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Cross-border Impact Assessment 2016

Dossier 5: The Qualifying Foreign Tax Obligation of Article 7.8 Dutch Income Tax Act and EU Law

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Dossier 5: The Qualifying Foreign Tax Obligation of Article 7.8 Dutch Income Tax Act and EU Law

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ITEM is an initiative of Maastricht University (UM), the Dutch Centre of Expertise and Innovation on Demographic Changes (NEIMED), Zuyd Hogeschool, the City of Maastricht, the Meuse-Rhine Euregion (EMR) and the Province of Limburg (NL).

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1. Introduction

On 1 January 2015, the optional scheme of article 2.5 Wet Inkomstenbelasting 2001 (hereinafter Dutch Income Tax Act 2001), was replaced by the new system of the qualifying foreign taxpayer. Under article 7.8, Dutch Income Tax Act 2001, qualifying foreign taxpayers are entitled to the same deductions and tax credits as domestic taxpayers.

The optional scheme was replaced because it was deemed to be incompatible with EU law.[1] In this dossier we will elaborate on the extent to which the new rule concerning the qualifying foreign tax obligation is in line with EU law.

The system is quite relevant in the Dutch border region. Globally speaking, it entails that taxpayers who do not reside in the Netherlands but enjoy over 90% of their worldwide income in the Netherlands are treated as residents of the Netherlands for tax purposes. It should be noted in this context that introducing a threshold is in principle always arbitrary. It is thinkable that most cases involving the qualifying foreign tax liability system will occur in border regions. After all, the further away people live from the Netherlands, the less likely they will be to accept a position there. Although this system also applies to taxpayers residing outside the border regions, it is reasonable to assume their numbers will be limited. The sheer number of potentially affected taxpayers alone would justify a thorough report within this broad field of research.

Concrete figures are unavailable given the recent entry into effect of the current system. For this reason, this study almost exclusively focuses on the legal consequences and discussion points of the system.

2. The legal arrangement

2.1 Period before the QFTO: Schumacker Doctrine

As a general rule, according to standard international tax law, the country of residence of the taxpayer must provide for the personal deductions. Under EU law, and specifically the ECJ's Schumacker decision, a Member State is obliged to allow foreign taxpayers who enjoy all or virtually all (90%) of their income in the Netherlands the same personal deductions as domestic taxpayers.[2] The underlying reasoning is that such taxpayers have insufficient taxable base in their states of residence, thus leading to a shift in the provision for these deductions to the state of employment. Subsequent ECJ case law has expanded this to other deductions beyond the immediate personal scope. [3] This includes, for example, the extension of the Dutch mortgage interest deduction to foreign taxpayers earning virtually their entire income in the Netherlands.[4]

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[1] ECJ 18 March 2010, Case C-440/08 (Gielen), NTFR 2010/795, Jur. 2010, p. I-2323.

[2] ECJ 14 February 1995, Case C-279/93 (Schumacker), Jur. 1995, p. I-225.

[3] See among others: ECJ 14 September 1999, Case C-391/97 (Gschwind), Jur. 1999, p. I-5451; ECJ 12 June 2003, Case C-234/01 (Gerritse), NTFR 2003/1142, Jur. 2003, p. I-5933; ECJ 1 July 2004, Case C-169/03 (Wallentin), NTFR 2004/1121,

2.2 Period before the QFTO: Optional scheme for domestic taxpayer status

2.2.1 Article 2.5 Dutch Income Tax Act

With the Schumacker decision in mind, the Netherlands introduced the option for domestic taxpayer status. This optional scheme allowed foreign taxpayers to receive virtually identical treatment as domestic taxpayers until the end of 2014. While it also allowed them access to the same fiscal facilities as domestic taxpayers, they formally remained foreign taxpayers. The scheme was more inclusive, however, than what the Schumacker decision (and similar jurisprudence) demanded of the Netherlands. The Netherlands also allowed foreign taxpayers who earned less than all or virtually all of their family income, i.e. at least 90% by Dutch standards, in the Netherlands to opt for treatment as a domestic taxpayer.

