THE PRINCIPLE OF EQUALITY IN TAXATION
(CONSTITUTIONAL LAW, EUROPEAN LAW, WTO LAW, AND TAX TREATIES)

On special income tax regimes for individuals

MASTER THESIS FISCAL ECONOMICS

In combination with the EUCOTAX WINTERCOURSE 2009/2010

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The best way to become acquainted with a subject is to write a book about it.

“Benjamin Disraeli”
Preface

This Master Thesis is written as a more in depth study of the Master Fiscal economics at Tilburg University. Part of this Master Thesis is based on the EUCOTAX Wintercourse 2009/2010 which was held in Uppsala, Sweden this year from 8th of April to 17th of April. This year’s theme was the Principle of Equality in taxation. I was happily to hear, in the first place that I could participate in this project and secondly that I could write about my preferred sub-theme namely: the Principle of Equality and Special Income Tax Regimes for Individuals.

Writing this thesis was a big learning process because never before I wrote such extensively work. I would to thank in this preface a few people who made it possible to write this Master thesis and with who I had great moments in Uppsalan during the Wintercourse.

First of all my supervisor Daniël Smit who kept me gave me guidance and supportive criticism on my work. Next to that I thank the other supervisors, Cees Peters and Hans-Peter Peeters for their support during our Wintercourse preparation meetings. Next to that I like to thank Suzanne Peraino for giving us a good advice during the meeting about our English language use. Furthermore I like to thank Yvonne van Hapert for taking care of the organisational part of before, during and after the Wintercourse.

I wrote most of this thesis in Rotterdam at Ernst & Young. I would to the Human Capital department for giving me the opportunity to work at their office. In special I like to thank Tom Dubbelman and Rianne van Halem-van der Linden. Tom for being my room-mate to whom I could ask and who was always happy discuss my researched topics extensively and Rianne for checking closely my progress and giving useful tips with respect to content and style.

As promoters of the Wintercourse I like to thank Professor dr. Peter Essers and Professor mr. Eric Kemmeren for all their enthusiastic effort they put into this project. A special thanks goes out to Eric Kemmeren and Yvonne van Hapert for organizing a possibility to travel home for all participants of the Wintercourse as a result of the cancelation of flight thanks to the Icelandic volcano Eyjafjallajökull. As a result our trip took longer than expected which I do not not regret spending more time with other Wintercourse participants who made it an unforgettable experience. I would thank the my group of sub-theme 4 for having a good cooperation and fun in finishing a joint paper. Lastly I would to thank Margriet, Mostafa, Peter, Rosanne and Sandra for being the Tilburg University Wintercourse participants of this year with who I had a great time in Tilburg and Uppsala and who helped me in completing my thesis and hopefully also my Master Fiscal Economics.
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I. Abbreviations

WTO - World Trade Organisation
TFEU - Treaty on the Functioning of the European Union
ECJ - European Court of Justice
OECD - Organisation for Economic Co-operation and Development
OECD MC - OECD Model Convention
GATT - General Agreement on Tariffs and Trade
ASCM - Agreement on Subsidies and Countervailing Measures
ICCPR - International Covenant on Civil and Political Rights
ECHR - European Convention on Human Rights

II. Most used Translations

| Dutch Wage Tax Act 1964 | - | Wet op de Loonbelasting 1964 |
| Implement Regulation Wage Tax 2001 | - | Uitvoeringregeling loonbelasting 2001 |
| Implement Order Wage Tax 1965 | - | Uitvoeringsbesluit Loonbelasting 1965 |
| Resolution Avoidance of Double Taxation | - | Besluit Voorkoming Dubbele Belasting 2001 |
| General Tax Act | - | Algemene wet inzake Rijksbelastingen |
| Acts of Parliament | - | Kamerstukken |
1. Introduction

In this thesis I will give a description of how individuals are taxed in the Netherlands with an emphasis on the special income tax regimes. The thesis will generally follow the questionnaire made for the EUCOTAX\textsuperscript{1} Wintercourse 2009/2010. The theme of this year is “The Principle of Equality in taxation”. This thesis will deal with the special income tax regimes for individuals found in Dutch tax legislation.

Special income tax regimes are regimes that make exceptions to the common income tax regime, hence the word special. These exceptions may create more equality because it lacks for instance in the common income tax regime or it can create inequality compared to the common income tax regime; either the equality or the inequality that exists can be created on or not on purpose. I will research the equality in these special income tax regimes and if the right justifications are present for potential inequalities that may occur. Inequalities that occur are justified if there is a solid argument for a different treatment.

My research question will be:

“Do the special income tax regimes for individuals in the Netherlands comply with the Principle of Equality in national law, European law, WTO law and tax treaties, and how can a balance between equality and a right justification for a special income tax regime be found in national law, European law, WTO law and tax treaties?”

To describe the special income tax regimes I first need to outline the Principle of Equality laid down in the personal income tax regime in the Netherlands. When the legislator started with formulating the new Personal Income Tax Act for 2001 it gave the legislator the opportunity to reconsider and also confirm the different objectives and values which it wanted to reach and incorporate this in a new tax law. Besides economic objectives of improving economic structure, employment and competitive position of the Netherlands it also formulated that the new tax act had to be within the framework of a well-balanced and fair distribution of the tax burden among tax payers\textsuperscript{2} which indicates that the Principle of Equality plays a significant role.

Personal income tax is based on the principle of ability to pay.\textsuperscript{3} The principle foresees in individual equal and for the individual fair treatment within the system. Equality works through from

\begin{footnotes}
\footnotetext{1}{European Universities Cooperating on Taxes, Wintercourse week held from 8th till 17th of April 2010 in Uppsala, Sweden}
\end{footnotes}
the level of the system to the individual as the ability to pay principle moreover foresees on the level of the individual itself.

Ability to pay principle creates justification for an unequal treatment of tax payers by the personal income tax act as it makes distinction between strong and weak tax payers. This justification is generally seen as a reflection of the term solidarity. Solidarity puts equality for taxation in a social economic context. Therefore the Principle of Equality needs to be treated as a social economic value because the strongly incorporated ability to pay principle projects equality as such. Inequality between tax payers compared at a social level gives the government the justification to create inequalities on a socially or economically level unequal tax payer for the purpose to create more equality with other tax payers.

The Principle of Equality can be laid down in different national and international laws. At national level the principle is laid down in the constitution and gives directions towards lower law. Internationally I will describe the equality principle founded as basics in EU-law and WTO-law. In EU law the four freedoms (free of movement of persons, goods, services and capital) play a role in expressing the Principle of Equality through the European Union. I will test if there might be a situation in one of the special income tax regimes which may violate or is in conflict with European Law. Furthermore I will have a quick look at the treaties under the World Trade Organisation (WTO) which foresee mostly on free movement of goods without obstruction and is signed by 153 countries worldwide. Finally I will take bilateral tax treaties in consideration which foresee in preventing double (non)-taxation, these treaties are also bases on equality amongst tax payers and countries.

I will go into the special income tax regimes one by one. The first special income regime discussed is the exit taxes. I will describe and discuss the personal exit taxes in the Netherlands when emigrating to another country. I will research if the Dutch exit tax is allowed under the European Union Treaty by asking a reservation on the tax burden by the Netherlands. The next discussion will be about taxation of excessive income which was introduced in 2009 by creating a new taxation moment on bonuses and other income that exceeds a certain limit. Unfortunately this special income tax regime is not discussed at the EUCOTAX Wintercourse. This special income tax regime is still in the middle of a discussion and it is not clear yet how many people it will concern. An already longer existing tax regime in the Netherlands is the so-called 30% facility which gives expatriates a 30% tax-free reimbursement of their total income. The regime is one of the strengths the Dutch tax system has to offer. A description and an evaluation will be given with the reasons of introduction and

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preservation. Further I will look for the justifications which can be found within the Dutch and European tax law.

Furthermore the Artists and Sportsmen regime for non-resident artists and sportsmen will be discussed. The regime results in non taxation in the Netherlands when coming from a double tax treaty country which in some cases can result in double non taxation in both countries. The creation of situations of double-non-taxation is in my opinion is undesirable. In the last chapter I will have a detailed look at the deductions, allowances and exemptions the Dutch personal income tax regimes has to offer such as the treatment of the primary residence, treatment of special investments, child allowance and so forth. Describing them and evaluating them on the Principle of Equality against national and international criteria will result in defining if such special treatments are acceptable or in violation against the Principle of Equality.

All previous mentioned regimes are compared at the EUCOTAX Wintercourse. This comparative law case is evaluated in a separate chapter. In this chapter I try to find similarities and differences in approach and execution of the special income tax regimes in the EUCOTAX Wintercourse countries. These evaluations will also be compared and tested against the Principle of Equality described in chapter 2.
2. Personal income tax in the Netherlands and the Principle of Equality

In this chapter I will give a descriptive overview of the Dutch Personal Income Tax Act and in which proportion it stands to the Principle of Equality. First I will go into detail on the main characteristics of the personal income tax such as the distribution on how the taxes are levied and what kind of facilities it offers. The description and evaluation of the regimes and facilities in the personal income tax will be done in detail further in this thesis. Furthermore I will describe how the Principle of Equality is founded in the Dutch constitution and tax system. Finally I will outline the Principle of Equality in international law such as EU-law, tax treaties and WTO-law in this chapter.

2.1 General overview of the Dutch personal income tax

The current Dutch Personal Income Tax Act came into force in 2001 as a replacement of the Personal Income Tax Act 1964. The Personal Income Tax Act foresees in taxation of all individuals who are resident of the Netherlands or non-residents who have certain specific sources of income in the Netherlands. The Personal Income Tax Act distinguishes different types of sources and subsequently levies different tax rates on certain sources. Three categories of sources of income are distinguished. Those so-called boxes have own separate rules concerning the taxable amount, tax rate and exemptions. Box I covers income from employment, freelance labour and personal enterprise profits with progressive tax rates up to 52%. Box 2 covers income from substantial interest with a flat tax rate of 25%. Finally Box III covers income from investments and savings by taxing by a net capital assets tax. A flat rate of 30% over a deemed 4% income of the total capital is levied which results in a 1.2% effective tax burden.

With this major difference in tax burden, up to 52% for labour or personal enterprise income in Box I versus only 1.2% effective for investments and savings in Box III, it is difficult to explain the fairness of the system and especially the difference in tax rates in my opinion for the different categories. A negative

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7 Article 2.1 Dutch Personal Income Tax Act 2001
following circumstance is created by attracting and creating fiscal behaviour towards the lower tax rates in Box III.  

2.1.1 Income from Labour

In Box I generally active income of individuals is covered. Income from employment, freelance, self-employment and personal enterprise profits as an entrepreneur. The exception is that primary residence is also taxed here as an active income with the possibility of deduction of mortgage interest. The primary residence regime will be further described in chapter 8.4.

Box I is the only box which has progressive rates. There are 4 brackets up to 52% at an income over € 54,367. The first 2 brackets include 31.15% of social security’s contributions. The income tax rates in those brackets are respectively only 2.3% and 10.8%. This means that the social security contributions in the Netherlands are maximized.

Table tax rates Box I income

<table>
<thead>
<tr>
<th>Income brackets</th>
<th>Tax rate with social contributions</th>
<th>Tax rate without social contributions</th>
</tr>
</thead>
<tbody>
<tr>
<td>€ 0 - € 18.218</td>
<td>33,45%</td>
<td>2,30%</td>
</tr>
<tr>
<td>€ 18.218 – € 32.738</td>
<td>41,95%</td>
<td>10,8%</td>
</tr>
<tr>
<td>€ 32.738 - € 54.367</td>
<td>42%</td>
<td>42%</td>
</tr>
<tr>
<td>€ 54.367 – and above</td>
<td>52%</td>
<td>52%</td>
</tr>
</tbody>
</table>

Income from employment is already taxed in advance through the wage tax. Based on the Wage Tax Act 1964 social security contributions and tax on employment income are withheld by the employer in advance. As a Result, at the end of the fiscal year in principle most of the social security contributions and tax are already fulfilled by the tax payer. This ensures that the government receives most of the taxes accountable. Taxation of employment income is described in detail in the wage tax act such as which allowances from the employer are taxable or not. Examples of tax free allowances from employment are expenses by employee related to his function which is subjectively judged by the tax authorities, a connection between expenses and function needs to be proved. Further connected costs concerning travel compensation for public transport, work clothes, study costs are also tax free. More examples can be found in chapter 8.

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10 Article 2.10 Dutch Personal Income Tax Act 2001
Income which is not from employment or business activities are in the Box I category other activities. Freelance work, compensations and other incidental income fall in this category. Another element that falls in this category are the anti abuse measures. By anti-abuse measures the government wants to avoid constructions which endanger a well balanced tax system. Because the differences of tax rates between the boxes people tend to create constructions to have their income taxed in other boxes then box I, especially tendency towards Box III. One of the measures is that active management of capital and investments can lead to taxation in Box I if the tax payer is exceeding the regular management activity on capital and investments and clearly pursues a profit that exceeds normal results. It will then be seen as income from labour and thus be taxed in Box I. Furthermore the anti-abuse measures intend to prevent that a tax payer gets taxed at a low tax rate and simultaneously claims over the same object a deduction at a high tax rate. This goes as far as related persons, such as family members or housemates involved, ensuring that there will not be an undesirable advantage for tax payers which can endanger a well balanced system. This is mostly concerning capital elements and will therefore be explained in chapter 2.1.2.

In the personal income tax entrepreneurs are also taxed. In most cases this concerns entrepreneurs with personal enterprises which are transparent. Larger businesses are generally formed in an entity to avoid direct liability. For tax-purposes the corporate income tax is more beneficial because of a lower tax rate. Entrepreneurs have within the personal income tax facilities available that help and support them in their business practice. With these facilities the government wants to stimulate entrepreneurship and make businesses in the personal income tax equal to businesses in corporate tax. Such facilities can be investments deductions which allow the entrepreneur to deduct its investment from his profit; and the opportunity to writing down arbitrary on certain investments such as environmental investments for example.

A common self-employment deduction available for entrepreneurs is the possibility to create a pension right. Further the personal income tax creates opportunities to move the business of an entrepreneur into an entity without end taxation on the capital built up through the years. Rules of treating investments and creating reserves and provisions are also laid down in the personal income tax act. Such as a repay of the investment deduction by early transfer or the investment before written down and requirements for which a reservation or provision may be made.

The personal income tax tries to equal the position of the entrepreneur with a personal enterprise with the entrepreneur with a business through an entity. The 25% tax rate of income from substantial interest in combination with the 20% to 25,5% corporate tax rate gives even with all the facilities for

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11 Article 3.90 Dutch Personal Income Tax Act 2001
12 Supreme Court, 9 October 2009, nr. 43.035, argument 3.3
the entrepreneur with a business in the personal income tax a disadvantage due to a higher tax burden. To tackle the differences in tax rates between corporate tax and the personal income tax entrepreneurs will get a 12% tax-profit exemption for income from business profits. The government strives towards a neutral taxation of businesses in the personal income tax and the corporate tax so that the choice of having a business as a transparent entity or entity liable for corporate income tax will not be driven by taxation motives.

To qualify as an entrepreneur there needs to be a business and that business needs to be run for the entrepreneur and the entrepreneur is liable for all commitments directly. Furthermore to receive certain facilities there is a working-hour criterion, which means that an entrepreneur needs to work for the businesses for at least 1225 hours a year. The judgement and facilitation of all regimes for the entrepreneur will be judged as total of all his business activities. I will not describe the position of businesses extensively in the personal income tax further in this thesis, only when relevant to special income tax regimes for individuals.

Periodic payments such as pensions are related to active income such as labour. The pension-contributions paid by the employer are tax free and the employee part is deductible, resulting in a pension entitlement which is not taxed in the present but taxed upon payout by time of the pension and thus seen as income from labour activity.

A last note about an important deduction is the possibility of loss compensation that overlooks all categories in Box I. It is possible to carry negative income 3 years back and carry 9 years forward with profit to other years when it is not possible to deduct in the current year. There is no possibility to compensate negative income with positive income from other boxes in principle.

### 2.1.2 Income from capital

Income from capital is in principle taxed at a lower rate than active income such as labour. However there are some situations that capital is also taxed at the progressive rates of Box I. We have seen that pensions are taxed in Box I because they are related to labour income. Annuities can fall under the Box I regime but can also in some cases fall under the net capital assets regime in Box III, this depends on what kind of type the annuity is, annuities concerning a form of pension or disability insurance will be taxed in Box I. Two situations can occur and are well balanced when falling in one of the regimes. The annuity will always stay in the same regime, so contributions will be deductible in Box I and so if the annuity is paid out it will be taxed under the Box I regime. An annuity in Box III

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13 Article 3.79a Dutch Personal Income Tax Act 2001
14 Article 3.4 Dutch Personal Income Tax Act 2001
15 Article 3.6 Dutch Personal Income Tax Act 2001
16 Article 3.150 Dutch Personal Income Tax Act 2001
will always be taxed when contributing, because of the net capital assets taxation over the current value of the annuity. Opposite of this the annuity payout will not be taxed. Both situations will result in taxation over the annuity capital.

Box II mainly covers income from substantial interest (5% or more) of shares or votes in a company in or outside the Netherlands. Capital gains and as well dividends are taxed at a flat rate of 25%. To determine if there is a 5% interest or more connected people such as spouses, fiscal partners, parents and children are also taken into account. The Netherlands has a classical system concerning taxing corporate and personal income. There is no direct crediting which occurs in a schedular system. However with the set flat rate of 25% for income of substantial interest, the legislator seems to take into account the corporate tax rate. When this regulation was first introduced in 1997 and later almost untouched adopt into the new Personal Income Tax Act of 2001 the corporate tax rate was 35%. With the 25% flat rate in Box II, the total tax burden would be effective 51.25%. This comes close towards the 52% tax rate from income from employment, which makes income from employment and income from substantial interest in a comparable balance in tax burden. However in the meantime the corporate tax rate has decreased over time due to the European tax competition. The current corporate tax rates are 20% for the first € 200,000 and 25.5% for above. Given that the personal income tax rates did not change in the meantime, I can conclude that the inequality which the legislator seemed to prevent is back and that the current tax system throws his schedular characteristics overboard.

Deductions that can be made in Box II are costs made for the acquisition the substantial interest and the costs of holding them, so interest on the loan for obtaining the interest can be deducted. Note that tax on dividends is not tax deductable as costs. Losses made on substantial interest can be credited only with profits from Box II. Like Box I, the possibility to credit losses with other years is present here as well, however in Box II there is only the possibility for 1 year carry back but still 9 years carry forward.

The last Box consists of income from investments and savings. In the so-called box III, a net capital assets tax is applicable. However there is a deemed income rate of 4% of the total capital and taxed at a flat rate of 30%. Effective this results in a tax burden of 1.2% of the total capital present in Box III. Furthermore there is a tax free base of € 20,661 and it is not possible to take losses into account in together with this net capital assets taxation. The legislator did deliberately not choose for a capital gain taxation system for income from investments. Arguments used were that a net capital

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18 “Nota werken aan winst”, Acts of Parliament II 2004/05, 30107, nr. 2 p. 15
assets tax creates a broader tax base, that it works better against fiscal driven constructions, that it
gives a better competitive position internationally because of mobility of capital and that it has a lower
administrative burden then capital gain taxation\textsuperscript{20}.

Taxation through a net capital assets tax is not in line with the general idea of the personal income
tax which taxes sources of income which is the base for taxation in the first two boxes.\textsuperscript{21} Together
with the low tax burden on investments and savings in comparison to box II income of substantial
interest, which can for example also be an investment with the only difference the 5% substantial
interest limit. It creates an inequality among tax payers. The person who gets a revenue of 3% within a
year on his capital will be higher taxed effectively then the person who had 5% revenue in a year on
his capital. It is obvious that the last person gets an advantage, resulting in a degressive tax burden\textsuperscript{22}. It
seems that practical issues have priority above the inequalities arising through this system of taxation
by the legislator.\textsuperscript{23}

There are some anti-abuse measures which move capital elements and thus its income that it will
generate to Box I to avoid abuse and undesired situations. One of the measures is the so called “ter
beschikkingsstellingsregeling”\textsuperscript{24}, it is anti abuse measure to prevent that capital elements are made
available for the same tax payer or a related person such as family members and housemates. A
misbalance is created in by taxing the benefits in the attractive regime of Box III and deducting the
costs against the high rates of Box I.

\textit{Illustrative example.}

\textit{An entrepreneur privately owns a property and lends this to his own enterprise. If this property is
not lend to his own enterprise or someone who is related to him but to a third party, income generated
from this property such as rent is situated in Box III and taxed with the net capital assets regime.
Meanwhile the enterprise can deduct rent paid from his profit, because rent are costs, and are situated
for the personal enterprise in Box I or for an entity enterprise in Box II. This unbalance is accepted as
long as this unbalance does not fall into one tax payer or related person. Because the entrepreneur
lends his property to his own enterprise the property is by drawn into Box I regime. This results in that
income from his property is taxed at the high progressive rates of box I. It prevented that the
entrepreneur could deduct costs at high rates against having income related to this same capital
element at a relative low rate.}

\textsuperscript{21} Cursus Belastingrecht: Inkomsten Belasting, Kluwer, Deventer, 2007 p 748
Gribnau “Vermogensrendementsheffing” p. 518
\textsuperscript{24} Articles 3.91 and 3.92 Dutch Personal Income Tax Act 2001
If both taxpayers are a 3rd party to each other there is no problem. To avoid that capital transfers occur by granting a difference in treatment of costs and benefits. It is not allowed for individuals who have a certain relation with each other. The anti abuse measure extends even to entities which make capital elements available to an individual in which he or a related person has a substantial interest. By taxing both costs and benefits in the same tax regime the government avoids that one tax payer or a relative will get an advantage over other tax payers which is in opinion of the government more desirable then the disadvantage the tax payer has now in the anti-abuse measure comparable with others who are not in the measure.

Recently a new anti-abuse measure was introduced. It taxes excessive income of individuals due to political pressure this regime was introduced in 2009 more or less as symbolic legislation in my opinion. Criteria are made on what excessive income is. When an individual falls under this regime it can mean that his equity related income goes to the regime of Box I. The discussion whether this is just high taxing of regular earned income is equal and justified is still developing. In chapter 5 I will go further into this special income regime in detail.

2.1.3 Place of residence

A resident of the Netherlands is taxed on his worldwide income. This includes all income earned by the individual wherever it comes from. Taxing worldwide income means that this income has also access to the facilities founded in the personal income tax. A non-resident tax payer is only taxed on his income earned in the Netherlands. A non-resident tax payer does not have access to all facilities offered in the personal income tax, because many facilities are directly connected with an activity in the Netherlands and thus only a limited number of deductions are available. Facilities are accessible if a tax payer meets the requirements of the Schumacker case when having 90% of his income in the Netherlands and if there is no possibility to similar facilities in his country of residence.

The evaluation if someone is a resident of the Netherlands takes place by the evaluation of facts and circumstances. Depending on being present in the Netherlands, having a primary residence and also social factors such as family can be decisive in being a resident or not.

A non-resident tax payer has the possibility to choose for being a fictive resident in the Netherlands; this non-resident must be a resident of a member state of the European Union or a

26 Article Dutch Personal Income Tax Act 2001
27 Article 2.1 and Article 7.1 Dutch Personal Income Tax Act 2001
28 European Court of Justice, 14 February 1995, C-279/93 (Schumacker)
29 Article 4 General Tax Act (AWR)
country with which the Netherlands concluded a treaty for double taxation where an international information exchange is arranged. When chosen the tax payer is treated analogy with the resident tax payer and thus taxed for his world wide income like a resident tax payer.

The pro for the tax payer is that he has access to every facility in the personal income tax act. The con of this possibility is that getting out of this fictive residency can be adversely for the tax payer. When stopping with opting for being a fictive resident means that when still having sources of income in the Netherlands the tax payer needs to pay back all object bound negative income which was deducted in the previous 8 years. Personal bound negative income does not need to paid back because no positive income can be generated in the future such as on objects. The legislator wants to prevent that people opt randomly for the possibility for fiscal reasons and negative income deduction. If there is no income in the Netherlands in the following year that the fictive resident treatment is stopped the provisional tax assessment will be dissolved.

Last must be mentioned that for the specialist in the Netherlands who is applicable for the 30% facility there is a different choice treatment of becoming only a partial fictive resident which excludes Box II and III for worldwide income taxation. The 30% facility will be explained in chapter 6.

2.1.4 General deductions, credits and allowances

Most of the deductions and allowances available in the personal income tax are situated in Box I and III relate to active income elements. Allowances are most of the time dependent on how high a tax payers income is. Income from their partner is also taken into account. The amount of income decides on whether a tax payer has the right for an allowance and if he gets the full allowance or only a certain ratio in proportion of his income. Allowances that are not in the personal income tax act but are directly related to income position of the tax payer are the healthcare, childcare and rent allowance and are part of the social welfare system.

Tax deductions can lower the taxable base of an individual. Deductions are available to everyone who meets the requirements and can be transferred to their fiscal partner or it can mean that only one of the fiscal partners may use a certain credit. First there is the common tax credit which amounts to 1.987 Euro and can also be credited on their fiscal partner income if the tax payer does not have sufficient income. Other tax credits are a credit for labour activity from (self)-employment or being entrepreneur in the personal income tax. Extra credits are available to people who are over 57 years of age. Then there are some credits left which are linked to the tax payers taxable income in combination

30 Article 2.5 Dutch Personal Income Tax Act 2001
31 Article 2.6 Dutch Personal Income Tax Act 2001
of the tax payers’ situation such as credits related to having children in your household to single parent credits. Then there are credits for the disabled and for people who are retired and have a low income. Credits will be discussed and further described one by one in chapter 8.

