KPMG Meijburg & Co Tax & Legal

Box 3: restoration of rights, the future and pending legal proceedings

On Friday, April 15, 2022 Deputy Minister of Finance, Mr. Van Rij, sent two letters about Box 3 to the Lower House of Parliament. One letter concerns the Supreme Court judgment rendered on December 24, 2021, in which the court ruled that the Box 3 tax regime for the years 2017-2022 was contrary to the European Convention on Human Rights (ECHR) (the Christmas judgment). The letter addresses how rights can be restored for the tax years 2017-2022, how the law should be amended for the years 2023 and 2024 and the pending (tax return) legal proceedings. The letter does not contain any definite positions. The letter is intended to prepare Lower House MPs for the technical briefing on April 19. Remedial action will only begin around July 1, 2022 when it will be clear which taxpayers are to have their rights restored and how this is to take place. The second letter (the outline policy memorandum) addresses the outlines of a Box 3 tax based on actual return on investment, as this should apply as of 2025. These points are briefly discussed below.

Restoration of rights for the years 2017-2022

Restoration of rights target group

The Christmas judgment has forced the government to restore the rights of taxpayers. Taxpayers who took part in the class-action lawsuit or for whom the tax assessment has not yet become irrevocable will in any case have their rights restored for the years 2017-2020. It is not certain whether taxpayers whose tax assessments for those years have become irrevocable will also be compensated. This will require an administrative decision at the political level. All taxpayers will be eligible to have their rights restored for the years 2021 and 2022.

Two options for the restoration of rights

The only feasible means of restoring rights that is acceptable for the government is based on an actual capital mix, with a new flat rate calculation that is more in line with the actual return. The government is considering two options.

Option 1 – the flat rate savings option

This option is based on three flat rates: for savings, debts and other assets. The actual savings interest rate will be used for savings. This was 0.25% in 2017 dropping to approximately 0% in the years thereafter. For debts, the mortgage interest rate will be used: from more than 3% dropping to just under 2.5%. As is now the case under the current Box 3 regime, the multi-year average return on investment will be used for other assets. This is a weighted return of the multi-year average return on bonds, shares and property.

Option 2 – the flat rate option for all asset categories

Under this option, the flat rates for all the headings in the tax return will be adjusted to the average returns for the various asset categories in the relevant tax year, so that the flat rate return will (on average) be as close as possible to the actual return realized in the relevant year.

Additional restoration of rights per taxpayer
Because both options are based on flat rate returns, for most taxpayers the newly calculated return will not be exactly the same as the actual return realized. This is inherent to working with flat rates. Therefore, irrespective of the option chosen, there will be a group of taxpayers with an actual return that is lower than the (new) return calculated at the flat rate. Legal remedies for litigating their restoration of rights are available to taxpayers pursuant to legislation and regulations. Such legal proceedings could be settled in two ways.

Option A – rebuttal evidence is dealt with immediately
Under this option, taxpayers should indicate in a structured and substantiated manner that their actual return is lower than the (new) return calculated at the flat rate. These notices of objections could then be dealt with automatically.

Option B – rebuttal evidence after more legal clarity
Under this option, a number of cases would be selected in order to obtain more clarity about the Supreme Court's intention regarding the scope of the restoration of rights and to further delineate its legal framework. Other taxpayers would be asked to refrain from initiating legal proceedings or it would be proposed to stay their request or notice of objection until there is more clarity. These cases could be settled as soon as more clarity has been provided.

Basically, it has been concluded that neither option is 'good'. For example, both options have major implications for how the Dutch Tax and Customs Administration is to enforce this.

Legislation for the years 2023 and 2024

Fast-track legislation will be introduced for the years 2023 and 2024. The fast-track legislation in effect concerns transposing into legislation the option chosen for the restoration of rights for the years 2017-2022. An important difference compared to the restoration of rights is that under the fast-track legislation the tax imposed on taxpayers could also be higher than would have been the case under the current Box 3 regime. Those who benefited under the flat rate asset mix in Box 3 during the years 2017-2022 will not have to pay any additional tax under the restoration of rights, because there is no legal basis for this.

