invested money in the partnership and therefore are entitled to a part of the profit, in other words silent partners.

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20 Article 3.42 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
In principle the threshold is applicable to every individual partner within a partnership. So if the part of the investment attributable to a partner is € 2000 while for another partner it is € 4000 only the last mentioned partner can claim the investment deduction. At the request of the business it is, however, allowed to apply the threshold for the entire investment, on the provision that when there is a dis-investment profit the threshold is still used for the entire investment.

Qualifying Assets

Only assets that are on a list created and kept up to date by the ministry of finance qualify for the investment deduction. The list has the following categories:

- Energy saving investments in building.
- Energy saving investments in machines or processes.
- Energy saving investments by using residual heat, when generating power.
- Energy saving investments in application of durable energy.
- Consultant fees concerning saving on energy.

It is important for the asset to exactly match the description on the list, or it will not qualify. When only certain parts of an asset qualify, only those parts will qualify for the investment deduction.

A second provision to qualify for the deduction is that the asset has to be unused. Unused in this context means that no business has used the acquired, otherwise qualifying, asset as an asset. When, for example, an energy efficient asset is rented out for a long period of time and consequently sold to the business who previously rented the asset the asset qualifies as used. Not because the asset was used by the business who eventually bought the asset, but because it functioned as an asset in the business who sold the asset. So when an asset is rented out for a limited time and then sold it looks much more like a stock item and thus qualifies as an unused it for the one buying the asset.

Excluded are assets that were acquired on behalf of a foreign party for the sole reason to be able to claim the profit deduction. Because of the profit deduction the asset could be rented out for a lower rate to the foreign party. The general exclusion of assets used by the foreign part of the business is not applicable.

Period to give notice of the investment

For a business to be allowed to apply the deduction the authorities have to have been given notice that the business has invested in a qualifying asset. The notice has to be given within three months of the moment of investment. When an asset, for whatever reason, is turned down as a qualifying asset and adjustment were made to the asset the moment of investment is the moment the adjustments were made that made the asset eventually qualify.

The reason behind the period of three months can be found in the high ceiling and deduction allowed. Every year a certain amount of money is set aside for financing the investment deduction. The
period gives immediate insight in the amount of money being spent. When the budget does no longer allow for the expenses, the regime can be put on hold.

Declaration of investment
For most assets a declaration has to be give out by the minister of finance stating that a qualifying investment was done and by which amount. When a declaration is not granted the business can file a complaint with a special authority.

Profit deduction when investing in environmentally friendly assets
The profit deduction when investing in environmentally friendly assets is more or less identical to the profit deduction when investing in energy efficient assets. The deduction can be claimed while also claiming the profit deduction when acquiring small assets, it can however not be claimed in combination with the profit deduction when investing in energy efficient assets.

Percentage, threshold & ceiling
The profit deduction when investing in environmentally friendly assets has several applicable percentages. The percentage of the investment expenditures that can be claimed is dependent on the asset that was acquired. To be a qualifying asset the asset has to be on a list that has several categories of assets. For every category a different percentage is applicable, which for 2010 are:

- Category 1: 60%
- Category 2: 50%
- Category 3: 35%

The threshold is the same as with the profit deduction when acquiring energy efficient assets, € 2200. There is no real ceiling that limits the expenditures on which the deduction is based, although the list has some assets that can only qualify for a deduction up until a certain amount. Also, for investments to qualify for the deduction with an investment cost higher than € 25.000.000 the business has to verify whether the investment qualifies.

Qualifying Assets
Only assets that are on a list created and kept up to date by the ministry of finance qualify for the investment deduction. For an asset to qualify it has to be, like with the profit deduction when acquiring energy efficient assets, unused. The excluded are assets are equal to the excluded asset for the profit deduction when acquiring energy efficient assets.

Period to give notice of the investment
The period to give notice of the investment is equal to the one for the profit deduction when acquiring energy efficient assets.

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21 Article 3.42a of the Dutch personal income tax (Wet inkomstenbelasting 2001)
Declaration of investment

No declaration is necessary; the fact that an item is on the list is enough to qualify.

Accelerated depreciation - general

According to sound business practice, which is the open standard on which the annual profit determination in The Netherlands is based, assets may be depreciated to their residual value over the course of their usual lifespan. Depreciation lowers the book value and increases the potential book profit when sold. Some limitations on this general rule have been instituted to prevent depreciation on assets, which normally do not decrease in value like real estate. For certain assets, however, it is allowed to depreciate them not based on their usual lifespan but at the discretion of the business. Depreciation is still only allowed to the residual value of the asset or to a value that is determined by law on some assets. Depreciation is part of a superior principle in Dutch taxation as it is a part of ‘sound business practice’ and direct result of the matching principle. According to that principle costs must be attributed to the period in time they belong to. Accelerated depreciation goes against everything the matching principle stands for because the costs are attributed to the year the business wishes them to be attributed to. The following assets qualify, each category with their own provisions, for accelerated depreciation:

- Investments in environmentally friendly assets.
- Investments made by starting businesses (not applicable to taxpayers who are taxed via the corporate income tax system).
- Investments in sea-going vessels.
- Investments while in the current economic crisis (will not be dealt with because it is a temporary measure).

The specific provisions of these accelerated depreciation schemes will be dealt within their respected chapters but I first want to give a general overview of accelerated depreciation.

General

Some of the accelerated depreciation regimes are dealt with in the Dutch personal income tax system but are, through the routing paragraph in the law governing the corporate income tax system, also applicable on corporate entities. Those that do carry through can therefore be classified as objective tax incentives because the legal form in which a business is carried out has no influence. In general accelerated depreciation can be advantageous for business since it constitutes a liquidity advantage because less or no tax has to be paid. In most cases the business will depreciate the asset for which the accelerated depreciation is allowed in the year the investment was done. In some cases there could be

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22 Article 3.30 in conjunction with article 3.30a of the Dutch personal income tax (Wet inkomstenbelasting 2001)
23 Source for the text in the sections on the accelerated depreciation is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.22.C.”
more advantage in choosing another year, for example when in the year the investment was done the business is already generating a loss. In the Dutch system it is allowed the carry-back those losses one year and carry them forward for nine years in the case of corporate entity, when dealing with a personal enterprise losses can be carried-back for three years. So when a loss is generated it can only be set off against a profit for the next nine years, additional losses will evaporate.

**Concurrence**

In some cases two or more of the accelerated depreciation regimes concur with one another. The business can in that case choose which of the regimes is more advantageous for the business. Whenever a choice has been made the provisions of that regime are applicable.

**Obligations & Start of depreciation**

Like with the investment deductions for an asset to qualify for accelerated depreciation obligations or investment costs have to have been made by the business. Assets that have not been acquired but that are brought into the business out of business owner’s private capital can also qualify. A business can however not arbitrarily decide to do this; approval has to have been given by the authorities. Starting value of such an asset is determined by the value given to when sold to the third party in the best circumstances thinkable.

Normal rules of depreciation state that one can start depreciating on an asset from the moment it has first been used. Accelerated depreciation allows for depreciating from the moment of investment or the moment the investment costs were made. The maximum amount that can be depreciated at that time is the sum that was actually paid. As soon as the asset is in use this provision is no longer in effect.

**Partnerships**

In a partnership the division of the depreciation on the asset is determined by the way the profits are split up. So when a partner is entitled to 40% of the annual profit he may claim 40% of the depreciated amount.

As a general rule silent partners in a partnership may not take into account, during the course of their partnership, more loss than the amount they originally brought into the business. This provision also applies to the accelerated depreciation regime. When a partnership generates a loss because of depreciation, it is possible that a silent partner has already used his potential to deduct a loss. A silent partner can be described merely as an investor and may not have any say in day to day operation of the business.

**Reinvestment reserve & Accelerated depreciation**

As discussed before a business can add profits made by the alienation of an asset to a reserve to defer profit taking for tax purposes. Since the book profit is equal to the difference between the book value and the amount the asset as alienated for, accelerated depreciation can have influence on the book
profit. It is therefore determined that a book profit attributable to accelerated depreciation may not be added to the reserve and is added to the annual profit. The reason behind this is that a book profit caused by an incentive should not be deferred.

**No longer qualifying**

When a business has applied an accelerated depreciation regime to an asset that no longer qualifies, the depreciated amount has to be added to the annual profit the moment the asset no longer qualifies.

**State Aid EU**

Accelerated depreciation allows for a shift in time when it comes to profit taxations. Profit not taxed because of accelerated depreciation will be taxed in a later year because depreciation is only allowed to the residual value. Accelerated depreciation does, however, qualify as aid paid for with government funds. The regimes are, apart from the accelerated depreciation for starting enterprise, available to every business when certain objective criteria are met and therefore not selective. Aid to newly created enterprise is under circumstances allowed under article 14 of the commission regulation of 6 August 2008\(^{24}\). The accelerated depreciation regime for sea-going vessels may constitute prohibited state-aid because it is aimed at very specific activities.

**State Aid WTO**

While accelerated depreciation merely constitutes a shift in time when it comes to taxation this is deemed a subsidy under the ASCM. Accelerated depreciation has nothing to do with the export of goods or the use of domestic goods over imported goods and is therefore not prohibited. The regimes are not specific because objective criteria are stated in law. However, the regimes for sea-going vessels and starting enterprise are limited to a specific enterprise and are therefore specific. Whether or not the cause adverse affects to other WTO members is hard to say. The incentives are actionable; whether or not a country will open a procedure is questionable.

**Accelerated depreciation of environmentally friendly assets\(^{25}\)**

The first regime dealt with is the regime that allows for accelerated depreciation on assets that qualify as environmentally friendly. For the regime to be applicable the asset has to be on a list published and kept up to date by the Dutch government. Most of the items on the list are not commonly in use in The Netherlands but do contribute to a cleaner environment. Also most of the items on the list qualify for the investment deduction when acquiring environmentally friendly assets. Like with the investment deduction an asset only qualifies when it is unused in the sense described in that item. Qualifying assets are looked at as a whole, however when only parts qualify accelerated depreciation is allowed for those parts.

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\(^{24}\) OJ 800/2008, 9.8.2008

\(^{25}\) Article 3.31 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
The regime has a ceiling of €25,000,000, this is the maximum expenditure per asset that may be taken into account. Some assets on the list have a different ceiling.

Normally when an asset no longer qualifies within a certain amount of time from the moment of investment the advantages of accelerated depreciated are taken back. For this regime, however, no such period was given. This can mean one of two things, whenever the asset no longer qualifies the advantage is taken back or the advantage is never taken back. In literature the latter situation is defended.

Environmentally friendly assets used abroad
Accelerated depreciation is also allowed for assets that are in use abroad. Additional provisions do, however, apply. A normally qualifying asset used abroad has to substantially contribute to a cleaner environment in The Netherlands. For this provision to be fulfilled water and air pollution that would normally effect the Dutch environment for at least 30% of their total volume would have to reduced. The second provision is that a business has to have a statement drawn up by the ministry of finance declaring that the asset does in fact contribute to a cleaner environment in The Netherlands.

Period to give notice
For the accelerated depreciation to be allowed the correct agency has to have been notice within three months. The commencement of this period is the moment of investment. When creating an asset in-house the period commences in the quarter following the quarter the investment expenditures were made. Whenever investment expenditures are borne in a different quarter the notice has to be given again. If the investment costs were made in the moment the asset starts being used the notice has to be given within three months of that moment.

The notice may coincide with the notice required for the investment deduction when acquiring either energy efficient or environmentally friendly assets.

Shipping regime
The regime is dealt with in the Dutch personal income tax system but is, through the routing paragraph in the law governing the corporate income tax system, also applicable on corporate entities. It can therefore be classified as an objective tax incentive because the legal form in which a business is carried out has no influence.

When a business generates its profit through ocean shipping it has the option to have those profits taxed not based on the actual profits but based on the net tonnage of the ship. This regime was introduced in 1996 with the approval of the European union to prevent shipping companies from moving to countries with more favorable tax rates by sailing under a different flag. A business can opt for the

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26 Source for the text in the section on the shipping regime is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.15.E.”
27 Article 3.22 in conjunction with articles 3.23 and 3.24 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
regime no matter what legal form through which the business is carried out, it can therefore be qualified as an objective taxi incentive. The regime is not part of superior general principle in Dutch taxation, in fact it is in conflict with almost every principle of taxation the Dutch system has because expenditures are not attributed to the period they belong to and the taxable profit does not reflect actual income.

*Net tonnage*

The net tonnage of a ship is the useful capacity of a ship that can be found on the international certificate of tonnage.

*Optional*

A business has to apply for the regime for it to be applicable. With the request the business has to supply the tax authorities with the book value and the market value of the ships it has in its possession and the fiscal reserves that exist at the moment of application. Reason for this is that when the after choosing for the fixed profit determination it has to be applied for at least ten years. Whenever a business, other than by the death of its owner, seizes to exist within ten years after implementation of the fixed profit determination these unrealized profits will be added to the profit of the year the business, or a part thereof, seizes to exist. Also when a certain activity of the business no longer qualifies for the regime within ten years, the unrealized profits are used to determine the book value of the ship at that time by deducting the unrealized profits from the market value. After ten years the before mentioned unrealized profits are no longer taxed when the business seizes to exist.

The period of ten years is extended by ten years automatically unless the business decides to return to the normal way of annual profit determination.

*Seagoing activities*

To qualify for this special regime the seagoing activities must entail the following:

- Exploitation of ships that transport goods and persons on international water or the transportation of goods and persons related to the exploration and exploitation of natural resources found at sea.
- Exploitation of ships that are used for dredging operations at sea for which most time is spend on transportation or exploitation of ships that aide and tow ships at sea, not being tugboats that moor ships in the harbor that would normally sail under their own power.
- Profits generated with activities related to the activities mentioned. Examples are the loading and unloading of ships done by the business that exploits the ships.

The definition of sea in this context is all water located offshore from European Union countries and certain waterways mentioned in enclosure 1 of the European Union directive nr. 13/2004.

Activities that don’t qualify include obtaining sand and gravel, fishing activities, pilot services and recreational activities.
Exploitation

Exploitation of a ship qualifies when the taxpayer:

- Manages the shipping operations from the Netherlands; the ship sails under the flag of one the member states of the European Union or European Economic Area and the taxpayer is (one of) the owner(s) of ship that is used or the business or charters a ship.

- Manages operations of the ships owned by third parties in the Netherlands, but only if the taxpayer also operates his or her own, or partly owned, ship(s) that comply with the demands of the first bullet point. When the ship is partly owned the ownership must at least be five percent.

- Manages a chartered ship with crew, but only if the taxpayer also operates his or her own, or partly owned, ship(s) that comply with the demands of the first bullet point. When the ship is partly owned the ownership must at least be five percent.

- Manages technical maintenance and crew of ships in the Netherlands.

There are some exceptions possible on the provision that the ships have to sail under the flag of one of the member states of either the European Union or European Economic Area. The details of these exceptions fall outside of the scope of this paper.

Partnerships

When a ship is exploited through a partnership the every partner can opt for the shipping regime but it is not mandatory that all of them do.

Tariffs

The tariffs per ship are the following:

<table>
<thead>
<tr>
<th>Taxation per day per 1000 net tonnage</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>€ 9,08</td>
<td>Up to 1000 net tonnage</td>
</tr>
<tr>
<td>€ 6,81</td>
<td>From 1000 to 10.000 net tonnage</td>
</tr>
<tr>
<td>€ 4,54</td>
<td>From 10.000 to 25.000 net tonnage</td>
</tr>
<tr>
<td>€ 2,27</td>
<td>From 25.000 to 50 000 net tonnage</td>
</tr>
<tr>
<td>€ 0,50</td>
<td>For 50.000 net tonnage and above</td>
</tr>
</tbody>
</table>

The amount of days is determined by the actual days the ship is exploited in the sense of the regime. Maintenance, repairs or non-exploitation because of unfavorable market conditions are also taken in to account.

The final tariff is only applicable to two categories of ships:

- Ships that have sailed under a flag after 31 December 2008 and from that moment fall under the regime.
- Ships that in the five years preceding entering the shipping regime have sailed under the flag of country that is not part of the European Union or European Economic Area.

When this is not the case the tariff for a net tonnage per 1000 per day above 50.000 becomes € 2,27.
The taxable profit for a ship that is exploited for 365 days a year that has a net tonnage of 20,500 is determined as follows:

- 1x € 9,08
- 9x € 6,81
- 10x € 4,54

The taxable profit per day in this case is € 115,77. The net tonnage figures are rounded down to one thousand. Annual profit for the ship in question would in this case be € 42,256,05.

If the fourth bullet point of the qualifying exploitation is applicable the profit would be 25% of the amount calculated.

**State Aid EU**

As said before the shipping regime constitutes state aid but has been approved by the commission.

**State Aid WTO**

The ASCM states that whenever government revenue that is otherwise due is not collected and a benefit is thereby conferred constitutes a subsidy. The shipping regime can be qualified as a subsidy when taxation because of the regime is lower than in normal situations. Access to the regime is very limited and the regime can therefore be qualified as specific. Whether or not the regime is harmful for other member states of the WTO is hard to say, the regime can be qualified as actionable.

**Accelerated depreciation for investments in sea-going vessels**

When a business has the option to choose the shipping regime for their annual profit determination but decides not to do so they can choose to depreciate investments in sea going vessels at their own discretion. Qualifying business owners in this case do include silent partners in a partnership. No approval is needed to apply this depreciating regime. The general rules as discussed before apply for as far as they do not contradict with the specific rules.

Qualifying assets are vessels used in businesses for which the business could have chosen to apply the shipping regime.

The term discretionary is somewhat misleading in this case because a business may only depreciate to a maximum of 20% of the normal depreciation capacity of an asset. Furthermore the depreciation caused by the regime may never generate a loss or increase an already existing loss. When the profits do not allow for the business to depreciate 20% in a certain year the remainder is carried forward to a next year when, if profits allow for it, the debiting may amount to more than otherwise allowable 20% depreciation capacity. Normal depreciation, however, may cause a loss or increase an

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28 Source for the text in the section on accelerated depreciation of investments in seagoing vessels is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.22.C.e”

29 Article 3.34 paragraph 2 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
already existing loss. So while in certain situations discretionary debiting is not allowed normal debiting may be possible.

When a business no longer qualifies within 10 years of the start of deprecating the advantages are taken back and the book values is set to what the book value would have been without the special depreciation regime.

**State Aid EU**
The accelerated depreciation for investments in sea-going vessels constitutes aid in the sense of the EU state aid rules. Accessibility to the regime is limited to certain activities and the regime is therefore selective. The regime can therefore be classified as prohibited state aid. It is, however, possible that the commission will approve of the regime since it also approved the shipping regime.

**State Aid WTO**
Accelerated depreciation constitutes a subsidy according to ASCM. The regime is specific and eligibility is spelled out in law but is not aimed at import or export of goods, and is therefore not prohibited. The regime can be qualified as actionable when it causes adverse affects to WTO member states.

**Exemptions**

**Forestry exemption**

Exempted from the taxable profits are profits generated by exploitation of a forest. The exemption is dealt with in the Dutch personal income tax system but is, through the routing paragraph in the law governing the corporate income tax system, also applicable on corporate entities. It can therefore be classified as an objective tax incentive because the legal form in which a business is carried out has no influence. The exemption is also available or forestry conducted in foreign nations.

What constitutes the exploitation of forest is defined to be very broad. A farm with the dividing line made up of trees can qualify for the exemption when the trees are chopped down and sold. An exemption means that while the profits are not taxed expenditures related to the turnover are not deductible.

There is only one provision to qualify for the exemption, which is that the forest has to be maintained as a forest. Maintaining a forest means that the forest is still in existence after some trees where chopped down. This is especially true when trees are only allowed to be chopped down when they have to be replaced. Subsidies received for instituting a forest also qualify even if it is not required to replace the trees after having been chopped down. The possibility that the forest will be maintained is enough to qualify.

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30 Source for the text in the section on the forestry exemption is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.13.B.”
31 Article 3.11 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
Optional taxation
The downside for the taxpayer is that, while profits are exempt, losses cannot be deducted from other sources of income. That is why the taxpayer has the option to choose to include the profits in the taxable base. When chosen the profits and losses will be included in the taxable base for at least ten years. Property will be valued at market value when the choice is made. So when after a period of ten years the taxpayer chooses re-enter the exemption regime the difference between the book value (which is the market value at the time the taxpayer chose to be exempt for profits related to forestry activities) and the market value is taxed. At the request of the taxpayer these profits will, however, not be taxed immediately but will instead be registered. When alienating the business, or part thereof, within five years of re-entering the exemption regime the registered profits are taxed. They will, however, not be taxed if the alienation is due to the death of the owner, expropriation or at the request of the new and the previous owner. The tax burden then shifts to the new owner when the business is alienated within five years.

State Aid EU
The exemption of forestry may constitute state aid for the EU because otherwise taxable activities are optionally not taxed. While available to every business the exemption is tailored to a certain activity, in my opinion the selectivity requirement is therefore satisfied. The exemption might affect trade between member states because wood can be sold against a lower price, while still resulting in the same net profit because profits are not taxed. The exemption may, however, be allowed under article 107 paragraph 3 section c of the EU Treaty.

State Aid WTO
The ASCM states that whenever government revenue that is otherwise due is not collected and a benefit is thereby conferred constitutes a subsidy. The forestry exemption can be qualified as a subsidy when taxation because of the regime is lower than in normal situations. While objective criteria determine whether an enterprise has access, access to the regime is very limited and the regime can therefore be qualified as specific. Whether or not the regime is harmful for other member states of the WTO is hard to say, but it is at least actionable.

Agricultural land exemption
The agricultural land exemption is dealt with in the Dutch personal income tax system but is, through the routing paragraph in the law governing the corporate income tax system, also applicable on corporate entities. It can therefore be classified as an objective tax incentive because the legal form in which a business is carried out has no influence.

32 Source for the text in the section on agricultural land exemption is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.13.C.”
33 Article 3.12 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
Exempted from the taxable profits are profits generated by changes in value of land used for agricultural purposes when these value changes are related to continued use for agriculture. Only profits that are attributable to inflation are exempt. Profits related to improvement made to the land, for example the addition of drainage pipes, while in use of the business are taxed. The exemption is dealt with in the Dutch personal income tax system but is, through the routing paragraph in the law governing the corporate income tax system, also applicable on corporate entities. It can therefore be classified as an objective tax incentive because the legal form in which a business is carried out has no influence. The exemption is not optional.