The optional scheme did include a significant anti-abuse clause, in the form of the 'clawback' provision under article 2.5 (3) Dutch Income Tax Act 2001. This set out that foreign taxpayers who no longer opted for domestic taxpayer status had to compensate for all the benefits, other than personal deductions, enjoyed over the previous eight years as a result of their opt in, which they would not have enjoyed as regular foreign taxpayers.

2.2.2 Discussions about the optional scheme

The clawback provision sparked a lot of discussion, mainly in Schumacker situations after the Renneberg decision.[5] In this case, the ECJ ruled that a foreign taxpayer who fulfilled the Schumacker criterion should be able to deduct his or her mortgage interest in the Netherlands. A situation is thinkable where foreign taxpayers who live in the EU initially opted in on domestic taxpayer status in the Netherlands and, as a result, could now claim mortgage interest deduction, even though they were actually entitled to do so all along under EU law, as the Renneberg decision asserted. Should these foreign taxpayers now decide to opt out again and directly invoke the Renneberg decision instead, this would lead to a mandatory restitution of the enjoyed mortgage interest deductions of the previous eight years, even if they could have claimed automatic granting of mortgage interest deduction for those previous eight years, provided they met the Schumacker criterion during those years. This discussion led the State Secretary to approve that foreign taxpayers initially opting in and later deciding to opt out because they met the Schumacker criterion would not have the clawback provision applied to them.[6] For non-

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Jur. 2004, p. I-6443; ECJ 6 July 2006, Case C-346/04 (Conijn), NTFR 2006/972, Jur. 2006, p. I-6137; ECJ 25 January 2007, Case C-329/05 (Meindl), NTFR 2007/471, Jur. 2007, p. I-1107; ECJ 18 July 2007, Case C-182/06 (Lakebrink), NTFR 2007/1334, Jur. 2007, p. I-6705; ECJ 16 October 2008, Case C-527/06 (Renneberg), NTFR 2008/2144, Jur. 2008, p. I-7735); ECJ 18 March 2010, Case C-440/08 (Gielen), NTFR 2010/795, Jur. 2010, p. I-2323; ECJ 31 March 2011, Case C-450/09 (Schröder), NTFR 2011/957, Jur. 2011, p. I-2497.

[4] ECJ 16 October 2008, Case C-527/06 (Renneberg), NTFR 2008/2144 Jur. 2008, p. I-7735.

[5] ECJ 16 October 2008, Case C-527/06 (Renneberg), NTFR 2008/2144, Jur. 2008, p. I-7735.

[6] Besluit van 26 april 2013, nr. DGB2013/201M, NTFR 2013/1090, V-N 2013/29.14. (Decision of 26 April 2013, no. DGB2013/201M, NTFR 2013/1090, V-N 2013/29.14.)

Schumacker cases, the optional scheme may still prove interesting for its mortgage interest deductibility.

In its Gielen ruling, the ECJ subsequently explicitly addressed the position of the optional scheme in EU law.[7] This case concerned a foreign tax subject who led an enterprise in both his country of residence Germany and in the Netherlands, and who made a claim to the application of the self-employed tax deduction of article 3.76 Dutch Income Tax Act 2001. Self-employed tax deduction is available to entrepreneurs who meet the hours criterion. The taxpayer did not meet the hours criterion when taking into account only the hours of managing the part of the enterprise in the Netherlands. Had all the hours spent on managing the foreign part of the enterprise been included, the taxpayer would have fulfilled the hours criterion. The ECJ first and foremost ruled that the hours spent on managing the foreign part of the enterprise had to be included in the assessment of whether the hours criterion had been met. Not including these hours constituted an infringement on the freedom of establishment given that domestic taxpayers who also performed parts of their entrepreneurial activities abroad were allowed to include these hours towards meeting the hours criterion. Subsequently, the Netherlands took the position that this infringement was justifiable since foreign taxpayers could opt for domestic taxpayer status. However, the ECJ ruled that the Netherlands could not hide behind the option for domestic taxpayer status. When primary EU law already obliges the Netherlands to include foreign hours towards the hours criterion, this benefit cannot be withheld by claiming that taxpayers would have been entitled to it had they chosen the optional scheme. The ECJ did not accept this justification as it effectively forced taxpayers to use the optional scheme. The optional scheme was thus unable to lift the impeding nature of the self-employed tax deduction.

