

## BOX 3 TAXATION

*How does the recent Dutch Supreme Court's judgment impact you?*

On the 24<sup>th</sup> of December 2021, the Supreme Court delivered its judgment that the Box 3 personal income tax, as it has been designed since the 1<sup>st</sup> of January 2017, fundamentally conflicts with the European Convention for Human Rights (ECHR). Meaning if you have not achieved the notional return on your assets of 5.39%, as laid down in statute, in the years from 2017 onwards, you may be able to reduce your taxes based on this judgment.

### EXPLAINING THE SUPREME COURT'S JUDGMENT

The box 3 system of taxing personal wealth has changed with effect from the 1<sup>st</sup> of January 2017. Since this date, a fixed return of 4% on all forms of capital is no longer assumed, instead an average return based on the amount of the capital held is used to calculate the return rate. In this regard, the law assumes that as the size of your capital increases, a larger amount is invested and that these invested assets provide a higher return than savings.

In July 2021, the Supreme Court already held that taxpayers may be confronted with an individual excessive burden as a result of the new system. In its judgment of the 24<sup>th</sup> of December 2021, the Supreme Court ruled that box 3 taxation at a system level, conflicts with the right to property and the prohibition of discrimination as entrenched in the ECHR.

Therefore, in the case at hand, the Supreme Court has sided with the taxpayer: by ruling that it is not the notional return that is taxed, but only the actual return of the taxpayer.

### WHAT CAN I DO?

This judgment signifies the final piece of a massive objection procedure against the box 3 taxation system. For the tax years up to and including 2016, taxpayers are automatically enrolled in the procedure, even if they did not object to the income tax assessment within 6 weeks deadline. However, since the law was adapted in the year 2017, taxpayers can no longer automatically benefit from the objection procedure.

This means that if did not file an objection within 6 weeks after receiving the final income tax assessment 2017, 2018, 2019 or 2020, you cannot in principle invoke the judgment of the Supreme Court. Have you not yet received a final assessment? It is then

recommended waiting for the final assessment and file an objection within 6 weeks. Especially if you achieved a lower (average) return on your assets, for example as a result of the general value decline of cryptocurrencies in 2018, we recommend to file an objection against the tax assessment.

### DOES IT STOP THERE?

Given the considerable impact of the Supreme Court's judgment and the extensive criticism that has been voiced in the House of Representatives about the box 3 system, it cannot be ruled out that the government will offer a scheme to taxpayers who have not submitted an individual objection.

We see opportunities to invoke the Supreme Court's ruling by submitting a request for an ex officio reduction. However, it remains to be seen whether this will succeed. This is because in principle, such a request will not be granted if it is based on new case law. Bearing in mind the special nature of this case, we do not consider such a request to be hopeless either.

In both cases, the actual return on your assets is paramount. After all, the impact of the Supreme Court ruling is that taxation must be based on the actual return as opposed to the notional rate.

### ACTUAL RETURN

If you only have savings, it is relatively easy to calculate the actual return on your assets.

Should you hold multiple forms of wealth, including cryptocurrencies or other non-tangible assets, this calculation becomes more complex. The Supreme Court's Judgment does not determine how the actual return should be calculated. It is therefore unclear, for example, whether unrealised returns (on cryptocurrencies) should be included. It may therefore be extremely advantageous for you to file an objection for the sake of certainty, if the interests are large enough.

If you have any questions regarding your (cryptocurrency) assets and the Dutch box 3 taxation system, we are happy to assist you.

**FOR MORE INFORMATION, PLEASE CONTACT:**



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