**Agriculture purposes**

Land used in the following businesses qualifies for the agricultural land exemption:

- Farming
- Grassland Farming
- Horticulture including cultivation trees, flowers, bulbs, mushrooms and fruit
- Cattle farming and breeding (not including breeding animals for sporting purposes, keeping them for trade or mainly to entertain people)
- Fish farming

The land in question has to actually be used in the business itself, land that is rented out does not qualify. Land on which buildings reside also qualifies as long as it is used in qualifying businesses.

**Market value and market value for land used for agriculture purposes.**

Whenever a qualifying piece of land is alienated, sold or otherwise, two distinct market values come into play, real market value and the market value for land used for agricultural purposes. Exempt form taxation is the difference between the book value and the market value for land used for agricultural purposes, taxed is the difference between the normal market value and the market value for land used for agricultural purposes.

**Compartmentalizing**

When a piece of land bought by farm is not used in the business itself but rented out it will not qualify for the exemption. When, however, after a certain period of time the land is used in the business it will qualify. If the land is consequently sold at the market value for land used for agricultural purposes the value change attributable to the period the land did not qualify is taxed. The exemption only applies for qualifying periods.

**Leased land**

In Dutch civil law the lessee has, whenever the lessor decides to alienate the leased land, first choice to buy the land. Furthermore the lessee can buy the land for the value attributed to the land when it is leased. When the lessee executes this right the land is, for the lack of a better word, bought with a
mandatory discount. The difference between the market value and the leased value is taxed when the land is sold. The parties can, however, agree to sell the land with this latent tax burden.

State Aid EU
As with the forestry exemption the agricultural land exemption may constitute state aid in the sense of the EU treaty because otherwise taxable profits are not taxed. The exemption is only available to certain businesses and therefore selectivity requirement is satisfied. The exemption might affect trade between member states because profits are not taxed. In literature it is argued that the influence of the exemption on the price of products is very small, and therefore the exemption does not conflict with the EU state aid rules\(^\text{34}\). If, however, the exemption does qualify it may be allowed under article 107 paragraphs 3, section c.

State Aid WTO
The ASCM states that whenever government revenue that is otherwise due is not collected, and a benefit is thereby conferred, constitutes as a subsidy. The agricultural land exemption can be qualified as a subsidy when taxation because of the regime is lower than in normal situations. Access to the regime is very limited and the regime can therefore be qualified as specific. Whether or not the regime is harmful for other member states of the WTO is hard to say, it is at least actionable in the sense of the ASCM.

Business Succession Exemption / Concession
The business succession exemption or concession is, for the main part, dealt with in the law that governs gift and inheritance taxation. I will, therefore, not go into to much detail because it is not an income tax incentive. There are, however, related incentives in the Dutch income tax system. Because this incentive is applicable to both the inheritance of a personal enterprise or stock in a corporate entity (at least 5% of the company has to be owned; known as a substantial interest) it can be qualified as an objective tax incentive.

Inheritance and gift tax
Whenever a person receives business assets, including business assets of a foreign business or foreign part of the business, or stock in a business as an inheritance or gift, inheritance or gift tax is levied. To stimulate the continuation of businesses without the person inheriting the business having to liquidate assets in order to pay for the inheritance tax or gift tax some concessions are in place that prevent taxation. The incentive has been in place for long time in the inheritance and gift tax, but was recently completely overhauled. Tax can only be levied when the gift or inheritance is from a person who lives or used to live in The Netherlands\(^\text{35}\).

\(^{34}\) J.J.M. Jansen, 'De landbouwvrijstelling in strijd met het Europese verdrag?', WFR 1992/6031, p. 1551
\(^{35}\) Article 1 of the Dutch Gift and Inheritance tax law (Successiewet 1956)
Concessions

The concession in the inheritance and gift tax consists of three conditional exemptions\(^\text{36}\). The value of the business assets or stock is based on the going concern value except when the liquidation value of a business is higher; when this is the case the liquidation value determines the base of taxation. When dealing with a partnership the business value also includes business assets that are on personal balance sheet of the person the inheritance or the gift is from. Real estate that is not on the balance of the business but is owned in private and is at the disposal of the business also qualifies for the exemption. This could, for example, be the case when a plot of land is owned in private but is rented out to a business owned by the same person.

The following conditional exemptions are in place as of 1 January 2010:

- 100% exempted are business assets or stock for as far as they are valued at €1 million or less.
- 100% exempted is the difference between the going concern value of a business and the liquidation value when the liquidation value of a business is higher than the going concern value and the liquidation value is higher than €1 million. When the liquidation value deducted with the difference between the liquidation value and the going concern value computes to less than €1 million the entire inheritance or gift is exempted.
- 83% exempted is the remaining value of the business.

For the value of the business that is not exempt from inheritance and gift tax the collection of the tax owed can be postponed for ten years as an interest bearing loan from the government.

These exemptions can cumulate with the normal exemptions that exist for non-business related inheritances or gifts. The difference between the normal exemptions is that the receiving party has to request for the exemptions to be applicable.

Conditions

For the exemptions to be applicable the following conditions concerning the possession of the business have to be met:

- When giving a business to someone without compensation the person giving the business has to have owned the business for at least five years.
- When the business belongs to an inheritance the business had to be owned by the person who passed away for at least a year.

When the inheritance or gift consists of qualifying stock the entity to which to stock belongs has to run a real business. A real business is a durable organization of capital and labor that enters into contracts with the intention to generate a profit. When part of the entity does not qualify the exemption is not given for that part. When the non-qualifying part is valued at less than 5% of the qualifying part,

\(^{36}\) Article 35b of the Dutch Gift and Inheritance tax law (Successiewet 1956)
the entire entity is considered to qualify. This 5% is taken into account even when the non-qualifying part of the entity is valued at more than 5% of the qualifying part.

The following conditions exist concerning the business:

- When the business capital that is given by or is part of the inheritance of a silent partner in a business, the silent partner has to have been a full partner or owner of the entire business at some point in the past before becoming a silent partner. Furthermore the one who receives the business has to be a full partner in the business.

- When stock is given or is part of the inheritance and that stock is of certain kind stock has to have been converted from normal stock into the special stock. Furthermore the one who receives the special stock has to own at least 5% of the normal stock.

The following condition exists for the one who receives the gift of inheritance:

- The one who receives the business has to continue running the business for at least five years.

When the business is alienated or ceases to exist, in whole or in part, the exemptions become void and the person who received the business has to pay the inheritance or gift tax that he would have had to have paid without the conditional exemptions. When only a part of the business is alienated or ceases to exist only that part of the exemption becomes void.

The before mentioned conditions are in place to prevent misuse of the exemptions. It would otherwise be relatively easy to convert normal capital into business capital and qualify for the exemptions (which are very generous).

It must be mentioned that the exemptions can only be utilized by the person who actually receives the business capital. When there are multiple heirs and only one decides to continue running the business the other heirs are compensated by the person who continues running the business. The compensation does not qualify for the exemptions even though it was paid to the other heirs because of a business transfer.

**Tariffs**

<table>
<thead>
<tr>
<th>Taxable acquisition from</th>
<th>to</th>
<th>Partner or lineal descendant</th>
<th>Other persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>€ 0</td>
<td>€ 118,000</td>
<td>10%</td>
<td>30%</td>
</tr>
<tr>
<td>€ 118,000</td>
<td>-</td>
<td>20%</td>
<td>40%</td>
</tr>
</tbody>
</table>

**Income Tax**

It is important to distinguish the inheritance tax incentives from the ones in place in the income tax system. Inheritance tax is levied from the one who receives the business capital, income tax is levied from the person who passed away or alienated his business without compensation.

**Alienation of business capital because of death**

When the owner of a personal enterprise dies the business is transferred to the heirs of that person. When the heirs of the business decide to continue the business they have the option to continue with
the book values of the person who died\textsuperscript{37}. Consequently their ability to depreciate on the assets of the business is diminished.

When the person who died owned at least 5\% of a corporate entity in which a business was run the heirs can, when certain conditions are met, choose to continue with the historical acquisition value of the stock, but only for as far as the value of the stock is attributable to the business capital of the entity\textsuperscript{38}. When this option is not utilized the difference between the market value of the stock and the historical acquisition value is taxed.

The following conditions have to be met before the heirs of the person who passed away can opt to keep the historical acquisition value:

- The entity the stock is from has to run a business that qualifies as a durable organization of capital and labor that enters into contracts with the intention to generate a profit.
- The stock represents at least 5\% of the value of the entire entity, excluded are situations that would cause stock that represent less than 5\% of the value of the entity to fall under the same regime.
- The recipients of the stock have to be Dutch residents and the stock received may not become part of a personal enterprise.
- When the stock was received because of a contract between heirs the transfer of the stock has to take place within two years of the death of the testator.

\textit{Alienation of business capital as a gift}

When the owner of a personal enterprise decides to alienate his business, in whole or in part, and give his business away the recipient of the business can choose to continue with the book values of the former owner\textsuperscript{39}. This is also possible if the owner of a personal enterprise decides to sell his business. Only selected recipients are eligible to continue with the book values of the former owner. The new owner of the business has to continue to run the business.

The following recipients are eligible:

- Fellow partners in a partnership who have been partners in the partnership for at least 36 months.
- A person who has been an employee of the business for at least 36 months.

There are a number of situation in which the period of 36 months may be reduced which are:

- The business owner becomes disabled.
- The business owner becomes bankrupt (in private).
- The business owner becomes under legal constraint.
- The business owner divorces his partner and acquires the entire enterprise.
- The business owner dies suddenly.

\textsuperscript{37} Article 3.62 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
\textsuperscript{38} Article 4.17a in conjunction with article 4.39a of the Dutch Personal Income Tax (Wet inkomstenbelasting 2001)
\textsuperscript{39} Article 3.63 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
A partnership or employer/employee relationship has to exist before these events occur. The situation that ownership of the business is transferred to a son when the father becomes disabled does not qualify because there was no professional relationship before the event.

When person decides to give his stock in a corporate entity, in which he held an interest of at least 5%, away the recipient and the former owner can request, when certain conditions are met, to continue with the historical acquisition value of the stock, but only for as far as the value of the stock is attributable to the business capital of the entity. The following conditions have to be met before the recipient can keep the historical acquisition value:

- The entity the stock is from has to run a business that qualifies as a durable organization of capital and labor that enters into contracts with the intention to generate a profit;
- The stock represents at least 5% of the value of the entire entity, excluded are situations that would cause stock that represent less than 5% of the value of the entity to fall under the same regime.
- The recipients of the stock have to be Dutch residents and the stock received may not become part of a personal enterprise.
- The recipient has to have been an employee of the business, which is run through the entity, for at least 36 months.

State Aid EU

When it comes to incentives in the inheritance and gift tax system the incentive for the taxpayer aid is given to the taxpayer by not taxing when the conditions are met. But because the concession is available to a wide variety of taxpayers the requirement of selectivity is not satisfied.

The income tax system allows for deferral of taxation when the conditions are met. Deferral of taxation is seen as aid within the state aid regime. However the regime is not specific enough to constitute prohibited state aid.

State Aid WTO

No inheritance or gift tax is collected when the conditions of the inventive are met. The incentive is not aimed at export and is therefore not prohibited. The incentive can be qualified as non-actionable because eligibility is based on objective criteria clearly spelled out in law.

The income tax system allows for the deferral of taxation, which can be seen as a subsidy according to the ASCM. Because the regime is not at import of export of goods, it is not prohibited. Conditions to qualify are clearly spelled out in law and access is not limited to certain enterprises. The regime can therefore be qualified as non-actionable.

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40 Article 4.17c in conjunction with article 4.39c of the Dutch personal income tax (Wet inkomstenbelasting 2001)
Subjective Tax Incentives

Holding companies

Participation exemption

Profits generated because of the participation in the capital of another entity are exempt from taxation when certain conditions are met. This exemption is available for every entity that is taxed via the corporate income tax system; it can therefore be qualified as a subjective tax incentive because the legal form in which the business is carried out is a condition for the exemption. Because the regime is not limited to a single legal form and access to the regime is also based on other conditions it can also be qualified as an objective incentive. The regime is applicable to most benefits received related to the participation in the capital of another entity when the conditions are met. An exception is in place based on the entity in which the participation is held.

The basis of the regime is part of a superior general principle of the Dutch tax system, as it is in place to prevent double taxation of the same profits. If profits generated by a subsidiary are also taxed at the level of the parent company this would be the case. When shares in a subsidiary qualify for the regime the subsidiary company is treated as an extension of the parent company. Profits are taxed at the level of the subsidiary and are exempt at the level of the parent company.

When qualifying for the participation exemption participations giving out dividends are also exempt from withholding dividend tax on those dividends.

Qualifying participations

The following participations qualify for the participation exemption:

- Ownership of at least 5% of the nominal paid up capital of a company/entity, when the capital of that entity is split up into shares.
- Ownership of at least 5% of profit slips of a common fund.
- Membership in a cooperative or mutual insurance company.
- Silent partnership in an open limited partnership, when this partnership entitles the entity to 5% of the benefits generated by the open limited partnership.
- When in a treaty concluded with one of the member states of the European Union a lower allowable source taxation on dividends is based on the right to vote, a participation also qualifies when this right represents at least 5% of the total votes. Certain situations can also cause the participation based the participation of a third party.

The exemption is granted for profits received no matter what country the subsidiary is a resident or carries out its activities.

41 Source for the text on the participation exemption is “Prof. dr. J.A.G. van der Geld, Hoofdzaken vennootschapsbelasting, Deventer: Kluwer 2008, Chapter 6”

42 Articles 13 to 13k of the Dutch corporate income tax (Wet op de vennootschapsbelasting 1969)
Non-qualifying participations

A participation in an investment company does not qualify for the participation exemption. The aim of the regime is to prevent double taxation on the same profit, because the investment companies, as they exist in Dutch tax law, are either exempt or taxed at 0% there is no danger of double taxation.

Participations also do not qualify for the participation exemption when a participation is not intended as a participation but as an investment. This intention is measured by the activities of both the parent company and the subsidiary. This so-called intention test is two fold; first the activities of the subsidiary are assessed. When these activities are investing the participation does not qualify for the participation exemption. By fiction the following participations don not qualify based on their activities:

- When over 50% of the assets of the participation consist of other participations that don’t amount to more that 5% per participation.
- When over 50% of activities consist of financing activities for group companies.

The second part of the intention test assesses the position of the participation in the whole of the activities of the group of which it is a part. When based on the activities a participation is a qualifying participation it can still be disqualified based its position in the group. When the activities of participation are alien to the rest of the group the participation exemption is not applicable.

Escape clause

When a participation is excluded based on the intention test it can still qualify when it is taxed at a reasonable rate or based on its assets. A reasonable rate is 10% or more. The rate is determined by what the law of the country the participation carries out its activities says the rate is. However, when tax rate is lower that 10% but the effective rate is 10% or more the participation can still qualify. When the assets of a participation qualify for over 50% as assets other than investments in participations the are taxed at a low rate the participation exemption is still applicable.

The participation exemption is also applicable for participations that normally would not qualify but whose assets consist for more than 90% of real estate.

Qualifying benefits

When a participation qualifies all benefits attributable to that participation are objectively exempt from taxation, this includes losses. Financing costs of a participation are deductible at the level of the parent company, however cost attributable to the purchase or selling of a participation are not deductible. Benefits included in the participation exemption are:

- Currency exchange rate profits.
- Profits attributable to options.

Benefits excluded are:

- Damages paid because the sale of a participation fell through.
• Dividends included in the purchase price of a participation. These are merely examples of benefits that qualify or don’t qualify for the participation exemption. When in certain period a participation did not qualify for the participation exemption profits attributable to that period made in a period when the regime is applicable don not qualify for the exemption, the profits are compartmentalized.

State Aid EU
Exemption from taxation is aid in the sense of the EU treaty. The measure can, however, be qualified as a general measure and does therefore not constitute state aid.

State Aid WTO
Exemption from taxation is a subsidy according to the ASCM. Eligibility for the regime is not only automatic, it is compulsory when the conditions are met. The regime is therefore not specific enough to constitute an actionable subsidy. The regime is therefore non-actionable.

Consolidated tax treatment or fiscal unit regime
Certain entities that are taxed via the corporate income tax system can, for tax purposes, request to be seen as one tax subject, and form a fiscal unit. This treatment is only available to certain groups of companies. Consequence of application of the regime is that while to the outside world they remain separate businesses, for tax purposes companies within a fiscal unit are merged. Advantages are:

• Only one tax return has to be filed.
• Transfer pricing is no longer an issue within the fiscal unit because fiscally there are no transactions.
• Losses of the subsidiaries can be set of against profits of the parent company or other subsidiaries belonging to the same fiscal unit.
• Restructuring a group of companies has no fiscal consequences, because fiscally there is only one company.
• No profit taking on intercompany transactions.

The incentive is only available to select types of entities and can therefore be qualified as a subjective incentive. Besides from the fact not every entity has access to the regime or treatment, a large number of other requirements have to be met. The regime is not a result of a general principle in taxation.

Qualifying groups
A parent company must own at least 95%, directly or indirectly, of the shares of a subsidiary determined by the nominal value of the shares. The ownership must include legal ownership en economic ownership. Shares in a subsidiary may not be kept as stock.

43 Source for the text on the consolidated tax treatment is “Prof. dr. J.A.G. van der Geld, Hoofdzaken vennootschapsbelasting, Deventer: Kluwer 2008, Chapter 10”
44 Articles 15 to 15a of the Dutch corporate income tax (Wet op de vennootschapsbelasting 1969)
Qualifying entities
The parent company in a group of companies has to be:

- A Dutch limited liability company
- A Dutch private company
- A Dutch cooperative
- A Dutch mutual insurance company
- Look-alike companies that have been instituted according to the laws of a member state of the European union, Aruba, The Netherlands Antilles or any other country with which the Netherlands has concluded a treaty to prevent double taxation which prohibits discrimination according to the nationality of entities. This means that foreign companies from qualifying countries that have a permanent establishment in The Netherlands can also be included in the consolidated tax treatment. The profits attributable to that permanent establishment have to be taxable in the Netherlands and the place of management has to be in a qualifying country.

The subsidiary can only be a Dutch limited liability company, a Dutch private company or a look-alike company from one of the other countries mentioned above that has to be either a Dutch resident or have permanent establishment in The Netherlands. When a cooperative serves a parent company with one of the qualifying subsidiaries and chooses to apply the consolidated tax treatment the cooperative can no longer apply the special tax regime for cooperatives, which will be dealt with later. The consolidated tax treatment is also possible, even though a cooperative is not mentioned as qualifying subsidiary, when a group consists of cooperatives. While it was already impossible, because of the provisions to apply the regime, the special regime for cooperatives is also no longer applicable. Apart from the general conditions to apply the consolidated tax treatment, there are a number of conditions specifically for cooperatives, which are:

- The activities of the member cooperatives have to be managed by the parent cooperative.
- The cooperatives have to vouch debts the other cooperatives might have.
- The distribution of the profits of the cooperatives has to be done according to a single standard.
- The financial years of the cooperatives have to match.
- The individual conditions, which can be different for every group of cooperative but will probably be standardized, instituted by the minister of finance, have to be met.

Both parent and subsidiary must be Dutch residents or taxation of the profits attributable a permanent establishment must be taxable in The Netherlands. So when a parent company that has been instituted according to laws of a qualifying country has enough shares of subsidiary, which has also been instituted according to the laws of qualifying country and those shares are attributable to the permanent establishment, those companies can opt for the consolidated tax treatment. The option is also available when the subsidiary is a Dutch private or limited liability company.

45 ECJ 337/08, *X Holding BV vs. State Secretary of Finance*, 25 February 2010
Same tax treatment.
Both parent and subsidiary have to be treated the same tax wise. Normally this would exclude foreign companies because those companies are taxable via different section of the law that governs corporate income tax. Although this section references the conditions of a resident taxpayer, they are not the same. The law, however, states that an exception can be made for permanent establishments and foreign companies.

Same financial year
Every entity must, before it can be included or chose for the consolidated tax treatment, have a matching financial year.

Request
The consolidated tax treatment can only be applied at request of all entities concerned. The time the consolidated tax treatment becomes in effect is at the discretion of the requesting parties but has to be at least three months after the request itself is done. The most convenient moment of course is at the start of the financial year. A newly acquired or existing entity can, however, be added to the group during the year. When cooperatives opt for the consolidated tax treatment this is not possible. Within a group of entities multiple fiscal units may exist, because of the different layers within that group.

State Aid EU
The consolidated tax treatment regime can be seen as a general measures and is therefore not state aid. Tax revenue is not lost because profits taxed at the level of the parent would have been deductible at the level of the subsidiary. Advantages of the regime are mostly administrative, on the side of the tax authorities as well as on the side of the group of companies, and are therefore not borne by the state.

State Aid WTO
While the objectively defined criteria limits access tot the regime to certain entities it is, in my opinion questionable if the consolidated tax treatment regime qualifies as a subsidy. Advantages offered are not because of loss of tax revenue in a single year. The regime might be considered actionable, but in my opinion the regime is non-actionable.

Personal enterprises & partnerships
Profit deductions for entrepreneurs (self-employed persons)\(^6\)
The deduction on the taxable profit for the self-employed is comprised of several independent profit deductions. Every deduction has its own requirements that determine whether an entrepreneur is eligible for the deduction. The deductions don’t influence one another and are tallied up and deducted from the annual taxable profit. Corporate entities cannot claim these deductions and therefore they are

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\(^6\) Source for the text in the section profit deductions for entrepreneurs (self employed persons) is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.38”
subjective since the legal form in which the business is runs does matter. Within that group of subjects, however, there are objective conditions that have to be met to qualify for the deductions. The profit deductions are available to both resident entrepreneurs with a business abroad and foreign entrepreneurs with a permanent establishment in the Netherlands.

The profit deduction for entrepreneurs is comprised of:

- General profit dependable deduction.
- Profit deduction for assisting spouse or partner.
- Profit deduction for starting enterprises operated by partially disabled persons.
- Deduction on profits generated when discontinuing an enterprise.
- Profit deduction for research and development activities.

When a person owns several personal enterprises the profits derived from those businesses are seen as one enterprise for the sake of the profit deduction for the self-employed. Also the profit deductions are only available to real businesses. Silent partners cannot qualify for the profit deductions. The deductions are not the result of a superior general principle.