Since foreign taxpayers in Schumacker situations automatically qualify for domestic treatment and the optional scheme could not justify the established infringement, the optional scheme was henceforth only relevant to foreign taxpayers in non-Schumacker situations and in non-EU situations, provided that a tax treaty is in place with the country of residence. It was initially actually the intention of the legislator to extend the system to non-Schumacker situations. After all, even cases in which foreign taxpayers only earned 70% of their family income in the Netherlands could lead to full use of the Dutch fiscal facilities in the state of residence. In that sense, the Netherlands was more generous at the introduction of the optional scheme than primary EU law, and particularly the Schumacker doctrine, required.

2.3 Introduction of the ‘qualifying foreign taxpayer’

2.3.1 Introduction

On 1 January 2015, the optional scheme of article 2.5, Dutch Income Tax Act 2001, was replaced by a new 90% system. With this system, the Dutch government is trying to move closer to EU law

[7] ECJ 18 March 2010, Case C-440/08 (Gielen), NTFR 2010/795, Jur. 2010, p. I-2323.

and the Schumacker doctrine specifically. The personal scope is more restrictive than the optional scheme, and it eliminates a number of options from the latter scheme that could have constituted a violation of EU law.[8] This means that henceforth, only foreign tax subjects who earn at least 90% of their income in the Netherlands are eligible for personal deductions. These persons are designated as qualifying foreign tax subjects under article 7.8(6) of the Dutch Income Tax Act 2001. With this change, the optional element of the present scheme is also eliminated, effectively putting the Netherlands in compliance with the ECJ's Schumacker criterion in its strictest form.

Besides the fact that only foreign taxpayers who meet the 90% criterion still qualify for the personal deductions available to domestic taxpayers, the scheme also has an important consequence for the determination of the taxable basis of qualifying foreign taxpayers. The system for qualifying foreign taxpayers only taxes income from the Netherlands, as with any other foreign taxpayers; articles 7.1 et seq. Dutch Income Tax Act 2001 are thus decisive. As a consequence, the tax progression clause ceases to exist, as do the preventive rules from the Uitvoeringsbesluit Inkomstenbelasting 2001 (implementing decision Income Tax 2001), i.e. the clawback provision and the specific settlement provision known as the 'inhaalregeling'. The optional element from the old scheme also disappeared: henceforth foreign taxpayers simply either qualify or don't qualify for the system. It will subsequently be determined whether additional regulations are required for migrating domestic taxpayers who were not taxpayers before or will no longer be taxpayers after their migration.

2.3.2 Definition

The status of qualifying foreign taxpayer is subject to a number of cumulative criteria under article 7.8 (6), Dutch Income Tax Act 2001:

1. The taxpayer is a tax-paying resident of an EU Member State, another State that is a party to the EEA, Switzerland or the BES Islands
2. 90% or more of the taxpayer's income is subject to wage and/or income tax in the Netherlands.
3. A declaration of the tax authority of the country of residence is presented with an overview of the income declared in the country of residence. Based on this declaration, the Dutch tax authority can assess whether at least 90% of the world income of the foreign taxpayer is earned in the Netherlands.

2.3.3 Personal scope of application

The personal scope of application under article 7.8(6) Dutch Income Tax Act 2001, is restricted to residents of EU and EEA countries, the BES Islands, and Switzerland. The system does not apply to residents of any other country. The optional scheme of article 2.5 Dutch Income Tax Act 2001,

[8] Kamerstukken II, 2013-2014, 33 752, nr. 3, under point 6 (Dutch Parliamentary Papers II).

applied to residents of EU Member States and of countries with which the Netherlands had a system in place for the prevention of double taxation that also provided for the exchange of information. The personal scope of application of article 7.8 Dutch Income Tax Act 2001, has thus been substantially limited compared to that of article 2.5 Dutch Income Tax Act 2001.

