Section A. On terminology

Questions 1-7

Until the PhD-thesis of the Netherlands legal author Hijmans van den Bergh in 1928, in Netherlands discourse the concept of ‘retroactivity’ was linked with the doctrine of ‘acquired rights’ or ‘vested rights’. Basically, the opinion was that a statute could be qualified as retroactive if acquired rights were infringed. Hijmans van den Bergh stated however that a difference should be made between retroactive effect, exclusive effect (nowadays usually called immediate effect) and grandfathering. The advantage of this approach is that the qualification of the temporal effect of a statute is not mixed up with the appraisal of the temporal effect. The approach of Hijmans van den Bergh has generally been accepted in the Netherlands legal discourse, although some minor adjustments have been made in the course of time.

Recently, the various concepts in transition tax law have been analysed and summarised in two PhD-theses. The conclusions of both authors are *grosso modo* the same. They argue that on the one hand there are transition rules that determine the temporal effect of the statute concerned: retroactive effect, immediate effect and delayed effect, and that, on the other hand, transition rules may arrange certain existing situations to be grandfathered.

Most of the times the temporal effect of a statute can be derived from the transition rule in that statute, namely by means of comparing the ‘effective entrance date’ that the statute mentions, with the ‘date of entry into force’ of the statute (which latter date should be – as required by article 81 of the Constitution – on or after the date of publication of the statute in the Government Gazette). So, if the effective entrance date is set prior to the date of entry into force, the statute has retroactive effect; if the effective date is the same as the date of entry into force, the statute has immediate effect; and if the effective date is set on a date after the date of entry of force, the statute has delayed effect. The just mentioned retroactive effect is called ‘formal retroactive’ (*formeel terugwerkende kracht*), to be distinguished from ‘material retroactive’ (see below). Please note that the afore-stated also implies that – otherwise than in some other countries – one speaks also about (formal) retroactive effect in case a statute enters into force on a certain moment in a tax year and is applicable as from the beginning of that year.

As stated above, besides the transition rules that determine the temporal effect, there are transition rules that may arrange that certain existing situations are grandfathered. Existing situations may partly be grandfathered, but also temporarily; these two ‘options’ may be chosen in one and the same existing situation. The

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3 L.J. Hijmans van den Bergh, Opeenvolgen van rechtsregels (*Succession of rules of law*), 1928.
question whether or not to grandfather does not only arise when the statute has immediate effect but also when the statute has retroactive effect or has delayed effect.

If a new statute has immediate effect and existing situations are not grandfathered, the literature refers to the effect of the statute on those existing situations as ‘material retroactive’ (materieel terugwerkende kracht). As mentioned in the introducing explanation to question 6, the concept of ‘material retroactivity’ is not well-defined in Netherlands legal (tax) discourse.5

Note that in the Netherlands legal language only one term (namely terugwerkende kracht), instead of two, is used but that an adjective (formeel (formal) and materieel (material)) is added to that term to make a distinction that corresponds with the two kinds of retroactivity for which in English two terms are used (‘retroactive’ and ‘retrospective’).

The conceptual variations that are mentioned in questions (2)-(4) are not commonly known in Netherlands legal discourse. It is true that the Netherlands legislator sometimes introduces a statute with retroactive effect and states that the statute only provides an interpretation (i.e., only clarifies the meaning) of another statute, but in the Netherlands legal system this phenomenon is not labelled with a specific concept, i.e. ‘interpretative statute’ as such. Furthermore, although it sometimes happens that the Netherlands tax legislator introduces a statute with retroactive effect to confirm a legislative practice or to ‘overrule’ a judicial decision that deviates from legislative practice (or only from the view of the Netherlands tax authorities), the phenomenon ‘validation statute’ is not recognised as such.

The distinction between substantive statutes and procedural statutes mentioned in question 7, is also made in Netherlands legal practice. So, a new procedural statute having immediate effect is directly applicable, also to legal proceedings regarding taxable years before the moment of entry into force. For example, the Netherlands legislator made an amendment to the existing rules regarding additional assessments in 1994, which amendment held that imposing an additional assessment would be possible in case of “bad faith” of the taxpayer. This change was applicable to all additional assessments imposed after the entry into force, so also to those regarding years prior to 1994.6

The consequences of the immediate effect of the introduction (or change of) rules regarding evidence or the burden of proof, depend on the answer whether such a rule is incorporated in a procedural rule or in a substantial rule. If such a rule is incorporated in a substantial rule (e.g., “cost of maintenance of real estate is only deductible when there are documents that can proof the maintenance” while before the legislative change the proof should no necessarily be provided by documents) the immediate effect of the change would in principle imply that the change is only applicable to costs made after the moment of entry of force - which usually is the beginning of the next tax year. If however a rule of evidence or the burden of proof is incorporated in a procedural rule (e.g., the rule that in case a taxpayer has filed a tax return that is substantially incorrect, the taxpayer has the burden of proof that the

5 Sometimes a conceptual sophistication is proposed. E.g., Schuver-Bravenboer, Fiscaal Overgangsbeleid (Tax transition policy), 2009, p. 53-60 suggests to use the term ‘material retroactive’ only for the situation in which the immediate effect of a new statute (without grandfathering) has the consequence that the new statute is applicable on a hidden reserve / unrealised gain that has accrued prior to the moment of entry into of force of the statute, and to use the term ‘retroactive in the social sense’ for other situations in which expectations of tax payers created by the old law are interfered by the new statute. However, this approach is not (yet) generally followed.

assessment imposed by the tax authorities is not correct), the immediate effect of the change would in principle imply that the change is applicable to all assessments imposed after the entry of force of the rule, so also to assessments regarding previous tax years.