**Hours criterion**

Several incentives can only be claimed if a business owner spends at least 1225 hours a year laboring in his or her business. This averages to about 25 hours a week. As an additional provision a business owner has to spend most of his time working to realize profits. This provision was introduced to prevent businesses from forming just for the sake of the profit deductions whilst simultaneously having an almost full time employment contract. The “most of his time” provision is not in effect for starting businesses. If a business owner has in the 5 previous years had a year when not generating a business profit (positive or negative) it qualifies as a starting business. In other words the first 5 years the business owner can still hold down a full time job whilst starting a business. The business owner still has to spend at least 1225 hours working in his business.

Some partners in a partnership with relatives may be excluded because in a normal situation an employment contract would have been in place. An often-used example of a situation that is excluded is the dentist that has a partnership with his wife who only takes care of administrative tasks. The husband would qualify but the wife wouldn’t because she is not deemed to be a real business owner.

When the required number of hours is not reached because of maternity leave or delivery of the baby the hours missing are ignored.

**General profit dependable deduction for the self-employed**

This general profit deduction was introduced to promote small businesses. The extra money available because of the tax break can be used to invest, reserve or consume. Furthermore the incentive is in

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47 Article 3.6 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
48 Article 3.76 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
place to clear up some of the inequalities between the business owner and the wage earner. In the Dutch tax system they are taxed against the same tariff, for a business to grow it has to reinvest which means not all money is available for consummation.

For a business owner to qualify for the deduction he or she only has to meet the hour criterion. When the business owner has reached the age of 65 years the deduction is half what it normally would be. The reason for this is that from that age the business owner usually starts receiving a government pension. Furthermore the social security premiums, which are part of the total tax burden, related to that government pension don’t have to be paid after having reached the age of 65. The date of reference whether or not a business owner is cut on his profit deduction is the beginning of the calendar year, even if the calendar year does not coincide with the book year.

If a business owner is just starting his business an extra deduction can be claimed when in the five previous years the general profit dependable deduction was not claimed for more than two times. In other words the starting business owner is eligible for a premium for three years. Excluded are businesses that start because they were released from a corporate entity and are personal businesses again. Since corporate entities cannot claim the general profit dependable deduction they would qualify as a starting business according to the general provision. The premium for starting businesses for the year 2010 is € 2110. The amount of profit deduction that may be claimed is dependent on the profit realized. The following table contains the deductions allowed for 2010:

<table>
<thead>
<tr>
<th>Profits higher than</th>
<th>But less than</th>
<th>Profit deduction allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>–</td>
<td>€ 13 960</td>
<td>€ 9427</td>
</tr>
<tr>
<td>€ 13 960</td>
<td>€ 16 195</td>
<td>€ 8764</td>
</tr>
<tr>
<td>€ 16 195</td>
<td>€ 18 425</td>
<td>€ 8105</td>
</tr>
<tr>
<td>€ 18 425</td>
<td>€ 52 750</td>
<td>€ 7222</td>
</tr>
<tr>
<td>€ 52 750</td>
<td>€ 54 985</td>
<td>€ 6593</td>
</tr>
<tr>
<td>€ 54 985</td>
<td>€ 57 220</td>
<td>€ 5895</td>
</tr>
<tr>
<td>€ 57 220</td>
<td>€ 59 450</td>
<td>€ 5204</td>
</tr>
<tr>
<td>€ 59 450</td>
<td>–</td>
<td>€ 4574</td>
</tr>
</tbody>
</table>

Deductions that cannot be claimed because there is not enough profit are added to the profit deduction in the nine following years.

State Aid EU
The general profit deduction constitutes aid in the sense of the state aid rule of the EU. However the measure can be seen as general measure because while limited to personal enterprises the measure is not limited enough to constitute prohibited state aid.

State Aid WTO
A deduction on the taxable base is considered a subsidy according to the ASCM. The deduction has nothing to do with import or export and is therefore not prohibited. While only available to personal
enterprises, eligibility is automatic when the criteria are met. The general profit deduction for the self-employed can therefore be qualified as non-actionable.

**Profit deduction for assisting spouse or partner**

When a business owners’ spouse or partner assists with the business activities without receiving a reward for this work the business owner can claim a profit deduction. The amount of deduction is dependant on the hours worked by the spouse or partner and the generated profit. Advantage of this deduction is that the business does not need a wages administration for the spouse or partner. The following conditions have to be met to qualify:

- The business owner has to be a real business owner in the sense that, for example, being a silent partner will not do.
- The business owner himself has to meet the hours criterion
- The spouse or partner has to assist with the business for at least 525 hours.
- The spouse or partner does not receive any remuneration. While this is in the law the state secretary of finance has allowed the deduction when the remuneration is less than € 5000, because remuneration of less than € 5000 paid to a spouse of partner is not deductible as an expense.

The deduction is obligatory when these conditions are met.

Certain elements of the taxable profit are not taken into account when determining the deduction, they are:

- Profits caused by expropriation.
- Profits caused by moving an asset or the entire business to another country.
- Profits caused by seizing the operations of a business (profits are then determined by the difference between the market value of assets and the book value).

The reason for excluding these elements from the base of the deduction is that they are not caused by the assistance of the partner or spouse in the business. The following table determines the deduction:

<table>
<thead>
<tr>
<th>Hours spent equal or more than:</th>
<th>But less than:</th>
<th>Deductible amount:</th>
</tr>
</thead>
<tbody>
<tr>
<td>525</td>
<td>875</td>
<td>1,25% of the taxable profit</td>
</tr>
<tr>
<td>875</td>
<td>1 225</td>
<td>2% of the taxable profit</td>
</tr>
<tr>
<td>1 225</td>
<td>1 750</td>
<td>3% of the taxable profit</td>
</tr>
<tr>
<td>1 750</td>
<td>–</td>
<td>4% of the taxable profit</td>
</tr>
</tbody>
</table>

Depending on the situation it can be more advantageous to award remuneration to the spouse because it may cause a higher deductible amount, and less taxation overall.

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49 Article 3.78 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
State Aid EU

The profit deduction for assisting spouse or partner constitutes aid in the sense of the state aid rule of the EU. It is also selective in the sense that it is only available to a very limited number of enterprises. While it is selective, it is highly doubtful if it is also harmful for other member states. If the deduction did not exist a business owner could have awarded wages to his partner or spouse, which is still possible.

State Aid WTO

A deduction on the taxable base is considered a subsidy according to the ASCM. The deduction has nothing to do with import or export and is therefore not prohibited. While only available to personal enterprises, eligibility is automatic when the criteria are met. The profit deduction for assisting spouse or partner can therefore be qualified as non-actionable.

Profit deduction for starting enterprises operated by partially disabled persons

This separate deduction for starting business was introduced in 2007 to stimulate persons that receive a disability benefit to start a business. It was deemed necessary because in many occasions the business owner did not meet the provisions of the hours criterion because of the disability. The deduction therefore has an hours criterion that requires 800 hours per year to be spent on the business instead of 1225. The following cumulative conditions have to be met to qualify for the deduction:

- The business owner qualifies as a real business owner, receiving profits from a silent partnership is not enough.
- The business owner did not generate profits in one or more of the previous 5 years.
- The business owner is entitled to a disability benefit. Some laws entitling certain groups of people to such a benefit are named but foreign benefits can also qualify.
- The normal hours criterion is not met but the business owner does meet the before mentioned reduced hours criterion.
- The business owner has not yet reached the age of 65 years.

The deductible amount is determined by the number of years the business is in existence.

- The deductible amount in year one is € 12.000.
- The deductible amount in year one is € 8.000.
- The deductible amount in year one is € 4.000.

In every year the deductible amount is maximized to the amount of profit actually generated. The deduction can therefore never generate a loss.

State Aid EU

The profit deduction for starting enterprises operated by partially disabled persons constitutes aid in the sense of the state aid rule of the EU. It is also selective because it is only available to a very lim-

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50 Article 3.78a of the Dutch personal income tax (Wet inkomstenbelasting 2001)
Eucotax Wintercourse 2009 – 2010: Equality and special income tax regimes for businesses

The number of enterprises. While it is selective it is highly doubtful if it is also harmful for other member states. Apart from that, the commission has allowed wage reductions in its regulation declaring certain categories of aid compatible with the common market when employing disabled people. This sets precedent for partially disabled entrepreneurs.

State Aid WTO
A deduction on the taxable base is considered a subsidy according to the ASCM. The deduction has nothing to do with import or export and is therefore not prohibited. While only available to personal enterprises, eligibility is automatic when the criteria are met. Profit deduction for starting enterprises operated by partially disabled persons can therefore be qualified as non-actionable.

Deduction on profits generated when discontinuing an enterprise
When a business seizes operations profits may be generated by the difference between the market value of assets and the book value. When this is the case the business owner can claim a profit deduction. To qualify for the deduction the business owner must meet the following provisions:

- One or more business must seize its operations in its entirety or;
- The reserve for future pensions becomes available because an entire personal business is moved into a corporate entity while retaining the book values. This happens because a corporate entity cannot have such a reserve on its balance sheet.

The amount deduction is maximized at € 3.630 and can only be claimed once by a business owner. When not the entire amount was used when seizing operation of a business the remaining amount can be claimed when seizing operations of another business. The deduction can never generate a loss.

State Aid EU
Deduction on profits generated when discontinuing an enterprise constitutes aid in the sense of the state aid rules of the EU. While access is limited to businesses that seize operations, having operated as a personal enterprise, it is highly doubtful it will distort the common market. The deduction is only granted while seizing operations and only once per (former) business owner. Because of this reason the measure, in my opinion, does not constitute prohibited state aid.

State Aid WTO
A deduction on the taxable base is considered a subsidy according to the ASCM. The deduction has nothing to do with import or export and is therefore not prohibited. While only available to personal enterprises, eligibility is automatic when the criteria are met. The deduction on profits generated when discontinuing an enterprise can therefore be qualified as non-actionable.

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51 Commission regulation No. 800/2008 (OJ L 214)
52 Article 3.79 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
**Profit deduction for research and development activities**

When a business owner spends at least 500 hours on research and development activities he or she may claim a profit deduction of € 12,031. The business owner has to meet the hours criterion and has to have statement that designates the activities as being research and development activities. I will discuss the statement and what constitute research and development when I discuss the deduction on payable wage tax when employees conduct research and development activities.

Starting businesses qualify for a premium of € 6,017. A starting business in this case is a business that has not qualified is a business in at least one of the previous 5 years. Excluded are the businesses that have been released from a corporate entity.

Because the expenses are coupled to a budget, the amount of deduction may vary but may never be more than € 14,291 (2010 maximum).

*State Aid EU*

Profit deduction for research and development activities constitutes aid in the sense of the state aid rules of the EU. Access to the deduction is only available to business owners who themselves conduct the required activities, this makes the deduction selective. Subsidizing research and development activities is, however, allowed.

*State Aid WTO*

A deduction on the taxable base is considered a subsidy according to the ASCM. The deduction has nothing to do with import or export and is therefore not prohibited. While only available to personal enterprises, eligibility is automatic when the criteria are met. The profit deduction for research and development activities can therefore be qualified as non-actionable, also because subsidies for research and development activities are allowed under the ASCM.

**Profit reservation for Future Pensions**

The reserve for future pensions is one of three fiscal reserves the others being the already discussed reinvestment reserve and the equalization reserve (which will not be discussed in detail but is in place to equally divide costs to the years they relate to, such as maintenance costs). All of these reserves defer taxation or spread out taxation over larger time frame. The reserve for future pensions is in place for business owners to build up a pension without the funds having to leave the business. The funds remain part of the working capital of the business and thus stimulate growth of a business. Ever-

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53 Article 3.77 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
54 Article 31 of Commission Regulation No 800/2008 of 6 August 2008
55 Article 8.2(a) of the ASCM
56 Source for the text in the section on profit reservation for future pensions is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.37”
57 Article 3.67 to 3.73 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
Every year a certain part of the annual profit can be added to the reserve. The regime is only available to personal enterprises and is therefore a subjective incentive.

The reserve is part of the annual profit determination and as such also influences the profit deductions for the self-employed and the profit deduction for small and middle-sized enterprises. Because it is part of the annual profit determination it can also be used by businesses whose owner is not a Dutch resident but has a permanent establishment in The Netherlands.

Qualifying business owners
To qualify for forming the reserve or adding to an already existing reserve the business owner has to meet the before mentioned hours criterion. Only real business owners qualify, silent partners are excluded. Adding to the reserve is only possible for those business owners who have not reached the age of 65 years at the beginning of the calendar year.

Amount to be added to the reserve
A qualifying business owner can add up to 12% of the annual profit to the reserve but not more than €11,811 (2010 maximum, altered annually to account for inflation). The annual profit in this case is the profit before deducting the addition to the reserve and without profits generated when the reserve was diminished, ways by which this can happen will be discussed later. Not taken into account are profits or losses attributable to a foreign country. Added to the annual profit that determines the allowable addition to the reserve are premiums that were paid to a pension fund. Those premiums are then deducted from the allowable addition to the reserve.

Additionally no more can be added to the reserve than the positive difference between the reserve at the beginning of the year and the business capital at the end of the year (second ceiling). The business capital in this case is the combined book value of the assets deducted with the reinvestment reserve and the equalization reserve. These provisions can best be explained by use of an example. The following data is applicable:

- The reserve at the beginning of the year is €20,000.
- The profit is €60,000.
- The business capital at the end of the year computes to €23,000.
- Premiums paid to a pension fund are €2,000.

The maximum addition based solely on the 12% criterion would be €7,440 (12% of the profit plus the premiums), which is less than the absolute maximum of €11,811. However premiums have to be deducted from that amount, which leaves €5,440. This amount cannot be added to the reserve because of the second ceiling which is €3,000 (business capital minus the reserve at the beginning of the year).
**Diminishing of the reserve (voluntary or involuntary)**

Whenever the reserve is diminished the amount by which the reserve has diminished is added to the taxable profit. Diminishment of the reserve can be voluntary or involuntary. When voluntary the amount by which the reserve is diminished has to be put into an annuity. Because this entire amount can then be deducting from the annual income there will on balance be no taxation. In three situations the reserve has to be decreased involuntary. This happens by the amount the reserve surpasses the business capital when:

- The business or part of the business has seized operations.
- The business owner has reached the age of 65 years at the beginning of the calendar year.
- The business owner has not met the hours criterion in the current and the previous calendar year.

To prevent taxation on these profits the business owner can always choose voluntarily put the difference between the business capital and the reserve into an annuity. Problems with this may be that he does not have money to actually buy into an annuity.

When the financial year does not coincide with the calendar year, the financial year is leading except concerning age requirements.

**State Aid EU**

Profit reservation for future pensions constitutes aid in the sense of the state aid rules of the EU. While only available to owners of personal business, the reserve is not selective, as it has no additional demands. The reserve can therefore not be qualified a prohibited state aid.

**State Aid WTO**

Entering profits into a reserve is considered a subsidy according to the ASCM. The deduction has nothing to do with import or export and is therefore not prohibited. While only available to personal enterprises, eligibility is automatic when the criteria are met. The reservation of profits for future pensions can therefore be qualified as non-actionable.

**Accelerated depreciation for starting enterprises**

When a business qualifies as a starting business or enterprise the business may depreciate certain assets at its own discretion. The incentive is dealt with in the personal income tax system and is only available to businesses run as a personal enterprise or certain partnerships, the incentive is therefore subjective. To qualify as a starting business a business owner must be eligible for the premium for starting businesses for the general profit dependable deduction. This means a business has to meet the hours criterion and silent partners are excluded.

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58 Source for the text in the section on accelerated depreciation for starting enterprises is “Cursus Belastingrecht, Inkomenstebelasting, Chapter 3, Paragraph 3.2.22.C.d”

59 Article 3.34 paragraph 2 of the Dutch personal income tax in conjunction with article 7 of the additional regulations on accelerated depreciation in the personal income tax (Wet inkomstenbelasting 2001)
Assets acquired in the year before the year the business is eligible for the premium for starting businesses for the general profit dependable deduction qualify for accelerated depreciation. Excluded are the same assets and contracts or obligations related to certain asset as with the investment deduction when investing in small assets. The general rules for accelerated depreciation apply for as far as they do not contradict with a specific rule.

The business does not need to have approval for accelerated depreciation but there is maximum to which the business is allowed to depreciate at its own discretion. The maximum is linked to the maximum amount for which an investment deduction when investing in small assets can be claimed, which for 2010 is set to € 300,000.

When the business no longer qualifies within five years the advantage of the depreciation will be taken back and the book value set to the value it would have had if depreciation had taken place in a normal fashion. No longer being eligible for the premium for the general profit dependable deduction, has of course no influence. After three years a business no longer qualifies as a starting business. Investments made from that moment on can no longer be depreciated at the businesses discretion for as far as they do not qualify for the other accelerated depreciation regimes. Because the asset acquired in the year before a business becomes eligible for the premium for starting businesses for the general profit dependable deduction are attributed to the next year the actual period the advantage may be taken back from can be six years.

**Profit deduction for Small to Medium-sized Enterprises**

When the tariffs for businesses operating via a corporate entity were lowered in 2007 inequality in taxation was created between those businesses operated as personal enterprise and those taxed in the personal income tax system. To negate this difference in taxation the profit deduction for small to medium-sized enterprises was introduced. The naming is a little confusing because a small to medium sized enterprise can also be run through a corporate entity but the profit deduction is only available to businesses taxed via the personal income tax system. The only requirement is that business owner qualifies as a real business owner, silent partners are therefore excluded. It is not part of the normal profit deductions for self-employed persons because the amount of deduction is influenced by those profit deductions. The deduction is compulsory and also applies to losses; it can therefore reduce the amount of loss generated by a business because it is a percentage of that loss. The deduction is applied to what normally would have been the taxable profit, so at the end of the line.

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60 Source for the text in the section on profit deduction for small to medium-sized enterprises is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.39”

61 Article 3.79a of the Dutch personal income tax (Wet inkomstenbelasting 2001)
The percentage for 2010 is 12%. When for example a business generates a profit of € 10,000 and is entitled to a profit deduction for self-employed persons of 2,000, the deduction is 12% of 8,000 which is € 960. Taxable profit for that year is € 7040.

When a business generated a loss of € 10,000 and is entitled to a profit deduction for self-employed persons of € 2,000, the deductions is 12% of - € 12,000. This computes to a deduction of - € 1,440 which leads to a taxable base of - € 10,560. Of course in such a case there is nothing to tax but the Dutch system does allow for carrying back a loss three years (on year in case a loss is generated by a corporate entity) and carrying it forward nine years. The profit deduction for small to medium sized enterprise lowers the amount of loss that may be taken into account in a later or previous year.

State Aid EU
The profit deduction for small to medium-sized enterprises constitutes aid in the sense of the state aid rules of the EU. The deduction is available to all personal enterprises and is therefore not selective. The deduction can therefore not be qualified a prohibited state aid.

State Aid WTO
A deduction on taxable profit is considered a subsidy according to the ASCM. The deduction has nothing to do with import or export and is therefore not prohibited. While only available to personal enterprises, eligibility is automatic when the criteria are met. The deduction can therefore be qualified as non-actionable.

Cooperatives
Cooperatives and associations that act like cooperatives are treated differently in the Dutch corporate income tax system. This difference is partly based on the legal form in which the business is run and partly based the way it behaves, because certain associations that behave like the businesses that are normally run through the legal form of the cooperative are also taxed according to the same regime. The rules of the regime prevent misuse of the regime by treating a cooperative that acts like a normal business, like a normal business. The regime can therefore be qualified as a subjective regime but with an objective touch. A cooperative is established through a multilateral deed. The only special provision as that the official naming of the cooperative must have cooperative in it and an abbreviation indicating in what way they are liable.

A real cooperative exists by the grace of its members; it provides services for its members through contracts with its members. The cooperative is represents the common goal of its members. The Dutch system normally does not allow for the deduction of distributed profits from the taxable

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62 Source for the text on the treatment of cooperatives is “Cursus Belastingrecht, Vennootschapsbelasting, Chapter II, Paragraph 2.2.0.3”
63 Article 9 paragraph 1 subsection g in conjunction with article 9 paragraph 2 of the Dutch corporate income tax. (Wet op de vennootschapsbelasting 1969)
base. But because cooperatives are seen as an extension of the business of their members an exception has been made. The taxation of cooperatives in the Dutch system is done partly on the level of the cooperative and partly at the level of the members of that cooperative. Because this system was chosen part or all of the profit is deductible from taxable base of the cooperative and is taxed at the level of the member. The part of the profit, known as the extension profit, that is deductible at the level of the cooperative is determined by the following equation:

\[ \frac{A}{B} \times C + D \]

Where:

\( A \) = Expenditures borne by the cooperative that are related to the members of the cooperative in a certain year, known as member costs.

\( B \) = Total expenditures of the cooperative in a certain year.

\( C \) = Profits before taxes.

\( D = \€ 2269 \) (maximum, meaning that when there is a loss this addition will be \( \€ 0 \)) this sum was introduced to help out small cooperatives because they are more likely to be a real extension of the members and do not act as a business.

The remaining part of the profit is deemed to have been generated without the members of the cooperative in mind and is therefore taxed like any other business in the corporate income tax system. To be allowed to actually deduct the amount calculated some conditions have to be met.

**Determination of profits before taxes**

The determination of the profits before taxes is done in the way it is done for every other entity that taxed through the corporate income tax system. Annual profit is determined by the set of rules largely developed in jurisprudence known as sound business practice. Profits and cost related to a certain year are taxed in that year. Also the profits that are not at arms length have to be eliminated.

**Determination of the Member costs**

When it comes to member costs two different kinds of cooperatives have to be distinguished: The cooperatives that buy goods or services from their members and sell those to third parties and the cooperatives that buy goods or services and sell those to their members.

- Member costs in case of the cooperatives that buy goods or services from their members are the arms length tax-deductible costs of those services attributable to the year in question. However, when a cooperative buys goods from a member only expenditures related to goods that where produced within the business of the member qualify as member costs, when a member resells goods from third party to the cooperative those expenditures do not qualify. Furthermore only expenditures that are actually received by the member qualify as member costs. When, for example
part of the expenditures are related to transportation that was carried out by a third party the expenditures do not qualify as member costs.

- Member costs in case of the cooperatives that sell goods or services to their members are tax-deductible expenditures borne by the cooperative that enabled them to provide those goods or services attributable to the year in question. When it comes to goods that are sold to the members that are produced by the cooperative only the expenditures related to the source materials qualify as member costs. Reasoning behind this condition is that the cooperative acts to much as an independent business. When goods are acquired from third parties the expenditures that qualify as member costs are only those expenditures that are paid directly to that third party. Expenditures related to, for example, storage do not qualify as member costs.