The legislator motivated this limitation referring to EU law, specifically the free movement of labour (article 45 TFEU) and the freedom of establishment (article 49 TFEU). On grounds of the above, there is no obligation to offer foreign taxpayers living outside the EU the same fiscal benefits as domestic taxpayers.[9]

In this respect, the legislator has broken with its long-standing policy, given that in 2001, when the Dutch Income Tax Act came into force, the legislator still expressed its desire not to limit the optional scheme to residents of EU Member States. In that context, the legislator reasoned that the inability to use such a scheme would cause serious financial disadvantage to a large number of persons from typical (r)emigration countries such as Australia, Israel and Morocco who largely enjoy a Dutch income.[10] These foreign taxpayers in (r)emigration countries, presently around 3200 persons, are excluded from the current system. The legislator estimates that these foreign taxpayers thus forfeit average benefits of EUR 940 formerly obtained from opting in.[11]

2.3.4 Income threshold

The income threshold of article 7.8 Dutch Income Tax Act 2001, implies that foreign taxpayers whose income is, by Dutch standards, entirely or virtually entirely, i.e. 90% in the Dutch view, subject to wage or income tax in the Netherlands receive identical tax benefits as domestic taxpayers. Note that this system is of mandatory nature. While the old system still offered foreign taxpayers the option of applying this scheme, regardless of the size of their Dutch income, article 7.8 Dutch Income Tax Act 2001, applies to all foreign taxpayers who qualify.

In addition, article 7.8 (8), Dutch Income Tax Act 2001, contains a provision of delegation, under which taxpayers who reside in the EU, EEA, Switzerland or the BES Islands and whose income is not subject to wage or income tax in the Netherlands for more than 90% can, under certain conditions, be designated as qualifying foreign taxpayers nevertheless. This provision of delegation has been included to enable a swift and adequate response to developments in ECJ jurisprudence, e.g. its ruling in the matter of the Commission v. Estonia.[12] This case involved a resident of Finland with small and approximately equal pension incomes from both Finland and Estonia. Due to the small size of her income, she was not taxable in her state of residence, Finland, so that her financial standing and her personal and family situation could not be factored in there. The ECJ ruled that, under such circumstances, the refusal of the state of employment to treat the non-resident person as equal to a resident constitutes an unjustifiable infringement on

[9] Such an obligation may exist under treaties between the EU and other powers, see for example the ECJ ruling 28 February 2013 nr. C-425/11, Jur. 2013, n.n.g (Ettwein) in the relationship with Switzerland.
[10] Kamerstukken II 1998/99, 26 727, nr. 3, p. 79-80 (Dutch Parliamentary Papers II).
[11] Kamerstukken II 2013/14, 33 752, nr. 11, p. 74 (Dutch Parliamentary Papers II).
[12] ECJ 10 May 2012, Case C-39/10 (Commission v. Estonia), NTFR 2012/1371.

the free movement of labour. As a result of the ruling in Commission v. Estonia, the literature has taken the point of view that no fixed percentage can be used for the assessment whether the Schumacker criterion has been fulfilled.[13] We concur with this point of view.