Section B. Ex ante evaluation of retroactivity

Question 8

The Constitution contains a provision that prohibits retroactivity of criminal statutes (article 16: “No fact is regarded as criminal then by force of a preceding criminal statute”; italics supplied). The Constitution does contain the principle of legality with regard to taxes, but that provision does not explicitly impose limitations on the retroactivity of tax statutes. Furthermore, the Constitution does neither contain a provision in which the principle of legal certainty (or the principle of ability to pay) is laid down.

There is an old act (the General Provisions Act (Wet Algemene Bepalingen)) of which article 4 stipulates: “A statute only binds for the future and has no retroactive effect.” However, according to case law of the Supreme Court this provision is not addressed to the legislator but only to the judge - who may not grant retroactive effect to a statute unless the legislator has provided so.

Notwithstanding the above, in Dutch legal discourse it is generally accepted the principle of legal certainty and of legitimate expectations are general legal principles and that these principles normatively restrict the legislator in his possibilities to grant retroactive effect. This latter is not altered by the fact that there is a constitutional prohibition for the courts to test Acts of Parliament for compatibility with general legal principles (unless such a principle is incorporated in a binding international treaty); see answer to questions 15-16 below.

Question 9

As mentioned in the explanation to this question, the Netherlands State Secretary of Finance has published – and discussed with Parliament – a memorandum. The State Secretary is the leading figure in the enacting of tax legislation, so it is his task to establish a general policy. This memorandum sets out the main lines of his ‘transition policy’ with respect to the introduction of tax statutes. The memorandum is not legally binding, but it has influence in the parliamentary debate, for example, in the event that a bill includes retroactive effect. The State Secretary and parliament

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7 Article 104 of the Constitution: “State taxes are imposed by force of a statute.”
8 E.g., Supreme Court January 13, 1971, no. 16 452, BNB 1971/44.
9 Compare e.g. Supreme Court October 7, 1992, no. 26 974, BNB 1993/4.
10 “Restrict”; so not an absolute prohibition.
11 In the Netherlands the enactment of a statute (Act of Parliament) is not a task of solely parliament, but is a task of parliament and government together (article 81 of the Netherlands Constitution). The government is constituted by the King and the Ministers (article 42 of the Constitution). In cases in which the Minister regards it as appropriate, the State Secretary can substitute the Minister (article 46 of the Constitution). Statutes are signed by the King and one or more Ministers or State Secretaries (article 47 of the Constitution).
12 The State Secretary of Finance introduces most of the tax bills. He is also head of the tax administration, and as such politically responsible for its functioning. Unlike some other countries, he is not part of the civil service.
discuss the temporal effects of the bill in terms of this memorandum. Furthermore, lower courts and advocates-general to the Supreme Court sometimes refer to the memorandum when testing transition rules of a statute for compatibility with article 1 First Protocol ECHR. Also, in tax literature the memorandum is used to discuss the fairness of the transition rules included in a bill.

Until very recently, the current status of the memorandum is not clear. When discussing the memorandum with parliament, the Netherlands State Secretary of Finance ended the discussion by stating that the advice of the Council of State with respect to retroactivity would be the guideline in the future. In practice however, the lines of the memorandum still seemed to be used by the State Secretary when drawing up tax bills. Recently, in December 2009, upon request of member of the Senate the State Secretary however again confirmed that he agrees with the view of the Council of State. Although the memorandum is thus officially withdrawn, it is still interesting to discuss.

The memorandum sets out as the starting points of tax transition policy that in principle no retroactive effect will be granted to statutes and that statutes in principle will have immediate effect (without grandfathering). The memorandum consists of two parts. The first deals with (formal) retroactivity and the second part deals with immediate effect and grandfathering.

The memorandum is especially focussed on changes in legislation that are disadvantageous for taxpayers. It gives no attention to the topic of granting retroactive effect to tax statutes that are favourable to taxpayers.

In the first part of the memorandum it is stated that the question whether or not retroactivity is justified, is a question of balancing of interests: on the one hand legal certainty of the individual taxpayers concerned and on the other hand the interest of the society as a whole that are served by granting retroactive effect to the statute concerned.\textsuperscript{13} Whether or not retroactivity in a concrete case is justified, cannot be answered in general but depends on the circumstances of the case. However, two elements can be distinguished. The first element is called the ‘substantive element’: whether or not a justification exists for granting retroactive effect. The second element is called the ‘timing element’, which element refers to the period of retroactivity.