**Determination of the total expenditure**

The total cost are the member costs and all other tax deductible costs attributable to the year in question. Remunerations paid out to the members as compensation for funds that have a same function as capital in a business are not tax deductible and are therefore not taken into account.

**Allowable deduction from the taxable profit**

Deduction of the extension profit is allowed when the following provision is met:

- **The extension profit has to be divided among the members of the cooperative.** The funds actually have to be paid out to the members, giving out certificates that give a member rights to a certain amount is not enough. When not the entire sum is paid out the amount deductible is equal to the amount that was paid out.

- **The extension profit has to be paid out to members out of the available profit of the year in question after taxes and certain costs that are not tax deductible such as remunerations paid out to the members as compensation for funds that have a same function as capital in a business are not tax deductible and are therefore not taken into account and additional tax bills over previous years.** When the net profit is not sufficient to pay out the extension profit may only be deducted for as far as it is sufficient.

- **The extension profit has to be divided by the rate of the participation in the cooperative of the member.** When for example a member purchases 60% percent of goods sold by the cooperative the in the year in question, he should receive 60% of the extension profit. When the ratio is not adhered the extension profit is deductible at the rate of the their participation multiplied by what the member with the smallest part of the profit has received. When for example the extension profit is € 100 and the cooperative has 2 members who each purchase an equal amount but one receives € 25 and the other € 75 of the extension profit the deductible extension profit at the level of the cooperation will be € 50.

- **Extension profit paid out to entities is not deductible.** Based on the participation exemption in the corporate income tax system the profit it exempt at the level of the member. This provision is in
place to prevent the use of a chain of cooperatives where one cooperative is a member of the one right above it. Had this provision not been in place in theory taxation could be deferred infinitely. However the condition also covers entities like public limited companies. Because of the provisions that the extension profit has to be paid out from the available extension profit after taxes and has to be divided based on the participation of the members in the year in question this can cause inequality between members that run personal enterprise and entities. The personal entities receive a net profit that is lower than that of entities because the entities are exempt for income tax in the corporate income tax system based on the participation exemption while personal enterprises are not.

State Aid EU
The cooperative regime is part of a general measure and can therefore not be seen as state aid. The regime, while selective in the sense that only certain entities are taxed in this manner, taxes deducted are taxable profits at the level of the members.

State Aid WTO
The cooperative regime cannot be seen as a subsidy because the profits are taxed, just not all on the level of the cooperative.

Associations & Foundations

While associations and foundations are different types of entities, tax wise they are treated equally. Legal bodies like public limited companies are assumed to run a business and use their entire capital to generate profit from that business, unless they are exempt from taxation based on their activities. Associations and foundations are only taxed, through the corporate income tax system, for as far as they run a business. The association and foundation are therefore subjectively exempt but can be liable to taxation based on their activities, which is an objective criterion.

Associations
Associations are founded by a multilateral legal act that bears no legal requirements. An association can be called into existence by a verbal agreement. Such an association, known as an informal association, has limited legal power. It cannot, for example, purchase real estate or become heir to someone’s estate. Committee members of such an associations are liable for the actions of the associations for the period they were members of the committee. Informal associations can choose to register the association, but this does not fully dismiss the liability of the committee members. Associations can also be founded by deed, which gives it full legal power, and limits the liability of the committee members. The deed of a formal association must contain the following:

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64 Source for the text on the treatment of associations & foundations is “Cursus Belastingrecht, Vennootschapsbelasting, Chapter I, Paragraph 1.0.3.1 & 1.0.3.3”
65 Article 2 paragraph 1 subsection e of the Dutch corporate income tax (Wet op de vennootschapsbelasting 1969)
• The name of the association and the municipality in which the association has its chair.
• The purpose of the association.
• The commitments the members of the association have towards the association.
• The way a general assembly is convened.
• The way committee members are appointed and discharged.
• The destination of remaining capital when the association is disbanded.

Foundations
A foundation is founded by unilateral or multilateral deed and has no members or stockholders. It exists for the purpose given to it by its founders and is often used for charities but also to fund activities. The deed of the foundation must contain the following:
• The name of the foundation, which must contain the word foundation.
• The municipality in which the foundation has its chair.
• The purpose of the foundation.
• The way committee members are appointed and discharged.
• The destination of remaining capital when the foundation is disbanded.

For as far a business is run
Both types of entities can be used for multiple purposes but when one of those is to generate a profit by using its capital, the entity is liable to taxation but only for as far as the profits relate to the business. Profits are only taxed if the business, which is carried out through the entity, is competing with businesses run as a personal enterprise or other entity.66

State Aid EU & WTO
When profits are generated they are taxed in the same way other businesses are taxed. There is no state aid.

Charities67
Charities are most often run through foundations. Foundations are, as mentioned before, exempt from taxation for as far they do not run a business that competes with other businesses on the market. To prevent taxation of charities that operate through another form of legal entity or are taxable based on the fact that they run a competing business a separate exemption was instituted.68 The main provision for qualifying for this exemption is that there is no or very little intention to generate a profit. The main goal of such an entity must be:
• Of general social interest or;

66 Article 4 paragraph a of the Dutch corporate income tax
67 Source for the text on the treatment of charities is “Cursus Belastingrecht, Vennootschapsbelasting, Chapter I, Paragraph 1.0.7.C”
68 Article 6 of the Dutch corporate income tax (Wet op de vennootschapsbelasting 1969)
- Of social interest and the profit is generated mainly with the help of volunteers or people working for remuneration that is significantly lower than what is usual.

**Profit**

The entities are exempt if the generated profit in the year in question is lower than € 7,500 or the profit of the year in question and the four years preceding that year combined is lower than € 37,500. The profits must either be used in the entity or have to be paid out to a good cause that represents a general social interest. The entity can, however, choose not to be exempt from taxation.

**Profit determination**

When determining the annual profit of these entities, in deviation of normal profit determination, additional expenditures may be taken into account, which are the following:

- Instead of the actual remuneration paid out, the amount of remuneration that may be taken into account is equal to the minimum wage. If, however, the entity can reasonably argue that in a normal situation higher remuneration than the minimum wage is warranted, that amount may be taken into account. This provision is only into effect when it does not cause a serious distortion of competition. In general charities use volunteers to do most of the work, labour for which little or no compensation is given, because of this provision expenditures not actually paid may be taken into account.

- Expenditures related to the social interest the entity represents and amounts paid out to good causes. These expenditures can only be taken into account when and for as far as they are higher than the before mentioned expenditures.

The deductions mentioned may never cause a loss.

**State Aid EU**

Non-taxation of certain activities constitutes aid in the sense of the EU treaty. Because access to the regime is limited the selectivity criterion is satisfied, however because of the nature required to have access to the regime and taxation when profits exceed a certain maximum it is highly doubtful the regime affects competition and trade between member states. In my opinion the regime does not constitute prohibited state aid.

**State Aid WTO**

Exemption from taxation constitutes a subsidy according to the ASCM. The regime is selective and eligibility is automatic when the criteria are met. It is however not very likely that this exemption causes an adverse affect to other member states because of the nature of the required activities to have access to the regime.
**Government owned companies**

The government operates through legal entities that have, by law, been given juristic personality but also via privately instituted entities that are governed by civil law. Certain activities run by the government are taxed as if they were privately owned businesses via the corporate income tax. A public body is therefore subjectively exempt but can be liable to taxation when certain activities are carried out. Private entities owned by the government are exempt but are liable to taxation for certain activities. Government owned and run activities are divided into two categories, direct and indirect activities.

**Direct government owned and run activities**

Direct government activities are activities run by public bodies themselves. Public bodies are:

- The Dutch government
- Provinces
- Municipalities
- District water board
- Bodies that have been given a public task, but only when this task entails legal personality if the law governing the task says so.

Only selected activities run by public bodies are taxed, the activities are listed in the law governing the taxation of corporate income, other activities are exempt from taxation. The following activities are taxed:

- Agricultural activities.
- Industrial activities, excluding those who almost exclusively trade water but including those activities that relating to generating electricity, delivering gas or heat. Also included are activities that maintain or build the necessary infrastructure to transport gas, electricity or heat.
- Mining activities.
- Trade activities not exclusively relating to real estate or rights related to real estate.
- Transportation activities excluding those who almost exclusive transport passenger within the limits of the municipality (public transport).
- Horticultural activities executed through the use of greenhouses.

The activities listed are taxed even if there is no intention of generating a profit.

**Indirect government run activities**

Indirect government run activities are activities run through a private entity, which is wholly owned by a public body. The bodies running those activities are taxed but only if they are on the list of activities that are taxed if they were run direct by those public bodies. Some wholly government owned

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69 Source for the text on the treatment of government owned companies is “Cursus Belastingrecht, Vennootschapsbelasting, Chapter I, Paragraph 1.0.3.Q”

70 Article 2 paragraph 1 subsection g of the Dutch corporate income tax
entities instituted according to the rules of civil law are, however, taxed even if they are not on the before mentioned list. Those companies are listed in the law governing the taxation of corporate entities. Mentioned in the list are also the companies acquired because of the economic crisis, those companies would otherwise have been exempt from taxation.

**Profit determination**

In general the profit determination for direct government owned businesses is the same as with every other business. However, a deduction of 4.5% (2010) of the business capital at the start of the year may be deducted from the taxable profit. Reasoning behind this is that determining the part of the business capital that was loaned may prove difficult. Public bodies often cannot finance those businesses themselves and finance them with debt, however this debt may not be entirely used for the business but also for other purposes. The deductible interest is therefore calculated over the entire business capital.

**State Aid EU**

Exemption of taxation constitutes aid in the sense of the EU treaty. Exempt are businesses that are wholly owned by the government and carry out certain activities, that are not on a list. Because the list is limitative a wide variety of activities can be exempt from taxation on the sole basis that they are government owned. The regime meets the selectivity requirements for those activities. Non-taxation strengthens the position of such business in the market. When government activities that are comparable to normal businesses are not taxed then that lack of taxation would be state aid.

**State Aid WTO**

Exemption from taxation constitutes a subsidy according to the ASCM. The regime is selective and eligibility is automatic when an activity is not on the list with taxable activities of government owned businesses. The regime could cause adverse effects to other member states, which makes this regime an actionable regime.

**Exemptions in the corporate income tax system**

The Dutch legislator has exempt some entities from taxation based on their activities or assets. The exemptions are not based on the legal form the entity but are only available to entities and thus partly subjective, the provisions are objective. Entities with the following activities and or assets are exempt:

- Entities whose assets are mainly (70% or more) rural estates and the activities are mainly focused on maintaining those estates. The percentage can, however, be reduced to 50% or more when the income generated with the other assets are used to maintain the estate. The activities may not

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71 Source for the text on the treatment of government owned companies is “Cursus Belastingrecht, Vennootschapsbelasting, Chapter I, Paragraph 1.0.7.B”

72 Article 5 of the Dutch corporate income tax (Wet op de vennootschapsbelasting 1969)
qualify as running a business. What qualifies as a rural estate is determined by the ministry of agriculture, nature conservation and fishery and the ministry of finance.

- Entities who’s activities are almost exclusively (90% or more) of a charitable nature when those activities include:
  - Healing and nursing of the sick, mothers of newly born and disabled people.
  - Provide housing for the elderly, disabled people or orphans.
  - Provide in activities for disabled people.
  - Provide micro credit to people who belong to a weaker part of society

When these entities are not public bodies the profits generated must be used to maintain the activities. The activities do, for example, not qualify when compensation is demanded that is much higher than the expenditures involved.

- Entities who are active in following sectors when the intent to generate a profit is non existent or is of secondary nature:
  - Agriculture. In this case the activities must entail exploitation of assets, providing laborers and the acquisition of necessities for the stakeholders, members or participants.
  - Mutual damage insurance.
  - Funeral services for stakeholders, members, participants or their families.

The activities have to be very small since when a profit is made in a certain year it may not be more than € 7.500 or the combined profits of a year and the four years preceding it may not be more than € 37.500.

- Health insurance companies when there is no intention to generate a profit or only generate profits to benefit national health.
- Insurance institutions that have been instituted by law, with the exception of those who also run a business.
- Public reading halls and libraries.

State Aid EU
Exemption from taxation constitutes aid in the sense of the EU treaty. The activities listed are mostly activities that are not intended to generate profits. Exemption of those activities does not affect competition and trade between EU member states. So, while selective, they do not constitute state aid when is they do not affect competition.

State Aid WTO
Exemption from taxation constitutes a subsidy according to the ASCM. The exemptions are specific and selective but eligibility is automatic when the criteria are met. Chance of adverse effect to other WTO members is limited. In my opinion the exemptions qualify as non-actionable.
**Pension Funds**

Entities, no matter what legal form they have, are exempt from taxation when the activities are exclusively related to the financial security of employees in case of:

- Old age.
- Disability.
- Death:
  - Partner or spouse of the employee that has passed away.
  - Children of employee’s that have passed away, when those children have not reached the age of 30.

Excluded from the exemption entities in which the employee, or his family has an interest of 10% or more or had such an interest.

**State Aid EU**

Exemption from taxation constitutes aid in the sense of the EU treaty. The regime is both selective and potentially effects competition between EU member states; premiums paid to Dutch pension funds can be lower because generated profits are not taxed. The regime for pension funds, in my opinion, constitutes prohibited state aid according to the rules of the EU Treaty.

**State Aid WTO**

Exemption from taxation constitutes a subsidy according to the ASCM. The exemptions are specific and selective but eligibility is automatic when the criteria are met. There is however a potential adverse effect when it comes to other WTO member states. The pension fund regime is therefore an actionable subsidy.
tion is that when dividends are derived from a foreign source the exempt investment company does not qualify for the advantages of a treaty preventing double taxation that might exist between The Netherlands and the country from which the dividend originates. This is because the entity is not liable to taxation. The following provisions must be met before an entity can apply for the regime:

- The entity must be a Dutch Limited Liability Company, Open funds or look-alike’s from The Netherlands Antilles, Aruba, EU-member state or other countries with which The Netherlands has concluded a treaty for the avoidance of double taxation that prohibits discrimination based on nationality of the legal individuals.
- The entity may only invest in financial instruments like stock, stock options and interest rate contracts. Investing in real estate is not allowed directly or indirectly.
- Stockholders of the entity must be allowed to sell that stock back to the entity. If the entity chooses to allow this only periodically the entity also qualifies. The provision is in place to ensure that investment possibilities are targeted at large group of people.
- The entity must have multiple stockholders. It is, however, also allowed that business owners can use such an entity to invest if he owns 90% of the entity and the remainder is owned by his children or his wife (but only if they were married without community of property).
- The entity must choose for this regime and they regime can only be applied for an entire financial year.

When the stockholder of the entity is an entity that is liable to taxation the participation exemption is not applicable to dividends received from an exempt investment company. When an entity chooses the regime they are no longer liable to taxation and the book values are therefore set to the market value, the difference between the book value and the market value is taxed as if the entity seizes operations.

Fiscal Investment Company

The regime for a fiscal investment company is very different than that of the exempt investment company. The fiscal investment company is not exempt for taxation but is taxed at 0%, so the investment company is liable to tax but is taxed at a very low rate. An entity becomes an investment company when every provision has been met, the entity does not have to apply for the regime to be applicable. The regime will be applicable in the financial year following the year the provisions have been met. An entity can, however, not be forced to become a fiscal investment company, to avert this the entity must change its articles of association so the provisions are not longer met. When an entity does become a fiscal investment company, just like with the exempt investment company, it is taxed on the difference between the market value and the book value of its capital. After taxation the book values are equal to the market values.

For the regime to be applicable the following provisions must be met:
• The entity must be a Dutch Limited Liability Company, a Dutch Private Company, Open funds or look-alike’s from The Netherlands Antilles, Aruba, EU-member state or other countries with which The Netherlands has concluded a treaty for the avoidance of double taxation that prohibits discrimination based on nationality of the legal individuals.
• The goal and actual activities of the entity must exclusively be the investing of capital.
• The entity may not be entirely financed with debt. The following limits have to be adhered:
  – 60% of investments in real estate may be financed with debt.
  – 20% of all other investments may be financed with debt.
• The available profit must be paid out to the stakeholders within eight months after the financial year has ended. The profit determination is somewhat different than normal so this will be dealt with, but not extensively, later.
• The profit must be divided among the stakeholders equally.
• Provisions related to the stakeholders when dealing with an investment company that is targeted at a large audience (quoted on the stock exchange):
  – A single person may own not more than 25% of the entity.
  – An entity, group of entities or a fiscally transparent partnership that is liable to taxation may own not more than 45% of the entity.
  – The board of directors and more than half of the board of commissioners may not also be in the board of directors or commissioners of an entity when that entity or group of entities owns 25% or more of the fiscal investment company.
• Provisions related to the stakeholders when dealing with an investment company that is targeted at a small audience (not quoted on the stock exchange):
  – 75% or more of the entity must be owned by:
    • Real persons and/or;
    • Entities that are not liable to taxation and/or;
    • Investment companies that are quoted on the stock exchange.
  – An individual person may only own less than 5% of the entity.

Profit determination of the fiscal investment company
The following facilities are not available to the fiscal investment company:
• Profit deduction when investing.
• Stock fusion facilities.
• Participation exemption.
The fiscal investment company has the right to take the following reserves into account:
• A reinvestment reserve (this reserve not the same as the normal reinvestment reserve).
• A rounding off reserve.
In the first year of the application of the regime the fiscal investment company can choose to use the special reinvestment reserve, this is only possible in the first year. When the investment company has chosen to apply this reinvestment reserve use of the reserve is mandatory for several profits but also for losses. The reserve acts like a running account where certain profits are allocated. These profits don’t have to be paid out to the stakeholders. When, however, there is loss the profits previously allocated to the reserve have to be paid out up until the amount of the loss. If the investment company does not choose to use this special investment reserve in the first year the normal reinvestment reserve may be applicable, they can however not be used in concurrence. The special reinvestment reserve is limited by a ceiling that is determined by the capital at the end of the financial year or the book value of the investments. The special reinvestment reserve cannot be negative but the negative number may be taken into account when a profit is transferred to the reserve.

The rounding off reserve is a real fiscal reserve, which the investment company can use to keep profits in the company. The reserve is maximized at 1% of the funds that were deposited on the stocks of the investment company. The funds in the reserve have to eventually be paid out to the stakeholders. This can be done voluntarily when there is a loss; the loss has to be decreased with the funds in the reserve, or compulsory when the regime is no longer applicable.

Since profits have to be paid out to the stakeholder losses can only be carried forward. The period a loss can be carried forward is eight years.

The profit that has to be paid out to the stakeholders is determined by the fiscal profit of the year deducted with non-deductible costs and foreign profit taxation.

*State Aid EU*
Exemption from taxation or non-taxation because of a rate of 0% constitutes aid in the sense of the EU treaty. The regimes are highly selective and it may adversely affect other EU member states. The investment company regimes are in my opinion prohibited state aid.

*State Aid WTO*
Exemption from taxation constitutes a subsidy according to the ASCM. The exemptions are specific and selective but eligibility is automatic when the criteria are met. The regime might adversely affect other WTO member states. In my opinion the regimes qualify as actionable.
Objective tax incentives for selected subjects

Interest regime

The Dutch Interestbox regime has not been (and may never be) implemented in the Dutch corporate income tax system\textsuperscript{77}. The regime was presented to the European Commission because of potential conflict with state-aid regulations, and has been altered per request of the commission. After a 30-month investigation into the regime the Commission approved the altered regime in its decision of 8 July 2009.\textsuperscript{78}

The regime lowers to 5 percent the tax rate on interest within a group of companies. This would mean that interest received is taxed at 5 percent, and can only be deducted at 5 percent. In its first incarnation, the Interestbox regime was optional. However, in its current form the regime is compulsory for group companies. Pursuant to the Interestbox regime, a group company is:

- An entity over which the taxpayer has control.
- An entity that has control over the taxpayer
- An entity over which a third party has control if this third party also has control over the taxpayer.

The taxpayer can determine from the tax office whether or not he is part of a group. In a purely internal situation, the regime would not pose a problem because while the interest received is taxed at 5 percent, the other group company would only be able to deduct it from its profits at 5 percent. In international situations this might be different when the interest is deductible at a higher tax rate.

While at its inception the main reason the Dutch government proposed to implement the system was to improve the business climate and attract financing companies, the Commission does not mention this at all. Another reason given by the Dutch government for implementing the system was that it negates the arbitrage possibilities between financing with equity or debt within controlled groups. Interest is generally deductible while dividend payments are not. This allows for profit-shifting between several entities. The Commission based most of its decision on these grounds. The Commission is correct in saying that the advantage for group companies is caused by a disparity between tax systems. Yet, by approving the Dutch system, the Commission actually makes other countries responsible for the increased disparity the Dutch system creates.

For now, the regime has not yet been implemented because, in light of the fact that the regime discourages Dutch companies from getting a loan from a foreign group company, the government thought it questionable whether the regime would actually help the business climate.

\textsuperscript{77} When implemented, the Interestbox can be found in article 12c of the Dutch Corporate Income Tax Act. An updated version of the regime can be found in the consultation document.

\textsuperscript{78} Commission decision of 8 July 2009, C(2009)4511.
Research and development

Deduction on payable wage tax when employees conduct research & development activities

Wages are one of the major expenses of a business; it is therefore that, to stimulate innovation through research and development, a deduction on payable wage tax can be claimed when an employee is occupied with such activities. The deduction is accessible to every business that qualifies as a withholder of wage tax when some criteria are met, however some employees do not qualify. It can therefore be qualified as objective incentive but with a subjective framework that determines whether the deduction can be claimed. The incentive is not given through the law that governs the taxation of wages but via separate law. A business can only claim the deduction when a so-called Research and Development statement was given to the business.

Qualifying businesses

Businesses qualify when besides from being a wage tax withholder they actually run a business. Wage tax withholding parties that do not run a business but are contracted to do research and development also qualify when this contract is laid down in writing and the other party in this contract is either a business, a partnership that runs a business or selected public bodies. Entities that may conduct research and development activities but do not run a business may include universities. When a university accepts a contract from one of the before mentioned parties it can claim a deduction on the payable wage tax, when all other conditions are met.

Qualifying research and development

Research and development qualifies for the deduction when it is done by a qualifying business and or wage tax withholder when this research is:

- Systematically organized and;
- Conducted in one of the member states.

The employee that does the research and development activities has to be on the Dutch payroll and liable to taxation in the Netherlands.