The Commission v. Estonia ruling concurs with the position of the legislator at the introduction of the Dutch Income Tax Act 2001:

'Gelet op de rechtspraak van het Hof van Justitie van de EU waarin is aangegeven dat het in beginsel aan de woonstaat is om rekening te houden met de persoonlijke en gezinssituatie van belastingplichtigen, maar dat bij onvoldoende inkomen uit die woonstaat ook de werkstaat met die situatie rekening moet houden, verdient een arbitraire grens van 75 of 90% van het wereldinkomen niet de voorkeur.' [14]

(*Based on the case law developed by the Court of Justice of the EU, which provides that it is generally the duty of the state of residence to take into account the personal and family situation of taxpayers but that, in case of insufficient income from that state of residence, the state of employment also has to take that situation into account, an arbitrary threshold of 75 or 90% of the world income is not preferable.*)

The fact that article 7.8 Dutch Income Tax Act 2001, does include an income threshold expressed as a percentage is remarkable in light of the above. The inclusion of article 7.8 Dutch Income Tax Act 2001, thus marks the reintroduction of a system with an arbitrary threshold. The legislator uses the justification that it follows from Schumacker that equal treatment need only be offered to taxpayers who live in an EU Member State, earn all or virtually all of their income in another Member State and enjoy insufficient income in their state of residence for that state to be able to take into account their personal and family situation.[15] From the Gschwind ruling it follows that 'all or virtually all' can be interpreted as 'at least 90%', according to the legislator.[16] This legal foundation reasons that, according to Schumacker, the comparability of residents and non-residents in the state of employment depends on the actual situation in the state of employment of the non-resident. This reasoning justifies an income threshold that relates to the actual situation. From the fact that the Court ruled out discrimination in the Gschwind case, the legislator has concluded that an income threshold of 90%, as was used in the German system disputed in this case, is indeed compatible with EU law.

The legislator postulates that both The Commission v. Estonia and Wallentin[17] are highly casuistic, so that no general principles can be derived from them and Gschwind still remains leading.[18] We,

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[13] See, among others, F.P.G. Pötgens, 'Nadere precisering Schumacker-criteria', NTFR-B 2012/36 (Further Precision of the Schumacker criteria) and H. de Vries, 'Keuzeregeling art. 2.5 Wet IB 2001 – stand van zaken en hoe nu verder?', WFR 2013/972 (Optional scheme Section 2.5 Dutch Dutch Income Tax Act 2001 - state of affairs and how to proceed?).
[14] Kamerstukken II 1999/2000, 26 727, nr. 7, p. 445 (Dutch Parliamentary Papers II).
[15] Kamerstukken II 2013/14, 33 752, nr. 3, p. 24 (Dutch Parliamentary Papers II); and ECJ 14 Februari 1995, no. C-279/93, Jur. 1995, p. I-225, BNB 1995/187, with note by A.H.M. Daniels (Schumacker).
[16] Kamerstukken II 2013/14, 33 752, nr. 3, p. 24 (Dutch Parliamentary Papers II); and ECJ 14 September 1999, nr. C-391/97, Jur. 1999, p. I-5451, BNB 2001/78, with note by I.J.J. Burgers (Gschwind).
[17] ECJ 1 July 2004, nr. C-169/03, Jur. 2004, p. I-6443, V-N 2004/35.15 (Wallentin).

on the other hand, view The Commission v. Estonia as a confirmation of that which the legislator argued at the introduction of the Dutch Income Tax Act 2001. Another case that might be of influence on the provision of delegation is X.[19] In this case, also known as the Spanish football broker, Advocate-General Wathelet has recently concluded that residents of Spain enjoying no income in their state of residence but enjoying income from companies based in the Netherlands (60%) and in Switzerland (40%) should be able to claim proportional personal deductions, such as mortgage interest deduction, in the Netherlands as their state of employment. According to the Advocate-General (AG) it would be paradoxical if a tax subject with only one work state could make a claim under the Schumacker doctrine, while a tax subject who made use of the freedom of movement and worked in two countries could not. If the ECJ were to follow the AG's reasoning, this would mean that the Dutch system for qualifying foreign tax liability would have to be adjusted, because in that case foreign tax subjects who earned less than 90% of their world income in the Netherlands would likewise have to be eligible for personal deductions in the appropriate proportion to their income.