2.1.5 Statistics concerning personal income tax.

The personal income tax together with the wage-tax which is a withholding tax on income tax is around 40.5 billion Euros and which 29.9% of the total income of the Dutch federal government of 135.5 billion in 2008. This means that it is one of the largest income generators. It produces substantial more income than the corporate tax (18.8 Billion Euros); only value added tax creates a small amount more (42.3 billion Euros) then the personal income tax. Income from substantial interest such as dividends (4 billion Euros) and tax on income from investments and savings (20 million Euros) take a very small amount of the total income of the federal government.32

2.2 The Principle of Equality in the Dutch Constitution

The Principle of Equality is laid down in article 1 of the Dutch constitution. The article pursues equality amongst equal cases. All tax legislation should in principle be in alignment with the constitution and thus aligned with the Principle of Equality. However article 120 of the Dutch constitution gives a prohibition for a judge to test formal legislation from government and parliament against the constitution. Therefore the legislator is the one that is ultimate in testing against the constitution and not the judge. Recently a bill by Member of Parliament Halsema was passed by both chambers of parliament of changing article 120 of the Dutch constitution by excluding the prohibition clause for a judge on certain articles; most articles concern the classical rights, such as article 1 of the constitution.33 Alteration of the constitution needs two different periods of government which means that the bill needs to pass again after the next elections in both chambers, this time with a two-third majority. The first time the bill passed it only went with a slight majority through the senate.34 What will happen in the next period of government is in such a way unclear.

Currently it is possible to test the Principle of Equality by article 94 of the Dutch constitution. This article makes it possible for the Dutch court to test against international treaties. International treaties concluded by the Netherlands are of a higher legal order national legislation. This means that

32 Centraal Bureau voor de Statistiek: Statline Database: Het Rijk; Belastingopbrengsten. Figures used of 2008:
for example the international treaties of ICCPR\textsuperscript{35} and ECHR\textsuperscript{36} can play a role in case law concerning the Principle of Equality. European law is of a higher legal order then Dutch national law.\textsuperscript{37}

Both treaties have the Principle of Equality incorporated in several articles, most important for non-discrimination in taxation is respectively founded in articles 26 and 14. The Supreme Court in the Netherlands confirmed the Principle of Equality through the treaties of ICCPR\textsuperscript{38} and ECHR\textsuperscript{39} and follows their definitions. However it keeps also distance towards the given norms in the treaties and allows the legislator to have some wide margin of discretion towards the Principle of Equality. Even with given that the principle has a legal base through national legislation and international treaties; it is also possible for the court to decide on the Principle of Equality itself without directing back to a legal base laid down in the constitution or treaty because the Principle of Equality is accepted as a norm of its own in society.\textsuperscript{40,41}

2.3 The Principle of Equality in European Law.

For the determination if a special income tax regime is in line with European law, I will test if there might be a situation which maybe violates or is in contrariety with the freedoms of the Treaty on the Functioning of the European Union (TFEU) and the general principles of the European Union. The treaty and jurisprudence from the European Court of Justice (ECJ) will be a starting point for the evaluation and determination of the special income tax regime.

The treatment of taxation of individuals by Member States can be an obstacle or create a violation of one of the freedoms incorporated in the TFEU. The European Union uses non-discrimination rules based on the equality principle as basis to strive for equality within the union by creating non-discriminatory rules such as the general freedoms of movement of persons, goods, services and capital. These freedoms formulate very directly that there may not be any discriminations or restrictions of those freedoms. By this the European Union pursues its goal to create a competitive internal market with no obstacles and with the intention of harmonizing the laws of the Member States for a well functioning European internal market, fiscal law is a good mean to do so\textsuperscript{42} the ECJ plays a guiding role in explaining and interpreting the TFEU. The ECJ cannot change a national legislation but indirectly it can by disagreeing by means of the TFEU, also it motivates the Member States to

\textsuperscript{35} International Covenant on Civil and Political Rights
\textsuperscript{36} European Convention on Human Rights
\textsuperscript{37} European Court of Justice, 5 February 1963, C-26/62 (Gend & Loos)
\textsuperscript{38} HR 27 September 1989, nr. 24.297, possibility to test against ICCPR and ECHR confirming of following their criteria of the Principle of Equality.
\textsuperscript{39} HR 12 July 2002, nr. 36.254, reconfirming the possibility to test against art 26 ICCPR and art 14 ECHR
\textsuperscript{40} R.H. Happe (1996), Drie beginselen van de fiscale rechtsbescherming, p.287, Kluwer, Deventer
\textsuperscript{41} NDFR N10008/14,article by article comments on ECHR, art 14 ECHR, par. 2
uniform or coordinate taxation themselves by pointing them on their responsibilities and the possibility of directives.

In article 18 TFEU the prohibition of discrimination is written down. The discrimination rules are laid down and extended further in the freedoms articles\(^{43}\). For the determination of a violation of one of the freedoms there must be a transnational situation where there is discrimination between comparable cases or an obstruction, which does not have a sound justification. Without a clear or suitable justification there may not be a different treatment or obstruction of any kind. Discrimination is present when a non-resident of a Member State is treated worse than a resident of the Member State and which are both indirect actually the same position with the only difference of being a resident or a non-resident.

ECJ never determined an inequality when it is concerning a discrimination of a national resident compared to a non-resident, but always a non-resident discriminated against a resident taxpayer.\(^{44}\) The ECJ concerns a case of a national resident who does not have any activity or situation present outside its residence state as a purely internal issue also because without having any cross-border situation the national resident has no access to the treaty\(^{45}\). So in fact a Member State is allowed to discriminate its own national residents towards non-residents.

An Obstruction or restriction is an indirect form of discrimination. There does not need to be a direct inequality or different treatment. Obstruction is present when it is more difficult or less attractive to access or obtain for a certain tax situation or measure. This can be for example when a non-resident tax payer needs to meet extra requirements or gets a disproportionate burden due a tax-measure. An Obstruction then leads to that a tax-subject cannot freely use one of the freedoms of the treaty. A discrimination occurs and thus violation of one of the freedoms.

Justifications can allow Member States to make distinctions between tax payers. Justifications are mostly formulated through the ECJ however they can also be found in the TFEU itself, for example article 65 TFEU where is stated that distinguishes may be made between subjects if they are not comparable concerning to capital. The most important justification grounds formulated by the ECJ are the proportionality rule which defines if a measure or law of a member state does not over do its goal, the harmonization/coordination rule which allows a justification if there is no harmonization or coordination at EU level presents for the current case and the common interest rule which tests if the measure taken is a legitimate as common interest to reach its goal.

\(^{43}\) Article 21 (Free movement of citizen), Article 45 (Free movement of labour), Article 49 (Freedom of establishment), Article 56 (Free movement of services), Article 63 (Free movement of Capital) of Treaty of the Functioning of the European Union.

\(^{44}\) Dr. mr. A.W. van der Woude(2000), EG-rechten, discriminaties en belemmeringen, Par. 2, Weekblad Fiscaal Recht 2000/1471

Examples of justifications created by the ECJ which support the common interest of the European Union are measures which support an effective fiscal control, create a coherent system\textsuperscript{46}, eliminate tax-avoidance\textsuperscript{47} and avoid double (non)-taxation\textsuperscript{48}. In the treaty of the European Community, the predecessor of the TFEU, article 293 stated directly that Member States have the obligation to avoid double taxation. In the TFEU such article is not mentioned anymore. It is not clear why this article is not mentioned anymore in the TFEU.

For the future we might still base on cases decided by ECJ related to this topic. The ECJ stated in the past that the obligation to avoid double taxation is not a direct obligation\textsuperscript{49}; however the obligation is still a common goal of the European Union. As such the TFEU cannot guarantee a basic neutral and purely equal taxation. The ECJ expressed this in the case Schempp\textsuperscript{50} where cross border alimony could not be deducted because there was no taxation in the other state while deduction would be possible if the alimony would be taxed. So a movement of the tax payer within the Union did lead to an obstruction due to the disparities of two tax-systems in this case Austria and Germany, for both national systems he was treated equally. The incoherency can mostly be undone by Member States by harmonization or coordination. Member States can agree together by creating a directive.

The steps to make in determining if a situation is in violation or not with European law are first to determine if the subject has access to one of the freedoms. The subject needs to be a resident of one of the Member States of the European Union. Next to this there needs to be discrimination or obstruction concerning one of the freedoms by an unequal treatment of equal cases or an obstruction for accessing and using one of the freedoms fully.

2.4 The Principle of Equality Tax in Treaties.

Tax treaties are agreements between two countries and so the Principle of Equality is in the beginning an open norm and thus defined by those countries involved. The main purpose of a tax treaty is to avoid double (non)-taxation by dividing the right to tax between the two countries involved. Almost all tax treaties which the Netherlands has concluded are based on the OECD-model convention (OECD MC) treaty. Therefore I will describe and evaluate firstly the special income tax

\textsuperscript{46} European Court of Justice, 11 August 1995, C-80/94 (Wielockx) and, 21 September 1999, C-307/97 (Saint Gobain)
\textsuperscript{47} European Court of Justice, 12 December 2002, C-385/00 (De Groot)
\textsuperscript{48} European Court of Justice, 18 July 2007, C-231/05 (Oy AA)
\textsuperscript{49} Particular stated in: European Court of Justice, 12 May 1998, nr. C-336/96 (Gilly), Later confirmed in: 16 July 2009, nr. C-128/08 (Damseaux)
\textsuperscript{50} European Court of Justice, 12 July 2005, C-403/03, Schempp, line 45, “the Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation”.
regimes based on the OECD MC and then if needed, relevant or remarkable on the individual tax-treaties that exist between the Netherlands and other countries.

The Principle of Equality is reflected in the non-discrimination article 24 OECD MC. The OECD MC commentary on art 24 OECD MC states clearly that the non-discrimination only sees at direct discrimination and not on indirect discrimination created by the treaty. Furthermore article 24 OECD MC prohibits that there will be a discrimination between a purely national situation and an international situation. The main Principle of Equality comes also back here; equal treatment of equal cases both individuals and entities. Article 24(3) OECD MC gives extra definitions of what also need to be considered as equal for the effect of the treaty such as it puts permanent establishments equal to an enterprise in the same state. A permanent establishment needs to be considered as it were a separate enterprise in comparison of an enterprise in the same state.

European law can be explained against tax-treaties by the ECJ, explaining a tax treaty the ECJ will keep international tax law concerning treaties in mind, however the ECJ cannot judge over a tax treaty between states. Still the ECJ wants that tax treaties are in line with European law. The distribution of which state gets to tax what object or subject is the full responsibility of the involving countries itself in which the ECJ will not judge.

If there is a cross-border activity with a state with which the Netherlands does not concluded a tax-treaty yet which can be due to various reasons ranging from that states being considered a tax-heaven till that a state is a developing or unstable state. The Netherlands applies an own resolution which takes only the resident tax payer in the Netherlands in consideration and gives the opportunity to get an ordinary tax credit on foreign income. Furthermore the resolution gives extra facilities for income that resulted from development countries by this the Dutch government supports and gives indirectly development aid. The resolution gives also the calculation methods used by the Netherlands for crediting double taxation in all treaties.

2.5 The Principle of Equality in WTO-law.

The World Trade Organisation comes forward out of international trade agreements. The WTO strives just as the European Union does to an equal trade balance without any obstructions. In the eyes of the WTO every sovereign state is an equal trading partner to each other. Treaties of the WTO

51 European Court of Justice, 26 September 2002, C 324/00 (Lankhorst-Hohorst), Conclusion A-G Micho, par. 80 “Indeed, assuming that such compliance were established, it must still be pointed out that the fact that the rules are consistent with the provisions of the OECD model convention does not also mean that they comply with Article 43 EC. Neither the provisions nor the objectives of the OECD model convention, on the one hand, nor of the EC Treaty, on the other, are in fact the same.”

52 Besluit Voorkoming Dubbele Belasting 2001, Resolution Avoidance Double Taxation

53 Article 6 Besluit Voorkoming Dubbele Belasting 2001, Resolution Avoidance of Double Taxation

54 The place of the WTO in the International Legal Order, 15 June 2008, P. Lamy Director General WTO.
mostly see on the trade of goods and not directly on capital or persons like European law does. The GATT treaty\textsuperscript{55} is the most used and important treaty in WTO-law. It is the bases of ensuring equal trade world-wide between members. Furthermore there are many other (sub) treaties which ensure the goal of the WTO to strive for equal trade. Tax can be an instrument to push an individual in a certain direction; this can be in the form of creating a higher burden or lower the burden with a subsidy.

Equality is found in two principles of WTO which are stated in the main GATT treaty namely in article I; the most favourable nation treatment which means that every trading party of a country has the same equal right. A country may not make differences between trading parties by granting one easier access to trade above the other. The second principle is found in article II; the national treatment principle. It prohibits that internal laws, regulations and taxes limit or support imported or domestic goods. The GATT tries to establish a level playing field for all trade partners. This means that domestic and foreign goods or services need to be on the same level playing field with each other. Also two foreign goods or services from different origin have to be at the same level playing field\textsuperscript{56}.

The ASCM treaty\textsuperscript{57} is a treaty that directly comes from article II of the GATT and foresees in that subsidies or an extra tax burden is not given to specific sectors or companies. It limits the possibility of giving state-aid or limiting foreign goods and services entering the country. It mainly focuses on indirect taxes such as customs at imported goods or subsidies on exported goods because GATT talks about goods and services, income tax at the contrary are not defined as taxation on goods or services mostly but a taxation of income by persons. Discrimination by direct taxes has similar consequences. Direct taxes mostly involve capital that is restricted to move or is extra supported by special tax regimes\textsuperscript{58}. The focus on discrimination by direct taxation concerns internal taxes and regulations that create or effect an unequal trade situation with goods or services from abroad or specific countries\textsuperscript{59}.

Currently the WTO focuses on abolishing and limiting import and export measures by states given through subsidies or taxes. However it allows exceptions for developing countries because seeing them as weak trade-partners which need to be supported, So far for the principle of the WTO that every sovereign state is equal and the most favourable nation treatment. These exceptions are is possible because the WTO is built on consensus and negotiation between member states which results in that in the strictness of the treaties can differ and the evaluation and judgement of measures by

\textsuperscript{55} General Agreement on Tariffs and Trade.
\textsuperscript{56} M. Lang, WTO and Direct Taxation, Kluwerlaw, 2005, p.18
\textsuperscript{57} Agreement on Subsidies and Countervailing Measures
\textsuperscript{58} M. Daly, The WTO and Direct Taxation, WTO, June 2005, p. 1
\textsuperscript{59} M. Lang, WTO and Direct Taxation, Kluwerlaw, 2005, p.19
countries as well. In comparison with the European Union for example the WTO is a less arbitrary; however this does not mean that it cannot be.

The Netherlands does not have any income tax related measures which can violate WTO law currently. In the past the Netherlands had an export reserve for companies in the income tax law which allowed companies to create a reserve from income on exported goods which created a lower tax burden or deferral of taxation. This reserve is abolished in the meantime.

2.6 Personal opinion on the Principle of Equality

Describing and in the end concluding if a special income regime for individuals complies with the principle of equality will be based on universal foundations and my personal thoughts and opinion. In this chapter I will outline my personal opinion about the Principle of Equality.

Equality for me means that every person is in the end treated equally of course, however I know too that not everyone can be compared as equal in the first place. It would be a violation of the equality principle if persons are not distinguished from each other for their personal situation. In no matter what situation a person finds himself it should have the same opportunities and possibilities like every other person. This means that a tax payer should have proper accessibility to tax incentives so that the individual tax payer is not restricted compared to another tax payers. Restrictions may exist, but of course in the point of view of equality it should possibly apply to all tax payers. This would in my opinion create a neutral approach and treatment of different tax payers.

The government has in my opinion an obligation to treat tax payers equally. However not all tax payers can be compared equally. By legislation the government should equalize those differences so that it can tax eventually in an equal and neutral matter. When this equalization is not working out properly, taxation will occur in an unequal matter because those different starting positions of different tax payers have not overcome in the first place which should have.

A tax payer should be able to rely on the government for an equal treatment. This means an equal approach from the government to each individual tax payer. In my opinion this means also transparency of the government concerning taxation and consistency of legislation and implementation of tax legislation towards the tax payer. This would result in a better enforcement of the Principle of Equality overall in my opinion because when legislation is not implemented properly equality can still be violated in real terms.

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60 The place of the WTO in the International Legal Order, 15 June 2008, P. Lamy Director General WTO
The principle of equality is not a principle of its own. It supports but is also supported by other principles such as the ability to pay principle and legal certainty principle. Without these other principles I think the Principle of Equality in taxation cannot be explained properly. The Principle of Equality stands for equal treatment and approach of the tax payer. This means to me that no distinctions or other treatments are allowed or possible if looking basically to the principle. The other principles make the necessary nuances towards the Principle of Equality so that distinctions may be made if of course suitable justifications are used.

The ability to pay principle makes a distinction between tax payers because they actually cannot be compared fully equally if approached via the Principle of Equality. Equal cases should be treated equally as far as their similarity exists. So the dissimilarities should to be solved in a way so that different situations will have the same neutral starting point when applying the Principle of Equality. Equal starting points can be created by giving incentives or creating special regimes for tax payers so that their dissimilarities can be overcome or neutralized. The justification for these incentives and special regimes must basically come forward as an argument from a possible unequal and different position of a tax payer towards another tax payer in my opinion.

In my opinion this is the point where it can possibly go wrong in tax legislation. Tax legislation can fail occasionally in removing the inequality in situations which still result in unequal outcomes when correction is not done enough or overdone. I do understand that it is difficult for the legislator to define an exact equality point where a situation is created where different tax payers can be compared properly with each other.

So a justification must argue that the relevant legislation improves the overall equality. What a sufficient justification is and if it will be the right justification for the matter is mostly shaped by social economic and political viewpoints. Case law has for me the task to take care for a consistent equality principle which is less dependent on social political viewpoints; of course this may change still because society and general beliefs change through time.

Often multiple justifications can be found and used for solving or creating an inequality. As mentioned earlier a justification should give the argument for the infringement. I think however that the less distorting and less proportionate justification should be used when needed. Sometimes the legislator has good intentions but chooses often the easy way which creates a rough effect for the tax payer and sometimes creates a new inequality.

Equality is a sensitive and difficult principle to understand and thus it will fail in some occasions in tax legislation. Different treatments are allowed as far as there are situations which are

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63 R.H. Happe (1996), Drie beginselen van de fiscale rechtsbescherming, Kluwer, Deventer
non-comparable or when right justifications are present which defend and allow a different treatment. Another important issue concerning the Principle of Equality is the consistency of application of the principle. This would generate a clear Principle of Equality because it would be easier to understand by all parties involved how the principle will be interpreted and executed. Furthermore it provides a neutral approach by the tax authority. Subsequently it will also give the tax payer more legal certainty concerning its actions and tax position.

The Principle of Equality for me means an equal treatment of equal tax payers and a neutral taxation when tax payers are not exactly comparable. Key points are the right justifications with non-directly comparable situations. They should have a minimal infringement on the situation. Often the response towards an inequality is not proportionate and overdone so that the justification annuls itself. So the response on a unequal situation should be as minimum as possible to achieve a neutral taxation.
3. Taxation on emigration in the Netherlands

In general countries want to tax all income generated within its territory. Based on the territorial principle a state taxes income generated by a person on his territory, therefore a state like the Netherlands wants to tax income that is generated or related to its territory. Problems occur when gained income cannot be taxed because it is not realized or cashed in yet and it leaves its territory. To avoid that the right to tax will be disappearing and to support a closing and balanced tax system the Netherlands introduced an exit tax on emigration. The Netherlands uses exit taxes in the personal income tax on substantial interest\(^{65}\), profit from personal enterprise\(^{66}\) and on pensions and annuities\(^{67}\). The system the Netherlands uses for substantial interest seems not to give any problem in respect to European and treaty law. However as concerns taxation in respect to pensions and annuities there are some violations and adaptations in exit tax law. Taxation of personal enterprises is still an open field and has no clear direction yet.

3.1 Exit tax on emigration in the Netherlands

If an individual emigrates from the Netherlands to another state he will be taxed in principle over its income resulting from his stay in the Netherlands which is not taxed yet because the Dutch tax system only taxes realisation of income and not for example capital gain on reserves and goodwill. In those situations the government does not want to lose its right to tax.

3.1.1 Exit taxation on substantial interest

Substantial interest consists of income from an entity in which the tax payer has a substantial interest and is situated in Box II. If the tax payer is emigrating normally there will be no realisation of his substantial interest capital. Realisation occurs when transferring or selling the substantial interest which leads to taxation. Without an exit tax the Dutch tax authorities cannot have any claim on the built up capital reserves of a substantial interest in the Netherlands if not concluded in a tax treaty. The territorial principle is the bases for exit taxation\(^ {68}\) in combination with an anti-abuse argument\(^ {69}\) that taxpayers go abroad for a short period of time purely to avoid taxation of the built up benefits. Exit tax on substantial interest will secure in the form of a preserved tax assessment. The taxable amount is

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\(^{65}\) for residents Article 4.16 (1)(h) and non residents article 7.5(7) Dutch Personal Income Tax Act 2001

\(^{66}\) Article 3.60 and 3.61 Dutch Personal Income Tax Act 2001

\(^{67}\) Article 3.83 and 3.133 Dutch Personal Income Tax Act 2001


determined directly before departure from the Netherlands. This preserved tax assessment will be remitted after 10 years on request if the substantial interest is not transferred or sold in the meantime\textsuperscript{70}. The preserved tax assessment will be executed when violating one of the forbidden acts a possible lower value of the substantial interest upon emigration will be taken into account.\textsuperscript{71}

3.1.2 Exit taxation on pensions and annuities

Pensions and annuities claims are not taxed and premiums can be deducted. The idea is that taxation will be on the payments which are paid out in the end. Pensions and annuities are treated similar as substantial interest and is thus valued and getting a preserved tax assessment\textsuperscript{72} just before departure with the similar conditions that the preserved tax assessment will be remitted if not selling, transferring or changing the pension or annuity claim within 10 years. Also here a lower value of the claim after departure will be taken into account\textsuperscript{73}. A difference with the previous is that pension and annuity payments will not be taxed. This is in line with the idea of a welfare state\textsuperscript{74} and special fiscal treatment is a meant to support this idea. Buy-outs or selling the pension or annuity is not in line with the idea of a welfare state and therefore the government sees a reason to tax as a mean of an anti-abuse measure because premiums have always been deducted and furthermore the Netherlands provided for the facilities to build up the pension\textsuperscript{75}. Pensions and annuities are taxed in the resident state based on article 18 OECD MC. If the preserved tax assessment is executed the whole value of the pension or annuity is taxed which might lead to a double taxation in the country of current and former residence. What should be is that the only the parts of the pension or annuity that is clearly build up in the Netherlands should be taxed. These are the deducted and paid premiums, because the remaining value of the pension or annuity is created by investments which can lie all over the world.

3.1.3 Emigration of personal enterprises

Personal enterprises from individuals are situated in Box I. If the personal enterprise of an individual emigrates it will result in exit taxation. The business will be treated if it stopped imaginary; in fact the business does stop existing in the Netherlands but will continue in another state. All income earned in the period the personal enterprise existed in the Netherlands and which is not taxed yet such as hidden reserves and goodwill will be taxable directly without any postponement of taxation on

\textsuperscript{70} Article 25 (8) Tax Collection Law 1990
\textsuperscript{71} Article 26 (5)(a) Tax Collection Law 1990
\textsuperscript{72} Article 26 (3) Tax Collection Law 1990
\textsuperscript{73} Article 26 (3) Tax Collection Law 1990
\textsuperscript{74} Mr M.P.A. Monfrooij, Exitheffingen en EG-recht, een analyse, see chapter III-1
\textsuperscript{75} Acts of Parliament II, 1998/1999, 26727, nr 3 p.49
contrary of previous described situations. Also lower value of the business after departure will not be taken into account. The legislator does not want to use this as anti abuse measure at first but at a closure of all related activities done in the Netherlands which includes all profits over all the years in its territory.76

3.2 European Law

Two important cases from the ECJ are the Lasteyrie du Saillant77 case and the N.-case78 are helping in the determination if the exit taxes of the Netherlands are in violation with the TFEU treaty or not. In Lasteryrie du Saillant it concerned an emigration of a person from France to Belgium. France applied direct exit taxation on the tax payers’ interests in an entity. The ECJ found the French exit tax which is similar to the Dutch did not have the proper justifications and was based on anti abuse measures which limit emigration. In the exit tax strict measures applied in securing the French preserved tax assessment. This made the Dutch government change its legislation on the preserved tax assessment. Before the taxpayer who immigrated had to ask for a preserved tax assessment on his departure and lower values after emigration where not taken into account. Now the preserved tax assessment will be given automatically and lower values are taken into account.

3.2.1. Exit taxation on a substantial interest

The N.-case concerned a person who emigrated with a substantial interest from the Netherlands. The question was if the preserved tax assessment by the Netherlands was in line with European law. ECJ stated that an exit tax on a person with substantial interest in principle violates the freedom of establishment; however the ECJ finds the current construction the Netherlands justified on the grounds of the territorial principle, that a state may tax over income generated on his territory79. As long as the member state does not ask for too many guarantees and as long it does incorporate any possible losses after emigration. The conclusion in the N. Case meant that the Dutch exit tax regarding the preserved tax assessment is allowed in its current form for the substantial interest claim because it already incorporates the possibility of crediting losses.