Research and development qualifies when it encompasses one or all of the following activities:

- Technical-scientific research;
- Development of technically new physical products, or technically new parts for products.
- Development of technically new physical production methods, or technically new parts of production methods.
- Development of software, or parts of software.
- Research into the technical feasibility of doing in-house research and development activities that would qualify for the deduction.

79 Source for the text on the deduction on payable wage tax when employees conduct research & development activities is “Cursus Belastingrecht, Loonbelasting, Chapter XI, Paragraph 11.9”

80 Chapter VIII of the Law for the deduction on payable wage tax and social security premiums (Wet vermindering afdracht loonbelasting en premie voor de volksverzekeringen)
• Research into the improvement of already existing production methods that are already applied in the business, when it is expected this will lead to a significant improvement.
• Research into modeling processes that will lead to improvement of software already used in the business.

Not qualifying as research and development activities are:

• Market research.
• Organizational and administrative activities.
• Activities that are listed in a regulation created by the minister of finance. The list is too detailed to be recited in this paper.

Qualifying employees
Excluded for the deduction on payable wage tax are employees that also own at least 5% of the entity they work for.

Research and development statement
A qualifying business that has the intention must apply for a research and development statement at least one month before the research and development activities commence. The statement is given for a minimum period of three months and a maximum of six months. When however in previous years the statement was given for the period of a year (this used to be a possibility) and the business has a dedicated research and development department, the statement can be given for the period of a year. Not more than three statements will be given out to the same business in a single year.

The statement contains:

• A description of the activities.
• The period for which the statement is given.
• The number of hours that employees are expected to spend on the described activities.
• The amount of wage tax deduction that can be claimed with a calculation of that amount.

Amount of deduction
The deduction is:

• 42% of the average hourly remuneration for an employee that does research and development multiplied by the amount of hours for as long as the outcome of multiplication of the hourly remuneration and the number of hours remains below € 200,000.
• 14% of the average hourly remuneration multiplied by the number of hours when this is higher than € 200,000.

The wage tax can only be deducted to nil. The maximum amount of deduction that can be claimed per calendar year is € 14,000,000. When, however, the business is part of a group of entities that apply the consolidated tax treatment regime the maximum is applicable to the entire group. The maximum for a single entity is then determined by what activities are attributable to a single entity.
The average hourly remuneration is determined by what the business paid an employee who carried out research and development activities two years before the year in question. The sum of those remunerations are then multiplied by 0.85 and divided by the number of hours the business paid these employees for. The result is rounded up to a multiple of five. When the business did not carry out research and development activities in the year two years before the year in question the average hourly remuneration is set to € 29.

For a business that is just starting or business that has just started doing research and development activities the percentage up until a deduction of € 200,000 is not 42% but 60%. The business qualifies when in the previous 5 years the business was not an employer and did not receive a statement in more than two of those years.

**Administrative duties**

The business must, when given a research and development statement, keep records of the activities and the number of hours spends. When the numbers of hours spend on research and development is more then 10% less than what was stated in the statement or the amount is at least € 10,000 to high per month based on the number of hours the business must alert the authorities. The statement will then be altered to match the new data. When a business fails to notify the authorities they risk a fine.

**Innovationbox regime**

To stimulate research and development activities entities that are subject to the corporate income tax system and generate profits because of those activities can choose to apply this special regime. The regime is only available to certain subjects and can therefore be qualified as a subjective incentive. However, qualifying subjects must meet certain conditions before this optional regime is available to them, it is therefore also an objective incentive. The activities must result in an intangible asset to which the expected profits are for the most part attributable. When all conditions are met the profits are taxed at 5%, losses related to the asset are deductible at the normal tax rate.

**Qualifying assets**

Profits attributed to an immaterial asset qualify when the business has created the asset in-house and a patent was granted for that asset. Plant variety rights also qualify as patents. Assets also qualify when for the research and development activities that caused the creation of the asset a so-called research and development statement was given. Requirements for such a statement are detailed in the section on the deduction on payable wage tax for research and development activities. Excluded immaterial assets are branding rights, logos and comparable assets.

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81 Source for the text on the innovation or patent regime is “Cursus Belastingrecht, Vennootschapsbelasting, Chapter II, Paragraph 2.2.13”

82 Article 12b of the Dutch corporate income tax
Threshold

Profits only qualify from the moment the total profit is higher than the initial expenditures of the creation of the asset. Reasoning behind this threshold is that the expenditures of the creation of the asset where at that time deducted from the taxable profit at the normal rate. Before the business can benefit from the lower tax rate the cost that were deducted are neutralized or recaptured. The threshold is only neutralized when the business has chosen to apply the regime, profits generated by the asset when the regime was not applicable do not qualify to neutralize the threshold.

State Aid EU

Both the deduction on payable wage tax and the innovation or patent regime constitute aid in the sense of the EU state aid rules. Both incentives are specific but both regimes are allowed according to the commission regulation declaring certain categories of activities compatible with the common market\(^83\).

State Aid WTO

Partial exemption on payable wage tax and partial exemption of on profits constitute a subsidy according to the ASCM. The incentive is not in place to promote export or import, so it is not prohibited. The exemptions are specific and selective but eligibility is automatic when the criteria are met. Both incentives can be qualified as non-actionable because of the nature of the activities required\(^84\).

Environmental

Deduction on profit adjustment for private use of (green) company car\(^85\)

Whenever a withdrawal of business assets is done for private use of the business owner, this withdrawal has to be added to the capital at the end of the year so a proper property comparison can be made\(^86\). Private use of a vehicle that is on the balance sheet of the business or paid for by the business is seen as a withdrawal of business capital and that withdrawal must therefore be added to the taxable profit. This is only the case for personal enterprises, when a car that is on the balance sheet of an entity is used by one of its employees (including those employees that have shares in that entity) this is seen as remuneration for their labor. The amount that was withdrawn is connected to the value of the car, a certain percentage of the value must be added to the taxable profit. The percentage of the value of the car that must be added is related to its CO\(_2\) emission. A similar system is in place when an employee uses a car that was put at his disposal by his or her employer. A percentage of the value of the car is added to the normal salary and then taxed via the wage tax system.

\(^83\) Section 7 of Commission Regulation No 800/2008 of 6 August 2008

\(^84\) Article 8.2(a) of the ASCM

\(^85\) Source for the text on deduction on profit adjustment for private use of (green) company car is “Cursus Belastingrecht, Inkomstenbelasting, Chapter 3, Paragraph 3.2.15.C”

\(^86\) Article 3.20 of the Dutch personal income tax (Wet inkomstenbelasting 2001)
Private use
When the business can prove that the business owner did not use the car privately, the withdrawal is non-existent and therefore does not have to be added to the taxable profit. When the number of kilometers the car was used privately does not amount to more than 500 kilometers, the withdrawal is excused and does not have to be added to the taxable profit. Private use is everything not business related. Not seen as private use of the car is the commute from home to the place of business.

Value of the car
The amount of the withdrawal is related to the list price of the car including value added tax and the vehicle registration tax. The applicable list price is the list price of the car when that model was first introduced in the Netherlands. Also included are extra costs for accessories. When a car is older than 15 years the value of the car is no longer the list price of the car but the market value. The value of the car when this car is leased is still the list price of the car. The withdrawal is not determined by the lease sums.

Type of car
The addition of the withdrawal to the taxable profit is only applicable when the car is suited for transport of passengers in a private capacity. Delivery vans are also included when they meet that criterion.

The withdrawal
The normal withdrawal is calculated is follows:

- 25% percent of the value of the car when that car was first used less than 15 years ago.
- 35% percent of the value of the car when that car was first used more than 15 years ago.

To stimulate environmentally friendly cars the withdrawal is lowered dependent on the amount of CO₂ the car emits. A distinction is made between diesel engines and all other engines. In the case of a diesel engine the normal withdrawal is lowered by:

- 11% of the value of the car when the emitted CO₂ per kilometer is not more than 95 grams.
- 5% of the value of the car when emitted CO₂ per kilometer lies between 95 and 117 grams.

The demands to qualify for a deduction on the withdrawal addition to the taxable profit for cars with other types of engines are as follows:

- 11% of the value of the car when the emitted CO₂ per kilometer is not more than 110 grams.
- 5% of the value of the car when emitted CO₂ per kilometer lies between 110 and 141 grams.

So when a company car with a diesel engine emits 75 grams of the CO₂ per kilometer and is 5 years old the withdrawal would be 14% of the value of the car.

As a temporary measure there is no addition to the taxable profit for cars that do not emit CO₂ gas, which at the moment is only the case with electric cars.
**Limits to the addition to the taxable profit**

It is assumed that when a company car is used privately all the costs related to that car are borne by the business. When this is not the case the cost that are paid out of private funds are deductible from the profit addition. The addition can, however, never become negative.

**State Aid EU**

The deduction on profit adjustment for private use of (green) company car constitutes aid in the sense of the EU state aid rules. The regime is available to every business owner that uses his company car in private as well as in the business. The incentive is therefore not selective and does not constitute prohibited state aid.

**State Aid WTO**

The deduction on taxable profit constitutes a subsidy according to the ASCM. The incentive is not in place to promote import or export of goods. Eligibility is automatic the criteria are met. Adverse effect of this incentive to WTO member states is very doubtful since it is a purely domestic incentive to promote cleaner cars. In my opinion this subsidy is non-actionable.

**Payable wage tax reductions**

**Deduction on payable wage tax for employees who are still being educated**

When a business hires person who is still being educated, a deduction on the payable wage tax can be claimed. The incentive is available to anyone who hires a qualifying employee. The law that governs the deduction on payable wage tax extensively specifies which student employees qualify. The deduction ranges between € 500 up to € 3247 annually dependent on the type of student employee. The deductions are based on an employee that works 36 hours every week. When this is less the deduction is adjusted accordingly. For some employees the deduction cannot be claimed because they are under 25 and earn more than € 23,507 annually.

**State Aid EU**

The deduction on payable wage tax for employees who are still being educated constitutes aid in the sense of the EU state aid rules. The regime is selective but is allowed according to the commission regulation of 6 August 2008.

**State Aid WTO**

Deduction on payable tax constitutes a subsidy according ASCM. The regime is specific and criteria for eligibility are spelled out in law. The deduction is not aimed at the import or export of goods, and

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87 Source for the text on the deduction on payable wage tax when employees conduct research & development activities is “Cursus Belastingrecht, Loonbelasting, Chapter XI, Paragraph 11.4”

88 Chapter V of the Law for the deduction on payable wage tax and social security premiums (Wet vermindering afdracht loonbelasting en premie voor de volksverzekeringen)

89 Section 8 of Commission Regulation No 800/2008 of 6 August 2008
is therefore not prohibited. The chance of adversely affecting other member states is small. In my opinion the subsidy is actionable but chances of countries actually initiating a procedure is small.

**Deduction on payable wage tax for seagoing employees**

The deduction on payable wage tax for seagoing employees is there business with employees whose activities are on board a seagoing vessel. The law governing this deduction on payable wage tax is very specific in what situation the deduction can be claimed. The deduction can be qualified as an objective tax incentive because it is of no importance in what legal form a business is run. The incentive is, however, only available to a selected number of businesses based on their activities and is therefore also a subjective incentive.

**Qualifying activities**

Business that exploit vessels that mainly operate on sea that carry out the following activities:

- International transport of goods or persons
- Transport of goods or persons in behalf of the exploration or exploitation of natural recourses.
- Tugging and assistance operations at sea
- Dredging operations at sea

Excluded are businesses with employees that carry out activities on board:

- A ship that is used for piloting services
- Most sailboats
- Ships that provide tugging services in a harbor.
- Dredging vessels that do not have their own propulsion system
- A ship that is professionally used for fishing or game fishing.

**Qualifying employees**

The employee for whom the deduction is claimed must be captain, officer or shipmate onboard a vessel that is registered in the Netherlands and sails under the Dutch flag. An employee also qualifies when the activities are carried on board a ship that operates regular passenger services between ports of member states of the European Union while this employee does not have the nationality of one of the member states of the European Union or the European Economic Area.

**Amount of deduction**

The amount of deduction allowed is a percentage of the gross remuneration of the seagoing employees. Only the remuneration that is related to a period in which the employee carried out qualifying

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90 Source for the text on the deduction on payable wage tax for seagoing employees is “Cursus Belastingrecht, Loonbelasting, Chapter XI, Paragraph 11.8”
91 Chapter VII of the Law for the deduction on payable wage tax and social security premiums (Wet vermindering afdragt loonbelasting en premie voor de volksverzekeringen)
activities is taken into account. The wage tax can only be deducted to nil. The following percentages apply:

- 40% when the employee is resident of the Netherlands or a member state of the European Union or European Economic Area. While not explicitly mentioned the employee must be subject to the Dutch wage tax or social security system.
- 10% when the employee is a not resident of the before mentioned country but is subject to the Dutch wage tax system or social security system.

In the wage tax administration certain items of proof have to be kept. When this is not done it is assumed the deduction was unjustly claimed.

Concurrence
The deduction on payable wage for seagoing employees cannot be claimed when the wage tax reduction for research and development has already been claimed for that employee.

State Aid EU
The deduction on payable wage tax for seas-going employees constitutes aid in the sense of the EU state aid rules. The regime selective but the commission has approved application of the regime.

State Aid WTO
Deduction on payable tax constitutes a subsidy according to ASCM. The regime is specific and eligibility is spelled out in law but is not aimed at import or export of goods, and is therefore not prohibited. The regime can be qualified as actionable when it causes adverse affects to WTO member states.
Chapter 4: Comparative analysis

The basis for this comparative analysis is the paper written at the Wintercourse conference in Uppsala, Sweden. At the conference certain topics were selected, special income tax regimes that belonged to that topic were gathered and compared. Not all of the special income tax regimes described in the previous chapter have therefore found their way into this comparison. The main reason for their omission is that the special regimes do not fall within the selected topics or that the regimes were found to be unique so no comparison could be made. One of the main Dutch special regime that was found to be unique was the, not yet implemented, interest box regime. Also found unique were the Belgian notional interest deduction, the Austrian cross-border group treatment and the American domestic international sales corporations and foreign sales corporation.

Two of the topics selected, the comparison of territorial and cultural incentives, had no relation to the Dutch special income tax regimes currently in existence and were therefore omitted from this thesis. The topics that will be discussed, from a Dutch perspective, in this part of the thesis are incentive’s related tot (i) agriculture and forestry (ii) charities (iii) shipping (iv) small and medium sized enterprises and; (v) research and development (R&D), in that order. Not investigated during the Wintercourse conference but a subject that in hindsight should have been included is the way the participating countries offer relief to prevent double taxation when profits are attributable to a permanent establishment in another country. In a separate part there is a limited analysis that tries to shed some light on this subject.

The countries participating in this subtheme of the wintercourse conference are (i) The Netherlands (ii) Belgium (iii) Germany (iv) Hungary (v) Poland (vi) The United States of America (vii) Spain (viii) Italy (ix) France (x) Sweden and (xi) Austria.

Agricultural and Forestry incentives

When the nomadic hunter-gatherer realized that it was easier to just remain in one place to breed cattle and grow vegetables, everyone became a farmer. When after a while a group of those farmers realized that farming was very hard work they figured out that it was probably easier when someone else did that. This group started a trend and nowadays only a few people are still farming and producing food for the entire world.

Agriculture within the European Union is a heavily regulated and subsidized activity it therefore seemed logical that taxation was also being used in granting subsidies. The results of the comparison can be seen in the matrices below. Also included in the comparison are activities related to forestry because this activity is more or less comparable to the agricultural activities.
### Table: Tax Treatment for Agriculture and Forestry

<table>
<thead>
<tr>
<th><strong>Tax Treatment</strong></th>
<th><strong>Austria</strong></th>
<th><strong>Belgium</strong></th>
<th><strong>France</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Consolidation into lump sum (justified on the basis of administration) (benefit = lower tax rate; based on average) (§ 17, Income Tax Act)</strong></td>
<td>Co-operatives in this area are also tax-exempt if the focus is on common use of agricultural &amp; forestry equipment (§ 5(9)(a),(b), Corporate Income Tax)</td>
<td>N/A</td>
<td>Property tax exemption on land</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Germany</strong></th>
<th><strong>Italy</strong></th>
<th><strong>Hungary</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tax Treatment</strong></td>
<td>Co-operatives – exempt from corporate income tax for woodland &amp; foliage + certain types of agricultural companies. Associations/co-operatives – exempt from local business tax (woodland, foliage, agricultural). Alternative scheme for calculating tax base for forestry/agricultural companies</td>
<td>N/A</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>The Netherlands</strong></th>
<th><strong>Poland</strong></th>
<th><strong>Spain</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tax Treatment</strong></td>
<td>Exemption for profits generated by exploitation of a forest (optional taxation) Exemption for profits generated by changes in value of land used for agricultural purposes when these value changes are related to continued use for agriculture. Changes in land value attributable to periods of non-agricultural use are not exempt. Also not exempt are changes in the value of the land attributable to assignment of the land for other uses than agriculture.</td>
<td>Agriculture &amp; forestry do not fall under income tax, but are subject to property tax (depends on # of hectares owned + soil quality; doesn’t reflect farmers’ income)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Sweden</strong></th>
<th><strong>United States</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tax Treatment</strong></td>
<td>Forestry deductions Forest accounts &amp; forest damages accounts</td>
</tr>
<tr>
<td></td>
<td>Tax deductible expenditures: § 175 – soil &amp; water conservation § 180 – fertilizer &amp; other minerals purchases § 450 – credit agricultural security measures Cooperatives Farmers’ cooperatives – special dividend distribution deductions</td>
</tr>
</tbody>
</table>

Not all of the participating countries have incentives related to either agriculture or forestry. However, three trends can be discerned when it comes to agricultural incentives:

- Special treatment of agricultural cooperatives
- Special treatment when it comes to the taxation of land that is used for agricultural purposes
- Non comparable regimes
The most interesting incentives from a Dutch perspective are of course the incentives related to the taxation of (the alienation of) land when used in agriculture. The Dutch system as described in the section on the agricultural land exemption exempts certain profits when they are related to the value changes of that land when alienated. The mentioned (book) profits are only exempt when the changes in value are attributable to the situation when that land will or would remain to be used for agricultural purposes. When first implemented in (income tax) 1893 the reasoning behind the exemption was to create equality between farmers that leased their land and landowners leased out their land to farmers. Changes in value at the side of the landowner were not taxed, so the farmer that owned his land should not be taxed either. Changes in legislation have made this argument null since the landowner that leases out his land to a farmer is now taxed.

Another argument was that leasing assets within a regular business was exceptional, in farming at that time the leasing of land was very common. Agricultural land was therefore not considered an asset, so when sold the book profits weren’t taxed.

In an evaluation of the agricultural land exemption in 2008 these arguments are mentioned but are dismissed as not valid anymore. For a number of years now the Dutch government has listed the exemption as a tax expenditure in the annual budget (the assessed expenditure for 2010 is 285 mln). The government has opted to let the exemption in existence mainly because of the impact it could have on the value of agricultural land. Other reasons given are that the exemption has an important part in business succession for farming and forced relocation of the farm. While all valid arguments, in my opinion the difference in treatment is unjustified. The book profits not taxed are mainly caused by inflation since depreciation on land is not allowed. To create an equal system this exemption from taxation because of inflation should be open to all business that own land.

The Dutch system is very different from all of the other regimes, however, the most closely related is the Spanish system. Spanish tax law allows taxpayers to claim exemptions from certain types of transfers of agricultural land. For instance, taxpayers may claim an exemption with respect to the proceeds of the transfer of land to young farmers or to farmers who will develop an undeveloped fraction of the seller’s farmlands.

While, from a Dutch perspective, not an income tax related incentive another comparable system when it comes to agricultural land exists in France. Certain types of agricultural properties such as those used for orchards, gardens, or vineyards are exempt from property tax. A comparable tax form

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93 See documents of parliament 2009-2010, 32 123, nr. 1 (Tweede Kamer, vergaderjaar 2009-2010)
94 See Modernization of Agricultural Exploitations Law (Law 19/1995), Chapters II and IV, Title I.
95 See Article 1586 D, 1599 ter D, 1599 quinquies and 1607 A of the CGI.
in the Netherlands would be the property tax levied by municipalities\textsuperscript{96}. Agricultural land, together with other types of land, is also exempt from property tax\textsuperscript{97}.

Unlike any of the other systems of the participating countries agricultural activities in Poland are not taxed based on actual income but on the income they could have generated based on the number hectares of land owned and the soil quality of that land. This system can best be compared with the tonnage tax that will be discussed in the section on shipping incentives.

A second group of comparable systems is formed by the special treatment of agricultural cooperatives. In Austria and Germany qualifying cooperatives are exempt from taxation. First, in Austria, Germany, Italy, and the USA, farmers are eligible to receive certain tax benefits if they participate in a cooperative\textsuperscript{98}. For example, in Germany, cooperatives are eligible for a tax exemption if they engage in woodland, foliage, or agricultural activities. However, members of such cooperatives are not eligible for a tax exemption to the extent that they maintain two or more business activities in addition to the agricultural or forestry activity that is the subject of the cooperative endeavor. Likewise, in Austria, cooperatives are eligible for a tax exemption if the focus of the cooperative is on the common use of agricultural and forestry equipment by cooperative members. In contrast, the tax benefits to agricultural cooperatives in Italy allow such cooperatives to incur a lower than usual tax rate in calculating their tax liability. For instance, while the baseline Italian cooperative must pay a 30 percent tax rate on undistributed money in the cooperative reserve, cooperatives that engage in fishing or agricultural activities are eligible for a lower 20 percent tax rate in calculating their tax liability. Not clear to me in these cases is whether or not the members or patrons of these cooperatives are taxed instead of the cooperative. While the Netherlands treats cooperatives different from other entities in the corporate income tax system, this difference in treatment is not dependent on the activity carried out by the cooperative, as can be read in the section on the treatment of cooperatives in the Netherlands. The general treatment of cooperatives in the United States of America can be compared with the Dutch system, tax is levied either at the level of the cooperative or at the level of the member / patron. The difference when it comes to agriculture lies in the fact that additional deductions at the level of the cooperative are available when the cooperative qualifies as a farmers’ cooperative.