The position of the legislator that general principles, such as an income threshold, can be distilled from certain older rulings of the Court whereas other, more recent case law on the same issues could not constitute a useful framework for legislation in our opinion mainly seems to be a consequence of the political choice to limit the scope of application of article 7.8 Dutch Income Tax Act 2001. Both the Schumacker (1995) and the Gschwind ruling (1999) were issued well before the introduction of the Dutch Income Tax Act 2001. Based on these same rulings, the legislator has now changed its position on how the requirements under EU law can best be fulfilled in Dutch income tax law. The legislator does not provide the reasons for this turnaround.

The conclusion must therefore be that, at present, the legislator has a clearly different interpretation of the Schumacker and Gschwind decisions than it did at the introduction of the Dutch Income Tax Act 2001, but the parliamentary history of article 7.8 of that act gives no indication of why, and on what grounds, the legislator revised its position. Likewise, how to deal with a situation in which a foreign tax subject has two work states, but meets the 90% criterion in neither of them, remains an open question.

2.3.5 Other conditions

2.3.5.1 Partners of 'qualifying foreign tax subjects'

In conformity with the second letter of amendment, partners of qualifying foreign tax subjects can also be designated as qualifying foreign tax subjects themselves. In such cases, partners are entitled to the same facilities as the person designated as a qualifying foreign tax subject on regular grounds. The requirements are that (i) the partner also lives in one of the countries listed above and (ii) at least 90% of the aggregate income of both partners is subject to wage or income

[18] Kamerstukken I 2013/14, 33 752, G, p. 23 (Dutch Parliamentary Papers I).
[19] Case C-283/15.

tax in the Netherlands. This extension to the partners does not affect any discussions that might arise on the awarding of and the amount of tax credits for emigrating and immigrating domestic tax subjects.

In principle, emigrating and immigrating domestic taxpayers who have a partner for part of the calendar year can no longer apply the optional scheme for partnership during the entire calendar year (2.17 (7) Dutch Income Tax Act 2001). Exceptions are made for emigrating or immigrating domestic taxpayers who are qualifying foreign taxpayers during the other period of that same year. Note that, also in this case, 90% of the aggregate income of both partners must be subject to wage or income tax in the Netherlands and both partners must reside in an EU/EEA Member State, Switzerland or the BES Islands for the entire year. Although the overall system seems reasonable, it is not possible to opt for partnership in cross-border situations where the taxpayer can be designated as a qualifying foreign taxpayer for one part of the year and is not taxable for the other part of the year. Given that allocation to one's partner would have been possible had the migrating tax subject been domestically taxable at any time that year, the difference in treatment within the year of migration might constitute an infringement on EU law.

2.3.5.2. Mortgage interest deduction and personal deduction

The qualifying foreign taxpayer system also imposes the rules for calculating the basis of the different tax boxes, departing from the rules applicable to regular foreign tax subjects. When a certain qualified source of income can be included in the basis of the foreign tax subject, the size of that qualified source has to be determined using the provisions for domestic tax subjects.

In addition to that, article 7.8 (1) Dutch Income Tax Act 2001, stipulates that the taxable Dutch income of qualifying foreign tax subjects generated from work and own home shall be supplemented with the taxable income from one's own home minus the expenses towards income provision and the personal deduction if said income is negative. Effectively, this means that qualifying foreign taxpayers can deduct their mortgage interest, expenses towards income provision and personal deductions from their income from work and own home from a Dutch source. As such, this is a different arrangement from that of regular foreign taxpayers. Similar systems have been included for the Dutch income from substantial interests (article7.8 (2) Dutch Income Tax Act 2001) and the Dutch income from savings and investments (article 7.8 (3) Dutch Income Tax Act 2001). As a result, the personal deduction can also be subtracted from the income in those boxes. The mortgage interest is naturally only deductible from the income from work and own home.