3.2.2 Exit taxation of pensions and annuities

The main goal of taxation of pensions and annuities is to prevent anti abuse by leaving the country with a unrealized pension or annuities and then come relative shortly back afterwards. Anti-

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76 Mr M.P.A. Monfrooij, Exitheffingen en EG-recht, een analyse, see chapter II-3-b
77 European Court of Justice, 11 March 2004, C-9/02 (Lasteyrie du Saillant)
78 European Court of Justice, 6 September 2006, C-470/04 (N.)
79 European Court of Justice, 6 September 2006, C-470/04 (N.) chapter 46 and 47
abuse measures can only be justified if the measure is specific enough on anti-abuse. If it is possible in another state to buy-out or selling a pension or annuity it does not immediately fall under the qualification of an abuse. It will be an abuse if the individual after his buy-out comes back within a short period of time.\textsuperscript{80} The exit tax in the Netherlands foresees not specific on such cases but has a more general approach. On the argument of an anti abuse measure the regime will fail. The argument of striving for a coherent tax system can maybe be used for a justification. On the one hand the built up of the pension or annuity is not taxed and on the other hand the claim originating from it is taxable.

This would be in line with the territorial principle explained in the N.-case. However the question can be asked if the Netherlands should tax over the whole entitlement of the pension or annuity. Pension and annuity contributions are deductible. Based on the territory principle the country withholds its right to retake the tax deduction given if it loses it right to tax on the pension payment in my opinion.

The appreciation of the entitlement however comes not directly from a certain territory but from investments in different places worldwide\textsuperscript{81}. It is of course not doable to tax at every source of the investment. Therefore in my opinion the current preserved tax assessment is not a direct and a hard measure because it only taxes over the paid premiums, so that the system is in proportionality with the aim pursued by the Netherlands of taxing originated income on its territory and as use as anti abuse measure to prevent undesired behaviour.

3.2.1 Direct taxation on personal enterprises by emigration

There is not a clear answer on the taxation on emigrating personal enterprises. Also here the taxed income is based on the territorial principle and fiscal coherency. The aim of the exit tax is complete the taxation of all the profits made in the Netherlands. The Netherlands sees the movement of a personal enterprise as a suspension of the enterprise, therefore the direct taxation occurs analogue to the direct taxation that occurs when an enterprise suspends permanently. However there is a facility\textsuperscript{82} available in the case that a taxpayer suspends its current personal enterprise and invests the equity from the suspended personal enterprise in a new personal enterprise within 12 months that no direct taxation will occur over the capital gains. This facility is not available for the taxpayer who moves its personal enterprise abroad. It could be said that the personal enterprise in the Netherlands moves into a

\textsuperscript{80} European Court of Justice, 11 March 2004, C-9/02 (Lasteyrie du Saillant) chapter 50 and 51
\textsuperscript{81} See also comment of D.S. Smit, Conserverende aanslag bij emigratie aanmerkelijkbelanghouder geen treaty override; rechtsgevolgen blijven in stand bij strijdigheid met EG-recht, FED 2009/65, Chapter 7
\textsuperscript{82} Article 3.64 Dutch Personal Income Tax Act 2001
new enterprise abroad. This would mean that the Netherlands should give the possibility to move the enterprise without direct taxation abroad.\footnote{See also D.S. Smit and R.C. Smit, De ondernemer in de Nederlandse inkomstenbelasting en het EU-Recht, yet non-published Weekblad Fiscaal Recht Article, Chapter 3.4}

This exit tax misses the preserved tax assessment and therefore the liable tax will be collected immediately after emigration. The missing of the preserved tax assessment condition makes that approval of the exit tax on personal enterprises cannot be made analogical with other exit taxes. The direct collection of the tax assessment makes it compared to the preserved tax assessment not in proportionality and therefore in my opinion the direct taxation is not in line with European law.

### 3.3 Tax treaties

A provision has been made in tax treaties from 1997 onwards after the introduction of the exit tax on substantial interest for the tax claim the Netherlands has. Treaty partners in negotiations for new tax treaties know the existence of the substantial interest exit tax in the Netherlands. It can be stated that treaty partners with treaties before the introduction of the exit taxes were not aware of this one-sided change. Because of implementing the exit tax before emigration the tax treaty will not be applicable in point of view of the Netherlands. The Supreme Court accepted and confirmed this exit taxation for substantial interest in February 2009\footnote{Derived from Mr M.P.A. Monfrooj, Exitheffingen en EG-recht, een analyse, see chapter II-2. Cases of Supreme Court, 20 February 2009, no. 42699, 42701, 42702, 43760}. Income originating from the Netherlands is taxable in the Netherlands based on the treaty\footnote{Article 13 OECD MC} Analogue to the previous, the treaty does not interfere with the exit taxation of personal enterprises, in this case the Netherlands remains to have the right to tax on the elements originated from the Netherlands concerning a personal enterprise and thus does not change the implementation of the tax treaty.

Concerning pensions and annuities the right to tax lies in the state of residence in most treaties. Article 18 OECD MC further states that it does not take in account the place where the pension is built up. This means that the Netherlands loses its claim under a tax treaty.

In recent case law\footnote{Supreme Court, 19 June 2009, no. 43978 and no. 44051} the Supreme Court found the preserved tax assessments on pensions and annuities made in case of emigration in violation with the tax treaty involved. The Netherlands changed the moment of taxation and so it one-sided leaves out the tax treaty by changing its own legislation. This results in giving itself one-sided the right to tax. Supreme Court based its decision on an earlier case\footnote{Supreme Court, 5 September 2003, nr. 37657} where it stated that the reallocation of the definition of income is not allowed and it is a violation against the treaty partner.
The interpretation of a tax treaty by both states must be applicable at the time of the conclusion of the agreement. In older tax treaties this interpretation says that the right to tax on pensions and annuities is for the residence state of the taxpayer. The Netherlands is therefore not allowed to change it in disadvantage of the treaty partner.  

Immediately after the decision of the Supreme Court in June 2009\(^ {89}\), the legislator adapted\(^ {90}\) the law on exit taxation for pensions and annuities by instead of claiming the entitlement of the pension or annuity only claiming the negative income deducted from pensions and annuities\(^ {91}\). This negative income contains the contributions which are deducted in the past. This results in that the Netherlands entitles itself for the contributions paid and not the appreciation which occurred later. Based on the territory principle this seems much more acceptable. The Netherlands only drops part of the claim, but still taxes. However the Netherlands still tries to tax pensions and annuities even now the court decided that the Netherlands plays treaty override with entitling itself the right to tax on pensions and annuities. In both cases it concerned tax treaties from before the introduction of the exit taxes. In new tax treaties the Netherlands tries to build in a clause that foresees in a fully or limited right to tax on pensions and annuities by the state of origin.\(^ {92}\) This way the Netherlands tries to avoid treaty override or and thereby a violation of trust of treaty partners.

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88 See also E.C.C.M. Kemmeren, Exitheffing bij pensioenen: Financien is hardleers, Weekblad Fiscaal Recht 2009/881, Chapter 4
89 Supreme Court, 19 June 2009, no. 43978
91 Article 26 (3) Tax Collection Law 1990
92 For example in treaties with Indonesia 2002, Jordan 2006, Belgium 2001, Poland 2002 or United Kingdom 2008
4. Taxation on stock options

Options can be bought on the stock market. These options will be taxed at the moment of realisation of the option. The profit made upon the option will be liable to tax. The stock option will be qualified as investment and will therefore be taxed in Box III under the net capital assets tax or under Box II if the option qualifies for a substantial interest on realisation of the option.

As an incentive or stimulation for employment activity an employee can receive so-called employee stock options. Stock options are granted to employees with the goal to stimulate their performance and/or binding with the company. This option will be qualified as wage as it comes forth from employment. Unconditional restrictions are mostly placed on stock options to emphasize the binding element. For taxation this results in an unconditional stock option that will not be realised as long as it stays unconditional such as the remittance of the option when the employee quits working for the company before a certain time for example.

From 2005 employee stock options are only taxed upon exercise. Before 2005 the employee stock options was taxed upon the moment the stock option becomes unconditional, so-called tax on vest; however there was a choice available if explicitly was requested to tax upon exercise. Profit was established by a formula if chosen for the option to tax on vest.

Problems can occur when in an internationally situation the other state would tax upon a different moment then in the Netherlands, which can create different valuations and thus double taxation. Most countries have taxation upon exercise which does not create any issues anymore with the moment and thus also validation of the stock-option in comparison with the old regime from before 2005 when there was a possibility to tax on vest in the Netherlands. Employee stock options from before 2005 are treated under the old regime only if was chosen to tax upon vest at that time. If was chosen on exercise at that time the current regime is applicable.

4.1 Current treatment of employee stock options

If all conditions of the stock option are met the option will become unconditional and thus the option can be realised when exercised on that moment. However the Netherlands will only tax when the option is really exercised. All profit created till exercise will be taxed as profit and thus wage.

The employee stock option regime is only applicable on stock options which come forth from employment and have conditions to acquire those. The stock options also need to be from the tax

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93 Used overview in Cursus Belastingrecht, Loonbelasting, Kluwer 2010, chapter 2.2.3-b5
94 Article 36 Wage Tax Act 1969
95 Article 10a Wage Tax Act 1969
withholding company of the employee or from an aligned company\textsuperscript{96}, the employer needs to have or being held by one-third interest in or by the related company. Otherwise it is not an employee stock option by a normal stock option. Normal stock options are taxed on their economically value upon unconditional receive from the employer as wage.

Employee stock options are taxed over their total profit made till exercise. Any costs or contribution by the employee can be taken into account.\textsuperscript{97} However this cannot lead to a negative income.

Any change in conditions or changing of options with regard of a fusion or division of the stock option company does not mean that the options are directly realised\textsuperscript{98}. The claim and the regime can stay valid to avoid that converting stock options lead to taxation in the meantime and that later added profit is left out, however this is mostly arranged in a stock option plan when a fusion or division of the company occurs.

### 4.2 International situations

When employees are sent abroad they could have stock options already. When working abroad the stock option benefit is also related to the employment abroad as performance abroad influences the benefit as well. This means that other states are also getting a claim to tax the stock option and that the Netherlands can have a claim on stock options from employees who are temporally working in the Netherlands.

An important resolution\textsuperscript{99} by the ministry of Finance deals on what and how the Netherlands will tax upon employee stock options regarding tax treaties. A tax treaty does not state how a state should tax but only if a state may tax in a certain situation. The claim of the Netherlands upon an employee stock option remains when the employee exercises its stock option even if he left the Netherlands long before.

Stock options are treated as wage and thus similar articles of article 15 OECD MC in double tax treaties are applicable for regular employees. The claim on the stock option is distributed between states upon the relevant work periods regarding the stock option. The distribution is defined on the period that the stock option was conditional. The unconditional time period is not related to where future employment is exercised. The OECD MC gave a clear example on how the distribution could be settled in their commentary on the article\textsuperscript{100}. OECD MC distributes the right to tax between

\begin{footnotesize}
\begin{enumerate}
\item Article 10a(6) Wage Tax Act 1969
\item Article 10a(2) Wage Tax Act 1969
\item Article 10a(3) Wage Tax Act 1969
\item Ministry of Finance, 11 February 2002, IFZ 2002/40M
\item OECD, 23 August 2004, Cross-border income tax issues arising from employee stock-option plans
\end{enumerate}
\end{footnotesize}
countries based on the worked days in the country during the period between granting and vesting of the stock option.

If an issue arises with the consequence of a double taxation of an employee stock option the Netherlands is willing to go into negotiation with the other state to solve the double taxation.101 An issue which can exist is when another state taxes on vest instead on exercise. This state can based on his national law qualify the profit made between the vest and the exercise as non-employment related profit. When a tax payer is resident of such a state, this state wants to tax this part. The Netherlands will see under its national legislation a part of this profit as income from employment which can create a double taxation situation. However notice that previous stated situation is more exception then general rule.

Taxation of employee stock options is in line with European law. I cannot find comments in literature nor a violation of the TFEU. Resident and non-resident tax payers are treated equally the same concerning wage tax part of taxing stock options. Also in the case the Netherlands still taxes upon the stock option when the tax payer left the Netherlands long before.

5. Taxation of excessive income and lucrative interest of individuals

As a measure to tax income generated through capital elements and interest which is related to employment activities higher, the legislator introduced in 2009 the so-called lucrative interest regime. In the opinion of Dutch politics it is undesired\textsuperscript{102} that excessive profit is generated through constructions of equity, interests or other options through shareholding resulting in gaining large amount of income from capital elements. Public opinion was that people who made unrealistic profits did this by taking too high risks which is harmful for the economy. The wish was there to halt this by introducing a regime that tackles these high income constructions by putting them in Box I against the progressive tax rates. Before the introduction of this regime excessive income could be taxed in Box I under the category Other Activities or under the net capital assets tax in Box III. The tax authorities had to proof if the excessive income element had a relation to employment activities instead of normal investment and that it therefore had to be taxed in Box I.

Lucrative interest will be income from capital elements that directly or indirectly results from employment activities. Together with constructions of capital leverage this can creates high income that is relatively not in proportion with the risk the person as investor has. Risks are generally low for the person in matter and the benefits high. This creates socially unacceptable behaviour in point of view by the legislator\textsuperscript{103}.

5.1 The lucrative interest regime

Article 3.92b of the Dutch personal income tax act 2001 forms the basis for the lucrative interest regime and places the regime in the category “other activities” in Box I. Lucrative income is defined as income from capital elements which can be allocated to the activities performed by an individual who is in a privileged position of getting those capital elements\textsuperscript{104}. This means that the privileged individual, such as a manager or director which has a decisive role, holds a capital element that contains a rewarding element which depends on the activities performed by the individual. Article 3.92b relates to this directly by an “intention for reward” statement\textsuperscript{105}.

The lucrative interest regime in article 3.92b covers more or less 4 different situations in which an individual can get into the lucrative interest regime. Situations are related to activities that can be rewarding in the form of acquiring shares, remission of debt, appreciation on claims and other

\footnotesize{\textsuperscript{102}“Wijziging van enige belastingwetten: Belastingheffing Excessieve Beloningsbestanddelen”, Acts of Parliament II 2007/08, 31 459, nr. 2

\textsuperscript{103}See footnote 87

\textsuperscript{104}Cursus Belastingrecht, Inkomstenbelasting, Kluwer, 2010, chapter 3.4.3.E.a

\textsuperscript{105}Article 3.92b(1) Personal Income Tax Act 2001, “beloning beogen”/”intending a reward”}
elements which derive from other possible activities which can result in an excessive income such as entitlements and options on capital elements.

One situation foresees in the acquirement of capital elements that have a certain reward intention such as capital elements in the form of shares. The important element here is the method of acquirement of those capital elements. The individual has to acquire these capital elements in relation to his activities towards a third party such as an entity or person who gave the individual the possibility to acquire those\textsuperscript{106}. In real terms this means that for example private equity houses who take over an entity gives managers next to salary for employment also salary in the form of capital elements that are directly or indirectly related to the results of those managers.

This can result in very high appreciation of capital when management and/or shareholders goals are linked to the value of the share and are met later in time; often done by pre-build ratchets which boost the profit substantially. To avoid taxation of normal payment of capital elements to employees by companies, the regime foresees not on every rewarding element but only tries to involve those who have in comparison a chance of generating very high profit results. The key element in making distinguish between normal and excessive income is the addition of creating a probability of high returns at the time of the acquirement of the capital element. This element excludes thereby employee-participations, business succession and management buy-outs\textsuperscript{107}. I will explain this using the following example where a manager acquires shares which have probability in them to return high profits dependently on the performance of the manager.

\textit{An example}\textsuperscript{108}:

\textit{Shared capital of a corporation that has just been taken over is divided in two different kinds of shares. One kind has a cumulative 10% preferential dividend a year, the second kind of shares are subordinate on this dividend however it is entitled for the all of the surplus profit. The first kind has 99 million Euros of placed shares and the second kind only 1 million Euros. The first kind of shares is placed at a private equity house and 20 % (200,000 Euros) of the second kind is placed at managers of the corporation and private equity house who are directly involved in the corporation. The first year after the takeover there is no profit yet. In the second there is a profit of 40 million Euros. First kind of shares who have a preferential dividend of 10% a year is entitled for 19.8 million Euros (two years each of 10% of 99 million). The surplus profit will fully go to the second kind of shares which is 20.2 million euro’s. The managers who had an influence on this profit will receive after 2 years of

\textsuperscript{106} Article 3.92b(1)(a) and (b) Personal Income Tax Act 2001
\textsuperscript{107} Cursus Belastingrecht, Inkomstenbelasting, Kluwer, 2010, chapter 3.4.3.E.b3
their acquirement of those shares a 4.04 million Euros dividend, which now will be taxed as lucrative interest instead of dividend.

Upon the acquirement of the shares the profit was already incorporated with conditions. The conditions are met here and as a result provide a high turnover. The risk is rather low (€200.000) in comparison of the possible and made profit of €4 million. The profit on the dividend is due the lucrative income regime taxed at the progressive rates of Box I, currently with a maximum rate of 52%. While without the regime dividend would have been taxed in Box II at a substantial lower rate of 25%.

Another situation that also creates a lucrative interest by article 3.92b from the personal income tax act is the conditional remission of debt or having an underwriting guarantee on a debt concerning the acquisition of capital elements that an individual in a privileged position has and which have a rewarding element in it. This can be case in a condition of staying a certain time in the company or acquiring a certain profit or given the guarantee that when profits fail the debt will be guaranteed paid off or remitted.

A third situation foresees on claims acquired by individuals in a privileged position. The interest on those claims can be dependent on the performance of the holding individual. In the article it is codified that if this dependence is 15% or more of the performance of the individual that it then qualifies as lucrative interest.

Last the legislator created a rest category in which it actually grasps every other situation that might exists and that results in an excessive profit. It describes it in article 3.92b(4) as every right or obligation that has a rewarding element that is dependent for at least 15% of the performance in which the privileged individual is involved and which are economically comparable with the described previous situations. By this the legislator made the regime very broad, however still the requirement needs to be there that this right or obligation is related to employment and that there is an awareness of a probability of high profits.

All of these before do also apply when the lucrative income is paid out for the individual indirectly via an entity. The sub-payment from the entity to the individual is normally taxed in Box II at a 25% rate when having a substantial interest in this entity. Together with corporate tax the effective tax burden is lower than in the progressive Box I in which we find the lucrative interest regime. So if a payment to an entity foresees in a lucrative interest payment then it will be taxed in Box I, hence that there already was corporate tax withhold before and that corporate tax does not take the personal income tax in consideration.
The taxpayer having a payment via an entity concerning lucrative interest can opt for an exclusive Box II treatment if the entity receiving passes the payment received through to the individual for at least 95% in the same calendar year. Then the taxpayer will not fall under the lucrative interest regime. This only escape through Box II forces the taxpayer to use the 95% passing through rule. Otherwise income from lucrative interest will be double taxed, in Box I up to 52% and in the corporate tax up to 25.5%. This problem occurs in the given example\textsuperscript{109} when dividend is not paid out via an entity. First the profit is taxed at the company at 25.5% corporate tax and at the individual in Box I at 52%. This indirectly forces the individual to use a sub entity to pay out his dividend. Problems occur when due to statutory provisions in entity payments are forbidden from certain amount of the present reserves.

The determination if there is a lucrative interest is also depending on the opinion and evidence the tax authority has. She has to decide and proof on the given facts and circumstances if there is a lucrative interest present, which gives the taxpayer no certainty of what exactly lucrative interest is. A worry expressed in literature is that open norms in legislation can create too much uncertainty for the taxpayer and arbitrary acting of the tax authority\textsuperscript{110}. As result a sceptical look can be found in literature upon the regime.\textsuperscript{111}

An option discussed and also possible without introduction of the lucrative interest regime is the possibility to drag lucrative income in the other activities category in Box I with the already existing legislation\textsuperscript{112}. Jurisprudence already described the connection between an activity and making a capital element profitable\textsuperscript{113}. Clear activity relating the capital element by physical activity and or with the use of expertise by the individual or someone else can result in that the generated income can be drawn into the other activities category of box I. In reality it is not always easy to prove a direct connection between the daily activities of the manager and the made profit on the capital elements. What might have been decided in jurisprudence is now codified in legislation; it seems that the legislator wanted to have more certainty about the position of those excessive incomes. Still it remains a new regime with unclear definitions\textsuperscript{114} which also in my opinion could better be solved through the existing legislation in Box I under other activities. If that legislation is considered insufficient it could be solved by making it easier for the tax inspector to proof that a certain activity is employment

\textsuperscript{109} See beginning of this chapter
\textsuperscript{110} R.M. Freudenthal and E.P.H.G. Raaijmakers, Belastingheffing over lucratiieve belangen: veel hagel en weinig mug, Weekblad Fiscaal Recht 2008/1363, chapter 4
\textsuperscript{111} If I personal look upon the general critics in articles that exist in literature, L.G.M. Stevens, Van het kind en het badwater, Weekblad Fiscaal Recht 2008/737 and R.M. Freudenthal and E.P.H.G. Raaijmakers, Belastingheffing over lucratiieve belangen: veel hagel en weinig mug, Weekblad Fiscaal Recht 2008/1363 and J.C.A. van Ruiten, Lucratief belang: een grabbelton, NTRFB 2009/1.
\textsuperscript{112} Cursus Belastingrecht, Inkomstenbelasting, Kluwer, 2010, chapter 3.4.3.E.e
\textsuperscript{113} See for relevant jurisprudence overview: Cursus Belastingrecht, Inkomstenbelasting, Kluwer, 2010, chapter 3.4.3.B.d
\textsuperscript{114} Cursus Belastingrecht, Inkomstenbelasting, Kluwer, 2010, chapter 3.4.3.E.e
income instead of investment income. Finding a solution is overdone by introducing a new regime with regulations which favours in my opinion the position of the tax authorities.

5.2 European Law

Non resident tax payers are also liable for the lucrative interest regime.\(^\text{115}\) They fall under the regime if there is income made as a lucrative interest which is related to an activity in the Netherlands. In basic there is no differences in treatment between a non resident with a resident taxpayer because a non-resident tax payer is set be equal to a resident tax payer for the execution of the regime.

However there might be a different treatment between a resident and a non resident tax payer. In the situation that a non resident tax payer immigrates to the Netherlands and at the same time brings a lucrative interest with him the lucrative interest is validated not at the acquisition value but at the economical value\(^\text{116}\) because the lucrative interest is immigrating with him. In a situation of a resident tax payer who holds a regular interest that becomes a lucrative interest because of changing conditions results in that the lucrative interest is valued at the acquisition price of the regular interest and not at the time of the changed conditions which would be the current economical value of the regular interest. In this case a resident tax payer has a disadvantage because also his appreciated value on the regular interest is calculated as profit while this profit is not related to lucrative activities. This can be seen as a discrimination of a resident taxpayer against a non-resident taxpayer. A discrimination of an own resident will not be in violation with one of the freedoms of the European Union as described and discussed in chapter 2.3.

The other comparison that can be made is the non-resident tax payer who moves his lucrative interest to the Netherlands against the non-resident tax payer who becomes a resident tax payer and moves together at the same time with his lucrative interest to the Netherlands\(^\text{117}\). The non resident tax payer who moves his lucrative income to the Netherlands has to value his lucrative interest at acquisition price. The result is that income on the lucrative interest which is related in the time outside the Netherlands is also taken into account for the taxable base. The other non resident tax payer who immigrates to the Netherlands together with his lucrative interest has the possibility to value his lucrative interest at economical value by immigration. In this case income related to lucrative income in the time outside the Netherlands is not taken into account. The only difference here is the movement of the individual itself, the non-resident tax payer is discriminated in comparison of the non resident tax payer that just immigrated and became a resident tax payer. The reason why the legislator

\(^{115}\) Article 7.2 (3) Personal Income Tax Act 2001
\(^{116}\) Article 3.95b (1) Personal Income Tax Act 2001
\(^{117}\) Article 3.95b (1) Personal Income Tax Act 2001
only facilitates valuation on economical value to the immigrant cannot be found in parliamentary history.

Emigration normally creates an exit tax burden on the reserves built up in the capital created in the Netherlands. The legislator does not see a need for an exit tax for capital elements under the lucrative interest regime because lucrative interest has an important connection with employment activities. Ending these activities in the Netherlands does not mean that the interests in those capital elements are lost and not lucrative anymore because they still relate to activities done in the Netherlands in eyes of the legislator.\(^{118}\)

5.3 Treaties

In international situations it is not clear yet what the outcome will be. Capital elements which will fall under the lucrative interest regime will be dividend, interest or capital gains. Looking at the OECD MC there can be concluded that in income from dividend, interest or capital gains deriving from the Netherlands are taxed in the resident state of the receiver expect in some cases there is a partial right to tax for the contracting state. The Ministry of Finance stated that every situation needs to be looked upon separately. However in most cases there needs to be a look at the articles concerning (self)-employment and directors fees.\(^{119}\) In such cases the Netherlands will already have the right to tax mostly.\(^{120}\) Qualifying lucrative interest as income from dividend, interest or capital gains or qualifying lucrative interest as income form (self)-employment or director fees does not have consequences in most tax treaties. The Netherlands has the right and remains to have the right to tax over those elements. The non-discrimination article\(^{121}\) will not be necessary to intervene.

The change of opinion of the Netherlands on which provision it has the right to tax is not in line with how treatment of treaty partners should be and also in jurisprudence this change is not honoured.\(^{122}\) In pas jurisprudence the Supreme Court in the Netherlands did not accept changing the treatment on another provision without consulting the treaty partner.\(^{123}\)

If another contracting state does not agree with the treatment the Netherlands proposes on considering the lucrative interest elements as income from (self)-employment or director fees then the

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\(^{118}\) Acts of Parliament II 2007/2008, 31459, nr. 8, p. 25


\(^{120}\) R.M. Freudenthal and E.P.H.G. Raaijmakers, Belastingheffing over lucratieve belangen: veel hagel en weinig mug, Weekblad Fiscaal Recht 2008/1363, chapter 8

\(^{121}\) Article 24 OECD- MC

\(^{122}\) In opinion of: R.M. Freudenthal and E.P.H.G. Raaijmakers, Belastingheffing over lucratieve belangen: veel hagel en weinig mug, Weekblad Fiscaal Recht 2008/1363, chapter 8 and the jurisprudence mentioned: Supreme Court, 5 september 2003, nr. 37 670

\(^{123}\) Supreme Court, 5 September 2003, nr. 37 651, Change of opinion of treatment of wage payment by the Dutch government concerning in tax treaty Netherlands Belgium 1970.
opinion of the Netherlands is that there must be a consultation procedure in every individual case this happens. This opinion of the Dutch government does not give the taxpayer nor treaty partner any certainty on how the taxation will be. The Netherlands does not fulfil its obligations of creating legal certainty towards the taxpayer and treaty partner in my opinion.