In the USA only listed expenditures seem to be tax deductible. This is of course very different from the Dutch system where this is the other way around, expenditures borne by the business are tax deductible in the year they can be attributed to, unless they are excluded. It is after all forbidden for the legislator to sit on the chair of the business owner, with some exceptions. It is for that reason that what from a Dutch perspective would seem as a normal expense in the USA is seen as an incentive. For example the USA allows taxpayers engaged in the business of farming to deduct expenses related

\textsuperscript{96} Property tax, the law governing municipalities chapter XV (Hoofdstuk XV Gemeentewet)
\textsuperscript{97} Art. 220c (1)(c) Law governing municipalities (Gemeentewet)
\textsuperscript{98} See Austrian Corporate Income Tax Act § 5(9)(a), (b); Cooperative Societies Act (GenG) § 1; Art. 12 L.904 1977; I.R.C. § 1381 et seq.
to soil and water conservation, soil erosion prevention for farmlands, and endangered species recovery.\textsuperscript{99} Moreover, USA law allows farmers to deduct expenses related to the acquisition of fertilizer and other minerals used to condition farmlands.\textsuperscript{100} All of the mentioned expenditures are generally deductible in the Dutch system without special regulations making them deductible. What, from a Dutch perspective constitutes a real incentive is that USA farmers can claim a tax credit for expenses related to the maintenance of security for agricultural facilities.\textsuperscript{101}

Not comparable to any of the systems discussed is the Austrian way of determining the annual profit when it comes agricultural activities. Austria allows farmers who engage in agricultural activities to calculate their tax base through a lump sum method.\textsuperscript{102} By doing so, such farmers can apply a tax rate on such income that is effectively lower than the tax rate they would pay absent the ability to calculate their tax base on a lump-sum basis.

The forestry exemption in Dutch income tax system dates from 1924. The purpose of this exemption is the conservation of the Dutch forests. The exemption is, however, also available for profits or losses related to a forest located in a foreign nation. Apart from nature conservation the exemption has the practical advantage that the business does not have to determine the annual capital gain based on the growth of the forest. There are no comparable systems in the participating countries. Swedish tax law does, however, provide for deductions for taxpayers that engage in forestry, and also allows such taxpayers to defer taxation on income by depositing the proceeds from forestry in forest accounts or forest damage accounts.\textsuperscript{103} The purpose of such accounts is to enable taxpayers who engage in forestry to finance their activities during periods of little or no income from the forest due to events such as storm damage.

Agriculture and forestry are very specific businesses. In general profit margins are low and there is always the risk of a bad crop or subpar wood because of weather conditions and such. Whether this is enough for them to be treated differently than other businesses is in my opinion largely dependent on the way they are treated different. The way the Dutch system grants a benefit to farmers is in my opinion not the best way of supporting agriculture. As I don’t have knowledge of other aid already available to the agricultural and forestry sector I will focus on aid through the tax system. A better way tax-wise might be a system that allows for profit reservation like Sweden does with forestry. A farmer could build up a reserve on the balance sheet that could serve as a buffer for bad years, of course there would be a limit to the size of this buffer. Excess profits would be taxed in a normal way. This would result in aid without the farmer having to sell property.

\textsuperscript{99} See I.R.C. § 175.
\textsuperscript{100} See I.R.C. § 180.
\textsuperscript{101} See I.R.C. § 45O.
\textsuperscript{102} Austrian Income Tax Act § 17.
\textsuperscript{103} See IL 21:4–19; IL 21:21–40.
State Aid EU
As the special tax treatment such as special calculation methods or deductions favor certain undertakings—namely the agricultural and forestry sector—one may conclude that such tax measures are selective. Indeed, the special tax regimes for farmers and cooperatives in the agricultural sector are not generally open to all economic players.

In fact not all companies, cooperatives or producers may opt for and qualify for the special tax treatment in the agricultural and forestry sector. However, one may question whether it is likely that a cooperative or producer benefiting from and a cooperative or producer not profiting from the tax incentives mentioned, may really operate in the same relevant product/service market. In this respect, it seems questionable whether the tax incentives for agriculture and forestry may meet the distortion of competition criterion.

As the special tax regimes for the agricultural and forestry sectors may either result in a tax reduction, exemption or lower rate, it seems to be clear that state resources are indirectly involved. Indeed, the prerequisite of being a burden to the public budget seems to be met, the Dutch government recognizes this by listing their incentives as tax expenditures.

With regards to tax incentives in the agriculture and forestry sector, one may conclude that it is very likely that all cumulative requirements under article 107 EU Treaty are met. However, due to the community guidelines recourse to state aid can be justified if it respects the objectives of this policy. Thus, the special tax treatments compared during this course may be justified against the background of these guidelines released by the European Commission.

State Aid WTO
Nearly all of the measures that participating countries have used to incentivize taxpayer investment in agricultural activities are likely ASCM article 1 subsidies. For example, by providing benefits to agricultural cooperatives or by providing general exemptions, deductions, or credits to farmers, the participating country governments are providing benefits to taxpayers who engage in agricultural activities over and above the benefits available to other types of taxpayers. Likewise, the Austrian lump-sum taxation system provides agricultural taxpayers with a benefit unavailable to other types of taxpayers by providing agricultural taxpayers with a lower tax rate than other taxpayers. Finally, the Polish system of providing only a property tax on agricultural activities is likely a subsidy because, in contrast to other types of business taxpayers, it precludes farmers from paying income taxes.

In addition, nearly all of the methods that the participating countries use to create incentives for agricultural and forestry activities are likely at least actionable subsidies. By giving taxpayers special tax breaks for engaging in agricultural and forestry activities, these subsidies provide domestic farmers or foresters with competitive advantages relative to their foreign counterparts. Moreover, in the event that any of these provisions require a certain amount of export performance or the use of do-
mestic goods over imported goods, then they would likely constitute prohibited subsidies. The available information does not suggest that this is generally the case.

**Charities**

Charities are all around, not a week goes by without receiving a letter in the mailbox asking for a donation. The check has already been filled all it needs now is a signature, but wait if you decide to become a regular contributor you will receive a present. It seems that charities are no strangers when it comes to incentives. It is therefore interesting to see whether or how these charities are treated tax wise, are they receiving incentives themselves. In the matrix below a division is made between the way the different governments deal with charitable contributions and the way they treat the charities themselves.

<table>
<thead>
<tr>
<th>Charitable contributions</th>
<th>Austria</th>
<th>Belgium</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charitable contributions</td>
<td>Business expenses; deductions for personal charitable contributions; list of charitable contributions at homepage of Austrian Ministry of Finance (§ 4(a), Income Tax Act)</td>
<td>To be deductible, gifts may not be less than € 25 and they may not exceed 5% of the total net income of the taxable period with a maximum of EUR 500,000 (Art. 200 ITC). Charity must be on a list. cultural institutions established in an EEA country if they influence at least one Belgian region (Art. 104(3)-(5) ITC). Gifts to other organizations are deductible if approved by a Royal Decree or by (mediation of) the Minister of the Federal Public Service of Finance. This approval remains valid for a maximum of 3 years, whereafter a new application has to be made. (IBFD.org)</td>
<td>Gifts are not deductible for tax purposes. Generally, the making of gifts is not a legitimate corporate purpose. A tax reduction is available within specified limits and under certain conditions. Gifts should be lawful and be made in the direct interest of the company. However, individual gifts exceeding EUR 31 must be reported on a special return. Gifts to non-profit organizations may benefit from a tax reduction of up to 60% of their amount up to a maximum of 0.05% of the French-source turnover. Foreign non-profit organizations that operate in France also qualify as recipients (Art. 238 bis CGI). Any gifts exceeding the above limitation may be carried forward for 5 years. (IBFD.org)</td>
</tr>
</tbody>
</table>

| Charitable organisations | Charities are tax-exempt (§ 5(6), Corporate Income Tax Act) Definition of charity (similar to German definition; requirement of declaration in articles of association); charity is not allowed to engage in profit-making activities (§ 34–47 BAO) Charities w/o residence or place of management in Austria must show to financial authorities that they fulfill the requirements (§ 34 BAO) | Tax-exempt + income attributable to corporate business is taxed | Non-profit organizations tax exempt (VAT, corporate tax, local biz tax) if they meet following criteria: (1) disinterested management, (2) no competition w/ commercial sector + competition exercised under different conditions than commercial sector (3) organization does NOT maintain relationships w/ companies (41 or. paper) Foreign charities subject to same requirements as in France, but may still be discriminatory b/c foreign entities may never be able to meet such requirements. (54 or. paper) |

<table>
<thead>
<tr>
<th>Germany</th>
<th>Italy</th>
<th>Hungary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charitable contributions</td>
<td>From 1 January 2008, donations for the furtherance of approved non-profit activities are deductible up to 20% of total income or, upon the company’s choice, 0.4% of the total sum of turn-</td>
<td>The Following gifts are deductible: (1)gifts made to or on behalf of all employees for the specific purposes of education, recreation or religious or social welfare, provided they do not</td>
</tr>
</tbody>
</table>

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89
### Charitable organisations

<table>
<thead>
<tr>
<th>Organisation Type</th>
<th>Description</th>
<th>Tax Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-commercial (or non-profit organisations)</td>
<td>—exempt from corporate tax + local business tax &amp; VAT rate is reduced to 7% (§§ 51–65 AO) (32)</td>
<td>Tax-exempt + income attributable to corporate business is taxed.</td>
</tr>
<tr>
<td></td>
<td>Criteria organization must meet include: (1) fulfills its purpose directly, exclusively, and unselfishly, (2) must be declared in the articles of association (not harmful that association runs a business)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Regulations not valid unless activity is directed towards individuals w/ residence or habitual residence in Germany</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No distinction b/n non-profit organisations &amp; charities</td>
<td></td>
</tr>
</tbody>
</table>

### The Netherlands

Charitable contributions are deductible if combined they are higher than € 227 (CITA) or € 60 (PITA) or up to 10% of the taxable income.

Only charitable contributions to listed charities are tax deductible. Charities

### Poland

Under certain conditions, donations made to public organizations registered in Poland or another EEA country as well as donations for religious purposes are deductible from taxable income up to a maximum of 10% of the income. However, certain other legal acts (regu-

### Spain

As a rule, gifts are deductible only if made to a regional industrial development company (Art. 14.1(e) LIS). Law 49/2002 of 24 December 2002, however, allows a tax credit of 35% of the amount donated in the following cases:

- and -20% of the documented amount if it is a long-term donation.
- The total amount of these deductions may not exceed the amount of the taxpayer’s pre-tax profit.

(ISFD.org)
may be established anywhere in the world as long as they have been approved and is present on the mentioned list. Also deductible are gifts to associations when they are not taxed and the association has more than 25 members. The associations must be a resident of a EU member state, the Netherlands Antilles or Aruba. Other countries have to approved and listed in a regulation issued by the minister of finance.

<table>
<thead>
<tr>
<th>Charitable organisations</th>
<th>Sweden</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charitable contributions</td>
<td>Gifts are in principle not deductible, unless they can be regarded as an expense incurred in obtaining or safeguarding income subject to taxation. Only specified donations are deductible which are defined in the law (Ch. 16, Secs. 10-12 IL). Provisions to charities done by government; SH can decide to donate right to dividend to charity.</td>
<td>Deductions for charitable contributions by both individuals &amp; corporations (subject to percentage limits in most cases; see Tax 1 notes § 170)</td>
</tr>
<tr>
<td>Charitable organisations</td>
<td>Charities (foundations &amp; non-profits) themselves exempt from tax based on certain criteria (as long as they don’t perform business—not for-profit, not done as a profession, not done independently) Foundation = (1) promote care &amp; raising of children, (2) promote lecturing &amp; education, (3) charities providing assis-</td>
<td>Tax exemption for charitable organizations that meet list of criteria in § 501(c)(3) (55)</td>
</tr>
</tbody>
</table>
All the participating countries provide for several tax incentives to encourage activities in the public interest. It seems that there is a common understanding of what kind of activities constitute activities in the public interest (religious, educational, support for needy people, etc.). The incentives encouraging activities in the public interest can be divided into two main groups. On the one hand, there is the taxation of charitable entities. On the other hand, there are tax incentives for businesses as well as natural persons to encourage donations to charities.

As can be deduced from the matrix all of the participating countries allow for either a deduction on the taxable profit or a tax credit. Also all of the charitable contributions only qualify up until a certain amount. Furthermore not all the charitable donations are tax deductible, only donations to qualifying recipients qualify for deductibility or credit. There are three different regimes throughout Europe and the USA. The first regime allows for deductibility of donations, donations to charities can be deducted as business expenses in the Netherlands, Austria, France, Poland, and the USA. In fact, the French legislature limits the deduction of donations to 0.5 percent of the donator’s total turnover. Similarly, donations by Polish individuals and organizations are limited to 6 percent and 10 percent (respectively) of such taxpayers’ income tax.

Second, there is a regime that gives Polish individual taxpayers the opportunity of transferring (donating) 1 percent of their tax to public organizations and charities. In fact, the Polish authorities are responsible for transferring the donations to the respective charities. The third regime is implemented in Sweden. While the Swedish legislature does not provide for an incentive such as deductions in Austria, France and the USA, a regime for encouraging the donations of stock is implemented in Sweden. In short, the Swedish taxpayer may transfer dividends tax-free to charities. The USA applies a rather similar system. Indeed, there is an added incentive, if the taxpayer donates its stock. Within limits, taxpayers may claim a deduction on the unrealized appreciation of stock if the taxpayer donates the stock to a charitable organization. The result is that the taxpayer receives a double benefit in the form of a deduction on unrealized gains.

Whether or not a charitable donation should be tax deductible is not a fiscal matter in my opinion but a political one. The amount that is deductible or eligible for a credit and the qualifying recipients
is, however, of consequence when looked at with equality in mind. The problem is that in determining what constitutes a worthy charity for one business may not be a worthy charity for another business or the government for that matter. In allowing a deduction only for certain charities the government a business may choose not to donate money to a charity that does not qualify for a tax break. This is also true from the business’ perspective. The business may have very legitimate reason for donating money to a charity, but it will not be able to claim the tax break when the charity does not qualify.

In my personal opinion it is questionable whether a donation is charitable when a business can get a tax break when doing so. It is in my opinion also questionable whether a real business is capable of making a charitable donation. In most occasions a business will make a donation to improve their public image, which would make it, at least in the Dutch system, a deductible expense without the limited deductibility the special regulations have.

With regards to entity taxation, in most countries charities are exempt from taxation.\(^\text{104}\) However, where the participating countries’ tax systems differ is their treatment of situations in which charitable organizations engage in profitable activities. There are countries such as Sweden and the USA that do not allow the charity to carry out any business activities in order to qualify for tax-exempt status. If the charities run a business, they do not benefit from the tax-exemption any longer. In short, the tax-exempted charities have to engage exclusively in charitable activities. However, while Austria\(^\text{105}\), Sweden and the USA require exclusiveness of charitable activities, France, Italy, Poland, the Netherlands, Spain and Germany allow the charity to perform profit-making activities. However, these countries levy a tax on the profits incurred by the commercial activities of the charities. What constitutes running a business in participating countries was not investigated.

In order to qualify for tax-exempt treatment, charities generally may not engage in a competitive market or commercial sector.\(^\text{106}\) For instance, France and Italy require charities to fulfill this criterion to qualify for the tax incentives. Moreover, such entities’ management must be disinterested—that is, it must not hold any stock in the company. For instance, in Austria it is also not allowed that a charitable entity distributes profits/dividends to its members.\(^\text{107}\) The disinterest requirement (which applies to management and members of charities) can be compared with the criterion of unselfish action which is required under German law in order to qualify for tax exemption. Unselfishness also seems to require that volunteers or low-wage workers engage in the organization. For instance Sweden requires that volunteers or/and low-wage workers engage in the activities carried out by the charity. In the Dutch system an extra deduction is allowed based on the minimum wage when determining the annual profit, even if no actual wages were paid out. Thereby facilitating charities when activities

\(^{104}\) Tax exemption: Sec. 5 (6) Austrian Corporate Income Tax Act; Spain Art. 6, 7 of Law 49/2002; Article 261 of the French General Tax Code (CGI); GER: Sections 51-65 AO; Section 5 para. 1 Nr. 9 KStG, Section 12 para. 2 Nr. 8 UStG, Section 3 Nr. 6 USG; the Netherlands: Source for the text on the treatment of charities is “Cursus Belastingrecht, Vennootschapsbelasting, Chapter I, Paragraph 1.0.7.C”.

\(^{105}\) List of criteria: AUT: Secs. 34 to 47 BAO; USA: list of criteria in § 501(c)(3) (55); GER: §§ 51–65 AO;

\(^{106}\) CE 1-10-1999 n° 170289, Association « Jeune France »

\(^{107}\) AUT:Sec. 39 BAO
are carried out by volunteers. Germany and Austria require that charities state their purpose/aim in the articles of association, Sweden requires the charity to exist for a minimum period to be eligible for tax-exemption.

The tax treatment of foreign entities performing charitable activities in the host country seems to be another important issue regarding the special tax treatment of charities. Like in the Dutch system Austria, France, Poland, Sweden and the USA apply the tax-exemption for charities also to foreign entities if they satisfy certain criteria that are almost the same for domestic charitable entities (Austria, France). In contrast to this group of countries, foreign charitable tax entities are not yet eligible for tax-exempt status in Germany.

State Aid EU

Three regimes of encouraging donations to charities:

In respect to the donator, the tax regimes encouraging donations to charities do not seem to be selective. Indeed, every taxpayer seems to be entitled to benefit from the tax incentive relating to his/her donations. Most regimes are however selective with respect which donations qualify for deductibility. When the limitation is purely based on the nationality of a charity this means that there is a problem with the four freedoms guaranteed by the TFEU. Also when a charity has to go through additional red tape, red tape a domestic charity does not have to go through, to be able to qualify as a charity to which donations are deductible this also constitutes a prohibited hindrance.

While there is a loss in revenue by allowing a deduction on the taxable profit the deductibility might also save the government money. By encouraging taxpayers to contribute to the public interest businesses finance projects that in all likelihood would have to be financed with state resources. Therefore, it is not really clear whether the incentive constitutes state aid financed through state resources. In this respect, Sweden seems to be a good example. As the Swedish system has implemented high tax rates and has a good social system, the individual is not encouraged to donate money to charities or non-profit organizations as much as individuals in other countries.

By not fulfilling the criteria above there can be no state aid with respect to the TFEU. The last criterion is that the benefit received may not distort the internal market by creating a more favorable position in that market for a company. It is hard to imagine that the benefits related to charitable donations distort the internal market.

To conclude, the tax incentives promoting donations to charities do not seem to be considered as state aid under article 107 EU Treaty.

Tax-exemption of charities:

As charities, which are the beneficiaries of the tax incentive, have the same specific features, they may fulfill the selectivity criterion. Moreover, certain undertakings, in fact charitable activities, benefit from the tax incentive. One may thus conclude that the criteria for qualifying as charitable activities seem to constitute common features of beneficiaries of state aid.

At first glance, one can argue that the prerequisite of being a burden to the public budget seems to be fulfilled. However, it should not be disregarded that by granting tax incentives to charities the state/government transfers responsibility to these organizations. Indeed, charities often perform charitable activities for which the state may not have enough resources to spend. By granting them this relief they might save money because they themselves do not have to engage in those activities.

As all participating countries require that charities do not engage in business activities or at least tax the profit incurred from commercial activities, there is no distortion in competition. In other words, charities do not compete with corporate entities.

So to conclude the criteria that determine whether or not the tax exemption of charitable organizations constitutes state are not fulfilled and can therefore not be considered prohibited state aid.

State Aid WTO

The participating countries’ tax regimes for entities such as charities at first glance may seem to be subsidies within the meaning of ASCM article 1 because they provide the benefit of tax-exemption to charities, while not providing a similar benefit to other types of organizations such as those that engage in profitable activities. However, closer examination suggests that the participating countries’ tax treatment of charities does not likely constitute a subsidy because charities are different from other entities in a way that justifies taxing them differently. In every one of the tax systems examined, a taxpayer is only eligible for tax-exempt status as a charity if it does not engage in commercial activities for profit. Even those systems that do not entirely preclude tax-exempt status for organizations that carry on at least some commercial activities require that such organizations pay taxes on their profits from such commercial activities. Thus, the participating countries’ tax treatment of charities does not likely constitute either actionable or prohibited subsidies under the ASCM.

Shipping industry incentives

The Netherlands has a very long tradition when it comes to maritime activities. A testament to that fact is that the first ever publicly traded company was a shipping company established in the Netherlands. Shipping activities have brought prosperity to the Netherlands and made many nations envious. So while some of our exploits are nowadays frowned upon, and I hereby refer to the “cruises” we organized between Africa and the New World, the Dutch exploits at sea have been beneficial to the
development of the Netherlands as a trading nation. One might even argue that the shipping industry is an industry worth protecting.

Large numbers of vessels sail the world's oceans every day, transporting vast quantities of goods of all kinds to and from places around the globe. With regard to the European Union, 90 percent of all trade with the rest of the world is transported by sea. It is clear that the shipping industry is of great importance for many countries. Therefore, many governments use tax incentives to stimulate this sector. In the matrix below an inventory was made what incentives are available in the participating countries.

<table>
<thead>
<tr>
<th>Tonnage Tax</th>
<th>Austria</th>
<th>Belgium</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>Forfeiture regime (taxable profits calculated based on tonnage of vessels owned/operated): The profit is determined per day and per merchant ship, categorized according to net ton.</td>
<td>Forfeiture regime (taxable profits calculated based on tonnage of vessels owned/operated): The profit is determined per day and per merchant ship, categorized according to net ton.</td>
<td>N/A</td>
</tr>
<tr>
<td>Available for</td>
<td>Domestic companies &amp; permanent establishments of foreign companies.</td>
<td>Domestic companies &amp; permanent establishments of foreign companies.</td>
<td>N/A</td>
</tr>
<tr>
<td>Year?</td>
<td>2002</td>
<td>2003</td>
<td>N/A</td>
</tr>
<tr>
<td>Optional?</td>
<td>Yes</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>Minimum period?</td>
<td>10 years, renewable</td>
<td>10 years, renewable</td>
<td>N/A</td>
</tr>
<tr>
<td>Capital gains included?</td>
<td>Yes</td>
<td>No, capital gains on ships are taxed</td>
<td>N/A</td>
</tr>
<tr>
<td>Other incentives</td>
<td>- Accelerated depreciation of vessels - Exemption of capital gains on vessels. Substantial reduction of registration fees on mortgages on vessels. All mutually exclusive with tonnage tax regime.</td>
<td>N/A</td>
<td>Tax credit: measured on pita that the employees pay on employment income &amp; self-employment. Granted to the company</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EU State Aid</th>
<th>Germany</th>
<th>Italy</th>
<th>Hungary</th>
</tr>
</thead>
<tbody>
<tr>
<td>State aid as defined by art. 107(1), but approved by EC under art. 107(3)(c) and/or art. 86(2)</td>
<td>EC Case N 504/02, as approved on 19 March 2003</td>
<td>Approved by commission case N 737/2002, approved on 13 May 2003</td>
<td>N/A</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>WTO State Aid</th>
<th>Germany</th>
<th>Italy</th>
<th>Hungary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actionable</td>
<td>Actionable</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>
A recurring incentive among the participating countries is the tonnage tax system. Obviously no shipping incentives are present in countries like Austria and Hungary since they are landlocked. The only country that has not implemented a tonnage tax system, but is considering implementation, is Sweden.

