

Dutch Supreme Court rules on actual return on second home in Box 3

On Friday, December 20, 2024 the Dutch Supreme Court rendered [judgment](#) on how the actual return on a second home should be calculated in the context of the restoration of rights in Box 3. The case concerned a second home that the taxpayer did not rent out, but used themselves. The Supreme Court also addressed (the treatment of) additional investments in homes. The Supreme Court has used this judgment to further elaborate again on the concept of 'actual return realized', as used for the restoration of rights in Box 3. This was in response to Supreme Court judgments where the court had ruled that the flat-rate Box 3 regime is contrary to human rights conventions and rights must be restored by taxing the 'actual return realized' if that is lower than the deemed return as that follows from the flat-rate Box 3 regime.

Actual return realized in the context of restoration of rights in Box 3

In 2024 the Supreme Court – in short – ruled that, for the purposes of the Box 3 restoration of rights, 'actual return realized' must include:

- any actual income received, such as interest, dividends and rent; and
- any unrealized appreciation in value, which for homes must be calculated on the basis of WOZ values.

There is no place in this system for the deduction of expenses, other than interest expenses. However, it was not clear which WOZ values must be used, how the tax was levied in years in which a home is bought or sold and whether deemed income should be taken into account for own use. These questions were answered by the Supreme Court in the judgment it rendered on Friday, December 20, 2024.

No deemed income for own use

The Supreme Court ruled that in determining the actual return realized in the context of Box 3 restoration of rights, the benefit from own use of the second home must be set at nil. Determining the amount of such a benefit from own use requires choices to be made that only the legislator can make and not the Supreme Court.

Unrealized appreciation / depreciation in value of homes

For the purposes of Box 3 restoration of rights, any unrealized appreciation and depreciation in value form part of the actual return realized. In situations where a taxpayer has owned the second home for the entire year, this unrealized appreciation or depreciation in value must be determined based on the WOZ value at the beginning and end of the calendar year.

The value of the home at the beginning of the year must be based on the value that the tax inspector has set for that year in a decision pursuant to the WOZ Act. According to the WOZ Act (Section 18(1) and (2)), that is the value that the home had on the value reference date, i.e. a year before the beginning of the calendar year for which that value is determined. With regard to the value of the home at the end of the year, this should be determined based on the value of the home determined pursuant to the WOZ Act for the next calendar year and for which the value reference date is also the year before. An example to illustrate this:

In 2024 X bought a second home. Relevant for the year 2024 are the WOZ decision from 2024 (value reference date January 1, 2023, let's assume a value

of EUR 250,000) and the WOZ decision from 2025 (value reference date January 1, 2024, value EUR 280,000). The appreciation in value for the year 2024 is EUR 30,000.

The Supreme Court realizes that this actually means that the change in value for the previous year is being taxed, but believes this method best suits the choices that the legislator has made in the current Box 3.

Actual return in buy and sell situations

For the sake of completeness, the Supreme Court has also set out the rules for the situation where the second home does *not* fall in Box 3 for the entire year. If a second home is sold during the year, the buyer only has to take a proportionate part of the change in the WOZ value into account. The same applies to the seller. For the purposes of offering the restoration of rights, the actual return realized in the buy-and-sell year is thus independent from the return realized in economic terms (i.e.: the difference between the buy/selling price and the WOZ value).

An example to illustrate this:

X sells his second home to Y on July 1, 2024 for EUR 300,000. For the year 2024, the WOZ decision from 2024 (value reference date January 1, 2023) and the WOZ decision from 2025 (value reference date January 1, 2024) are relevant. Let's assume that the WOZ values are EUR 250,000 and EUR 280,000 respectively. To determine the actual return realized in the context of the restoration of rights, X and Y should then both take EUR 15,000 into account, i.e. each a 6/12th share of EUR 30,000.

Because the WOZ decisions for the period during which Y did not yet own the home also affect Y, Y may request the competent WOZ tax inspector in the relevant municipality to also determine the value of the home for the relevant year for him in a decision open to objection. Y can then (together with X?), if necessary, submit a notice of objection against that WOZ value.

Additional investments in a property

The Supreme Court then addressed the question of how additional investments in a property made after it was acquired should be treated when determining the actual return on a property in Box 3 in the context of offering the restoration of rights. This concerns expenditure related to improving or enlarging the property, not being maintenance expenses. With regard to property in general, the Supreme Court ruled that any appreciation in value up to the amount of the additional investment does not yield any actual return. In this respect, it only involves (the equivalent value of) the own capital input. The Supreme Court then addressed the application of this principle to homes.

The Supreme Court noted that for homes an adjustment for such additional investments will also somehow have to be made. According to the Supreme Court, there is only a place for this within the methodology of the WOZ value comparison method if such additional investments affect the 'WOZ final value', i.e. the WOZ value that applies for the following year and which is determined pursuant to Section 18(3)(b)

WOZ Act. The – one-off – deviation means that in those cases the share of the WOZ final value that can be allocated to the enlargement or improvement (not being maintenance) can be disregarded when determining the actual return for the year in which the additional investment is made. It is up to the taxpayer to produce facts, and if they are disputed, to demonstrate what the reason is for such a deviation and the amount thereof.

After the year of investment, the investment will be reflected in the WOZ value of the following year, so that for those years the WOZ value comparison method can then be used; at least that's how we understand the Supreme Court's ruling on this point.

KPMG Meijburg & Co comments

The Supreme Court has used this judgment to further elaborate again on the principle it formulated for the actual return realized in the context of the Box 3 restoration of rights. Although there is now more clarity, it is still a rather illogical system. Why are expenses (other than interest expenses) not allowed to be taken into account and why should the unrealized appreciation in value on homes be based on the WOZ values, which in fact reflect the change in value in the preceding calendar year?

Moreover, by using the WOZ value, (still) more legal proceedings about the WOZ value can be expected, including debates about the question whether something is an improvement. The debate about maintenance and improvement also plays a role with regard to properties that are not homes, even if the WOZ value in such situations has not been prescribed as a mandatory catch-all for determining the actual return realized.

Hopefully, in the bill that should lead to taxing the actual return, the legislator will make choices that will bring the income concept more in line with what an average citizen experiences as income. A choice that the legislator has in the meantime made in the envisaged, new Box 3 regime, relates to the amount of the benefit from own use of a second home. That benefit has been set at 2,65% of the WOZ value in the draft bill. The Council of State [has been critical](#) of that percentage, and we also wonder whether this percentage is not somewhat high. According to reports, there won't be a new Box 3 regime before 2028. Until that time, and unless the law is amended, the rules formulated by the Supreme Court will apply if taxpayers wish to invoke the restoration of rights in Box 3.

If you would like to know more about Box 3, feel free to contact us or your usual Meijburg advisor.

KPMG Meijburg & Co
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