Also article 3 OECD MC describes that not described elements in the treaty need to be treated as they will be treated in national legislation of the contracting states. The elements falling under the lucrative interest regime are not to be considered as wage or income directly from labour, but income that is related to labour activities in the Netherlands. Thus it seems that the Dutch government has a weak argument here in preserving the treatment of lucrative income as employment income in treaties.

How the lucrative interest regime needs to be treated in an internationally context is only guessable till this point in time. The first tax year (2009) of the regime just ended. So we will have to wait for the first case that will give an issue that can be discussed and guide the right direction.
6. The 30% facility for expatriates

This facility\textsuperscript{124} is one of the most important and attractive tax measures the Netherlands has to offer for incoming foreign employees and as well for employees in the Netherlands who are sent abroad\textsuperscript{125}. In the next paragraphs first the 30% facility for incoming employees is described; the main focus in this chapter will be on the facility in respect to foreign incoming employees. After that the 30% facility for outgoing employees is described. Last the international aspect of the 30% facility is described through European law, treaty law and WTO law.

6.1 Incoming employees

The 30% facility provides the possibility to reimburse extra costs that are related with employment abroad, so-called extra territorial costs. Extra territorial costs can be for example costs for housing, preparation, language and culture courses, international schools and home leave reimbursements\textsuperscript{126}. A 30% fixed rate of the gross salary can be paid tax free to the employee for the reimbursements of extra territorial costs. This results in a significant lower tax burden for the incoming foreign employee or outgoing employee and employer who applies and the 30% facility. If the actual extraterritorial costs exceed 30% of the gross salary and thus the 30% tax free fixed rate is not favourable anymore, then there is an option to reimburse actual extraterritorial costs made\textsuperscript{127}.

\textit{A short example by way of illustration.}

A foreign specialist comes to the Netherlands and meets all requirements for the 30% facility. His gross salary including reimbursements for extra territorial cost is 80.000 Euro. This means that 30% (24.000) can be paid out taxed free. The taxable base for the personal income tax will be 56.000 Euro instead of 80.000 Euros without the 30% facility.

It can also be calculated from someone’s gross salary without reimbursements included. So if someone has a gross salary of 56.000 Euros, then the calculation will be 30/70 of 56.000 Euros. The maximum tax free reimbursement can be 24.000 Euros.

\textsuperscript{124}The 30% facility: Legal bases in article 15a (1)(j) Wage Tax Act 1964
\textsuperscript{125}Both incoming foreign employee and outgoing employee need be qualified as employee as such, Article 2 Wage Tax Act 1964
\textsuperscript{126}For more detail on extra territorial costs; Resolution Ministry of Finance, 11 February 2004, no. CPP2003/641M
\textsuperscript{127}Article 82(1)(i) Implement Regulation Wage Tax 2001
To fall under the 30% facility both employee and employer have to request for application of the 30% facility. In the contract between employee and employer it must be stated that the 30% facility will be applied. The 30% fixed rate of the gross salary for free reimbursement of extra territorial costs can be divided between employee and employer. With a net salary guarantee the benefits are fully for the employer because of lower gross salary costs. It can also be spread that part of the benefit of the 30% facility goes to the employee as well by giving it a higher net salary.

The facility is only available to incoming employees meet certain criteria. The main requirements for the facility are that the employee needs to be recruited from abroad and that he possesses a specialty which is rare on the Dutch labour market. It is therefore meant to attract specialist to the Netherlands and support employers to acquire those.

Specialty means having the following requirements such as having education level; must be similar to higher education in the Netherlands, wage level; must be at market conditions or higher and at least higher in comparison of country of origin, work experience; 2.5 years in the present function or from the middle to higher management function from the same company. Not all requirements are necessarily being needed to get the 30% facility. Court decided in a case that the requirement of 2.5 years experience is not absolutely necessary to proof that someone is a specialist. Also when an incoming employee has an acquired a visa and work permit as knowledge worker for the Netherlands it is assumed that the employee meets the specialty requirements.

For incoming employees the facility can be granted for a maximum of 10 years in total. The facility is granted for the full period of 10 years at first but can be reviewed after the 5 first years and then be granted for another 5 years which makes it possible to have the 30% facility for 10 years in total. The 10 year term will be shortened with every previous stay or activity such as employment in the Netherlands and will be rounded up in months. Presence and activities by the person more than 15 years before are not taken into account if the person was not present for a period more than 20 days of work and 6 weeks of holiday or family visit each calendar year and a onetime only 3 months in the Netherlands in the previous 10 years. If those limits are exceeded in the last 10 years then an extra 5 year period is taken into account till 15 years before for periods of a person which ended in the Netherlands 15 years ago. So if a the person left the Netherlands between 10 and 15 years ago all years in the Netherlands of that ending period in those years are taken into account which means that years

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128 Article 9(1) Implement Order Wage Tax 1965
129 Article 8(2) Implement Order Wage Tax 1965
130 Article 9a Implement Order Wage Tax 1965
131 Court of Justice The Hague, 18 March 2008, no. BK-0500260
132 Article 9b Implement Order Wage Tax 1965
133 Article 9d Implement Order Wage Tax 1965
134 Article 9e Implement Order Wage Tax 1965
longer than 15 years can also taken into account. Note that every stay is taken into account means; one day present within a 30 day period means that 1 month is shortened each time from the total of 120 months of the possible facility.

This can mean that someone born in the Netherlands left the Netherlands more than 10 years ago but less than 15 years ago. If he does not exceed the limits stated for the last 10 year period then only the periods of the last 10 years will taken into account. If he does exceed the limits than the period which ended more than 10 years but less than 15 years ago is taken into account. This can mean that all years from his birth onwards can be taken into account, which means generally that no period is left for the 30% facility.

The starting date for the facility is from the first working day in the Netherlands. The facility can retroact till the first working day if the request for is done within the first 4 months of employment. Otherwise it will start the when the application is filed. Take in mind that this shortens the duration of the 30% facility because someone already worked in the Netherlands before and thus stayed in those 4 months before in the Netherlands and thus consequently shortens the facility by at least 4 months.

A short example by way of illustration.

An incoming employee meets the requirements for the 30% facility and comes to the Netherlands on January 1st 2010. However the person has been in the Netherlands before in the last 10 years, for example once for 2,5 months in 2002 and once for 2 consecutive days in 2006. These previous stays in the Netherlands shortens the length of the 30% facility by 4 months in total. 3 months for the 2,5 months in 2002 and one month for the 2 days in 2006.

The 30% facility is only applicable on income from current employment, which means that severance payments do not fall under the 30% facility. Bonuses or acquired stock options related to employment under the facility which is paid out afterwards can only be under the 30% facility if the in time of the acquirement the bonus or stock option is unconditional.

The employee does not need to have its residence in the Netherlands, however mostly the employee will become a resident of the Netherlands. The same is applicable for its employer; it does not need to have a residence in the Netherlands, however also here mostly the employee will be sent to a group company for which it will work and that company will become the employer for the wage

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135 Article 9h(2) Implement Order Wage Tax 1965
136 Article 9(1) Implement Order Wage Tax 1965 and supported by Supreme Court, 25 January 2008, no. 43396
137 Resolution Ministry of Finance, 21 October 2005, no. CPP2005/2378M
46

tax\textsuperscript{138}. The foreign employer can also transfer its obligations as tax withholder to the concern company for which employee is going to work if he remains the employer\textsuperscript{139}.

Furthermore the incoming employee with the 30\% facility\textsuperscript{140} has the possibility to choose for partial non-resident treatment in the personal income tax\textsuperscript{141}. The incoming employee stays a resident tax payer if resident in the Netherlands, however for income from Box II\textsuperscript{142} and or Box III\textsuperscript{143} can be chosen to treat it as if the employee were a non resident tax payer. Basically income that is not situated in the Netherlands is not taken into account\textsuperscript{144} of the world wide income a resident tax payer normally is taxed for.

Arguments for abolishment are that the facility is unequal compared to regular employees from the Netherlands who do exactly the same work but have to pay significantly more taxes because they do not have a 30\% fixed tax free amount of their gross salary. Arguments for the 30\% facility, also supported by the government\textsuperscript{145}, are that expatriates have more costs then regular employees. Furthermore the facility supports the Netherlands as an investment and settling country which supports its position in the world market. The fixed 30\% rate is a simplification for the execution of the facility. Extraterritorial cost reimbursements would be tax free anyhow due existing legislation. The 30\% facility lowers the administrative burden for employers and employees by not asking for evidence for actual made extraterritorial costs.

6.2 Outgoing employees

An employee will qualify for an outgoing employee if he is sent abroad for a period more than 45 days within a 12 month period consisting in parts of at least 15 days in a row, travel days are included\textsuperscript{146}. If these day criteria are met also detachments of 10 days are acceptable\textsuperscript{147}. For outgoing employees the facility has no requirements for specialism. Another important requirement is that the facility only applies on an outgoing employee who is detached to a certain country which is in most

\textsuperscript{138} Normally formal employer is wage tax withholder, Article 6 Wage Tax Act 1964. Resolution Ministry of Finance, 21 October 2005, no. CPP2005/2378M question 39: Group company in the Netherlands can be the withholding agent.

\textsuperscript{139} Article 10 Implement Order Wage Tax 1965

\textsuperscript{140} Only applicable for employee who meets the 30\% facility requirements; Supreme Court, 14 March 2008, no. 43171

\textsuperscript{141} Article 2.6 Personal Income Tax Act 2001

\textsuperscript{142} Income from substantial interest

\textsuperscript{143} Income from investments and savings

\textsuperscript{144} Note that article 7.7 Dutch Personal Income Tax does mention, and thus not tax bank deposits.

\textsuperscript{145} Press Release Ministry of Finance, 20 October 2003, no. 2003/244.

\textsuperscript{146} Article 8(3) Implementation Order Wage Tax 1965

\textsuperscript{147} Article 8(3) Implementation Order Wage Tax 1965
cases is a developing country\textsuperscript{148}. Except public officials, military and employees with scientific and educational background can have this facility in other than developing countries\textsuperscript{149}.

Salary which can be allocated to work related abroad is applicable for the 30\% tax free reimbursement. If employee goes abroad for a long period of time it can result in a situation that the employee becomes a non-resident tax payer. This means that the Netherlands only taxes income related to the activities performed the Netherlands and not income related to activities performed abroad. As a result not being an employee for income related abroad and thus no access to the facility. Next to that the consequence of a tax treaty for double taxation based on article 15 OECD MC can result in the situation that the Netherlands loses its right to tax on income earned abroad when a resident tax payer works a large amount of time abroad\textsuperscript{150}.

6.3 European Law

The 30\% facility gives benefits to incoming employees and lowers the administrative burden by giving a fixed 30\% tax free reimbursement. So far no discrimination of employees coming to the Netherlands; however discrimination can be seen towards Dutch nationals which do not have access to the benefits of the 30\% facility. As stated in chapter 2, discrimination of Dutch nationals is allowed. The question can be raised if incoming employees are comparable situations with employees who already are in the country. On the work floor level the two employees are similar, however individually they are both different because the incoming employee has probably extra costs which is countered by the 30\% facility.

Due to the 30\% facility, costs for the employer can be significantly lower if the incoming employee gets the same net salary as a similar regular employee or as before in his originated country by giving a tax equalization guarantee. The gross salary for the incoming employee is lower due the 30\% tax free reimbursement. It supports the employer by having lower costs and is thus in a better competitive position. The 30\% facility is basically a wage tax subsidy then\textsuperscript{151}.

If the benefits of the 30\% facility are for the employee this means that he gets a higher net salary which makes the Netherlands extra attractive for foreign employees and creating thereby a better position for the Netherlands on the European labour market. Article 107(1) TFEU implies that there is state aid when the measure is beneficial, supported by state means, specified for certain companies or productions which create an unfair competition on the European internal market. The 30\% facility is

\textsuperscript{148}Article 8 Implement Order Wage Tax 1965, for list developing countries; Article 27 Implement Regulation Wage Tax 2001
\textsuperscript{149}Article 8 Implement Order Wage Tax 1965, for list developing countries; Article 27 Implement Regulation Wage Tax 2001
\textsuperscript{150}E.g. 183 days rule in article 15(2) OECD MC
\textsuperscript{151}P. Kavelaars, Uitzending van personeel en fiscale faciliteiten, PS Documenta 2007/1002, chapter 2
beneficial for companies and subsidised with state means by granting a tax free reimbursement which are normally taxed; however it is accessible for all companies and incoming employees who have a certain specialties. This requirement is not indented for a certain company or production. In general all companies have access and can apply for the 30% facility. The state aid rules do not foresee on the beneficial treatment of employees or individuals. Also in my opinion it is a choice between employee and employer if tax equalization is applied and thus the benefits are for the employer or not for example and therefore it cannot be seen solely as a wage tax subsidy.

For outgoing employees the 30% facility is only applicable for a few countries from the European Union who are on the list. In my opinion the 30% facility does not have a large impact and does not violate competition rules because the outgoing activities are for short period of times, also fiscal reasons do not really apply here concerning where an employee is sent to. Even with the fact that the facility can be beneficial for companies using the 30% facility with tax equalization.

Furthermore for outgoing employees the applicable 30% facility which is in most cases for officials and development workers does in my opinion also here not intervene with any competition within the internal European market because it concerns public institutions which do not have the intention to compete.

6.4 Treaties

If a resident tax payer under the 30% facility chooses for the partial non resident treatment there I do not see a problem concerning tax treaties. Treaties based on OECD MC define in article 4 that to get access to the treaty the tax payer needs to be a resident of one of the contracting states. The tax payer will be considered as a resident tax payer for the Netherlands. That the Netherlands gives a fictive exception by not treating the tax payer for Box II and III as a resident tax payer does not matter.

6.5 WTO-law

Concerning the Agreement of Subsidies and Countervailing Measures (ASCM) the 30% facility could be seen as a subsidy when tax equalization is used between employee and employer. Costs for the employer are in that situation significantly lower and it attracts high educated employees to the Netherlands and maybe at the expense of other countries. The 30% facility violates Article 1(a1)(ii) ASCM which states that not taxing where could have been taxed is a form of subsidy.

152 Article 27 Implement Regulation Wage Tax 2001, Countries in Europe: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia.
Concerning outgoing employees the same arguments as mentioned in paragraph 5.3 apply in my opinion for the European countries. Also here the argument of the short period of exercise in the foreign state applies longer stay in the other state means often that the 30% facility cannot be applicable anymore. For the WTO it would also not be a problem that indirect state means are used in developing countries can get exceptions concerning WTO law\textsuperscript{153}. I think at the moment the 30% facility does not have that large effect which concerns WTO to take direct measures at the moment. Furthermore also here, it is a choice between employee and employer if tax equalization is applied and thus the benefits are for the employer or not.

\textsuperscript{153} See Chapter 2.5 of this thesis.
7. Artist and sportsmen regime

The Artist and Sportsmen Scheme (the Regime) is a special regime in the Dutch Personal income tax. The regime foresees in taxation of artists and sportsmen who have a short period of performance in the Netherlands. Artists or sportsmen who are resident tax payer in the Netherlands will be taxed in the personal income tax as income from other activities or if the individual has employer and thus a wage tax withholding agent he or she will be taxed as a regular employee in the Wage Tax Act.

Both resident and non resident artists and sportsmen who are employed under an employer are treated like any other employee in the wage tax and are not falling under the regime. The regime specifically sees upon artists and sportsmen who do not have an enduring employment relation and are thus be considered as self-employed.

In 2007 the Regime changed concerning artists and sportsmen. Before 2007 both resident and non-resident artists and sportsmen who did not have an employer where taxed via the wage tax under the regime. For the resident artist or sportsmen who does not have employer this meant that he was liable for wage tax and thus had to follow those rules, next to that income tax was withheld through the wage tax. This gave in the opinion of the artist and sportsmen a large administrative burden.

The legislator moved the taxation of resident individuals to the other income category in the personal income tax which means that there is no need for a withholding agent anymore, but means that income tax is paid afterwards. Furthermore costs can be deducted accordance to the normal rules of Box I of the category other income.

The taxation for non residents nowadays has changed as well. Non residents were taxed through the regime via the wage tax. It ensured that there was a withholding agent present in the Netherlands which withheld tax from their income. Non-residents who are in the Netherlands for a short performance and not having an employer who is a withholding agent and who are a resident of a state with which the Netherlands has a tax-treaty for double taxation or a BRK-country are not in the regime anymore. The result of this is that there is no other ground in tax law to tax them they are not taxed at all, so only artists and sportsmen with a short performance in the Netherlands who are resident of a state with which the Netherlands does not have a treaty of double taxation are taxed. The reason of this change is the argument that the revenue in comparison with the administrative burden for the tax payer and government is too high for having an efficient source driven taxation.

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154 Article 5a Wage Tax Act 1964
156 Belasting Regeling voor het Koninkrijk: Countries include the Dutch Antilles and Aruba. It is a national regulation.
In double-taxation treaties normally the Netherlands as working state has the right to tax over income of artists and sportsmen. The concerned article in tax treaties is based on article 17 OECD MC in most cases which clearly gives the state of exercise or performance the right to tax.\textsuperscript{158} This unilateral withdrawal of taxation of non-residents artists and sportsmen can be called surprisingly; a state gives up his right to tax. In the section European law and tax-treaties I will go further into this.

7.1 Treatment of artists and sportsmen

The regime does not cover all artist and sportsmen without an employer anymore. The only individuals who are still liable for the regime are those who are non residents from non-treaty states and will therefore be taxed through the wage tax. In the wage tax there needs to be a withholding agent present. This withholding obligation needs to be fulfilled by the person who gives the order for the performance or by the artist or sportsmen itself\textsuperscript{159}. Specific regulations are mentioned in the wage tax concerning the determination of the income of the individual. It determines which reimbursements do not need to be calculated as income\textsuperscript{160}. The special tax rate of the regime is 20\% if the right information is given related to the tax payer, otherwise the tax rate will be 52\%\textsuperscript{161}.

Residents who have in accordance to the wage tax an employment relationship are taxed as regular employers in the wage tax and are in contrary to the regime liable for social security contributions. Furthermore for sportsmen there is a possibility to be in a fictive employment if he only gets a reimbursement for living and costs made from an allowance by a fund. This results falling into the wage tax\textsuperscript{162}. This will mean that he will not fall under the regime but just be treated as a regular employee.

Resident artists and sportsmen without an employer will be taxed in Box I of the personal income tax as profit from business or other activities\textsuperscript{163}. They will have to file a tax declaration at the end of the fiscal year. In contrary to the wage tax the artist and sportsmen will now have to pay its taxes by them self.

Foreign groups of artists and sportsmen such as orchestra’s and sport teams will be treated as group\textsuperscript{164} tax payer if payments cannot be distributed individually. These groups will not fall under the regime, if 70\% or more existing persons of the group are from a treaty state. This results also in a non taxation of the group as a whole.

\textsuperscript{158} Article 17 (1) OECD  
\textsuperscript{159} Article 8a Wage Tax Act 1969  
\textsuperscript{160} Article 35 Wage Tax Act 1969, calculating the taxable fee  
\textsuperscript{161} Article 35a Wage Tax Act 1969  
\textsuperscript{162} Article 2 Implement Order Wage Tax Act 1965  
\textsuperscript{163} Articles 3.2 and 3.90 Personal Income Tax Act 2001  
\textsuperscript{164} Article 5h Wage Tax Act.
The artist and sportsmen regime results in that foreign artists and sportsmen are treated in at two different ways. The artists and sportsmen who are a resident of a treaty state cannot be taxed in the Netherlands because there is simply no possibility for the Dutch authorities under domestic law to tax while a treaty gave the right tax in most cases. The other group consists of residents of a state with which the Netherlands does not have concluded a treaty of double taxation. These tax payers will be under the regime and taxed in through the wage tax.

7.2 European law

In the Gerritse case the ECJ decided that a non-resident of the regarding state needs to take into account the costs an artist makes and thereby also taxation that finds place in the residence state of the artist otherwise there would be a violation of the freedom of services of article 56 and 57 of the TFEU. In the situation of Gerritse artist resident in the Netherlands could not take into account his travelling and staying cost in Germany against his German income. In the ordinary tax credit in the Netherlands the costs were taken into account which meant a lower credit for the artist and thus creating double taxation. Because of non taxation in the Netherlands of non-resident artists and sportsmen who are a resident of an European member state there cannot be a situation which is in violation of the TFEU by the Netherlands like in the Gerritse Case because there is no obstruction created.

Artists and sportsmen who are resident in the Netherlands are taxed over their world wide income. The Netherlands will give over foreign income of the tax payer an exemption or credit depending on the applicable tax treaty. Costs made concerning their activities abroad can be deducted from their foreign income. If there is no possibility to deduct in any given year it is possible to credit this with income in future years. This is in line with EU-law.

This regime is in my opinion a clear example how inequality is created with between tax payers. The treatment of non resident artists and sportsmen is more favourable then the treatment of resident artists and sportsmen. Both are performing in the Netherlands however resident tax payers have to pay tax while non residents are not. A favourable treatment of a non resident is for now allowed in the European Union.

Within tax treaties the Netherlands gets in most cases the right to tax over income from artists and sportsmen by provisions in tax-treaties based on article 17 OECD MC. Because the possibility to tax is given up, income originated in the Netherlands will not be taxed in the Netherlands. In most treaties with other states an ordinary tax credit needs to be given by the other state. In the situation of a non-resident artist or sportsman from a treaty state there will be zero tax in the Netherlands so the ordinary

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165 European Court of Justice, 12 June 2003, C-234/01 (Arnoud Gerritse)
166 Article 14 Order for the Avoidance of Double Taxation, Besluit ter Voorkoming Dubbele Belasting
tax credit in the other state will also be zero. This results in that income from the Netherlands is still taxed. This system of tax treaties results in a well balanced taxation of income.

However there are treaties where there is no ordinary tax credit given but an exemption. Artists or sportsmen get an exemption in his residence state over the amount of income earned in the Netherlands which creates double non-taxation or a lower average tax burden. Double non taxation is against the goals of the European Union which wants to avoid double taxation and double non taxation. A resident of such a state will not complain at the ECJ and residents of other states cannot be compared and are thus not equal and secondly double non taxation does not create an obstruction. Furthermore states have a sovereignty and responsibility themselves to avoid double non taxation with each other, by going into negotiation. A easy solution would be to add a protocol to an existing treaty will solve this. When the Netherlands changed the taxation on artists and sportsmen it informed it treaty partners about the possibility of double non taxation and offered negotiations of changing the tax treaty with them.

A remark towards the Netherlands can be made that it does not support and help the creation and harmonisation of coherent tax systems in Europe. Switching to letting the residence state tax over income from short performances of artists and sportsmen is not in line what is common practice in international context. It creates an inconsistent taxation of individuals by letting the taxation be very dependent on from which state the individual is from and thus which tax treaty is applicable.

### 7.2 Tax treaties

In tax treaties artists and sportsmen have as specific provision. An assumption which is made and still exists is that artists or sportsmen do not declare their income earned in another state in their state of residence. Article 17 OECD MC therefore allocates the right to tax to the work state because that state should have the easiest possibility to control and check income earned in their state. Paragraph two of the article is an anti-abuse measure and involves also entities trough which an artist or sportsmen can operate.

The non discrimination provision of article 24 of the OECD MC states that there may not be a taxation which is more burdensome than the taxation in the other state. The fact is that the Netherlands does not create a higher burden but does the opposite of creating a lower burden for non-resident compared to a resident tax payer. In my opinion therefore no discrimination is present based on the

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167 “No tax, no credit”

168 Article 25.2 Tax treaty Netherlands-Spain for example gives a exemption on income originated from the Netherlands.

169 Acts of Parliament II 2006/07, 30804, nr. 3; p. 15-17


171 OECD, 1987, Issues in International Taxation no. 2 Taxation of Entertainers, Artists and Sportsmen
provision of the OECD MC. Furthermore the article does look upon discrimination on nationality and does not forbid discrimination of place of residents.

The justification of excluding this group of tax payers by the Netherlands is that there are enough opportunities to exchange information with treaty states to prevent non taxation. The Netherlands trust on the information exchange through the European Union\textsuperscript{172} and clauses of information exchange in most of its tax treaties. With this adaptation of changing the treatment of artists and sportsmen seems to imply that it prefers the same treatment of artists and sportsmen as normal employees which means that article 15 OECD MC needs to be followed. So that incidental performance and work in another state will be taxed by the residence state. However the Netherlands stands alone in this view\textsuperscript{173}. It would be better in my opinion if the Netherlands would express their wishes more to change to another system which it seems to imply in my opinion. By creating double non-taxation it leaves it in my opinion obligation to tax artists and sportsmen in some occasions.

\textsuperscript{172} Directive 2001/44/EG
8. Personal deductions, credits and allowances in Dutch tax law.

Most of the deductions, credits and allowances available in the personal income tax are situated in Box I. Allowances or deductions are most of the time dependent on how high a taxpayer’s income is. The amount of income determines on whether a taxpayer has the right for an allowance and if he gets the full allowance or a certain ratio in proportion of his income.