Since the 1970s, the European fleet has been faced with competition from vessels registered in developing countries, which do not take much care to observe social and safety rules in force at the international level. The lack of competitiveness of Community-flagged vessels was recognized at the
end of the 1980s and, in the absence of harmonized European measures, several Member States adopted different arrangements for aiding maritime transport. The strategies adopted and the budgets allocated to support measures differ from one Member State to the other based on the attitude of those States to public aid or the importance they attach to the maritime sector.

Two different tonnage tax systems can be distinguished, namely the Dutch model and the Greek model. The Greek model will not be discussed in this thesis because only Greece, Cyprus, and Malta have implemented it. All the participating countries use the Dutch model.

In general, operating vessels in international traffic qualify for tonnage tax regimes. In most participating countries, dredging and towing activities can also qualify under the condition that more than 50 percent of these activities take place at sea. The vessel owner (or bareboat charterer) must also exercise certain management activities with respect to the vessel.

With regard to the European participating countries, qualifying users of the tonnage tax regime include individual entrepreneurs, foundations, legal entities, partnerships, and permanent establishments. In the USA, on the other hand, only corporate legal entities can opt for the tonnage tax system.

In all participating countries, both owned vessels and vessels in bareboat charter are qualified. In the USA, qualifying vessels must be at least 6,000 deadweight tons.

In all countries, a qualifying party is only granted the tonnage tax regime upon application. In general a binding choice must be made “locking up” the taxpayer usually for 10 years. The Dutch systems allows for making this decision at any time as do the Belgian and Spanish system, the lock-up period is, like in the Netherlands, 10 years. The French system is different in that it only allows for the option at a certain moments in time, but is also binding for 10 years. In Poland the choice is fixed for 5 years. And although the USA is not a member of the European Union they also have a tonnage tax system but no lock-up period is defined.

Among the participating countries, there are number of additional (minor) incentives. These types of incentives include:

- Accelerated depreciation on investments in ships.
- Exemption of capital gains on ships
- Substantial reduction of registration fees on mortgages on vessels
- support to employers including a tax credit based on wages of employees and reduced social security contributions.

When the incentives are income tax based they are usually mutually exclusive with the tonnage tax regime.
**State Aid EU**

As stated by the European Commission, the system of replacing the normal determination of annual taxable income by a tonnage tax is considered as state aid. However, national tonnage tax regimes can be justified according to article 107(3)(c) TFEU. The reasoning for this justification stems from the fact that EU Member States have been suffering from fierce competition by developing countries since the 1990s (i.e., ship owners benefitting from substantial cost savings when flagging out to certain third country registers).

With regard to fiscal competition within the European Community, the EC has stated that tonnage tax schemes do not distort trade between EU Member States to an extent contrary to the common interest. In order to avoid such fiscal competition, the EC tends not to approve tonnage tax schemes that differ substantially from already-approved schemes. This is proven by the fact that the Polish system was put on hold because an investigation by commission. The commission has approved the regimes in the participating countries. Every now and then countries do try to make regimes more favorable by including several activities that were previously excluded. The Dutch system has been altered several times the latest alteration had to do with lowering the tax for very large ships, and was approved by the commission\(^{109}\).

While the rates used for calculating taxable profits (“virtual profits”) have been homogeneous throughout the EU, national corporate tax rates may vary significantly across the Community, therefore creating uneven tax levels and fiscal competition.

The other (minor) incentives are justified as long as they promote the repatriation of the strategic and commercial management of all ships concerned in the Community and the beneficiaries of the schemes are liable to corporate tax in the Community.

**State Aid WTO**

Since the tonnage tax regime includes both a fiscal incentive granted by a government and a benefit received by companies active in the maritime sector, the benefit can be seen as a subsidy. In order to be qualified as an actionable subsidy, the tax scheme must be specific and must cause adverse effects to the domestic industry of another WTO Member State. While the specificity of tonnage tax regimes can be clearly derived from previous paragraphs, its adverse effects are unsure. It is hard to determine whether or not trade of non-EU WTO members\(^{110}\) are negatively affected by the tonnage tax regime used by the participating countries. However, based on the information at hand, no WTO member has initiated an infringement procedure against any tonnage tax regime as used by participating countries. The above, in combination with the fact that a lot of non-EU WTO members use tonnage tax regimes and other shipping incentives as well, leave us to conclude that adverse effects may be rather limited.

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\(^{110}\) As mentioned above, the EC tonnage tax schemes do not distort trade between EU Member States to an extent contrary to the common interest.
Incentives for Small and Medium-Sized Enterprises

Every business in the world was once a small business; in fact a few of the most successful businesses in the world were started in a garage. Not every business is destined to become a big company; this however does not make them failed enterprises or less important, because as they say in acting there are no small parts only small actors. Micro, small and medium-sized enterprises are socially and economically important because they represent 99 percent of all enterprises in the EU. Moreover, they provide around 65 million jobs and contribute to entrepreneurship and innovation. The taxation of small and medium-size enterprises (“SME”) is therefore an important topic for policy makers. In the matrix below an inventory was made with the different incentives that are present in the tax systems of the participating countries.

<table>
<thead>
<tr>
<th>SME Definition</th>
<th>Austria</th>
<th>Belgium</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>Article 15 Company Code: the company should not have exceeded one of the following criteria during the last and second last accounting year: - annual average number of personnel of 50 - annual turnover (excl. VAT) of € 7,300,000 - balance sheet total of € 3,650,000</td>
<td>Higher tariff applying the notional interest deduction. Reduced corporate tax rate within the limit of a taxable result of € 322,500 (article 215 (2) BITC 1992).</td>
<td>EU definition: - total number of employees is less than 250 and - net income is at most € 50 million or - balance sheet total is at most 43 million.</td>
</tr>
<tr>
<td>Incentive</td>
<td>carryforward hidden reserves (natural persons)</td>
<td>- Specific tax regimes for micro enterprises: exemption from VAT - Tax reduction in favour of growth SMEs - Deduction of foreign deficits (article 209 C CGI) - Reduced tax rate (15%) on SMEs profits - Tax relief on ISF (tax on wealth) for investment in SMEs - Tax credit for marketing expenditure</td>
<td></td>
</tr>
<tr>
<td>State aid EU</td>
<td></td>
<td></td>
<td>Most of these tax incentives are subject to the de minimis Regulation with no requirement of prior notification. - Tax relief on ISF: the scheme was notified on October 11th 2007 to the Commission which analysed it in the light of the Community guidelines on state aid to promote risk capital investment in SMEs and authorized it.</td>
</tr>
<tr>
<td>State aid WTO</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SME Definition</th>
<th>Germany</th>
<th>Italy</th>
<th>Hungary</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td>EU definition: - total number of employees is less than 250 and - net income is at most 50 million € or balance sheet total is at most 43 million.</td>
</tr>
<tr>
<td>Incentive</td>
<td>Investment allowance: deduction equal to 40% of acquisition or production costs of a depreciating movable permanent asset within the limit of</td>
<td>N/A</td>
<td>- Investments tax allowance (property, machines, intangible assets) - Special staff increase tax allowance for micro-enterprises</td>
</tr>
</tbody>
</table>
Eucotax Wintercourse 2009 – 2010: Equality and special income tax regimes for businesses

<table>
<thead>
<tr>
<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SME Definition</strong></td>
<td>N/A</td>
<td>&quot;a small taxpayer&quot; is a taxpayer, whose value of the sales income (with amount of the due VAT) – did not exceed the amount in the previous tax year expressed in PLN in the amount of EUR 1,200,000.</td>
</tr>
<tr>
<td><strong>Incentive</strong></td>
<td>PITA</td>
<td>- Disposable depreciation allowance in the tax year up to amount EUR 50 000 which takes up fixed assets (Art. 22 k 7-12 of the PITA)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Possibility of making a withholding tax payment in quarterly periods (Art. 44.3g – 3i of the PITA).</td>
</tr>
<tr>
<td><strong>State aid EU</strong></td>
<td>None of them – more neutral</td>
<td>Small and medium-sized companies, i.e. companies whose turnover in the immediately preceding tax year was lower than EUR 8 million may benefit from certain tax incentives. If the company files a consolidated tax return, the turnover refers to the whole group. If the company is newly established, the threshold is applied to the turnover in its first tax year.</td>
</tr>
<tr>
<td><strong>State aid WTO</strong></td>
<td>Not - actionable</td>
<td>N/A</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sweden</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SME Definition</strong></td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Incentive</strong></td>
<td>The first year when a business has been started, the business is allowed to deduct expenses that the person has had for the business before it was started, IL 16:36. This is in addition to expenses from the period that the business has been run.</td>
</tr>
<tr>
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</tbody>
</table>
business corporations to elect to be treated as an S corporation rather than a C corporation. There is only an income tax at the shareholder level and not at the corporate level. Moreover, the Code treats distributions by an S corporation to its shareholders in a similar manner to the way in which it treats distributions by a partnership to its partners. For example, the Code passes all of an S corporation’s tax items such as income, deductions, credits, and losses on to its shareholders on a pro rata basis. 264 Thus, like partnerships, S corporations pay no income tax.

<table>
<thead>
<tr>
<th>State aid EU</th>
<th>N/A</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>State aid WTO</td>
<td>N/A</td>
<td>- None of these incentives seem to be prohibited subsidies because they are available to U.S. taxpayers regardless of export performance and regardless of whether or not U.S. taxpayers use domestic over imported goods. - Some of the provisions may qualify as actionable subsidies. The ordinary loss treatment for sales or exchanges of small business stock may injure industries in foreign countries because it gives U.S. investors an incentive to invest in domestic small businesses over foreign small businesses. Moreover, the S corporation provisions may be actionable subsidies because, by relieving only domestic U.S. small businesses from double taxation, they give such entities a competitive advantage over businesses in other countries that might be subject to double taxation.</td>
</tr>
</tbody>
</table>

SMEs face particular difficulties, which the EU and national legislation try to address by granting such SMEs various advantages. The application of a common definition by the Commission and Member States ensures consistency and effectiveness of those policies targeting SMEs and therefore limits the risk of distortions of competition in the Single Market.

**SME definition**

Most countries have a definition of what is considered a small and medium-sized enterprise. But since 1996, the EU has started to standardize the concept. In 1996, the European Commission adopted a recommendation establishing the first common definition for small and medium-sized enterprises in the EU.\(^{111}\) It was replaced by the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises of 6 May 2003\(^ {112}\) (hereinafter "SME definition") which entered into force on 1 January 2005.

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\(^{111}\) OJ L 107, 30.04.1996.

\(^{112}\) OJ L 124, 20.05.2003, p.36-41.
In contrast, in the United States, there is no distinctive way to identify an SME—typically it depends on the industry in which it competes. When small business is defined by the number of employees, it often refers to those with fewer than 100 employees, while medium-sized business often refers to those with fewer than 500 employees. In the Dutch tax system only one reference is made to the definition. Extra expenditures qualify for the environmental investment deduction when a business qualifies as either a small or medium sized business as by the definition.

Not all EU member countries apply the SME definition to determine eligibility for tax incentives for SMEs. For example, in Belgium, to qualify for reduced tax rate, article 15 of the Company Code provides that a company should not exceed one of the following criteria during the previous and penultimate fiscal years: an annual average staff size of 50, an annual turnover of €7,300,000, or a balance sheet total of €3,650,000. Like mentioned before the Dutch system only references the definition once in granting an extra incentive. Most of the incentives granted in the Dutch system are not bound by the size of the business. Some incentives are however only available to business taxed through either the personal income tax system or the corporate income tax system. The difference in treatment was justified by the different tax rates that exist between the two systems and that running a business through a personal enterprise is different that running a business via a corporate entity. What I personally do not perceive as an incentive but merely a result of the ability to pay principle is the step up in the corporate income tax system as listed in the Matrix. Incentives in the Netherlands are not granted based on the size of the business but based on the amount of profit. If a business generates less profit they are less able to pay taxes. A good example of this is the general profit dependable deduction for the self-employed. The deduction on the taxable profit becomes smaller when the profits rise.

The definition is, as can be seen, solely based on the turnover, balance sheet value and number of employees. In my personal opinion a definition based on annual profit would have been better. The ability to pay and the need for relief or aid is better defined by profit then turnover. Certain sectors in

<table>
<thead>
<tr>
<th>Enterprise category</th>
<th>Staff Headcount (number of persons expressed in annual work units)</th>
<th>Turnover</th>
<th>Or</th>
<th>Balance sheet total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medium-sized</td>
<td>&lt; 250</td>
<td>≤ € 50 million</td>
<td>≤ € 43 million</td>
<td></td>
</tr>
<tr>
<td>Small</td>
<td>&lt; 50</td>
<td>≤ € 10 million</td>
<td>≤ € 10 million</td>
<td></td>
</tr>
<tr>
<td>Micro</td>
<td>&lt; 10</td>
<td>≤ € 2 million</td>
<td>≤ € 2 million</td>
<td></td>
</tr>
</tbody>
</table>
business have a relatively high turnover with a very small profit margin. The choice for the turnover as a benchmark is however understandable. Inequality in the application of incentives could still arise in a system based on profits since a unified way of determining profits is not implemented for all taxpayers within and certainly not outside of the community.

**Tax incentives**

Given the important role of SMEs and concerns in some cases that SMEs may be at a competitive disadvantage as a result of the fact that their creation and growth are more dependent on taxation. As a result, governments are often inclined to design policies that foster the growth of SMEs.

Income tax relief may be provided to SMEs in a number of ways. Tax incentive measures include found in the participating countries include:

- Reductions in the corporate income tax (CIT) rate.
- Accelerated depreciation allowances for capital expenditures.
- Extra deductions for newly created business and general or targeted investment tax credits.

**Corporate tax rate reduction**

A common form of tax relief to encourage SME investment is a reduced corporate income tax rate on qualifying income. The rate reduction may be targeted at small business income in a number of ways, but tax regimes aimed at SMEs are often available to SMEs only up to some taxable profit limit. For example, there are reduced corporate income tax rates in the following countries:

- France: reduced CIT rate of 15 percent instead of 33.33 percent up to a taxable income of €38,120 per period of 12 months.\textsuperscript{113}
- Spain: reduced CIT rate of 25 percent (instead of 30 percent) between €0 and €120,202.\textsuperscript{114}
- Belgium: reduced CIT rate up to a taxable income of €322,500.\textsuperscript{115}
- Netherlands: reduced CIT rate of 20 percent up to a taxable income of €200,000 instead of 25.5 percent.

**Accelerated depreciation**

Another way through which investment incentives may be granted is through special tax provisions that lower the effective price of acquiring capital. Investment allowances (accelerated and enhanced depreciation allowances) are deductions against taxable income. Accelerated depreciation allowances allow firms to depreciate capital costs over a shorter time period relative to the estimated useful economic life of the asset.

For example, in Hungary, SMEs can adopt an accelerated depreciation of assets such as machines, equipment and vehicles (except personal cars). This tax incentive is only applicable if the new

\textsuperscript{113} Article 219 I-b of the French General Tax Code
\textsuperscript{114} Article 108 of the Corporation Tax Law
\textsuperscript{115} Article 215 (2) BITC 1992
asset is located in one of the 47 most underdeveloped small regions in Hungary. Germany also has special depreciation regulations for SMEs, which are able to deduct up to 40 percent of the acquisition or production costs of a depreciating movable permanent asset. This tax incentive is limited to €200,000 per company. Spain also grants specific tax depreciation incentives to SMEs, so that such entities benefit from free depreciation for non-valuable investments, amortization and depreciation for new elements of fixed and intangible assets, and for property investment and depreciation of property elements which are reinvestment objects\textsuperscript{116}. In the same way, Poland has a tax depreciation allowance up to €50,000 on fixed assets\textsuperscript{117}. Sweden and France report that there are no special allowances related to SME investments.

Other incentives
There are also other ways to grant tax incentives. All the EU countries have tax incentives but they are very different from one country to another. For example, both France and Hungary provide for certain exemptions from VAT for SMEs. Both countries have specific tax regimes for micro enterprises, which benefit from VAT exemption.

The main tax incentive for SMEs in the USA is stated by Internal Revenue Code section 1362 et seq., which allow small business corporations to elect to be treated as an S corporation rather than a C corporation. S corporations specifically benefit from the fact that (in contrast to C corporations) they only incur income tax liability at the shareholder level and not at the corporate level. Moreover, the Code treats distributions by an S corporation to its shareholders in a similar manner to the way in which it treats distributions by a partnership to its partners. For example, the Code passes all of an S corporation’s tax items such as income, deductions, credits, and losses on to its shareholders on a pro rata basis. Thus, like partnerships, S corporations themselves pay no income tax.

State Aid EU
Most of the tax incentives described above are subject to the de minimis rule. The “de minimis” policy, begun by the Commission in 1992, is designed to benefit small and medium sized enterprises (SMEs). The current “de minimis” rule, laid down in Commission Regulation No 69/2001, provides that subsidies of less than €100,000 granted to an undertaking over a period of 3 years do not constitute state aid within the meaning of the EC Treaty’s ban on aid liable to distort competition. Subsidies below that amount are presumed to have only negligible effects on competition and trade between Member States. Therefore such measures do not need to be notified to the Commission for approval. The Commission announced that it would adapt the “de minimis” ceiling to the “evolution of the economy.” The main change contained in the regulation is the increase in the ceiling from €100,000 to €200,000, to take account of inflation and GDP growth in the EU. State aid policy has traditionally

\textsuperscript{116} Corporation Tax Law, articles 109 to 113
\textsuperscript{117} Article 22 k 7-12 of the PITA
been very favorable towards SMEs. Under the existing block exemptions and guidelines, SMEs generally benefit from higher aid intensities than large firms.

While it is obvious that these tax incentives can be considered as state aid because they are granted by Member States to specific companies, such aid constitutes under EC law horizontal aid subject to the General Block Exemption Regulation. Actually, state aid policy has traditionally been very favorable towards SMEs. Under the existing block exemptions and guidelines, SMEs generally benefit from higher aid intensities than large firms.

**State Aid WTO**

None of these incentives seem to be prohibited subsidies because they are available to taxpayers regardless of export performance and regardless of whether or not SMEs use domestic over imported goods.

Some of the provisions may qualify as actionable subsidies. The tax incentives for SMES may injure industries in foreign countries because they give SMEs incentives to relieve their tax burdens, and stimulate investment in domestic small businesses over foreign small businesses.

For example, in the USA, the S corporation provisions may be actionable subsidies because, by relieving only domestic small businesses from double taxation, they give such entities a competitive advantage over businesses in other countries that might be subject to double taxation.

**Reflection**

As I stated earlier the Dutch system for granting relief for smaller business, which is for the most part based on profits with multiple intensities, seems favorable to me. Eligibility based on turnover can be very harsh when one of the limits has been reached and eligibility for a certain incentive disappears. It might in some ways even discourage businesses to grow especially when the intensity of the incentive (like a tax rate reduction) is not adjusted relative to the increase in size of the turnover, number of employees or balance sheet values. When a business realizes one of the limits might me reached they could, for example reduce the number of employees, distribute profits or delay some activities to the next fiscal year just to still qualify for the reduced rate.

**R&D Incentives**

In a well know anecdote Thomas Edison was asked by a journalist if he never thought of giving up researching materials that would allow the filament of the incandescent light bulb tot last longer than it did up until that moment in time, after having failed over 3000 times. Edison’s response to this question was that he had not failed 3000 times to find the right combination of materials, he had succeeded in finding 3000 materials that would definitely not work. While this story might not be entirely true it illustrates two important facts about research and development (“R&D”); namely that the outcome of R&D is highly uncertain and that it may take a very long time before actual discoveries or
results are generated. While mister Edison in the story seems to be very keen on finding out how not
to do something, in business these kinds of results might cause a company to go bankrupt. Another
fact illustrated by the story is that the outcome of research and development can change the way we
perceive the world, after all mister Edison’s discovery made the world a little brighter. Apart from
possibly significant social implications of R&D there are also financial advantages to having a leading
role in R&D. It is therefore that as part of the Lisbon Strategy, set out at the Lisbon summit in March
of 2000, a lot of EU countries have adopted tax measures to promote R&D activities. In the matrix
below an inventory can be found of the R&D incentives present in the participating countries.

