

Supreme Court sets aside current Box 3 tax

On December 24, 2021 the Supreme Court ruled in a class-action appeal that the Box 3 tax regime for the years 2017 and 2018 is contrary to the European Convention on Human Rights (ECHR). This deficiency in the law can be remedied by only taxing the actual return earned. The judgment affects the years from 2017 onward and may have consequences for thousands of taxpayers.

Box 3 since 2017

Since 2017 the tax in Box 3 has been based on a fixed asset mix. This means that it is presumed that part of the assets consist of investments and part of savings. The investments and savings are each deemed to have earned a specific fixed return. Investments are considered to earn a higher return than savings. This fixed asset mix in combination with the fixed returns has the effect of assuming that taxpayers with relatively large savings earn a significantly higher return than is actually the case. As a result, the Box 3 tax is in some cases out of step with the tax that would be payable on the basis of the actual return.

The Supreme Court judgment

The Supreme Court ruled that the fixed regime of Box 3, which has applied since 2017, is contrary to the right to uninterrupted enjoyment of property and the prohibition on discrimination in the ECHR. Consequently, taxpayers must be restored their rights by only taxing the actual return earned. The latter is noteworthy. Previously, the Supreme Court had ruled that the Box 3 regime could be in violation of the ECHR, but that the legal deficiency that would arise because of that violation cannot be rectified by the courts for the years through to 2016. Resolving the violation requires political choices to be made that are reserved for the legislator.

However, the Supreme Court now sees scope for the restoration of rights. This is because (in short) the introduction of a tax based on actual return cannot be expected before 2025, while the current regime not only violates the right to uninterrupted enjoyment of property but also discriminates.

Questions raised by the judgment

The Supreme Court has said that the actual return must be taxed, but does not explain how this actual return should be calculated and thus that important element is still unclear. The following questions could, for example, be raised: Should capital gains also be included? How should costs be dealt with? Can the Box 3 tax also be negative?

There is therefore still a lot of uncertainty about how this judgment applies to other taxpayers. We expect the Deputy Minister of Finance to provide more clarity about this soon and that the legislation will now also be quickly amended. Waiting until 2025, as previously announced, is no longer an option. After all, if the legislation is not amended, only taxpayers who benefit from this judgment will opt to have the actual return taxed.

Please feel free to contact your KPMG Meijburg & Co advisor if you have any questions or would like to discuss this judgment.

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