Deductions are possible in the tax declaration of the current year and will be applied after establishing the taxable amount. Certain specific costs defined as personal costs, for example specific healthcare costs, alimony, study costs, can be credited from the taxable base, so before applying tax. Because of the progressive tax regime in Box I this results in that individuals in higher brackets have subsequently more benefit from a cost related credit than someone in a lower bracket.

A common tax credit is for everyone in place. The common tax credit amounts for everyone younger than 65 years who also pays social security amounts 1,987 Euro for 2010, for people older than 65 years the credit amounts 925 Euro. Other tax credits are related to having children, a house, disability, age and family situation. These credits will be described in detail in later in this chapter.

Allowances are not directly stated in the personal income tax act however they are directly related to income position of the taxpayer. Allowances are paid out monthly to cover the expenses of the individual. Allowances in the Netherlands are the healthcare, rent and child allowance and support the lower income in having healthcare insurance, house or children.

Furthermore this chapter describes how fringe benefits, voluntary work and certain investments are treated in the Dutch personal income tax.

8.1 Marital Status and fiscal partnership

In the personal income tax in the Netherlands there is a concept of the fiscal partnership. Fiscal partners can also be individuals who are not married or having a registered partnership and are registered at the same address. Individuals who are married or having a registered partnership are automatically fiscal partners with each other, with the condition that they live together in one household. Two individuals who are living in one household can request to be each other’s fiscal partner. Both have to request each year in their tax declaration for appliance of the fiscal partnership. Conditions are that both individuals are living in one household for more than 6 months in one calendar year together. Fiscal partnership will then be applied for the time in the calendar year that

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175 Married and not living together does not qualify as fiscal partner, Article 1.2(4) Dutch Personal Income Tax Act.
they are living together. Furthermore a partner cannot be a non-resident tax payer and a family relative in the first degree who is younger than 27 years. From 2011 onwards this fiscal partnership cannot be freely requested anymore and will automatically applied on individuals who are married or having a registered partnership, notarially contract, child, house ownership or pension scheme together.\textsuperscript{176}

Fiscal partnership can be beneficial. It allows tax payers to transfer certain credits to each other. This can be beneficial when a partner does not have enough income left for the credits or if due to the difference in brackets it is more profitable to place a credit at the other partner. However fiscal partnership also means that for the determination for certain tax credits and allowances the total income from both partners are taken into account which can mean that due to a higher total income the right for a credit or allowance dissolves.

\subsection*{8.2 Age}

In several occasions in the personal income tax the age of the tax payer is taken into account. One of the tax credits which takes age into account is the employment credit\textsuperscript{177} which is available for labour income from (self) employment or income from entrepreneurship and will be higher from the age of 57 till 65, this to stimulate people to continue working. The employment credit is dependable on the income base of the tax payer. A percentage from labour income can be deducted but is maximized as well. The percentages and maximizations are higher for people older than 57 years. Credit is maximized at 1.433 Euros for tax payers younger than 57 years and will go up in steps to a 2.217 Euros maximum for tax payers at the age of 65. A lower percentage and maximum credit is in place for tax payers older than 65 which amounts 1.031 Euro. Also her amounts are lower when the person is not paying social contributions in the Netherlands.

Another credit which is meant to stimulate work under the older age group is an extra credit\textsuperscript{178} if individuals are still working from the age of 62. The extra credit will amount from 2.340 Euros to 4.679 Euros by the age of 64. At the age of 65 and 66 the credit will amount only 936 Euro and at an older age 468 Euro if the person is still working.

Individuals older than 65 years old are at their pensionable age in the Netherlands and receive state pension. State pension and individual pensions are taxed. A credit is available for all individuals older than 65 with an income not higher income together with their fiscal partner than 34.282 Euro, this credit amounts 678 Euros\textsuperscript{179}. In the progressive box I income the first brackets of taxation are low.

\textsuperscript{176} Acts of Parliament 2009/2010, no. 32129, Wijziging van enkele belastingwetten en enige andere wetten (Overige fiscale maatregelen 2010)
\textsuperscript{177} Article 8.11 Dutch Personal Income Tax Act 2001, Employment deduction
\textsuperscript{178} Article 8.12 Dutch Personal Income Tax Act 2001, Bonus deduction on Carry on working
\textsuperscript{179} Article 8.17 Dutch Personal Income Tax Act 2001, Elderly deduction
because social security is withheld within those brackets. Individuals older than 65 years old which is the pensionable age in the Netherlands do not have to contribute to all social security’s anymore which results in a lower burden in the first two brackets of the personal income tax.

8.3 Children

Individuals having children are supported by a child allowance. This child allowance is split up in two allowances. One common allowance is for every resident in the Netherlands with children and a second allowance is dependable on the income of the individual. A non resident with children who pays wage tax and social security’s in the Netherlands can also request for child allowance.

Furthermore an allowance for Child care is available if both partners and the child need to go to day care. Every allowance is child dependent and will be determined for every child separately. The amount of the allowance is also dependable on the age of the child.

Two credits are available for single parents with only children in their household. One credit is for every single parent with no child older 27 years in the same household and the second credit is available when the parent works and if a child did not reach the age of 16 years yet.

8.4 Treatment of the primary residence

Individuals owning their own primary residence have to pay taxes over their property. The primary residence is not taxed in Box III like all other immoveable property but in Box I on at progressive tax rates. To correspond with the system of Box I, profits such as the financing costs of the primary residence are taken into account. Income from the primary home is determined at a deemed income depending on the value of the property, commonly at 0.55% of the value of the property. The value is determined by the authorities through the so-called Value for Property Tax Act which should be around the economic market value of the property.

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180 See Chapter 2.1.1
181 Common Child Allowance Act, Algemene Kinderbijslagwet
182 Law on Child Commited Budget, Wet op het kindgebonden budget
183 Article 6 Common Child Allowance Act
184 Childcare Act, Kinderopvangswet
185 Article 12 Common Child Allowance Act, differenc catagories, 0-6 years, 6-12 years, 12-18 years age of the child.
186 Article 8.15 Dutch Personal Income Tax Act 2001, amounts €902
187 Article 8.16 Dutch Personal Income Tax Act 2001, amounts 4.3% of income from Box I but not more than €1.513
188 Article 3.110 Dutch Personal Income Tax Act 2001
189 Article 3.112 Dutch Personal Income Tax Act 2001, Percentage for property value between €75.000 and €1.010.000, most primary residences in the Netherlands will be in this category Average value primary residence: €249.000, source: Verenging Eigenhuis, kwartaal 4, 2009. For a primary residence with a value higher then €1.010.000 the deemed income is 0.80% for the value above €1.010.000
House ownership in the Netherlands is subsidised through the mortgage interest credit. The financial costs from the primary residence can be deducted. These financial costs are some of the costs for acquiring the mortgage and the rent paid on the mortgage or other financial loan. This will in most cases result in that the costs that can be deducted are higher than the income generated through the deemed income calculation for primary residence. Negative income from primary residence will be the outcome which can be credited against the positive income elements in Box I. It can be concluded that the government indirectly subsidises home ownership. Mortgage interest can only be deducted for 30 years, also any profit from previous residences are taken into account for the calculation of the total mortgage interest deduction. First profits from previous residences have to be used for financing the new residence. Only on the amount which is left for financing with mortgage can be deducted.

Individuals who do not own their primary residence but rent their primary residence can get a rent allowance if the household income is not more than 21,450 Euro for a single person household and 29,125 Euros if there is a multi person household. For tax payers above the age of 65 the limits are respectively 19,100 Euros and 25,284 Euros. For the rent allowance the primary residence itself needs to be an independent unit of its own unless it is a designated independent unit for the rent allowance.

8.5 Healthcare

In the Netherlands every person is obliged to be insured or having a insurance for healthcare. To support for paying the healthcare insurance a healthcare allowance is present. Also here the allowance depends on the income of the individual.

Only specific mentioned health related costs are tax deductable. Examples are costs for medicine, diet, disability tools, and travel costs to hospital. Costs concerning a child younger or parent in the household which need specific needed care can be deducted if not covered by the health insurance. Very specific situations are described in the law.

Furthermore there is a special credit available for individuals with a disability which got already on or from young age. This credit amounts 691 Euros.

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190 Article 3.120(1) Dutch Personal Income Tax Act 2001
191 Article 3.119a Dutch Personal Income Tax Act 2001
192 Article 14 Rent Allowance Act, Wet op de huurtoeslag
193 Own unit means, independent house; e.g. own front door/address, kitchen, bathroom etc. No common areas in general.
194 Article 11 Rent Allowance Act
195 Article 1(f) Health Allowance Act, Wet op de zorgtoeslag, for income lower then € 33,743 the allowance is applicable.
197 Article 8.16a Dutch Personal Income Tax Act 2001
8.6 Fringe benefits

Benefits from employment next to the regular wage exist in many forms. The main rule is that everything that is related to the employment is wage and will be taxed as such. This can be benefits in equity such as stock-options or in benefits in kind such as a work clothes, company car, computer, telephone or laptop or reimbursements for meals, childcare, healthcare, travel costs, sport facility and so on. Necessities for the execution of the employment are tax free, for example work equipment such as tools and protective clothes and educational courses necessary for the profession. Detailed rules are laid down in the tax law concerning elements that can also benefit the employee in a private matter. Examples of detailed facility are about the company phone, computer and car. The company phone can be reimbursed tax free to the employee if it is used for more than 10% professionally. The computer on the other hand is only tax free if used more than 90% professionally. Last example is about the company car. The company car can be given tax free, however only if the employee uses the car for employment purposes and does not drive more than 500 km a year privately if the company car will be used more than 500km privately or when there is no correct kilometre administration then the car will be seen as benefits in kind. Wage tax need to paid, however the company car is exempt for social security contributions. For the employee the car is seen as income and he will get a deemed income dependently on the environmental friendliness of the car and can be or 25%, 20% or 14% calculated against the value of the car and will be added to its income from employment in Box I.

Further examples of tax free reimbursements that are listed are: professional literatures, congresses, contribution labour union, travel costs concerning employment abroad, company fitness, and costs for a home office.

8.7 Non-profit work

Working for a non-profit organisation as a professional is not treated differently in the Netherlands then working for a regular organisation and will just be taxed likewise through the wage tax and personal income tax.

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198 Article 10 Wage Tax Act 1969
199 Article 15 and 15a Wage Tax Act 1969
200 Article 15b Wage Tax Act 1969
201 Article 15b(f) Wage Tax Act 1969
202 Article 15b(s) Wage Tax Act 1969
204 Article 3.20(2) and (3) Dutch Personal Income Tax act.
205 Article 15a and 15 Wage Tax Act 1969
A volunteer is someone who does not perform its work as a professional at an organisation which is not liable to corporate tax. Reimbursements for voluntary work are not taxed as long as it does not compete with regular employees functions and does not exceed 150 Euros a month and 1500 Euros a year.\(^{206}\)

### 8.8 Place and type of investment

Investments and savings situated in Box III can be exempt from taxation till an amount of 55,145 Euros or together with their fiscal partner up to 110,290 Euros\(^ {207}\). Those investments or savings are defined as social investments. These investments concern investments in environmental funds, companies or projects in the Netherlands or developing countries listed or approved by the Dutch government\(^ {208}\) or in moral funds, companies or projects in developing countries for the support of food security and social and cultural development\(^ {209}\).

### 8.9 European Law

Common tax credits discussed in this chapter are not accessible for non resident tax payers because tax credits general in nature are overlooking the individual situation of the tax payer. A non resident tax payer can only deduct costs made concerning the employment, or investments concerning substantial interest. Two types of credits need to be distinguished; source connected credits such as credits on investments and property and personal connected credits such as credits related to personal employment or family related.

Due the case Schumacker\(^ {210}\) a non-resident tax payer who has 90% or more of his income from the Netherlands and has no possibility to deduct his personal related credits in his resident country will have access to the Dutch credits which are related to the personal situation of the tax payer. However in basis the resident country is responsible for taken personal circumstances in account. The case of Schumacker allowed the non-resident taxpayer to have credits concerning personal circumstances.

Following the case Lakebrink\(^ {211}\) and Renneberg\(^ {212}\) the ECJ decided in the first case that not only personal credits as in Schumacker but also credits concerning the fiscal ability to pay of the non resident tax payer at the condition that there is no possibility to have a similar credit in the resident state. Renneberg case is based on the Lakebrink case, court decided that a non-resident tax payer in the

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\(^{206}\) Article 2(6) Wage Tax Act 1969  
\(^{207}\) Article 5.13 Dutch Personal Income Tax Act 2001  
\(^{208}\) Article 5.14 Dutch Personal Income Tax Act 2001  
\(^{209}\) Article 5.15 Dutch Personal Income Tax Act 2001  
\(^{210}\) European Court of Justice, 14 February 1995, C-279/93 (Schumacker)  
\(^{211}\) European Court of Justice, 18 July 2007, C-182/06 (Lakebrink)  
\(^{212}\) European Court of Justice, 16 October 2008, C-527/06 (Renneberg)
Netherlands can deduct his negative income from real-estate that is situated in Belgium without opting for the fictive resident treatment of article 2.5 Dutch Personal Income Tax Act\(^{213}\). In this case it concerned the possibility for the mortgage interest deduction on his residence in Belgium, which is not a personal credit but a source connected credit that influences his tax position compared to a resident tax payer in the Netherlands who has access to this facility in opinion of the ECJ.

The case of Renneberg led to some critics in literature. The ECJ sees the mortgage interest deduction as a personal credit and that it influences the ability to pay of a taxpayer\(^ {214}\). It seems that ECJ treats individual tax payers differently than entities concerning negative foreign income\(^ {215}\). In the case Busley and Cibrian\(^ {216}\) court accepted negative income from real-estate outside of Germany to be credited from income from individual taxpayers in Germany. In case of foreign negative income of entities the ECJ does only allow those negative income if those are permanent\(^ {217}\).

A non-resident can choose to be treated like a resident tax payer\(^ {218}\); as a result he has access to all tax credits available. The Renneberg case results in that the possibility to opt for the treatment of a resident tax payer is not necessary anymore for a non-resident tax payer who qualifies for the Schumacker criteria to use facilities available in the Dutch personal income tax such as the mortgage interest deduction. If a non-resident tax payer wants to step out of the fictive resident treatment it needs to payback all negative income credited from the previous 8 years if there is still income present in the Netherlands the year after not choosing for the fictive resident treatment\(^ {219}\). This means that someone who wants to step out of the fictive resident treatment has to pay back all the deductions of the previous 8 years, while it actually has the right to deduct it. Stepping out of the fictive resident treatment seems therefore not in line with the European freedoms and restricts the movement of persons within the Union\(^ {220}\).

An argument which can be made against the non-resident tax payer who cannot get personal credits in the Netherlands is that he could have chosen for the fictive resident treatment of article 2.5 of the personal income tax. On the one hand the argument can be used that the Netherlands gives the opportunity to the non-resident tax payer is treated like a resident taxpayer, so the taxpayer is aware of

\(^{213}\) Explained in chapter 2.1.4. A Tax payer will be fictively considered as a resident tax payer. All regulations for a resident tax payer apply in this way.


\(^{215}\) D.S. Smit and R.C.Smit, De ondernemer in de Nederlandse inkomstenbelasting en het EU-Recht, yet non-published Weekblad Fiscaal Recht Article.

\(^{216}\) European Court of Justice, 15 October 2009, C-35/08 (Busley and Cibrian)

\(^{217}\) European Court of Justice, 15 may 2008, C-414/06 (Lidl Belgium), European Court of Justice, 13 December 2005, C-446/03 (Marks & Spencer)

\(^{218}\) Article 2.5 Dutch Personal Income Tax Act 2001, see also chapter 2.1.3

\(^{219}\) Article 2.5 Dutch Personal Income Tax Act 2001

the possibility of the negative consequences of the claw-back. However case law of the ECJ suggests that an argument of logic choice is not valid, for example the choice of having an entity or permanent establishment is up to the resident of the European Union.

In the Gielen case\textsuperscript{221} the ECJ answered negative on the necessary choice of becoming a fictive resident tax payer for getting access for entrepreneur credits in the Netherlands. ECJ agrees with the conclusion of the Advocate General which seems to argue that the fictive resident treatment is not the right solution for giving the non-resident tax payer the opportunity to access tax credits in the Netherlands.

In my opinion the fictive resident treatment is a wrong solution by the Netherlands of interpreting the Schumacker, Lakebrink and Renneberg case. The opportunity created of becoming a fictive resident even for non-residents not qualifying for the Schumacker criteria seems an open attitude of the Netherlands. However the strict rules concerning exiting treatment (the claw-back) and the everything-or-nothing treatment by the Netherlands are in disproportion. A non-resident tax payer who meets the case law criteria made by the ECJ cannot access the facilities in the Netherlands if not choosing for the fictive resident treatment resulting in a full treatment as a Dutch resident tax payer.

The intention of case law by the ECJ is in my view that it wants to give access to facilities in the source country for the particular concerning income objects in the source country so not meaning to include immediately all objects of the tax payer. However the ECJ needs to watch out with decisions such as Renneberg that it does not create an imbalance between positive and negative income taxation which can result in that negative income would be placed in a country for fiscal reasons.

8.10 Treaties

Related to previous issues in European Law, it could mean that the non-resident source state of the tax payer will be the state with attracts all negative income of the taxpayer. This causes symmetry issues between states. Solution can lie in adapting double taxation treaties between states were the right to tax positive and negative income come more in balance\textsuperscript{222}. Creating situations where having the right to tax is also on positive income if first negative income is deducted in the past.

In a resolution\textsuperscript{223} the Ministry of finance concluded that for the double tax treaties of the Netherlands with Belgium, Germany, Suriname, and the Dutch Antilles credits concerning personal and family conditions are allowed through the non-discrimination conditions in the double tax treaties. In the tax treaty with Belgium and Germany conditions are present that give a resident of Belgium or

\textsuperscript{221} European Court of Justice, 23 March 2010, C440/08 (Gielen)
\textsuperscript{222} E.C.C.M Kemmeren, Renneberg Endangers the Double Tax Convention System or Can a Second Round Bring Recovery, EC- Tax Review, 2009-1, Chapter 6.6 p.14
\textsuperscript{223} Ministry of Finance, 26 April 2006, CPP2005/3340
Germany the possibility to use Dutch credits concerning personal and family conditions on Dutch income\textsuperscript{224}.

In the light of European law it could be stated that if a state accepts a facility in a double tax treaty it should on the most favourite principle also facilitate this to individuals who are from other double tax treaty states. However this is was not granted in a similar situation of case D.\textsuperscript{225} where a credit was given in one treaty but not the other because still have the freedom to make conditions in tax treaties with different countries.

\textsuperscript{224} Article 26 Treaty Netherlands – Belgium and cross border protocol 1980 Treaty Netherlands Germany
\textsuperscript{225} European Court of Justice, 5 July 2005, C-373 (D.)
In this Chapter the main focus of the discussion will be about the different tax systems and incentives used by EUCOTAX Wintercourse states in relation to the Principle of Equality. The explanation of the Principle of Equality is more or less the same in all states. However the interpretation and the protection of the Principle of Equality in the different states vary by a way of direct or indirect protection.

By first describing and comparing the Principle of Equality found in different states I will plot the outline where I will make a comparison between tax systems in different states concerning family and housing issues and special income tax regimes such as exit taxation, treatment of stock options and the expat regimes. The comparison is based on the joint paper which is created at the EUCOTAX Wintercourse. A large matrix with all issues is created in Uppsala and can be found in the appendix of this thesis.

The special income tax regimes are not always present in every EUCOTAX Wintercourse state. However some regimes that occur in only a few countries have such a character that they are worth taken into the discussion because they can affect the Principle of Equality in both domestic and internationally situations.

The final conclusion will be made if those different systems and approaches of the Principle of Equality can co-exist or if they should be harmonized or coordinated at a European level. With the possibility of harmonising different systems and incentives discrimination can be avoided if needed. Also an option which can be concluded is that there should not be any harmonization if there are justifications which are stronger then the violation of the Principle of Equality.

9.1 Principle of Equality

As described for the Netherlands the Principle of Equality is generally laid down in the Dutch constitution\(^{226}\), furthermore there is no direct reference in law about the Principle of Equality and taxation. The Netherlands is unique in its situation that there is no Constitutional or Supreme Court that can test formal legislation against the constitution.\(^{227}\) In other countries a constitutional court\(^{228}\) can test tax legislation against the Principle of Equality stated in the constitution.

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\(^{226}\) Article 1 Dutch Constitution
\(^{227}\) Article 120 Dutch Constitution
\(^{228}\) Supreme Court in Sweden or in United States of America
The constitutional courts in Belgium\textsuperscript{229}, France\textsuperscript{230}, Hungary\textsuperscript{231}, Italy\textsuperscript{232} and Spain\textsuperscript{233} can directly refer back to the Principle of Equality in taxation in their constitution. The other courts in the states test upon the general Principle of Equality laid down in their constitution respectively. The specific equality principle in taxation is an elaboration of the general principle and is in matter of fact a codification of the principle for tax purposes. States without a direct reference\textsuperscript{234} to the Principle of Equality in taxation apply the general principle found in the constitution or legislation through their tax legislation or case law.

It should not be a problem for the Netherlands to test tax legislation against the existing general Principle of Equality found in the constitution when the prohibition to test against the constitution by courts is abolished. A separate Principle of Equality in taxation would not be necessary. An open Principle of Equality norm, not specifically for taxation, would be enough to review the principle. Also no other adaptations would be required in Dutch tax legislation.

\textbf{9.1.1 Progressivity of tax rates}

All states levy taxes on labour in their personal income tax system through progressive tax rates. Only in Italy\textsuperscript{235} and Spain\textsuperscript{236} taxation by progressivity is laid down in their constitution. In Belgium progressivity is laid down in the Belgian Code of Income Taxes\textsuperscript{237}, other states do not have a specific reference to a progressive taxation.

Arguments for a progressive taxation are common in every state. The ability to pay principle comes forward as an argument for progressive taxation on labour income in the personal income tax to ensure vertical equality between taxpayers. Considering taxpayers with high income not equal to taxpayers with lower income because the difference between taxpayers in their ability to contribute financially to society\textsuperscript{238}. For Poland and Hungary there might be said that progressivity is not that clear and effectively present. Both countries have only two tax brackets, whereby in Hungary only a small rich group of taxpayers falls in the highest tax bracket. Also the differences in tax rates between the 2 brackets are in my opinion remarkably large, for Hungary the tax rates for the two existing brackets are 17\% and
32%\textsuperscript{239} and for Poland the tax rates are 18% and 32%\textsuperscript{240}, this in comparison to the other EUCOTAX Wintercourse countries where a less steep and more distributive progression is present. This results in my opinion that the link between progressive tax rates and the Principle of Equality is not that strong with a steep progressive tax rate such as in Poland and Hungary.

Capital income is generally taxed with a fixed flat rate in contrary to labour income\textsuperscript{241}. The Principle of Equality and progressivity does not apply here. An explanation why capital income is not taxed progressively could be that capital income is more movable then labour income, wherefore a state wants to attract as much capital as possible, a high progressive rate would possibly create capital to flee to places where it is taxed lower and at a fixed tax rate.

9.2 Family issues and taxation

Persons are the most valuable asset of a state. They work and in fact they decide and create whatever happens in a state. The individual is the cornerstone in society, moreover a group of individuals; a family is considered the cornerstone in most states. The approach towards individuals or families differs between states. A state’s view on marriage, gender issue and family matters can differ much. Most issues concerning the individual or family are specific in domestic context and therefore it is difficult or even impossible to compare all issues. In this chapter I like to outline the similarities and differences in approaches and execution by tax in a state.

9.2.1 Filing status and benefits

The first basic difference is the different approach by the states to an individual taxation or family taxation. Austria, Hungary, Italy, Netherlands, Sweden have a purely individual taxation. With the individualistic approach tax is filled and calculated separately. The other states, Belgium, France, Germany, Poland, Spain, United States of America, facilitate a joint filing and thus family taxation. Filing jointly is in most states only allowed by married taxpayers. In France and Belgium also civil contracts between tax payers allow joint filing.

Filing jointly creates a more favourable tax position then filing separately. If filing jointly the taxpayers will have more tax deductions and credits available, and their tax brackets can be larger which results in a lower tax rate. Overall a joint tax assessment is more beneficial. In Belgium where joint filing is possible however where income is calculated individually it still provides for loss

\textsuperscript{239} Section 29 and 30 Hungarian Personal Income Tax Act.

\textsuperscript{240} Article 27 Polish Personal Income Tax Act.

\textsuperscript{241} Some exeptions for some capital income sources. E.g. short term capital gains are taxed progressive in the United States of America. Internal Revenue Code. §1222(1)-(4)
compensation between spouses who filing jointly for example. In Poland and Germany joint filing creates benefits by taken the total sum of both spouses and divides this by two, this means that the average income is taxed by both spouses. In the United States of America taxpayers can actually chose to tax separately or jointly, nonetheless joint filing will create a benefit due to lower tax rates.

France and Spain have a family unit approach, the household will subject to tax. In Spain family joint taxation is beneficial because an extra reduction of 3,400EUR upon the taxable amount is provided. France’s splitting income system divides the household’s taxable income into parts according to the number of people constituting a tax household, and then the progressive rate is applied to the taxable income per part. The income tax due is multiplied by the number of parts to provide a larger number, which is still lower than the number that would have been used if based on individual filing. This system comes forward from a pronatalist policy and helps large families.

However the Netherlands has an individual taxation it has some characteristics of a joint taxation. The previously explained fiscal partner gives a possibility to transfer common income sources to one of the partners and when an individual does not have sufficient income transfer of the general levy reduction. Married and persons with a civil contract are automatically fiscal partners, other persons can request if they are living in the same household for more than 6 months of a calendar year.