<table>
<thead>
<tr>
<th>Austria</th>
<th>Belgium</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of incentive</strong></td>
<td>Tax credit or Allowance (deduction on taxable income) Donation for Austrian universities is tax deductible.</td>
<td>Tax Credit or Investment deduction; expenditures must be capitalized. Patent income deduction Tax spread credit</td>
</tr>
</tbody>
</table>

| Basis | Credit & Allowance: Eligible expenditures (Paid to EU and EEA) The donation | Credit: Expenditures Income deduction: Revenues attributable to patent Tax spread credit: Amount of depreciation of the asset. | Eligible expenditures |

| Amount Rate? | Credit: 6% of the eligible expenditures Allowance: 20% of eligible expenditures Donation: The Donation | Credit: FY2010: 15.5% of the expenditures * tax rate Investment deduction: 15.5% of the expenditures Patent income deduction: 80% of the revenue | First Year: 50% Second Year: 40% After that: < 100 milj. = 30% > 100 milj. = 5% |

| Available to PE? | Unknown | Yes | Yes |

| State Aid EU | Credit & Allowance: No state aid (not selective) Donation: Infringement procedure has been started. | No state aid: selectivity not satisfied | ECJ: laboratory Fournier After changes: General Measure |

| State Aid WTO | Actionable | Non-actionable | Actionable |

<table>
<thead>
<tr>
<th>Germany</th>
<th>Italy</th>
<th>Hungary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of incentive</strong></td>
<td>No special incentives, deduction of costs No capitalization</td>
<td>Tax Credit Costs tax deductible, no capitalization</td>
</tr>
</tbody>
</table>

| Basis | Listed eligible expenditures | Normal cost deduction at expenditures Deduction on taxable profit: Several listed qualifying expenditures. (Directly related expenditures) Tax Credit: Side deduction |

| Amount | 10% of the eligible expenditure; 15% when connected to universities. | Normal cost deduction (all of the costs) |
### Rate?

| Procedure: Click day one a year to qualify! Only the first applicants get the credit (Budget: 654 mil. (2010)) | Additionally: 100% of qualifying expenditures. Or 300% of qualifying expenditures when the research is done on the premises of a Hungarian, EU or EEA institution. (Ceiling 50 mil HUF) |

### Available to PE?

| Unknown | Yes, EEA / EU / listed country | Yes |

### State Aid EU

| I Think state Aid (selective) or at least unequal treatment | Minimis Aid |

### State Aid WTO

| Actionable | Actionable |

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<table>
<thead>
<tr>
<th>The Netherlands</th>
<th>Poland</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of incentive</strong></td>
<td>PITA: Profit deduction</td>
<td>Tax Deduction</td>
</tr>
<tr>
<td></td>
<td>CIT: Reduction of taxable base</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wage Tax: Deduction payable wage tax for R&amp;D employees</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Cost deduction in the year the are borne: No capitalization</td>
<td></td>
</tr>
<tr>
<td><strong>Basis</strong></td>
<td>PITA: Fixed amount when conditions are met</td>
<td>New technologies that have not been used for 5 years. R&amp;D. Also qualifies</td>
</tr>
<tr>
<td></td>
<td>CIT: Revenue derived from R&amp;D Activities or Patent</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wage Tax: Hours spent on R&amp;D activities</td>
<td></td>
</tr>
<tr>
<td><strong>Amount Rate?</strong></td>
<td>PITA (personal enterprises only): € 12,031</td>
<td>50% of the expenditures taken back when a asset is sold</td>
</tr>
<tr>
<td></td>
<td>CIT: Revenues * (5/highest tax rate) (innovation box)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wage Tax: Dependent on multiple factors.</td>
<td></td>
</tr>
<tr>
<td><strong>Available to PE?</strong></td>
<td>Yes</td>
<td>Unknown</td>
</tr>
<tr>
<td><strong>State Aid EU</strong></td>
<td>PITA: General Measure</td>
<td>No State Aid</td>
</tr>
<tr>
<td></td>
<td>CIT: State Aid; but justified (only available for CITA taxpayers; PITA taxpayers don't qualify)</td>
<td></td>
</tr>
<tr>
<td><strong>State Aid WTO</strong></td>
<td>Actionable</td>
<td>Actionable</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Sweden</th>
<th>USA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of incentive</strong></td>
<td>No special incentives, deduction of costs</td>
</tr>
<tr>
<td></td>
<td>No capitalization</td>
</tr>
<tr>
<td><strong>Basis</strong></td>
<td>Qualifying expenditures</td>
</tr>
<tr>
<td><strong>Amount Rate?</strong></td>
<td>Tax Credit: Different rates for different activities.</td>
</tr>
<tr>
<td><strong>Available to PE?</strong></td>
<td>Unknown</td>
</tr>
<tr>
<td><strong>State Aid EU</strong></td>
<td>Unknown</td>
</tr>
<tr>
<td><strong>State Aid</strong></td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>Likely actionable</td>
</tr>
</tbody>
</table>
While the measures in existence exhibit multiple similarities, they are also different in many ways. Of course we should also look at countries outside the EU, which is why this comparison of the different forms of tax incentives also includes those enacted by the USA. The incentives have been tested against both the provisions of the ASCM and the provisions of TFEU article 107. In general, there are four ways of granting tax incentives to taxpayers who carry out R&D activities:

- Granting a tax credit.
- Allowing a deduction on the taxable income.
- Allowing the expenditures to be deducted in the year they were borne, when in normal situations they would have to be capitalized.
- Allowing a reduction on the taxable base of the revenues related to intangible assets created with R&D activities.

The main incentive in the Dutch system can be found in the corporate income tax system. The innovation box regime allows for a reduced tax rate of 5 percent (achieved by a reduction of the taxable base) on revenues related to patents and qualifying R&D activities. As said before the innovation box regime is only available to businesses taxed via the corporate income tax, a business taxed via the personal income tax cannot opt for the regime. This difference has been point of discussion in parliament and criticized in literature. The response of the state secretary was that a business can always be incorporated and choose to be taxed via the corporate income tax. Not a very convincing argument and it does not justify treating the same type of income disproportionately different.

In the personal income tax system, which taxes businesses and certain partnerships, there is a deduction available on the profit when the business owner himself conducts R&D activities. When employees conduct qualifying activities, a credit is granted on the wage tax that is due. Moreover, the business has the option to capitalize the expenditures related to the creation of an intangible asset, but this is not required.

**Belgium**

The Belgians have a system that is quite similar to that of the Netherlands when it comes to the taxation of revenues related to R&D, but in this case only revenues attributable to patents qualify. The scheme allows for a deduction on the taxable base of 80 percent. When conducting R&D activities, the expenditures related to these activities have to be capitalized. However, a deduction on the taxable

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118 Article 12b of the Dutch corporate income tax act
119 See WFR 2010/146
120 Article 3.77 of the Dutch personal income tax act
121 Chapter VIII of the Law for the deduction on payable wage tax and social security premiums (Wet vermindering afdracht loonbelasting en premie voor de volksverzekeringen)
122 Article 3.30(3) of the Dutch personal income tax act
base is granted based on a percentage of the expenditures. The taxpayer can also choose to get a tax credit. Whatever the taxpayer chooses, the actual benefit is the same because the current tax rate is taken into account in calculating the credit. Alternatively the credit can be spread out over the years the asset is depreciated, the tax credit is then based on the depreciation of the assets.

France
The French system allows for immediate deduction of qualifying expenditures. In addition to the deduction of eligible expenditures a tax credit is granted, the amount of which is based on these expenditures. Expenditures for subcontracted R&D activities also qualify provided that the subcontractor is located within the European Union or European Economic Area with which France has concluded a treaty to prevent double taxation. In the past only expenditures related to subcontracted activities carried out in France would qualify, this was deemed incompatible with community law by the ECJ. The tax credit is calculated by taking 30 percent of the expenditures up to €100 million. When the expenditures amount to more than €100 million, the remaining tax credit consists of 5 percent of the expenditures above that amount. In the first two years of eligibility rates, higher rates are applicable. The first year the credit is 50 percent of the expenditures, while in the second year a 40 percent credit applies. When not enough tax is due in any fiscal year the company can carry over the credit to the following year. If however the credit is not entirely used within three years the business can claim the credit in cash. Certain innovative businesses have this claim this money immediately. Because of this possibility the French has all the characteristic of an actual subsidy. The credit in the wage tax for R&D activities in the Netherlands can in comparison never result in a tax claim on the tax authorities.

Austria
In Austria, a donation to an Austrian university is tax deductible, while a donation to foreign universities is not deductible. An infringement procedure has been started concerning the inability to deduct donations to foreign universities. In light of R&D activity expenditures, the Austrian system allows for an 8 percent tax credit or a 25 percent deduction on the taxable income, both of which reflect a percentage of the eligible expenditures. The maximum amount of expenditures taken into account is €100,000 annually.

Hungary
The Hungarian system currently allows for a tax credit and a deduction on taxable income. The base of the tax credit is the salary related to R&D activities and amounts to 10 percent of those expenditures. The deduction is based on eligible expenditures that are directly related to R&D activities. The

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125 Article 244 quarter B of French General Tax Code ("Code général des impôts" – "CGI")
126 Section 108c Income Tax Act Austria
127 Section 4 (4)(4) Income Tax Act Austria / 4 (4)(4a)
system distinguishes two different situations for which different percentages might apply. When the R&D activities are done in-house, the deduction is 100 percent of the eligible expenditures. If however, the R&D is conducted on the premises of a university in the EU or EEA, the deduction is 300 percent of the eligible expenditures. In the past the 200 percent extra deduction was only available when the expenditures were paid to a Hungarian university, but this was deemed incompatible with community law. The eligible expenditures themselves are deductible from the taxable base in the same year, the result of which is that in actuality the deductible amount is twice or four times the amount that was actually spent. The highest percentage has ceiling of 50 HUF (+/- €188.25).

Spain

The Spanish system allows for a deduction on taxable profit of 30 percent of eligible R&D expenditures. However, if any subsidy is received to promote the activity, the expenditures are set to 65 percent of what the normal base would be. When, however, in any year the expenditures are somewhat higher than normal, this creates an excess that is deductible at 50 percent. The excess is calculated by deducting the average expenditures of the previous two years from the current expenditures. With the inclusion of an excess deduction it seems that the Spanish government tries to encourage companies to increase their R&D activities.

Italy

While Italy’s basic system of granting a tax credit is not radically different from the other countries that grant a tax credit, the procedure to receive a credit is worth mentioning. The credit is 10 percent of the eligible expenditures on 15 percent when the R&D was done at a university. Every year, a certain budget is available. The credit is granted in the order the businesses apply for the credit. A certain day in the year is selected on which registration for the credit opens and will remain open until the budget has been fully booked—this is known as a click-day since the Internet is used to apply. In the past this method has meant that the entire budget was spoken for within one minute. In the Netherlands such a system is not used in taxation, however there has been a time when the budget for certain environmental incentives had run out and the incentive was suspended until the next fiscal year. However when applying for a subsidy related to the installation for solar panels in the Netherlands the same system is used. This could result in neighboring business both carrying out the same otherwise qualifying activities with one benefitting from a tax credit and the other not qualifying because he was not on time. A playbook example of in my opinion unjustified unequal treatment.

128 Article 35 of the Spanish Corporate Income Tax
129 This relief was introduced on 29 November 2008, n. 185, converted with modifications into Law 28 January 2009, n. 2, introduced important modifications to this tax relief, that was originally established by art.1, par. 280-283 of L. 27 December 2006, n.296 (Budget Law for 2007) and by the regulation 28 March 2008, n.76 of the two Ministeries of Economic Development and of Economy and Public Finance.
United States of America

For very specific activities, the USA awards the. The regulations that cover the specific credit also tells you the amount of credit you will receive.\textsuperscript{130} Moreover, when the taxpayer incurs research and experimental expenditures, that taxpayer can elect to deduct those expenditures in the year they occur\textsuperscript{131}.

Poland

Apart from normal deductibility of R&D expenditures, the Polish system allows for an additional deduction of 50 percent based on the expenditures.

Germany / Sweden

Both Germany and Sweden do not have a tax credit system, but they do allow expenditures related to R&D activities to be deducted from the taxable base in the year those expenditures were actually paid.

State Aid EU

In some part because of the Lisbon Strategy, none of the tax regimes that we have compared in this part of the paper constitute prohibited state aid as they are deemed justified according to various commission regulations,\textsuperscript{132} This result obtains even though such tax regimes might be selective in a way that is normally not allowed.

State Aid WTO

Most of the incentives are probably actionable subsidies when tested against the state aid rules of the ASCM. All of the measures constitute a subsidy under this treaty because selected taxpayers are treated more favorably than normal in their respected tax systems. The incentives are not contingent on export performance and are therefore not prohibited.

Reflection

It is clear that most of the incentives aim to grant relief for R&D activities through a credit or deduction on taxable income. Most governments seem to recognize the uncertainty that the expenses related to R&D activities will actually generate a profit, and want to lessen the monetary risk by granting tax relief based on these expenses. This is also reflected by the fact that most governments allow for immediate deduction of related expenses.

Exceptional are the Dutch and Belgian incentives that also grant relief when it comes to revenues received with either patents or R&D activities. It is because of the before mentioned reasons that I do not think those systems contribute to the furtherance of R&D within the community. The Dutch system was introduced in 2007 but has already been altered several times because it was not particularly popular with taxpayers. I think that that one of the reasons is because when initiating activities related to R&D it is uncertain that the regime can actually be used. Furthermore, both tax systems provide for

\textsuperscript{130} I.R.C. § 41 (2010)
\textsuperscript{131} I.R.C. § 174 (2010)
incentives based on the expenses and based on the profits, which increases difference in treatment with other activities.

There is great disparity in the percentages that determine the relief granted, but this has to be seen in light of the entire tax system. This is especially true when it comes to countries that grant an exemption. In such cases the relative relief is then linked to the applicable tax rate in that country.

The chances of anyone getting into trouble when it comes to EU state aid law are small because of the Lisbon Strategy and the regulations issued by the Commission. The USA is of course not bound by these EU regulations, but if they were, they do not appear to be in breach of such regulations. WTO-law and the ASCM state aid regulations are applicable to everyone because both the EU countries and the USA are members of the WTO. While all of the incentives can be regarded as actionable, the chances of anyone starting a procedure are small because (as we have seen) most countries have similar incentives or are at least providing relief with the same objective.

While the incentives are generally allowed under the community state aid rules, community law might actually cause problems in terms of equality. As an example of this I refer to both the situation in France and in Hungary. Based on community law these countries let lose the territorial restrictions in their national tax legislation to allow foreign expenses to also qualify for the incentive. If, for example, a French company has outsourced some research and development activities to a qualifying country and this country also has an incentive when it comes the R&D the same activities are incentivized twice. Coordination or harmonization is desirable in this area. Limiting qualifying activities to in-house R&D activities could do this.

As can be seen in the matrix in most if not all countries the R&D incentives are also granted to the permanent establishment of a company in member states. So permanent establishments are treated equal by the host country in relation to their resident competitors. This equal treatment could however be negated by the way the country of residence relieves double taxation. I will discuss this problem in the next section of the analysis.

Prevention of double taxation in relation to special income tax regimes

As seen in the previous sections of this chapter every country has tax incentives. However no two countries have exactly the same incentives embedded within their tax system. Unequal treatment within the community may arise because of the way the state of residence offers relief in the prevention of double taxation. In most cases the way the relief is given has been determined in a treaty between the state of residence of a taxpayer and the state in which the taxpayer derives income. It is also possible that there is no such treaty; the taxpayer then has to rely on domestic tax law to provide for relief. In the matrix below the information is displayed about the manner in which tax relief is given in case a company has permanent establishment in the Netherlands. The Netherlands has concluded
treaties with all of the participating countries so the treatment in the treaty is leading in these cases. However also listed are the ways the participating countries offer relief when a taxpayer derives income via a permanent establishment.\(^{133}\)

<table>
<thead>
<tr>
<th></th>
<th>Treaty NL</th>
<th>Unilateral</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>Exemption with progression</td>
<td>Ordinary Tax Credit</td>
</tr>
<tr>
<td>Poland</td>
<td>Ordinary Tax credit</td>
<td>Ordinary Tax Credit</td>
</tr>
<tr>
<td>Hungary</td>
<td>Ordinary Tax credit</td>
<td>Ordinary Tax Credit (max 90% + may not exceed Hungarian tax on income)</td>
</tr>
<tr>
<td>Sweden</td>
<td>Ordinary Tax credit</td>
<td>Ordinary Tax Credit (limited by domestic tax attributable to foreign income; unused credit can be carried forward)</td>
</tr>
<tr>
<td>France</td>
<td>Exemption</td>
<td>Exemption (some limitations apply)</td>
</tr>
<tr>
<td>Spain</td>
<td>Exemption with progression</td>
<td>Exemption or Ordinary Tax Credit depending on fulfillment of criteria</td>
</tr>
<tr>
<td>Italy</td>
<td>Ordinary Tax Credit</td>
<td>Ordinary Tax Credit</td>
</tr>
<tr>
<td>Austria</td>
<td>Exemption with progression</td>
<td>Exemption with progression</td>
</tr>
<tr>
<td>Belgium</td>
<td>Exemption with progression</td>
<td>No unilateral relief</td>
</tr>
<tr>
<td>USA</td>
<td>Credit system</td>
<td>Credit system (very specific)</td>
</tr>
</tbody>
</table>

The conclusion from this limited survey is that over half of the participating countries have chosen a way of relieving double taxation that promotes capital and labor import neutrality. The only country that seems fully dedicated to this principle is France because it objectively exempts income from the domestic tax base, not taking progression in the tax rates into account. Most countries however, like the Netherlands, tax the worldwide income and then calculate the exemption with based on the amount attributable to the foreign permanent establishment.

A lot of countries still adhere to the capital export neutrality system by granting a tax credit for the foreign tax up until the tax actually paid or the tax that is attributable to the profits related to the permanent establishment. In doing this there is very real possibility that incentives given to a permanent establishment in the Netherlands, and I have already concluded at the beginning of this thesis that permanent establishments are entitled to all of them, will be nullified in whole or in part when country of residence doesn’t have a similar incentive. At the moment the Dutch legislation is riddled with incentives that try to bring businesses to invest in environmentally friendly assets. None of the participating countries, with the exception of Spain, have incentives with the same objective. When, for example, the permanent establishment in the Netherlands of an Italian company invests heavily into qualifying assets, that permanent establishment can claim such an investment deduction. In the respected year the tax due of that permanent establishment might be will be very little because of the deduction. On the Italian side the investment deduction will not be taken into account when calculation the taxation on the worldwide income. Because of the first limit the tax credit granted by the Ital-

\(^{133}\) Source of the unilateral way of the prevention of double taxation are the country surveys the respected country that can be found on IBFG.org. Treaty relief was distilled from the treaty the respected country has concluded with the Netherlands.
ian government will be equal to tax due in the Netherlands or less when the worldwide income was disappointing.

Before there can be a functioning internal marker within the European Union a country has to be able to function in every domestic market on equal terms. This means that preferably foreign source income derived via a permanent establishment is completely exempt from taxation, like the French system.
Chapter 5: Conclusions

With respect to the Dutch system I can conclude that while there are many special income tax regimes for businesses currently in existence, conflicts with the principle of equality in the Dutch constitution are very unlikely. As already stated chapter two the only way to test tax legislation to the principle of equality, and nullify that legislation, would be through the direct influence of treaties concluded by the Netherlands. Since the interpretation to these treaties has resulted in a wide margin of appreciation for the tax legislator, the national courts will generally allow difference in treatment between taxpayers, even if this difference is slightly disproportionate.

All of the Dutch pieces of legislation discussed are available to resident and non-resident companies so there are no issues when it comes to the non-discrimination provision in the OECD model tax convention and consequently in tax treaties that were based on that convention. This provision does however not prevent that certain incentives will be nullified because a country has chosen for a system of capital export neutrality (granting a tax credit). To promote equal competition within the European Union the commission should issue a directive that moves the member states to alter their treaty policy to include a policy of capital import neutrality, preferably by objectively exempting income generated by permanent establishment. Even better would be a commission regulation that governs taxing rights within the European Union. This piece of legislation would then also govern the way the double taxation is prevented. For this piece of legislation to function there first has to be a general framework that unifies, for example, tax treatment of different types of entities (transparent / non transparent) and type of remuneration. Politically this is, however, probably not feasible at this time.

WTO state aid legislation is not of very great importance to the Netherlands. There has only been one case brought on in history that had to do with taxation that involved the Netherlands\textsuperscript{134}, the case had no influence on Dutch tax legislation. The lack of cases concerning tax law seems mainly due to the fact that most countries have at least actionable tax measures themselves. Their fear would of course be that these measures would then be targeted. So while there are a number of incentives in the Dutch tax legislation that can be qualified as actionable, chances of them actually being disputed are very small. This is not true when it comes to EU state aid provisions. A number of the currently existing measures in Dutch tax law can be considered prohibited; especially the exemption of certain government owned activities and investment companies and possibly pension funds.

In trying to conform with EU law and opening up certain investment expenditures also for expense paid out to other member states countries may have inadvertently caused inequality while trying to treat all expenses the same with respect to the domestic incentive. I am referring to the possibility to be granted an incentive multiple times in different countries for the same activity. This is a problem that should be dealt with within the European Union by way of positive integration, since I can con-

\textsuperscript{134} Case ds128 of 5 may 1998 (brought on by the USA)
clude that negative integration might actually be opening up these possibilities. This is especially true with respect to incentives granted related to R&D activities. The trend in granting incentives for R&D activities was fueled by the Lisbon strategy. The intention was to compete as one European market with the rest of the world when it comes to technology and innovation. With the great disparity in existence at this moment we are still competing amongst ourselves. That competition can have a harmonizing effect, all be it regulated by the commission, can be seen in the widespread implementation of similar tonnage tax regimes. The R&D sector is however a very different then the shipping industry, generally moving much faster, and therefore maybe not suitable for the slow-paced harmonizing effect of competition. I therefore conclude that the best way of harmonizing the incentives is to issue a directive regulating the ways in which countries should stimulate R&D activities. In my opinion this aid should be targeted with relation to the expenditures, so regimes like the innovation box would have to disappear (and thereby also removing unequal treatment from Dutch tax law).

In trying to answer the research question stated at the beginning of this thesis I have found that special income tax regimes are for the most part there to aid taxpayers or promote certain investments or behavior. The way in which the aid is granted is of great importance when doing this. The Dutch system is in that way no different then any of the other Eucotax countries, all have special regimes that are tailored to their own social and or political needs.

When looking at income tax regimes that are in place to aid certain groups of taxpayers, like farmers, there has to be good reason to lessen the tax burden for this group. I have concluded that in case of farmers the way the Dutch tax system grants aid to these groups might not be the best way. Another example of difference in tax treatment is the shipping sector. From the viewpoint of equality and the premise the business are and should be taxed on the total tax during their lifetime the tonnage tax system should be abolished. When, however, a regime was implemented because of entirely non-fiscal reasons fiscal and equality arguments are acknowledged but easily put aside.

The same goes for the special regimes in existence to promote certain behavior, in my opinion the real tax incentives. These incentives utilize fiscal law to redistribute money by not levying it in the first place. As I have said before the Dutch government every year includes with the budget a list of tax expenditures. So the Dutch tax system has two functions collection government funds while at the same time distributing them.

Should special regimes remain in existence? When looked at from a state aid point of view they can when they are not selective and or harmful to other states. When looked at from the non-discrimination point of view they can when no distinction is made between residents and non-residents. And finally constitutionally they can because the Dutch courts are bound by the judgment of a higher-ranking court stating that the tax legislator has a wide margin of appreciation in creating tax law and are prohibited to test tax laws against the principle of equality against the Dutch constitution. If special regimes and especially tax incentives should remain is dependent on the question
whether or not tax legislation should be used to set out government policy. As this question has not been discussed in either Sweden or this paper no well-founded answer can be given.
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