Qualifying foreign tax subjects can deduct 100% of the negative taxable income from their own home, the expenses towards income provision and their personal deduction, even if less than 100% of their income is taxable in the Netherlands. Although the personal deduction was initially only generally referred to, the second letter of amendment explicitly added that expenses incurred for monumental buildings should be deductible. Insofar as the amount of these deductions depends on income (see for example article 6.39 (1) Dutch Income Tax Act 2001), the income as calculated according to the rules for Dutch domestic taxpayers will serve as the

measure to determine this amount. By seeking alignment with the calculation already in place for domestic taxpayers, any unjustified valuation differences between domestic and qualifying foreign tax subjects are avoided. The system thus seems sufficiently neutrally formulated from an EU-legal perspective. The personal deduction is subject to the regular order of allocation to boxes set out in article 6.2 Dutch Income Tax Act 2001.

Regarding the application of the rules on Dutch income from savings and investments, it is stipulated that the tax-free threshold and the debt threshold that apply to domestic taxpayers also apply to qualifying foreign tax subjects.

Article 7.8 (4) Dutch Income Tax Act 2001, prevents deductions from being granted both in the country of residence and in the Netherlands as country of employment. Under the optional scheme, the personal deductions were not granted to the foreign taxpayers who opted in only insofar as they were already being effected with their partner. Under the current system, the circle has expanded to include the qualifying foreign taxpayers themselves. Thus, when the negative income from their own home, the expenses towards income provision or the personal deductions of qualifying foreign taxpayers have already been taken into account by their state of residence, they cannot lower the Dutch tax basis of the qualifying foreign tax subject. In such cases, the notion of partnership is interpreted according to Dutch standards. This also seems in accordance with EU law and general international tax law. After all, were the Netherlands, as state of employment, also to grant a deduction in such situations, double deduction would occur, both in the country of residence and the country of employment. In such situations, the main rule applies that the state of residence provides the personal deductions if this is manifestly possible. It is noteworthy, moreover, that the fall-back provision to avoid double deductions does not explicitly focus on the tax credits and the tax-free threshold. The explanatory memorandum does note that it is the intention to include them. The relevant literature suggests that the provision should be supplemented in this area.[20] Extension of the provision has not taken place in the parliamentary process, however.

3. European Integration

The influence of the system on European integration still awaits thorough investigation. However, this requires substantiating figures, which are unavailable at present. For this reason, the influence of the system on European integration remains unknown.

Nevertheless, it is thought to have a negative impact on European integration as the imposition of a hard, arbitrary threshold of 90% by the Dutch legislator might be in breach of EU law. The reader is referred to paragraph 2.3.4. for more relevant information.

[20] See, among others, F.P.G. Pötgens, 'Van een kiezende naar een kwalificerende buitenlandse belastingplichtige', WFR 2013/1348 (From an opting to a qualifying foreign tax subject).

4. Conclusion

This contribution has demonstrated that the scope of application of the qualifying foreign tax subject under article 7.8 Dutch Income Tax Act 2001, is more limited than the previous optional scheme under article 2.5 Dutch Income Tax Act 2001, because the personal scope of application under article 7.8 Dutch Income Tax Act 2001, is restricted to residents of the EU and EEA countries, the BES Islands, and Switzerland. In addition, article 7.8 Dutch Income Tax Act 2001, is only applicable when all or virtually all of the income of the foreign taxpayer is subject to taxation in the Netherlands. This condition contradicts the legislative history of article 2.5 Dutch Income Tax Act 2001, because at the time of the introduction of the Dutch Income Tax Act 2001 the legislator indicated that this type of arbitrary percentage threshold was not preferable. Further, this hard threshold, set at 90% of the world income, could arguably be in violation of ECJ case law, specifically the matters Commission v. Estonia, Wallentin, and the conclusion in the still pending procedure X (Spanish football broker).

In support of these changes, the legislator has argued that it wanted to align the new system with EU law. This has succeeded as far as the personal scope of application is concerned, although we would have preferred a continuation of the broad personal scope of application. Concerning the income threshold, for which the legislator has fallen back on the Schumacker and Gschwind decisions, we find it remarkable that the legislator now adheres to a clearly different interpretation of these decisions than at the introduction of the Dutch Income Tax Act of 2001. Also in light of the new EU jurisprudence, we request a reconsideration of this condition.

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