Reasons for choosing an individualistic approach or a family approach can be dependent on many factors. One of the reasons in Sweden was to stimulate work participation among women. The general idea is that joint taxation restrains women to participate because extra income has more negative influence then the positive benefit of the extra income. The choice of an individualistic approach in the Netherlands is in my opinion a logical result of the current general individualistic in Dutch society.

Both family and the individualistic approach are based on the ability to pay principle, one state sees compares on a family level while other states compare on an individualistic level tax payers with each other. Making a distinction between on how the tax payer is bound creates an unequally treatment between taxation of a single individual and an individual in a family unit. The main thought behind joint taxation results from a traditional view that marriage constitutes a social and economical unit where the spouses should share and be treated equally in burden.

242 Article 14 & 129 Belgian Income Tax Code
243 Article 6.2 Polish Income Tax Act
244 § 32a I German Income Tax Act
245 United States of America Internal Revenue Code §1
246 Articles 193, 194, 195 French General Tax Code
247 Article 1.2 Dutch Personal Income Tax Act, see further explanation chapter 8.1
9.2.2 Dependents, e.g. Children

Children are of course considered as an essential part of the family. Children are dependent on the support of their parents and will likely not generate any remarkable profit. To support family life, every state treating the family as unit or the family members separately has credits and allowances available to support children or other family members which are dependent on their family. Taxation of those dependent individuals can be approached differently by states, In Belgium for example children’s earnings, except labour income, are added up on their parents’ income\(^\text{248}\) while The Netherlands and Sweden for example treat incomes from children separately. Two mainstream distinctions can be described; states that regard children as dependent family members, and states that take the entire immediate family into consideration for taxation as a unit.

States support having children by providing credits and allowance, amounts differ between states, however the intention is the same, supporting in the costs of having children. Austria\(^\text{249}\), Belgium\(^\text{250}\), Germany\(^\text{251}\), Poland\(^\text{252}\) and United States of America\(^\text{253}\) grant tax reductions on the basis of any dependent child. In France this is influenced by the ability to pay principle that a household with a higher number of dependents creates more parts and thus lower income tax which benefits all taxpaying members of the family. In Italy the ability to pay principle is worked out differently, the tax reduction regarding to children is based on the gross income of the main taxpayer. With an increased income the allowed deduction decreases\(^\text{254}\). Sweden does in general not use tax reductions but facilitates benefits through their extended social welfare system by granting allowances depending on the number of children. Other countries have also allowances in force to support children in the family depending on the income of the taxpayer through their social welfare system; however this is not in detail discussed at the EUCOTAX Wintercourse in Uppsala.

Another often seen approach in many states is the support of single parenthood. Extra reductions or allowances are provided as support for the difficult social and eventually financial situation of having children together with a job or not, this to strengthen the ability to pay position of the single parent taxpayer.

Overall this different preferential treatment of tax payers with or without children is not seen as harmful unequal and socially accept norm. States have different views on the ability to pay principle regarding to family matters. While some states assess the taxpaying capacity on a family as a whole

\(^{248}\) Article 124§4 Belgian Income Tax Code  
\(^{249}\) Article 33(3) Austrian Income Tax Act  
\(^{250}\) Article 132 Belgian Income Tax Code  
\(^{251}\) §32 German Income Tax Act  
\(^{252}\) Article 27f Polish Income Tax Act  
\(^{253}\) United States of America Internal Revenue Code §152(c)  
\(^{254}\) Article 12 Italian Income Tax Act
other states assess the taxpaying capacity on an individual level and compensate the taxpayer for expenses through credits or allowances. The Principle of Equality can be argued concerning the different treatment of families or individual taxpayers regarding child benefits. A general conclusion cannot be made because for each state there should be a separate conclusion if there is a justification for creating an inequality between taxpayers to the extent of their inequality. Furthermore the social welfare system plays a significant role concerning family benefits which are not extensively taken into account in this comparison.

9.3 Housing

Owning a house is a wish for many persons. The state participates in this wish by stimulating house ownership through tax expenditures. The primary residence is in all countries seen as a special property of the taxpayer and is therefore treated with special care. It’s beneficial for governments to support house ownership since it forms the basic and primary financial asset of a person. Although states also provide renting incentives most states support buying over renting more. Ownership is favourable treated because it seems for society more favourable. Most countries support house ownership directly. Some others support also persons who rent a home. Both measures increase the independency and self-sufficiency of the taxpayer. Incentives for housing are definitely an instrument for achieving a society based on political viewpoint the government. Governments prefer a stable economy and stable family or individual life, house ownership creates those situations because persons with house ownership are more involved in society and more important their local community. This chapter will describe different treatments by the states concerning the primary residence and how they support house ownership.

9.3.1 Buying and selling the primary residence

Most of the states have tax expenditures concerning home ownership, however only Austria, Spain and the Netherlands have a direct initiative for supporting or stimulating buying a new house. In Austria it is possible to deduct costs relating of building a residence, in the contrary costs of acquiring a new existing primary residence are not deductable, this to stimulate building new houses. In the Netherlands costs occurring due to financing the acquisition of the residence are tax deductable\textsuperscript{255}. Spain also facilitates under certain conditions a 7,5\% deduction from the amounts paid concerning the acquisition.

\textsuperscript{255} Article 3.120 Dutch Personal Income Tax Act
Selling a house can create a profit or capital gain. In most states the capital gain on a primary resident is exempt for taxation when meeting certain criteria. Only in Spain there is no exemption at all for the capital gain on the selling of the primary residence and will be treated as a normal capital gain on immovable property. As mentioned other states will exempt capital gain from the primary resident often only when specific criteria are met.

In Austria\textsuperscript{256}, Belgium\textsuperscript{257}, Germany\textsuperscript{258} and United States of America\textsuperscript{259} the primary resident is not taxed. In France there is an exemption for property sales under 15,000EUR which is in no proportion with the average property value in France so it can be said that capital gains from the primary residence in France is taxed as normal capital gain\textsuperscript{260}. Hungary also facilitates a exemption for capital gain from a primary residents, however to counterbalance speculation on the real estate market Hungary imposes a 10\% exemption in the 6\textsuperscript{th} year of after acquisition up to a 100\% exemption when the property is sold after the 15\textsuperscript{th} years of acquisition\textsuperscript{261}. Another condition which can create a exemption on capital gains is when the person of the primary residence moves to a home for the elderly or handicapped in any EEA member state\textsuperscript{262}.

A second group of states, Italy\textsuperscript{263}, Poland\textsuperscript{264}, The Netherlands\textsuperscript{265} and Sweden\textsuperscript{266} exempt the capital gain on the primary resident only when this capital gain is used to finance a new primary residence. In Poland there are different regimes present applicable depending when the primary resident is acquired. Currently the selling of a primary residence after 5 years of acquisition is always exempt; otherwise the capital gain is only exempt when reinvested in a new primary residence. Poland and Sweden changed their legislation the past years as it was not in line with European law. Sweden violated European law as it only exempted the capital gain if it was reinvested in a primary residence in Sweden\textsuperscript{267}. Poland had similar conditions and changed it legislation subsequently. States have to take the international playing field into account with domestic issues. Even incentives which have domestic goals are clearly influenced by the European Union and have to be in line with the regarding freedoms.

The primary resident is often the main element in a tax payers' capital. So it has significant influence on a tax payers' ability to pay. However taxation on the selling of the primary residence

\textsuperscript{256} Article 30(2) Austrian Income Tax Act
\textsuperscript{257} Article 93bis Belgian Income Tax Code
\textsuperscript{258} Only taxable if tax payer sells more than 3 properties within 5 years.
\textsuperscript{259} United States of America Internal Revenue Code §121 if certain conditions are not met such as: gain shall not exceed $250,000 or a sale within 2 years of a previous sale.
\textsuperscript{260} Article 150ter French General Tax Code and further
\textsuperscript{261} Section 59-64 Hungarian Personal Income Tax Act
\textsuperscript{262} Idem.
\textsuperscript{263} Article 12 §4bis Italian Income Tax Act.
\textsuperscript{264} Article 30e Polish Income Tax Act
\textsuperscript{265} Article 119a Dutch Personal Income Tax Act.
\textsuperscript{266} Chapter 47 Swedish Income Tax Act
\textsuperscript{267} European Court of Justice, 8 January 2007, C-104/06 (Comission v. Sweden)
would be a large infringement on the ability to pay of the tax payer. This taxation and thus infringement would be right in my opinion when the capital profit is not reinvested in the new primary residence. Because the ability to pay of the tax payer would increase only for real when not reinvested and when it could be used for other proposes. Taxation when not reinvested would create the same approach as normal capital investments. So that a equal and neutral taxation on capital is created.

9.3.2 Living in the primary residence

Owning and living in a primary residence can result in taxation in some states. Basically most states have an immovable property tax; however the primary residence is often exempt for taxation. Belgium and the Netherlands the primary residence creates a fictitious income. Difference is that in Belgium it is seen as income from immovable property\(^{268}\) while in the Netherlands this income is taxed\(^{269}\) in Box I at the progressive rates of the personal income tax. Spain is the exception: the primary residence is taxed as normal immovable property, no exception exists.

A possible explanation that some countries do not tax the primary residence is that the residence is not seen as a wealth object as it goal is to facilitate a living place for the family and not as a direct investment. States which tax the primary residence have a mortgage interest deduction available which neutralizes more or less the taxable income. In the Netherlands for example income from the primary residence is closely linked to the mortgage interest deduction. When income the mortgage interest deduction does not create a negative income on the primary residence anymore (when income from primary residence is higher than the mortgage interest deduction) this positive income is exempted\(^{270}\). So it is not possible to get a net positive income on the primary residence in the Netherlands.

9.3.3 Mortgage/Loan Interest Deduction

Most of the EUCOTAX states provide for the possibility to deduct the paid interest on their mortgage for the primary residence. Only Germany, Hungary and Poland do not provide for a mortgage interest deduction. Hungary abolished in 2009 the mortgage interest deduction because the Hungarian government lost millions of Euros in tax revenue, the incentive was too costly to maintain. In several other states the same issue is being discussed due to the economical crisis. In the Netherlands the issue is at the moment one of the main topics of the upcoming elections in June.

\(^{268}\) Article 12 §3 Belgian Income tax Code  
\(^{269}\) Article 3.112 Dutch Personal Income Tax Act  
\(^{270}\) Article 3.123a Dutch Personal Income Tax Act
Although it creates a significant loss of tax revenue and the incentive is unequal towards persons who rent a home. Governments hold on to the mortgage interest deduction because it creates economically stability and politically it is often a sensitive subject. The underlying policy is to encourage home ownership which creates stability and permanency, creates jobs tied to home ownership for upkeep and in general persons who own a house take more interest in their local community.

How and from which income the mortgage interest is deducted varies between the states. France\(^{271}\) and the United States of America\(^{272}\) have limits on their facility financially while in the Netherlands\(^{273}\) there is a time limit, the mortgage interest can only be deducted for 30 years in total. Furthermore as described in chapter 8.4 of this thesis, capital gains from previous primary residences are taken into account for the total amount which can be deducted\(^{274}\).

Mortgage interest deduction creates an inequality between tax payers with home ownership and tax payers who rent. To counter inequality the Netherlands has created an allowance for tax payers who rent their residence to provide for a neutral treatment, however it still favours home ownership which is the actually policy of the government.

9.3.4 Rental payments or income

In response of the favourable treatment of home ownership some states have counter-incentives for rental housing. This chapter treats both sides of the rental contract. Rental income as rent paid by the tenant is in some states favourable treated or supported.

Belgium stimulates to rent a property to an individual by creating a lower tax burden in contrary to renting to a company\(^{275}\). Also a distinction is made in Belgium between families and individuals who rent a house, families will get a larger allowance then an individual\(^{276}\) because a family would have a greater need for housing then an individual. Netherlands, Poland and Sweden give allowances to persons with low income and rent a house. Support individuals with low income by giving an allowance achieves that those persons will become more self-sufficient and independent.

Spain does not facilitate a direct support of renting a home. However it influences the rental market by exempting rental income if the tenant is younger than thirty years old. Sweden also exempts rental income if it does not exceed 20% of the capital base where the rent derives from\(^{277}\).
9.4 Exit taxation

Exit taxation is based on the territorial principle. A state wants to tax all income derived from its territory in principle. In relation to the realization principle, taxation takes place at the moment of realization of the income. Upon emigration, an individual does not necessarily realize income. Still hidden reserves can be present. These hidden reserves originate from activities within the state. The territorial principle provides the state with a justification to tax in spite of these hidden reserves. Furthermore, another argument in support of the territorial principle is that a state originally provided the facilities to acquire this income. Exit tax regimes for individuals who leave the state ensure that the state retains the right to income which is unrealized and is leaving their direct tax jurisdiction. Exit taxes inevitably create discrimination and hinder the movement of the tax payer compared to a tax payer who moves its residence within the same state.

To be mentioned must be the special situation which concerns the United States of America. A United States citizen will be taxed upon its world-wide income whether he is a resident or non-resident of the United States of America. When giving up its United States citizenship the person will be taxed\textsuperscript{278} and such can be seen as exit taxation for relinquishing United States citizenship. This is an exit taxation based on nationality instead of residency compared with the other EUCOTAX Wintercourse states who have an exit taxation.

Austria, Belgium, Germany, Netherlands still having a present exit taxation regime for individuals. Following the landmark decision of the ECJ case in Lasteyrie du Saillant\textsuperscript{279}; France, Spain and Sweden abolished its exit tax regime for individuals. As a result, the European Union uses the ECJ case of Lasteryrie du Saillant as basis and argument for the explanation of exit taxation\textsuperscript{280}. In the Lasteyrie du Saillant case direct taxation upon exit is not allowed. Austria, Germany and the Netherlands have a system of preserving the right to tax the individual later and seems to be in line with the N-case\textsuperscript{281} where a preserved tax assessment is accepted as long as it does not have too many restrictive requirements that would protect a state’s interest. A difference in solution for exit taxation exists. For instance, taxes in the Netherlands will be remitted after 10 years, while in Austria and Germany this assessment has no time limitation. It may be agreed that this ability to tax indefinitely may impose a restriction on emigration that could be seen as discriminatory.

\textsuperscript{278} United States of America Internal Revenue Code §887A
\textsuperscript{279} European Court of Justice, 11 March 2004, C-9/02 (Lasteyrie du Saillant)
\textsuperscript{280} European Comission, COM (2006) 825
\textsuperscript{281} European Court of Justice, 6 September 2006, C-470/04 (N.-case)
Covered sources include pensions and annuities in and substantial interests, in Belgium, Germany and the Netherlands, while Austria only has an exit tax on having a substantial interest. Belgium only applies the exit tax if persons immigrate to a state outside the EEA and that state does not have a tax-treaty with information exchange clause with Belgium. Austria and Germany make a distinction between emigrating to an EEA country versus another country. Direct taxation will be applied when emigrating outside the EEA. Germany gives a possibility for having a deferral on income for 5 years after the direct tax assessment.

That the Netherlands does not make a distinction between the European Union and EEA countries is in my opinion better then what Austria and Germany do with exit taxation. It seems that they adapted their exit taxation rules minimally for only to comply with European law. The European Union is not all the world, and for the Principle of Equality there should be no different treatment for emigrating to a European Union or EEA country. That distinctions are still made with countries with who the Netherlands does not have a tax treaty is logical in the point of view of information exchange which plays a crucial role when executing the exit tax regime.

Remitting the preserved tax assessment after 10 years by the Netherlands does not seem necessary because there is no violation when holding on the tax claim indefinitely by a state. When following the principle of realisation any realisation in the future can be taxed by the states where this profit originated from. This is how Austria and Germany currently tax, the Netherlands only taxes for when realisation takes place in the first 10 years after emigration which is in my opinion more a rule for administrative reasons.

Looking at the individual exit tax systems in the EUCOTAX Wintercourse states, it can be concluded that the wealthier states typically apply an exit tax. An exit tax on individuals is not present in Hungary and Poland but there is no specific reason given as to why those states do not have an exit tax. The theory behind the failure to include an exit tax on individuals in those states may be that an exit tax is not that relevant or important in comparison to others states which may have a higher risk and larger amount of capital that can leave the state. Every state can decide if it wants an exit tax. Having no exit tax in a state can result in the drain of capital because people will use this as a financial incentive to go abroad to a state that does not tax or taxes at a lower rate while this gained capital is built up with the support of the infrastructure in the first mentioned state. This could be an explainable reason why the rich states which have mostly an expensive welfare system and extensive infrastructure want to protect capital to flee.

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282 For the Netherlands a substantial interest is 5% or more of the shares, while in Austria and Germany this is 1% or more of the shares.
283 Article 364bis Belgian Income Tax Code
284 § 6 IV Foreign Tax Statutory (ASNG)
Following ECJ case law some states abolished exit taxation. This may be the reason that states which did not have exit taxation regimes before are not introducing one. Looking at the internal market of the European Union exit taxation is not in line with the freedom on free movement principles found in the TFEU. At the moment there is no clear policy in the European Union of having or not having an exit tax. The communication guidelines provided by the European Commision only give the possibility of having an exit tax but does not state how. For harmonization there should be an exit tax if equality between member states is to be reached. Also it will prevent double (non)-taxation and distributes capital earned in different states equally. On the other hand total renunciation of exit taxes will make it easier for the tax payer to move through the European Union, however in this case it will create an unequal distribution of capital between the member states.

In the absence of an exit tax, double non taxation can easily occur when the immigrant country uses step-up market validation. In light of equality and fair value this is a perfect method because capital value accountable for the other state will be skipped in the state of immigration. However it only works equally if the origin state has an exit tax. For instance when the origin state does not have exit taxation and the immigrant state does have a step-up to market validation; part of the income generated in the origin state will not be taxed.

9.5 Treatment of Employee Stock Options

Stock options give the right to buy shares of a company at a predefined price. Stock options received or with special conditions related to employment are treated often with all special regime. Two groups can be distinguished. A group that taxes these stock options as employment income and a group that treats them as investment. Only in Poland and the United States of America stock options related to employment are fully treated as income from investments or capital gain. Austria, Belgium, France, Germany, Hungary, Italy, Netherlands, Spain and Sweden tax the employee stock option as income from employment against the progressive tax rates that exist for employment income. What need to be noted is that stock option regimes in some states can be very extensive. For instance the regimes in Belgium and France are in my opinion relatively complicated and can create exceptions to the common situations described in this chapter.

States that tax stock options as employment income tax either at the time the stock option is granted or at the moment that the stock option is executed. Austria and Germany distinguish employee stock options that are transferable or non-transferable. The first are tax upon the granting of the stock

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286 Step-up to market validation means to assess the total assets of an immigrant in comparison to their fair market value and use the fair market value as the correct value for taxation purposes.
options while the latter is taxed when the stock option will be executed. Same applies to Belgium where in normal conditions the stock option is taxed when granted, however when the value of the stock option is closely related to the performance of the employee taxation takes place at the time of execution to make validation easier.

The EUCOTAX Wintercourse states except Belgium, Poland and United States of America have regarding to employee stock options two taxable moments. The system works similar to the Dutch system described in chapter 4. The first taxable moment takes place either at granting or execution moment and is regarded as employment income. The period between the execution of the stock options and the selling of the shares acquired is regarded as capital income. Austria does not tax the selling of the shares if sold after 1 year or later\(^{287}\), Belgium does not tax the selling of the shares at all. In the United States of America stock options are treated as capital. However they make a distinction between short term and long term capital gain when selling the shares. If sold within a year it is treated as a short term capital gain which is taxed at a progressive rate which is the same as employment income\(^{288}\).

A possible reasons that states tax employee stock options as employment income is to prevent that most of the wage is paid out through stock options which creates an inequality in taxation compared to normal wage. A possible reason for taxing employee stock options solely as capital income is to encourage businesses in general furthermore it improves commitment and motivation of employees for their businesses.

Internationally problems can occur as a result of the different ways employee stock options are taxed. States that tax at the time when the stock option is granted do not take in consideration part of the value that can be allocated to future employment abroad, subsequently double taxation can occur when a second state does tax later on at the moment of execution.

Double non-taxation can also occur, when a person is going to work in another state. The stock option is related to its employment activities. If this is in multiple states the capital gain of the stock option is mostly equally divided between states. When there is a movement to a state which taxes upon the granting of the stock option, which means that there is no taxation over the part till execution, the origin state will probably tax on execution moment only over the part which can be allocated to employment in the origin state and not the state where the employment moved to. So a part will not be taxed.

Many things are unclear concerning the international treatment of stock options. The principles are in most states more or less the same. Employee stock options and their income should be taxed as

\(^{287}\) Section 30 and 31 Austrian Income Tax Act

\(^{288}\) United States of America Internal Revenue Code §1222 (5)-(6)
employment income in my opinion. When treaties conform OECD MC are applied, the allocation of the stock option does not need to create large issues, however because states have sometimes detailed regimes and tax not always at the same point in time problems can occur. I would recommend a direct coordination at European level at least to counter most of the possible problem situations that can occur by achieving consensus on time of taxation and the qualification of employee stock options for international situations.

9.6 Expatriate Regimes

Five of the EUCOTAX Wintercourse states have an expatriate regime in force. Austria Belgium, France, Netherlands and Sweden grant special favourable treatments to often qualified foreign persons to attract them to their state. The goals of the regimes are mostly the same. This chapter will describe the similarities and differences as well as issues towards the Principle of Equality.

The scope of these regimes is mainly concerned a group of certain qualified persons such as scientists, specialists and mid to higher level managers. The scope of such regimes can nevertheless be more or less specific in each state. Austria for example applies the regime only on a small group of persons (scientists, researchers, artists and sportsmen) while the Netherlands for instance applies the regime to all people who have a certain specialty. Applying the regime for very specific groups makes the regime to have a very limited impact than applying the regime in a broader sense such as in the Netherlands. Still in both situations there is a discrimination. However by being very specific there is more legal certainty for the tax payer because it is clear for which groups the regime applies. By having a more broad approach the impact is much bigger, however no specific industries for example are excluded which makes the Dutch in that sense less discriminatory. A broader approach is in my point of view more discriminatory at a European level because it has a bigger impact on the competition position if a country than a very specific regime has a limited impact. However the discussion about the regime should be argued first on a national level because it stays a discriminatory regime.

Belgium and Sweden are similar in their restrictions towards their own nationals. Persons with the Belgian or Swedish nationality cannot opt for the special regime. This is a clear discrimination of persons with the nationalities of the respective states. In the other states there is no

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289 Based on function, salary, education and experience level, Article 8(2) Dutch Implement order Wage Tax
290 Commentary Belgian Income Tax Code 1992, no. 227/6
291 Chapter 11:22-23§a Swedish Income Tax Act
direct discrimination on nationality however there are many restrictions which restrict access and do
discriminate own nationals as we saw in the Netherlands\(^\text{292}\).

Furthermore for all states with a special expatriate regime the favourable treatment raises
concerns regarding the relation with the Principle of Equality. This “reverse discrimination” does not
immediately cause a violation of European Law and therefore does not provide a solution on a
European level\(^\text{293}\). A solution should be provided by national legislation which has to establish a
violation with the Principle of Equality. So it is completely up to the national courts to decide of such
discrimination is justified or not.

Another interesting difference which gives restrictions is the treatment or the accessibility of the
regimes by non-residents. In France\(^\text{294}\) and the Netherlands\(^\text{295}\) there is no requirement to live and
become a resident of one of the states in comparison to Belgium where it is required to live in Belgium
to get access to the expatriate regime. However inconsistently in Belgium persons under the
expatriated regime are treated as non-residents and will only be liable to tax for their source of income
in Belgium. By this treatment Belgium might creating a problem on double tax treaty level. It treats
and pretends that actual residents are non-residents\(^\text{296}\). Result can be that for some income sources
there will be no resident state available which can subsequently lead to double non taxation when the
source state does not tax or just takes into account that the resident state will tax.

States with a preferential expatriate regime seem to apply such regime for mainly 2 reasons. First
the states want refund the extraterritorial costs made related to reallocation and support the individual
ability to pay of such persons who reallocate. The second reason for an expatriate regime is to attract
qualified persons and strengthen the economical and competitive position of respective states. An
actual third and less official reason is the support of companies by reducing costs of labour by a
subsequently lower tax burden at employee level which can be beneficial for the company in their
negotiation position towards employees.

It is interesting to mention that looking at the researched states it is surprisingly that the
wealthiest states with an advanced economy have an expatriate regime\(^\text{297}\). While commonly less
wealthy states have lower tax rates to strengthen their economical and competitive position, wealthier
states seem to compete at a different level. The question why states with advanced economies are
more likely to have such regime in respect to less wealthy states can maybe be explained by the state
of their economy and their goals. While advanced economies focus on attracting qualified persons a

\(^{292}\) See chapter 6, description of the 30% facility
\(^{293}\) European Court of Justice, 21 February 2006, C-152/03 (Ritter-Coulais)
\(^{294}\) Article 81 B French General Tax Code
\(^{295}\) Article 15a(1)(j) Dutch Wage Tax Act
\(^{296}\) Circular Ci.RH.624/325.294 van 8 augustus 1983, Bull. Bel, no. 620 142/2
\(^{297}\) Except for Germany
less advanced economies are still in a stage of focussing to attract capital and companies in general. So these goals are reached differently and create on different levels tax competition.

Determining the tax rates are considered in the European Union as a sovereign freedom of a state. Tax competition in through tax rates is therefore accepted. In this respect it can be argued that lowering the tax burden cannot be seen as harmful tax competition. In the expatriate regimes this is actually happening, however it is only available for a specific group and it discriminates as concluded before. In my opinion the European Union should also protect and avoid the so-called reverse discrimination of own nationals/residents.

In my opinion it is the fault of the country itself that it allows discrimination of own nationals. National non-discrimination rules should solve it if necessary. If in the Netherlands we want to get rid of the 30% facility we could do this by democratic way. In matter of fact a large group of tax payers, generally Dutch nationals are discriminated. This large group can by vote in principle revoke the 30% facility if it wants to.