Legislation for the years 2025 and subsequent years

The government has proposed that as of 2025 the Box 3 regime be structured as a capital growth tax, whereby tax is levied annually on regular income (such as interest, dividends, rent and lease income) and the movement in value of assets (such as share price gains or losses and increases or decreases in the value of immovable property). Flat rates will initially still be used for immovable property. For example, the movement in value of a share portfolio will be taxed from year to year, rather than in the year in which some of the shares are sold. This will avoid the long-term deferral of taxation.

Under the regime applying as of 2025, certain costs will also be taken into account on the basis of the actual return and a type of loss set-off will become an integral part of Box 3. The very nature of taxation based on actual return means that it is more complicated than working with flat rates. Taxpayers will have to keep more records and a far greater effort from banks and insurers (the 'cooperating organizations') will be required to provide data to the Dutch Tax and Customs Administration. If Box 3 taxation on the basis of actual return is to be realized as of January 1, 2025, the legislative process will have to be completed by the end of 2023 at the latest.

Pending legal proceedings

Restoration of rights for the years 2017-2020
The Deputy Minister will try to review/re-evaluate the tax assessments included in the class-action lawsuit and reduce these if necessary in line with the Christmas judgment by August 4, 2022 at the latest. Whether other tax assessments will be reduced (either before or after August 4, 2022) will depend on whether the target group that is to have their rights restored is enlarged and as stated above this requires an administrative decision at the political level.

For the year 2021
The Dutch Tax and Customs Administration has not yet incorporated the Christmas judgment into the digital tax return software for the 2021 tax year (for which tax returns can be filed as of March 1, 2022), which means that the income and threshold calculations and the tax payable in many tax returns with Box 3 assets are not correct. However, the final tax assessment will take this into account.

For the year 2022
For taxpayers who have received a provisional tax assessment for 2022 with income from Box 3, the amount on the provisional assessment may be wrong. These taxpayers can therefore opt to not pay the provisional assessment in full. The Dutch Tax and Customs Administration will not send any payment reminders or demands for payment for the unpaid installments. Nor will any late payment interest be charged on the 2022 provisional assessment. This will be laid down in law. The 'collection pause' will last until taxpayers receive the (provisional or final) tax assessment in 2023, in response to the 2022 tax return for the 2022 tax year. The Dutch Tax and Customs Administration will take account of the Supreme Court judgment when imposing these tax assessments. Any overpaid tax that taxpayers may pay as a result of the provisional 2022 tax assessment will be credited against the final 2022 tax assessment.

Cover for loss of tax revenue

The government will look into how it can cover the loss of tax revenue resulting from the restoration of rights, irrespective of the option or target group chosen. The basic assumption here is that the loss of tax revenue will, in principle, be covered within the term of the present government, with the asset domain also being taken into consideration. The Lower House of Parliament will be informed of the outcome of this weighting in the Spring Memorandum, which will be presented to the House no later than June 1, 2022.

KPMG Meijburg & Co comments

The Christmas judgment means that the government and the Dutch Tax and Customs Administration have a lot of work to do with regard to Box 3. Rights must be restored for the years 2017-2022. The government wants to make abundantly clear to the Lower House MPs where the bottlenecks are. This means that the process will take longer and taxpayers will have to wait a while longer for clarity (the remedial action should be able to begin on July 1, 2022). Transitional rules in line with the regime for 2017-2022 will apply for 2023 and 2024; the big difference being that taxpayers could also be 'worse off' for those years, whereas they could only be 'better off' for the years 2017-2022. As of 2025 the Box 3 tax will be based on the actual return on investment. This will again represent a major change for investors. What is striking is that in both letters hardly any attention is paid to the relationship with allowances, with investors in Box 2 and that many details still have to be worked out. Investors will frequently have to review their assets and debts going forward.

Should you have any questions about the above, Meijburg's advisors would be pleased to use their expertise to help you.

KPMG Meijburg & Co
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