9.7 Artist and Sportsmen

Whether not discussed at the Wintercourse in Uppsala because not present or described regimes in other countries I will describe and compare shortly the special regime known in Austria for sportsmen. Unfortunately artists do not fall under this regime and I will not compare this group of taxpayers with the Austrian regime.

In Austria a special regime applies for self-employed sportsmen over which Austria has unlimited tax liability, in general a resident of Austria. Furthermore these sportsmen have to predominantly participating in sporting events abroad. In this regime only 33% of their total worldwide income from sporting activities (including connected advertisement income) will be taxed in Austria. In return crediting of foreign taxes is not possible. For calculation of the tax rate all the total worldwide income will be taken into account. In real terms a sportsmen will only apply for this regime when he or she has more than 33% of their total income in Austria or when their foreign income is not liable to tax because mostly the source state will tax already over the foreign income of the sportsmen already. It will have a negative result when applying for the regime if less than 33% of the total worldwide income from sport activities lies in Austria.

Like the Netherlands, the official reason for this regime is to simplify the taxation of sportsmen and lower the administrative burden because the many international active situations of sportsmen. In

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298 predominantly participating abroad means there are more days being abroad related to a sporting event abroad compared to the the days being in Austria related to a sporting event in Austria, EStR 2000 MN 4373
299 Ordinance BGBl II 418/2000
most international situations the source state will taxed based on article 17 OECD MC in treaties and Austria will need to facilitate for an exemption or credit anyway. Because this regime voluntarily I would say that the regime does not violate double tax treaties when national legislation excludes the possibility to credit foreign taxes because in real terms you will only apply for the regime if your domestic income will be higher than 33%.

As mentioned before international active sportsmen will only apply for the regime when their total domestic or non-taxed foreign income is higher than 33%; this happens often when they are active abroad most of the time but however have a high domestic advertisement income from for instance from TV commercials. So inequality occurs on a national level when international active sportsmen are compared with mainly domestic active sportsmen, the tax burden from domestic sources are lower taxed in the case of internationally active sportsmen with the regime.

It should be a sign that only the Austria and the Netherlands have a special treatment of artists and sportsmen. Even the simplification of the regime in 2007 by the Netherlands for artists and sportsmen from abroad is very one-sided view on the issue. In OECD article 17 the source state receives the right to tax. In my opinion it is not only the right to tax which is received but also a slight obligation to participate in the internationally agreed procedure of treatment of artists and sportsmen. If the Netherlands wants to simplify the treatment it should not treat this group differently than normal tax payers. Taxation would be in line with the taxation of resident artists and sportsmen in the Netherlands. The problem of information exchange is a issue for the Netherlands and not for the tax payer, the Netherlands should take action in receiving and checking the right information. The Netherlands would also reconnect with the international system of taxation of artists and sportsmen.
10. Summary and Conclusions

This short summary comprehends most important issues and conclusions concerning Dutch special income tax regimes. For explanation and references to literature I refer to the thesis itself.

10.1 General overview Dutch personal income tax

The Dutch Personal Income Tax Act distinguishes different types of sources and subsequently levies different tax rates on certain sources. Three categories of sources of income are distinguished. Those so-called boxes have own separate rules concerning the taxable amount, tax rate and exemptions. Box I covers income from employment, freelance labour, personal enterprise profits and some capital elements with progressive tax rates up to 52%. Box 2 covers income from substantial interest with a flat tax rate of 25%. Finally Box III covers income from investments and savings by taxing by a net capital assets tax. A flat rate of 30% over a deemed 4% income of the total capital is levied which results in a 1.2% effective tax burden.

A resident of the Netherlands is taxed on his worldwide income. A non-resident taxpayer is only taxed on his income earned in the Netherlands. A non-resident taxpayer does not have access to all facilities offered in the personal income tax, because many facilities are directly connected with an activity in the Netherlands and thus only limited numbers of deductions are available. A non-resident taxpayer has the possibility to choose for being a fictive resident in the Netherlands which creates a fully resident treatment for the Dutch personal income tax. Due to European case law it is now possible for a non-resident to credit personal and maybe even foreign source connected negative income with positive income in the Netherlands even without choosing for the fictive resident treatment. For the specialist in the Netherlands who is applicable for the 30% facility there is a different choice treatment of becoming only a partial fictive resident which excludes Box II and III worldwide income for taxation.

10.1.1 Issues on treatment of non-residents

The basic rule is that a non-resident does not have access to the credit and deduction facilities in the Netherlands. By choosing for the fictive resident treatment the non-resident is treated as a resident taxpayer. Due the Schumacker case the Netherlands has to provide the possibility for a non resident taxpayer to access the personal credits available in the Netherlands. In the Renneberg case the Netherlands needs also to allow a credit concerning a non-personal source related deduction. It seems that non-resident tax payers are not obliged to opt for the fictive resident treatment for getting access
to the credit facilities in the Netherlands. The Renneberg case is seen as a non coherent decision of the ECJ which does not take the coherencies of the tax system between countries in consideration. Future case law has to prove the exact interpretation of the Renneberg case.

In the Gielen case the ECJ answered negative on the necessary choice of becoming a fictive resident tax payer for getting access for entrepreneur credits in the Netherlands. ECJ agrees with the Conclusion of the Advocate General seems to argue that the fictive resident treatment is not the right solution for giving the non-resident tax payer the opportunity to access tax credits in the Netherlands.

10.2 The Principle of Equality in law

The Principle of Equality is laid down in article 1 of the Dutch constitution. The article pursues equality amongst equal cases. All tax legislation should in principle be in alignment with the constitution and thus aligned with the Principle of Equality. However article 120 of the Dutch constitution gives a prohibition for a judge to test formal legislation from government and parliament against the constitution. Currently it is possible to test the Principle of Equality by article 94 of the Dutch constitution. This article makes it possible for the Dutch court to test against international treaties. International treaties concluded by the Netherlands are of higher legal order than national legislation. This means that for example the international treaties of ICCPR and ECHR can play a role in case law concerning the Principle of Equality. European law is always of a higher order then national law.

The Netherlands is the only country where legislation cannot be tested against the constitution by any court. It should not be a problem for the Netherlands to test tax legislation against the existing general Principle of Equality found in the constitution when the prohibition to test against the constitution by courts is abolished. A separate Principle of Equality in taxation would not be necessary. An open Principle of Equality norm, not specifically for taxation, would be enough to review the principle for taxation matters. Also no other adaptations would be required in Dutch tax legislation when applying the general principle.

Equality is a sensitive and difficult principle to understand and thus it will fail in some occasions in tax legislation. Different treatments are allowed as far as there are situations non-comparable and if right justifications are present which defend and allow a different treatment. Another important issue is the consistency of application of the principle of equality. This generates a clear Principle of Equality because it would be easier to understand by all parties involved. Furthermore it providing a neutral approach by the tax authority it gives the tax payer more legal certainty concerning its position.
10.3 Exit Taxation

A state wants to tax all income generated within its territory. Based on the territorial principle a state taxes income generated by a person on his territory, therefore a state like the Netherlands wants to tax income that is generated or related to its territory. Therefore the Netherlands has exit taxes on substantial interest, pensions or annuities by emigration of the taxpayer, also the emigration of a personal enterprise creates exit taxation. The preserved tax assessment of a substantial interest seems in line with European law. The preserved tax assessment on pensions and annuities are not in line with European law and with double tax treaties the Netherlands has concluded. The Netherlands adapted its preserved tax assessment for pensions and annuities; it claims the right to tax on the contributions paid in the past.

Personal enterprises are confronted with direct taxation upon emigration. There is no clear case law concerning this matter. It seems that exit taxation can be accepted on based on the territory principle however direct exit taxation seems to be too much out of proportion. In the contrary comparing the emigration of a personal enterprise with a transferring or suspending personal enterprise within the Netherlands the conclusion can be that the emigrating personal enterprise does not have same beneficial facilities available in my opinion. A preserved tax assessment would also here be the best solution as long as it also takes losses into account.

Remitting the preserved tax assessment after 10 years by the Netherlands does not seem necessary because there is no violation when holding on the tax claim indefinitely by a state. When following the principle of realisation any realisation in the future can be taxed by the states where this profit originated from. This is how Austria and Germany currently tax, the Netherlands only taxes for when realisation takes place in the first 10 years after emigration which is in my opinion more a rule for administrative reasons.

Following ECJ case law some states abolished exit taxation. This may be the reason that states which did not have exit taxation regimes before are not introducing one. Looking at the internal market of the European Union exit taxation is not in line with the freedom on free movement principles found in the TFEU. At the moment there is no clear policy in the European Union of having or not having an exit tax. The communication guidelines provided by the European Commission only give the possibility of having an exit tax but does not state how. For harmonization there should be an exit tax if equality between member states is to be reached. Also it will prevent double (non)-taxation and distributes capital earned in different states equally. On the other hand total renunciation of exit taxes will make it easier for the tax payer to move through the European Union, however in this case it will create an unequal distribution of capital between the member states. No matter what, a common European solution is necessary in the field of exit taxation.
10.4 Stock Options

The stock option in the Netherlands will be qualified as investment and will therefore be taxed in Box III under the net capital assets tax or under Box II if the option qualifies for a substantial interest on realisation of the option.

As a reward or stimulation for employment activity an employee can receive so-called employee stock options. This option will be qualified as wage as it comes forth from employment. From 2005 employee stock options are only taxed upon exercise. Before 2005 there was a choice to tax the employee stock options upon exercise or upon the moment the stock option becomes unconditional.

Employee stock options are taxed over their total profit made till exercise. Any costs or contribution by the employee can be taken into account. However this cannot lead to a negative income.

When working abroad the stock option is also related on the employment abroad. This means that other states are also getting a claim on the stock option and that the Netherlands has a claim on stock options from employees who are temporally working in the Netherlands. Stock options are treated as wage and thus similar articles of article 15 OECD MC in double tax treaties are applicable. The claim on the stock option is distributed between states upon the relevant work periods regarding the stock option. The distribution is defined on the period that the stock option was conditional. The unconditional time period is not related to where future employment is exercised. The OECD MC gave a clear example on how the distribution could be settled. OECD MC distributes the right to tax between countries based on the worked days in the other country. I could not find any comments in literature nor a violation of the TFEU.

Many things are unclear concerning the international treatment of stock options. The principles are in most states more or less the same. Employee stock options and their income should be taxed as employment income in my opinion. When treaties conform OECD MC are applied, the allocation of the stock option does not need to create large issues, however because states have sometimes detailed regimes and tax not always at the same point in time problems can occur. I would recommend a direct coordination at European level at least to counter most of the possible problem situations that can occur by achieving consensus on time of taxation and the qualification of employee stock options for international situations.

10.5 Lucrative interest regime

The newly introduced lucrative interest regime foresees in the taxation of excessive income. The regime comes forth from the political desire to tax persons who have high benefits. Lucrative interest is defined as income from capital elements that directly or indirectly results from employment
activities. Equality issues occur concerning the validation of the lucrative interest upon immigration to the Netherlands. There is a possibility that the lucrative interest is valued at the acquisition price and not the economical value. Further problems occur in the determination of the definitions concerning tax treaties. The Netherlands sees lucrative interest as income from (self) employment while treaty partners would see it an income from capital as it was before the regime. The Netherlands plays treaty override here.

This regime seems to come forward from symbolic legislation by political points of view. Discussions about taxation of excessive income are also present in other countries. Unfortunately no regimes like in the Netherlands exist. In my opinion no special regime is needed in the Netherlands. A better solution is possible by changing and using current other regulations in Box I under the other income category where this income was taxed previously as well. Then the lucrative interest regime should not be needed.

10.6 Expatriate regime; The 30% facility in the Netherlands

The 30% facility is one of the most important and attractive tax measures the Netherlands has to offer for incoming foreign employees and as well for employees in the Netherlands who are sent abroad. The 30% facility provides the possibility to reimburse extra costs that are related with employment abroad, so-called extra territorial costs.

Extra territorial costs can be for example costs for housing, preparation, language and culture courses, international schools and home leave reimbursements. For incoming employees the facility is only available for who meet certain requirements such as having a specialty and it is therefore meant to attract specialist to the Netherlands and can be granted for a maximum of 10 years in total. For outgoing employees the facility has no requirements for specialism, but is intended as a support for activities in developing countries.

The 30% facility is basically a wage tax subsidy; however I do not see a direct violation of the competition rules in the European Union. However it is clear that it gives an advantage to Dutch companies and labour market. For WTO law the 30% facility violates the ASCM which states that not taxing where could have been taxed is a form of subsidy when tax equalization is applied in favour of the employer. Also in my opinion it is a choice between employee and employer if tax equalization is applied and thus the benefits are for the employer or not for example and therefore it cannot be seen solely as a wage tax subsidy.

At the EUCOTAX Wintercourse different expatriate regimes were discussed. Persons with the Belgian or Swedish nationality cannot opt for the special expatriate regime in their respective country. This is a clear discrimination of persons with the nationalities of the respective states. In the other states there is
no direct and formal discrimination on nationality however there are many restrictions which restrict access and do discriminate own nationals as we saw in the Netherlands. The scope of these regimes is mainly concerned a group of certain qualified persons such as scientists, specialists and mid to higher level managers. The scope of such regimes can nevertheless be more or less specific in each state. Austria for example applies the regime only on a small group of persons (scientists, researchers, artists and sportsmen) while the Netherlands for instance applies the regime to all people who have a certain specialty. Applying the regime for very specific groups makes the regime to have a very limited impact than applying the regime in a broader sense such as in the Netherlands. Still in both situations there is a discrimination. However by being very specific there is more legal certainty for the tax payer because it is clear for which groups the regime applies. By having a more broad approach the impact is much bigger, however no specific industries for example are excluded which makes the Dutch in that sense less discriminatory. A broader approach is in my point of view more discriminatory at a European level because it has a bigger impact on the competition position if a country than a very specific regime has a limited impact. However the discussion about the regime should be argued first on a national level because it stays a discriminatory regime.

It is interesting to mention that looking at the researched states it is surprisingly that the wealthiest states with an advanced economy have an expatriate regime. While commonly less wealthy states have lower tax rates to strengthen their economical and competitive position, wealthier states seem to compete at a different level. The question why states with advanced economies are more likely to have such regime in respect to less wealthy states can maybe be explained by the state of their economy and their goals. While advanced economies focus on attracting qualified persons a less advanced economies are still in a stage of focusing to attract capital and companies in general. So these goals are reached differently and create on different levels tax competition.

Determining the tax rates are considered in the European Union as a sovereign freedom of a state. Tax competition in through tax rates is therefore accepted. In this respect it can be argued that lowering the tax burden cannot be seen as harmful tax competition. In the expatriate regimes this is actually happening, however it is only available for a specific group and it discriminates as concluded before. In my opinion the European Union should also protect and avoid the so-called reverse discrimination of own nationals/residents.

In my opinion it is the fault of the country itself that it allows discrimination of own nationals. National non-discrimination rules should solve it if necessary. If in the Netherlands we want to get rid of the 30% facility we could do this by democratic way. In matter of fact a large group of tax payers,
generally Dutch nationals are discriminated. This large group can by vote in principle revoke the 30% facility if it wants to.

10.7 The Artist and Sportsmen Scheme

The Artist and Sportsmen Scheme (the Regime) is a special regime in the Dutch Personal income tax. The regime foresees in taxation of artists and sportsmen who have a short period of performance in the Netherlands. The regime specifically sees upon artists and sportsmen who do not have an enduring employment relation. Non-residents who are in the Netherlands for a short performance and not having a employer who is a withholder and who are a resident of a state with which the Netherlands has a tax-treaty for double taxation or a BRK-country are not in the regime anymore and because there is no other ground in tax law to tax them they are not taxed at all, so only artists and sportsmen with a short performance in the Netherlands who are resident of a state with which the Netherlands does not have a treaty of double taxation are taxed.

In double-taxation treaties the Netherlands has the right to tax over income of artists and sportsmen. Problem occurs when there is no ordinary tax credit given but an exemption in a double tax treaty. Without taxation in the Netherlands and without taxation in the resident state it means that there is double non taxation or a lower average tax burden. The Netherlands seems with this adaptation of changing the treatment of artists and sportsmen to imply that it prefers the same treatment of artists and sportsmen as normal employees which means that article 15 OECD MC needs to be followed. So that incidental performance and work in another state will be taxed by the residence state. However the Netherlands stands alone in this view. It would be better in my opinion if the Netherlands would express their wishes more to change to another system which it seems to imply in my opinion. By creating double non-taxation it leaves it in my opinion obligation to tax artists and sportsmen in some occasions.

It should be a sign that only the Austria and the Netherlands have a special treatment of artists and sportsmen. In OECD article 17 the source state receives the right to tax. In my opinion it is not only the right to tax which is received but also a slight obligation to participate in the internationally agreed procedure of treatment of artists and sportsmen. Taxation would be in line with the taxation of resident artists and sportsmen in the Netherlands. The problem of information exchange is a issue for the Netherlands and not for the tax payer, the Netherlands should take action in receiving and checking the right information. The Netherlands would also reconnect with the international system of taxation of artists and sportsmen.
10.8 General outcome EUCOTAX Wintercourse on the principle of equality

States have different views on the ability to pay principle regarding to family matters. While some states assess the taxing capacity on a family as a whole other states assess the taxing capacity on an individual level and compensate the taxpayer for expenses through credits or allowances. The Principle of Equality can be argued concerning the different treatment of families or individual taxpayers regarding child benefits. A general conclusion cannot be made because for each state there should be a separate conclusion if there is a justification for creating an inequality between taxpayers to the extent of their inequality. Furthermore the social welfare system plays a significant role concerning family benefits which are not extensively taken into account in this comparison.

Both family and the individualistic approach are based on the ability to pay principle, one state sees compares on a family level while other states compare on an individualistic level taxpayers with each other. Making a distinction between on how the taxpayer is bound creates an unequally treatment between taxation of a single individual and an individual in a family unit. The main thought behind joint taxation results from a traditional view that marriage constitutes a social and economical unit where the spouses should share and be treated equally in burden.

Capital income is generally taxed with a fixed flat rate in contrary to labour income. The Principle of Equality and progressivity does not apply here. An explanation why capital income is not taxed progressively could be that capital income is more movable then labour income, wherefore a state wants to attract as much capital as possible, a high progressive rate would possibly create capital to flee to places where it is taxed lower and at a fixed tax rate.

Arguments for a progressive taxation are common in every state. The ability to pay principle comes forward as an argument for progressive taxation on labour income in the personal income tax to ensure vertical equality between taxpayers. Considering taxpayers with high income not equal to taxpayers with lower income because the difference between tax payers in their ability to contribute financially to society. A general conclusion cannot be made for applying family benefits because for each state there should be a separate conclusion if there is a justification for creating an inequality between taxpayers to the extent of their inequality for their individual or family situation. Furthermore the social welfare system plays a significant role concerning family benefits which are not extensively taken into account in this comparison.
**Literature used:**


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26 September 2002, C 324/00 (Lankhorst-Hohorst),
12 December 2002, C-385/00 (De Groot)
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11 March 2004, C-9/02 (Lasteyrie du Saillant)
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6 September 2006, C-470/04 (N.)
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16 July 2009, C-128/08 (Damseaux)

**Supreme Court the Netherlands**
27 September 1989, no. 24.297,  
12 July 2002, no. 36.254  
5 September 2003, no 37 651, 37657 and 37 670  
25 January 2008, no. 43396  
14 March 2008, no. 43171  
20 February 2009, no. 42699, 42701, 42702 and 43760  
19 June 2009, no. 43978  
9 October 2009, no. 43.035

**Courts in the Netherlands**
Court of Justice The Hague, 18 March 2008, no. BK-0500260
Appendix
<table>
<thead>
<tr>
<th>CONSTITUTION</th>
<th>AUSTRIA</th>
<th>BELGIUM</th>
<th>FRANCE</th>
<th>GERMANY</th>
<th>HUNGARY</th>
<th>ITALY</th>
<th>NETHERLANDS</th>
<th>POLAND</th>
<th>SPAIN</th>
<th>SWEDEN</th>
<th>USA</th>
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</thead>
<tbody>
<tr>
<td><strong>Direct/Indirect reference to the principle of equality</strong></td>
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<tr>
<td>In general (articles 2 and 7)</td>
<td>Yes, art. 172</td>
<td>Yes, article 13 in Declaration of Rights of Man and the Citizen of 1789, which is part of the Constitutional Bloc.</td>
<td>No direct reference; indirect reference in Art. 3</td>
<td>No direct reference, Art. 31</td>
<td>General - yes (Art. 1 of the Dutch Constitution); taxation - no. There is no constitutional court, the judges are prohibited to test formal legislation against the Constitution (Art. 120 of the Dutch constitution). The court may test only against international treaties (Art. 54 of the Dutch Constitution)</td>
<td>General - yes (Arts. 32 of The Constitution of the Republic of Poland of 2 April 1997), in taxation - no</td>
<td>No reference to the principle of equality in taxation in the Constitution. There is a constitutional principle of geographical uniformity of state taxes (Art. 1, section 8, clause 1), general principle of equality - 14th Amendment to the Constitution</td>
<td></td>
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</tr>
<tr>
<td><strong>Direct reference to progressivity in taxation in the Constitution</strong></td>
<td>No</td>
<td>No, principle of progressivity is stated in Article 136 of the Belgian Code of Income Taxes of 1992</td>
<td>No</td>
<td>No direct reference</td>
<td>No</td>
<td>No</td>
<td>Yes, article 31</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<tr>
<td><strong>Constitutional Court judgments</strong></td>
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<tr>
<td>VIRGH 15, 03, 1984, 276/63: prohibition to treat differently equal circumstances without an objective justification. Also VIRGH 13, 10, 1962, B 18/62, &quot;Different treatment is based on an objective criterion, can be reasonably justified, is pertinent and is proportionate with the objective and nature&quot;.</td>
<td>Progressivity and equality are linked. Coherence check and proportionality check is made for special regimes. Equality in tax law means different burdens for different tax payers negating to the different ability to pay (BVerfGE 82, 60 (86)).</td>
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<td>Constitutional Court Judgment of 20th July 1961</td>
<td>Very important role of the European Convention on Human Rights – it was adopted as a domestic law and is applied directly - the same status as the RF. There is no Constitutional Court, Supreme Court may test the legislation against RF only if the infringement is apparent (RF, chapter 11, paragraph 14)</td>
</tr>
<tr>
<td>GENERAL CHARACTERISTICS OF THE SYSTEM</td>
<td>AUSTRIA</td>
<td>BELGIUM</td>
<td>FRANCE</td>
<td>GERMANY</td>
<td>HUNGARY</td>
<td>ITALY</td>
<td>NETHERLANDS</td>
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<tr>
<td>General/scheduled for certain capital income.</td>
<td>General but almost every income taxed at a flat rate.</td>
<td>General, but certain income categories are taxed at a flat rate.</td>
<td>Generally a general system; income from investment is usually treated as a separate category at a lower rate.</td>
<td>The system is general; it is applicable only for the financial year, for which a low flat rate is provided.</td>
<td>General, but certain income categories are taxed at a flat rate.</td>
<td>General with some schedular characteristics. Income from certain boxes is not subject to consolidation.</td>
<td>General with some elements of schedular, e.g., capital gains are not subject to consolidation (art 29 - 30 of the Act of 16 July 1991 on Personal Income Tax)</td>
<td>General with schedular characteristics</td>
<td>Schedular, result of the reform of 1991</td>
<td>General with some elements of schedular</td>
<td></td>
</tr>
</tbody>
</table>

Examples of sources

- Income from agriculture and forestry; income from self-employment activity; income from trade or business; employment income; income from capital investments; rental and royalty income; and other income.
- Immovable and movable property and investments, labour and diverse incomes.
- Income from real property; business profits; remuneration of certain company heads; agricultural profits; wages, salaries, pensions and annuities; professional profits; income from capital assets; and capital gains.
- There are 7 sources of income mentioned in § 2 of 1 number 1 of the ESG. Income from trade or business, self-employment, agriculture and forest economy, employment, capital investments and other income. There are 3 categories of income distinguished by the source in art 6, IACT: income from land and buildings, income from employment and self-employment, income from business and other kind of income. 3 different boxes, Box I - employment, freelance, labor, personal enterprise; Box II - capital gains from enterprises in which the taxpayer has at least 5% share, Box III - investment and savings (art. 2.3 of Dutch Personal Income Tax Act 2001 - IB01) |
- Employment relationship, commercial activities, personally performed activities (art. 10.1 of I), not all incomes included in one consolidated base.
- Three different sources of income: 1. labor, 2. capital gains, 3. business (Inkomstskattelagen SFS 1999:1229, chapter 1, paragraph 3).
- Sources of income include: gross income (business, labor, pensions, annuities, alimony - Internal Revenue Code, Section 61 (a) and capital gains (IRC Section 1221).

Rates

- Between 36.5% and 50%.
- Between 25% and 50%.
- Between 5.5% and 40%.
- 5 sections: from the "zero-zone" (0% up to 8,004 €), over section 2 (transition zone: beginning with 14% up to the "rich people tax" (section 5) which has a rate of 45%.
- 1. Two tax rates for the tax on the consolidated tax base: 17% and 32% (21% and 40% in effect) (Sec. 29 and 30 of the Sza-tv) 2. 20% and 25% for different types of capital income.
- The law provides for 6 rates, from 25% to 43%.
- Box I: progressive - 33.45%, 41.95% (these two rates include 31, 15% of social insurance contribution), 42%, 52% (art. 2.10 of IB01). Box II: flat - 25% (art. 12.1 of IB01). Box III: flat - 30% (1.2% effective, art. 2.13.1 of IB01).
- The tax rate is 18 %, 32 % - employment (art. 27 of PIT Act), 19 % - capital gains (art. 30a.1 and 30b.1 of PIT Act)
- Between 15% and 43%.
- Progressive rates on labor - 28.85% - 34.17% (municipal tax, depending on the place of residence), 45.89% - 54.17% (state tax, added up to municipal tax), 53.89% - 59.17% (another higher state tax/l). (chapter 65, paragraph 6), 30% rate on income from capital (l. chapter 65, paragraph 7), 16% rate of 26.5% on business income (l. chapter 65, paragraph 10).
- Progressive rates for taxable income: 10%, 15%, 25%, 28%, 33%, 35% (IRC sec. 1, tax brackets are different depending on the filing status), long-term capital gains (over one year) - 15% flat rate (IRC sec.)

Correlation between equality and progressivity

The concept of a progressive tax rate is realized in Sec. 33 (5) ESG. In the past, the theory of the same sacrifice was discredited in public finance. Nowadays, the progressivity of tax rates might be rather legitimized by the social state principle.

The Conseil Constitutionnel ruled that progressivity does not constitute an unequal treatment, as long as the distinction is based on an objective criterion and is reasonably justified (19th January 2004) (page 12) in Article 13 of the Declaration, the need for progressive income tax and continuously proclaimed it in several decisions (Corts const. December 29, 1989, No 69-268 DC).

A tax rate which is increasing with increasing incomes means a progressive sacrifice to the taxpayer. So the increasing tax liability decreases the difference between sacrifices suffered by richer and poorer persons. That is why the progressivity of tax rates helps to support equality in taxation.

The tax system is formally progressive but considered that most of the income and other income brackets are less progressive recently. The personal income tax is the one in this legal system which applies in the best way the principle of fiscal equality, as a matter of fact is realized with the generosity and the progressivity of the taxation.

Principle of equality is fully respected in every source. Labour income is taxed by ability to pay and progressive rates. While a degressive tax burden occurs in Box III. The legislator believes that people with higher income have greater ability to pay.

Constitutional Court judgment 27/1981, 20th July. "Equality claimed here is closely linked to the concept of ability to pay and to the progressivity principle, that is why it cannot be only redirected to the terms of article 14 of the Constitution + "

Progressivity corresponds to the general principle of vertical equality.

Progressivity has been considered constitutional by the Supreme Court, progressivity corresponds to ability to pay principle and the principle of vertical equality.
### Housing

<table>
<thead>
<tr>
<th>Country</th>
<th>Austria</th>
<th>Belgium</th>
<th>Germany</th>
<th>France</th>
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<th>USA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Buy Family Residence</td>
<td>Costs related to acquisition of existing houses cannot be deducted</td>
<td>1 tax deduction from taxable income of 1,500 EUR max (indexed) from global taxable income (condition: only one house) (art.104.9 &amp; 118B1TCC)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Residence deduction of 7.5% from the amounts paid during period concerned to the acquisition (p.15)</td>
<td>N/A</td>
<td>N/A</td>
<td>Does not apply.</td>
</tr>
</tbody>
</table>

### Sale of Family Residence

**Tax exempt if it has both been the official residence of the family since the time of acquisition/ construction and in the last 2 years (Sec. 30(2) ITA)**

**No taxation on surplus values if the residence was exempt from taxation for 12 months preceding the sale. (art.83b3BITC)**

**Parents can transfer income to a child which also has a tax-free amount less than 8 000 EUR. §32a I S. 2 Nr. 1. The child has to receive this income.**

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>1. Exemption of capital gains from the sale of the family residence or sales of properties does not exceed 15 000 EUR</td>
<td>2 taxed as capital gain (16%) (art. 150ber and following CGI)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>If financed by loan: interest deduction and certain acquisition costs (art. 3.120(1) DPITA)</td>
<td>Residence deduction of 7.5% from the amounts paid during period concerned to the acquisition (p.15)</td>
<td>N/A</td>
<td>N/A</td>
<td>Does not apply.</td>
<td></td>
</tr>
</tbody>
</table>

### Sale of Family Residence

**1. Revenues from the sale of real property are taxed as capital gains separately at a flat 25% rate. Exception: If the real estate is sold more than 15 years after it was bought, the deductions are accounted for according to the date of the transfer taking the year of the acquisition as the first year. 10% per cent of the calculated amount in the sixth year, 20 per cent of the calculated amount in the seventh year, and so on, until 100 per cent of the calculated amount may be deducted in the fifteenth year from the calculated amount of income. 4. Revenues are exempt from taxation if the taxpayer uses the income from the transfer for purchasing an accommodation in a home for the elderly or a residential home for the handicapped, or in a similar institution in any EEA Member State without repossessing and reselling rights for himself, for a close relative or for his domestic partner. (Sec. 59-64 Szérv)**

**When a surplus value is realised in Box II as a capital, unless the money is invested in a new family residence.**

**When a surplus value is realised in Box III as a capital, unless the money is invested in a new family residence.**

**1. General principle: taxation on return from capital (IL. 42(1) 2) Defferred on income from capital if reinvesting return in new residence within a year (IL chapter 47)**

**1. Special rules: taxation on return from capital (IL. 42(1) 2) Defferred on income from capital if reinvesting return in new residence within a year (IL chapter 47)**

**2. Special rules for joint returns—in the case of a domestic partner who make a joint return for the tax year or if the couple is subject to the tax (art. 42(1) 2) Special rules for joint returns—in the case of a domestic partner who make a joint return for the tax year or if the couple is subject to the tax (art. 42(1) 2) Special rules for joint returns—in the case of a domestic partner who make a joint return for the tax year or if the couple is subject to the tax (art. 42(1) 2) Special rules for joint returns—in the case of a domestic partner who make a joint return for the tax year or if the couple is subject to the tax (art. 42(1) 2) Special rules for joint returns—in the case of a domestic partner who make a joint return for the tax year or if the couple is subject to the tax (art. 42(1) 2)**

### Live in a Family Residence

**1. Family residence is taxed in Box I at progressive rates. A fictitious income is taken into account in the taxable base (0.55% x the value) (art. 3.112 DPITA)**

**A separate system of ‘immovable property tax’**

**1. no beneficial value (IL 42(28) B 2) If deferral on income on taxation, yearly interest of 1.67% of the defered amount in income from capital**

<table>
<thead>
<tr>
<th>Country</th>
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<th>USA</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>House is exempt from income taxation, still an &quot;Immovable withholding tax&quot; (art.1269BITC)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Family residence is taxed in Box I at progressive rates. A fictitious income is taken into account in the taxable base (0.55% x the value) (art. 3.112 DPITA)</td>
<td>N/A</td>
<td>N/A</td>
<td>Interest Deduction mentioned herein below.</td>
</tr>
</tbody>
</table>

**1. For-May 7, 1997, sales not treated as sales.**

**Subparagraph (a) shall be applied without regard to any sale or exchange before May 1, 1997.**

**Subparagraph (b) shall be applied without regard to any sale or exchange before May 1, 1997.**

**Subparagraph (c) shall be applied without regard to any sale or exchange before May 1, 1997.**

**Subparagraph (d) shall be applied without regard to any sale or exchange before May 1, 1997.**

**Subparagraph (e) shall be applied without regard to any sale or exchange before May 1, 1997.**
<p>| Rental Income from Housing | To NP for private reasons: taxable income = fictitious amount. No deductible expenses if rented to company or NP for professional reasons: taxable income = real amount, deductible expenses up to a certain amount (Art.78 &amp; 13BITC) | N/A | 1. Separate category taxed at progressive rates 2. Special simplified regimes apply to recipients of income from real property whose annual revenues do not exceed €15,000 and who do not let properties covered by certain special regimes (Art.14-33 CGI) | N/A | 1. Revenues from the rental of real property are regarded as income in its entirety. 2. The tax rate is 25% (Sec.74 84ja-kv) Income from rental included in the aggregated income of the taxpayer/owner of the residence. The property is taxed in Box III as capital income. Dutch system does not look upon the rental income but taxes over a fictitious 4% income over the value of the property which is rented out. 1. Taxed as patrimonial profits. 2. Exemption: if rented to taxpayer &lt;30yrs, transaction is not taxed. Income from capital (IL 42:1, 42:30) with one nominal tax reduction and one tax reduction assessing 20% of the capital gain (IL 42:31). General Rule - taxed as part of the consolidated base. Taxed together with labour income and it is taxed on a progressive rate of 18% or 32% (Art.27.1 of PIT Act). Taxpayers may however choose to tax it with the lump tax (rate of 8.5% on gross income) Included in Gross Income under I.R. C. §61. No special provisions for a principal residence. |
| Deduction of Interest on Mortgage | yes | yes | N/A | 1. Tax credit for interest paid the 5 first years of reimbursement of the loan. The amount of interest giving rise to a tax credit may not exceed €3,700 euros per year for a single, widower or divorced person and €5,000 euros for a couple filing jointly. This amount is increased to take into account dependents. 2. The credit tax amounts to 20% of the interests. It amounts to 40% for interest paid the 1st year of reimbursement (Art.200quedecis CGI) | Abolished in 2009 (too costly) | yes yes (Art. 3.120(1)) (DPITA) | Yes from income from capital (IL 42:1) | N/A | Under I.R.C. §163(h), the United States allows a home mortgage interest deduction, with several limitations. First, the taxpayer must elect to itemize deductions, and the total itemized deductions must exceed the standard deduction (otherwise, itemization would not reduce tax). Second, the deduction is limited to interest on debt secured by a principal residence or a second home. Third, interest is only deductible on up to $1 million of debt used to acquire, construct, or substantially improve the residence, or up to $100,000 of home equity debt regardless of the purpose or use of the loan. Mortgage interest deduction allowed for a primary and a secondary residence not exceeding 1 million. See Mortgage Interest column herein above. |
| Misc. housing | N/A | Additional tax deduction from taxable income of 500 EUR (condition: don't acquire a new house in the 1st 10yrs of your mortgage) Raised with 50 EUR when 3 or more children (Art.116BITC) | Services at house i.e. housekeeping, gardening, and any other service performed in connection with the home (§ 35a ESBC). Special regimes apply to some investments on real estate (Art.199quatties CGI) a reduction of income tax for French residents taxpayers building or acquiring a new housing that they undertake to lease unfurnished as a housing for individuals for a minimum of nine years. Certain housing subsidies are exempt from taxation (granted on the basis of government decrees for example). For tenant renting a house: 15% of the cost is deductible (Art. 37 IOTA) Profits from previous primary residences are taken into account for the deduction of interest of Mortgage (Art. 3.111a DPITA) | N/A | Under certain conditions, right to deduct costs associated with double housing due to work far away from permanent residence (IL 12:6-19-22) Restrictive mortgage subsidy. There are some preferential credits granted for low income housing depending on the income of the taxpayer. Subsidies to these credits are tax exempt | N/A |</p>
<table>
<thead>
<tr>
<th>FAMILY ISSUES</th>
<th>Austria</th>
<th>Belgium</th>
<th>France</th>
<th>Germany</th>
<th>Hungary</th>
<th>Italy</th>
<th>Netherlands</th>
<th>Poland</th>
<th>Spain</th>
<th>Sweden</th>
<th>USA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filing Status</td>
<td>No joint filing</td>
<td>If married: Filing jointly (but incomes are calculated separately); however, common assessment</td>
<td>Taxpayers can only file separately (Sec. 16 to 21 Art tv)</td>
<td>Filing separately; separate assessment</td>
<td>Individual (Corte costituzionale 36/1961) individual approach to the ability to pay principle</td>
<td>Spouses may be taxed jointly on the sum total of their incomes. They both have the right to exercise tax allowances and tax credits mentioned in the second part of this report. Tax is assessed in the name of both spouses at the double amount of the tax calculated on half of the joint income of the spouses. (Art. 6.2 of PIT Act.)</td>
<td>Individual (joint taxation up until 1991, regarded to restrain women from labour market principle of equality)</td>
<td>4 types of filing in I.R.C. §1</td>
<td>1. Married Filing Jointly</td>
<td>2. Married Filing Separately</td>
<td>3. Head of Household</td>
</tr>
<tr>
<td>Benefits</td>
<td>N/A</td>
<td>1. Loss compensation between spouses (art. 14 &amp; 129 BICT)</td>
<td>Joint taxation involves the “splitting-tariff”. The joint taxable income is divided into halves. The income from taxation for one half of the taxable income is calculated with the normal tax rate of § 32a I EStG and then double the tax amount to tax each separately.</td>
<td>N/A</td>
<td>Benefit to filing jointly is because less of your income will be subject to a higher rate of 32%. The same rule applies to you, single-endedly raises children. You, use the same mechanisms as filing jointly. Take the taxable base and divide by 2 and apply the deductions to each party dividing by two (Art. 5.4. of PIT Act).</td>
<td>FU: Reduction of taxable amount of 3.400EUR</td>
<td>FU: Reduction of taxable amount of 2.150EUR (not applicable when tax, lives with his parents)</td>
<td>Compensation for individual taxation; integration of social welfare system with extensive rights to allowances.</td>
<td>Married Filing Jointly: spousal incomes are taxed as a unit and all gross income is added together provided the spouses file as married filing jointly rather than married filing separately under I.R.C. §1.</td>
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<tr>
<td>Dependent Children</td>
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</tbody>
</table>
| 1. Tax credit for children under certain conditions (art. 33(3) ESIG)
2. Tax credit for married people in a comparable partnership (Sec. 33(4)(1) ESIG)
3. Tax credit for single-parents (Sec. 33(4)(2) ESIG) |

1. Children’s earnings added up to parents income till 18yr (conditions: legal right of possession on the income). Exception income from labour is taxed separately (art. 12§§4 BITC). Threshold level of ‘tax free base’ increases (art.132BITC). |

§ 31 ESIG is the citation for § 32 ESIG granting tax exempt amounts and §§62 ff ESIG granting child benefits. The tax reduction is 2.904€ per child or if you are low income you get a monthly allowance for 184 € for the first and the second child. The third child gets 190€ and then 215€. |

1. The family tax allowance for each beneficiary dependent per month of eligibility shall be 4,000 forints, provided that the number of dependents does not fall below three on any given day of the month. |
2. Beneficiary dependent means a person in connection with whom any family allowance or similar support is provided in accordance with the Family Assistance Act or with any other similar legislation of any EEA Member State, any person who is eligible to receive family allowances in his own right, spouses or two related (biological, adoptive) and/or private individuals who receive disability benefits. |

1. Dependent children, family members, spouse who needs support
2. Decreasing deductions from the main tax payers income base as the income of the consorts increases (ICTA, art.12).
3. Credit of 345EUR for single parents with children
4. Additional credit with a max. of 1513EUR for children <16yrs (art. 8.15 DPITA) |

Child deduction < 25yrs (no age-condition if disabled) (condition: max. amount of income earned by child=8000EUR, max. amount of income from labour earned by child=1800EUR) (p14&15) |

Social welfare system: monthly child allowances depending on the number of children (Lag om almanna bambiarag SFS 1947.529).

<table>
<thead>
<tr>
<th>Misc. Initiatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
</tr>
</tbody>
</table>

Special regimes for cooperating spouses (art. 33 & 86 BITC) |

Parents can transfer a source of income (e.g. stocks) to a child which also has a tax-free amount of 80.04€ (32a I S. 2 Nr. 1). |

N/A |

N/A |

N/A |

N/A |

N/A |

N/A |

N/A |
<table>
<thead>
<tr>
<th>EXIT TAXES</th>
<th>AUSTRIA</th>
<th>BELGIUM</th>
<th>FRANCE</th>
<th>GERMANY</th>
<th>HUNGARY</th>
<th>ITALY</th>
<th>NETHERLANDS</th>
<th>POLAND</th>
<th>SPAIN</th>
<th>SWEDEN</th>
<th>USA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regime present?</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>n.a</td>
<td>no</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Why not present?</td>
<td>n.a</td>
<td>n.a</td>
<td>old rule infringed the freedom of establishment</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>old rule infringed the freedom of establishment</td>
<td>n.a</td>
</tr>
<tr>
<td>Based on a principle? Which?</td>
<td>Territorial principle</td>
<td>Territorial principle</td>
<td>Territorial principle</td>
<td>n.a</td>
<td>n.a</td>
<td>Territorial principle</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>Citizenship</td>
</tr>
<tr>
<td>Covered sources</td>
<td>substantial shareholding in a corporation (more than 1% of the shares) Sec. 3t (2) (2) EESG (2)</td>
<td>one-time payments from life insurance contracts, pension savings or group insurance contracts, but not interests or periodically paid pensions</td>
<td>n.a</td>
<td>shares in the sense of § 171 S.1 EESG (share of corporate entity; at least 1% within the last 5 years)</td>
<td>n.a</td>
<td>n.a</td>
<td>substantial interests (art. 4.16 (1)h) IB2001 &amp; art. 7.5 (7), pensions/annuities (art. 3.83 &amp; 3.133 IB2001)</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td></td>
</tr>
<tr>
<td>Time of taxation</td>
<td>n.a</td>
<td>n.a</td>
<td>Unlimited preserved tax assessment for EEC/EEA citizens who move to another EEC/EEA Member state in which they have a status similar to the unlimited tax payer in Germany, if administrative assistance and support on execution of the taxes is agreed upon (§ 6 V AISG)</td>
<td>n.a</td>
<td>n.a</td>
<td>preserved tax assessment on substantial interests and pensions/annuities, Exclusion of preserved tax assessment when improper acts art. 3.83 &amp; 3.133 IB2001 within 10 years (art. 26(3) and 26(3) inv. 1990)</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td></td>
</tr>
<tr>
<td>EEA</td>
<td>filing for preserved tax assessment in case of moving to EC member states or EAC member states with administrative and legal assistance</td>
<td>n.a</td>
<td>Unlimited preserved tax assessment for EEC/EEA citizens who move to another EEC/EEA Member state in which they have a status similar to the unlimited tax payer in Germany, if administrative assistance and support on execution of the taxes is agreed upon (§ 6 V AISG)</td>
<td>n.a</td>
<td>n.a</td>
<td>preserved tax assessment on substantial interests and pensions/annuities, Exclusion of preserved tax assessment when improper acts art. 3.83 &amp; 3.133 IB2001 within 10 years (art. 26(3) and 26(3) inv. 1990)</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td></td>
</tr>
<tr>
<td>other countries</td>
<td>Direct taxation</td>
<td>direct taxation</td>
<td>n.a</td>
<td>Direct taxation: possibility of deferral for at most 5 years in return for deposit in case of a soon payment bearing a significant hardship (§ 6 IV AISG)</td>
<td>n.a</td>
<td>n.a</td>
<td>preserved tax assessment on substantial interests and pensions/annuities, Exclusion of preserved tax assessment when improper acts art. 3.83 &amp; 3.133 IB2001 within 10 years (art. 26(3) and 26(3) inv. 1990)</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
</tr>
<tr>
<td>Expat Regimes</td>
<td>Austria</td>
<td>Belgium</td>
<td>France</td>
<td>Germany</td>
<td>Hungary</td>
<td>Italy</td>
<td>Netherlands</td>
<td>Poland</td>
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<td>Sweden</td>
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<tr>
<td>Regime present?</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>no</td>
<td>Yes</td>
<td>n.a.</td>
<td>no</td>
<td>yes</td>
<td>n.a.</td>
</tr>
<tr>
<td>Scope: for whom (subject)</td>
<td>A) advancement of science, researchers, art or sport (Sec. 103 ESIG)</td>
<td>B) temporarily assigned employees from foreign employers (ESR 2000 MN 1038a-1038b)</td>
<td>employees working temporarily as executives, directors or scientific researchers already having this function or the requirements to get it before working for scientific research centre, laboratory or an international group being non-profit organization, except one involved in research and development, already having or letting the employee create a permanent establishment</td>
<td>no</td>
<td>n.a.</td>
<td>n.a.</td>
<td>Legal base in art. 15a (15j) LB 1994 Meant for incoming employees with a &quot;certain specialty&quot; (art. 54 UVV bezal. LB 1995) based on function level, salary level, education level, experience level.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>IL 11.22-236a - An employee who is considered an expert, researcher, key person at a level which cannot be found in Sweden (IL 11.22) Maximum employment duration in Sweden for 5 years.</td>
</tr>
<tr>
<td>Needs to become a resident?</td>
<td>A) yes</td>
<td>B) no</td>
<td>yes</td>
<td>no</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>no</td>
<td>n.a.</td>
<td>n.a.</td>
<td>yes</td>
</tr>
<tr>
<td>Distinction on nationality? (formal and actual situation)</td>
<td>A and B) no, but centre of vital interest must not have been in Austria for 10 years</td>
<td>only applying to non-Belgians</td>
<td>only applying to non-French</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>no, however period of the regime is shortened by previous stays in the Netherlands in the last 10 years in months</td>
<td>n.a.</td>
<td>n.a.</td>
<td>yes, not for Swedish nationality</td>
<td>n.a.</td>
</tr>
<tr>
<td>Type of preferential treatment (tax exemption, tax rates) (object)</td>
<td>A) elimination of additional tax burden caused by establishment of unlimited tax liability in Austria (applicable to income previously not subject to limited Austrian tax liability)</td>
<td>B) reimbursement of costs for allocations, rental reimbursement, home travelling expenses are tax exempted</td>
<td>income reduced with the additional social security contribution; allowances to cover employee's extra expenses caused by the assignment in Belgium are not taxed, travel exclusion</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>30% of gross income is lowered as taxable base.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>tax reduction of 25% of the gross salary</td>
<td>n.a.</td>
</tr>
<tr>
<td>Time Frame (for how long can you opt for the regime)</td>
<td>A) annual filing possible for duration of public interest B) temporarily (not more than 5 years)</td>
<td>as long as the requirements are fulfilled</td>
<td>5 years</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>19 years, however will be shortened with previous stays in the Netherlands, calculated in months</td>
<td>n.a.</td>
<td>n.a.</td>
<td>3 years (IL 11.22 stretch 3)</td>
<td>n.a.</td>
</tr>
<tr>
<td>Official Reasons</td>
<td>A) importance of the activity of highly qualified persons for the Austrian economy</td>
<td>B) to consider territorial costs</td>
<td>attraction of foreign investors (e.g. multinationals) to boost Belgian economy</td>
<td>encouraging the installation of persons whose presence is normally a source of economic development</td>
<td>To refund extra territorial costs with a flat rate and thus lower the administrative burden. Also to attract foreign specialists for the Dutch labour market.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>to attract experts which cannot be found in Sweden</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
<td>Taxable event</td>
<td>Austria</td>
<td>Belgium</td>
<td>France</td>
<td>Germany</td>
<td>Hungary</td>
<td>Italy</td>
<td>Netherlands</td>
<td>Poland</td>
<td>Spain</td>
<td>Sweden</td>
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<tr>
<td><strong>Time of acquisition</strong></td>
<td>Taxation of transferable options</td>
<td>At 60th day after the offer, if offer is accepted within 60 days</td>
<td>yes</td>
<td>Taxation of transferable options</td>
<td>no</td>
<td>no</td>
<td>no</td>
<td>no</td>
<td>no</td>
<td>Taxation of stock option (Article 11 Royal Decree 439/2007)</td>
<td>no</td>
</tr>
<tr>
<td><strong>Time of execution</strong></td>
<td>Taxation of non-transferable options</td>
<td>if the option goes hand in hand with a certain benefit</td>
<td>no</td>
<td>Taxation of non-transferable options</td>
<td>Tax-free, if the stock option falls under the Approved Employee Securities Program, otherwise the tax rate depends on the relationship of the parties (Sec. 77B. and Sec. 77C.)</td>
<td>yes</td>
<td>yes (Article 10a Dutch Wage Tax Act 1965)</td>
<td>no</td>
<td>no</td>
<td>yes, (L 10:11 section 2)</td>
<td>no</td>
</tr>
<tr>
<td><strong>Selling the shares</strong></td>
<td>Taxation of the capital gain if shares are sold within 1 year (progressive tax rate as speculative income according to Sec. 30 EISG); selling after 1 year is tax-exempt, unless more than 1% of the total corporation’s shares have been sold according to Sec. 31 EISG</td>
<td>n.a.</td>
<td>Taxation of the capital gain of the share: Acquisition gain = exercise price (+ excess discount) - opening price of the underlying share on the options exercise date. b) Capital gain = selling price - market price of the underlying share on the option exercise date.</td>
<td>Taxation of the capital gain of the share (Sec. 77B. and Sec. 77C)</td>
<td>Taxation of the capital gain of the share</td>
<td>taxed as capital income</td>
<td>art. 30b 1 Polish Income Tax Act Taxation of the capital gain of the share</td>
<td>Taxation of the capital gain of the share</td>
<td>Taxation of the capital gain of the share</td>
<td>Taxation of the capital gain of the share</td>
<td></td>
</tr>
<tr>
<td><strong>Income type: Employment income/Capital income</strong></td>
<td>a) employment income: monetary benefit from the stock-option b) capital income: exercising of transferable options / selling the shares with capital gain</td>
<td>a) employment income: monetary benefit from the stock-option b) capital income: selling the shares with capital gain</td>
<td>a) employment income: monetary benefit from the stock-option b) capital income: selling the shares with capital gain</td>
<td>a) employment income: monetary benefit from the stock-option b) capital income: selling the shares with capital gain</td>
<td>a) employment income: monetary benefit from the stock-option b) capital income: selling the shares with capital gain</td>
<td>a) till exercise seen as employment income b) selling the shares seen as capital gain</td>
<td>taxed as capital income</td>
<td>a) employment income: monetary benefit from the stock-option b) capital income: selling the shares with capital gain</td>
<td>a) till exercise seen as employment income b) selling the shares seen as capital gain</td>
<td>Selling the stock or dividends are capital income</td>
<td></td>
</tr>
</tbody>
</table>