With respect to the ‘substantive element’ the memorandum mentions several relevant circumstances and factors that could justify retroactivity and/or that should be taken into account; in summary:

- The new statute targets abuse or improper use of tax rules;
- There is an obvious omission in the existing legislation;
- Announcement effects would occur after publication of the bill, if no retroactive effect would be granted;
- Government’s budgetary interest;
- Practical aspects regarding the implementation and execution of the tax legislation by the tax authorities.

With respect to the ‘timing element’ the memorandum states that the retroactive effect should in principle not reach further back in time than the moment on which the

\textsuperscript{13} The memorandum deals especially with retroactive effect of statutes that are disadvantageous for taxpayers. The memorandum does not examine the question under which circumstances granting retroactive effect to statutes that are favourable to tax payers is justified.
taxpayers have been informed about the intention to introduce a new statute. This latter moment is, e.g., the moment on which a bill is submitted with parliament or the moment on which a press release is issued in which the intention to introduce a new statute with retroactive effect is announced. However, retroactivity could also be justified in case the amendment concerned is ‘otherwise’ foreseeable, e.g. in case of an obvious omission. Furthermore, if there are very weighty arguments, the retroactive effect could even reach further back in time than the moment on which the regulation concerned was foreseeable for taxpayers. According to the memorandum, such arguments could be very big budgetary interests of the government or the avoidance that a small group of taxpayers would gain an unintended and unjustified advantage.

The second part of the memorandum points out that the question whether a statute should have immediate effect (without grandfathering) or should provide for grandfathering, is (also) a case of balancing of interests. These interests are the legitimate expectations of the taxpayers and the interest that is served by the statute concerned. In comparison with the first part (regarding retroactivity), the second part gives less guidance with respect to the circumstances and factors that should be taken into account when balancing the interests concerned. It is especially a pity that little attention is given to the question when expectations raised by the existing law can be considered ‘legitimate’. Furthermore, it would have been helpful when the memorandum would have provided examples of situations in which grandfathering is considered appropriate. Most examples provided refer to situations in which grandfathering is not regarded as appropriate (according to the memorandum), which is obviously less informative as it is in line with the transitional starting point of immediate effect without grandfathering.

Question 10

The Netherlands Council of State (Raad van State) advises the Netherlands government and parliament on legislation and governance and is the country’s highest administrative court.15 Like the House of Representatives and the Senate, which together form the States General (Parliament), the Netherlands Court of Audit and the National Ombudsman the Council of State is one of the High Councils of State. These are bodies regulated by the Constitution, each with its own specific task, which it carries out independently of the government. The Council of State provides government and parliament with independent advice on legislative proposals, i.e. bills submitted to Parliament by the government.16 In one of its advices with respect to a concrete legislative proposal, the Council of State has formulated its general criteria for examining tax transition law.

With respect to (formal) retroactivity the Council of State states that only in the event of ‘exceptional circumstances’ it is allowed to grant retroactive effect to statutes

14 The memorandum mentions relatively abstract factors like the nature of the new regulations’, the nature of the old regulations, the degree of reality of the expectations, the extent of the breach with the old law by the new regulations, whether the change of the statutes was foreseeable, and whether positions taken up under, and relying on, the old law can be changed.
15 The basis for its responsibilities can be found in Articles 73-75 of the Netherlands Constitution.
16 After a bill - together with the accompanying Explanatory Memorandum - is discussed in the Council of Ministers, it goes - together with the authorisation of the King - to the Council of State for advice; see Article 73 of the Netherlands Constitution and Article 15 of the Council of State Act (Wet op de Raad van State).
that are disadvantageous\textsuperscript{17} to taxpayers. Such exceptional circumstances could be present in case of \textit{considerable} announcement effects or in case of \textit{large-scale} tax abuse or improper use of tax rules. Please note that these requirements are stricter than those mentioned in the memorandum of the State Secretary: only two circumstances are mentioned and those two are more restrictive (see the adjectives in italics). Also with respect to the period of retroactivity (the ‘timing element’ in the memorandum) the Council of State is stricter than the State Secretary. According to the Council retroactivity is in any case not allowed if the regulations concerned were not sufficiently known for taxpayers at the point in time to which the retroactive effect reaches back in time.

With respect to the question of grandfathering or not, the remarks of the Council of State with respect to ‘material retroactivity’ are relevant. These remarks were made in an advice regarding a legislative proposal that provided that the new statute would also be applicable on existing agreements. The Council of State stated that in case a statute has ‘material retroactive effect’ a balancing of interests is necessary: on the one hand the interest of grandfathering existing agreements and on the other hand the financial interest of the government. The Council notes that a relevant circumstance to be taken into account is whether the taxpayers could rely that the transactions concerned are in line with aim and purpose of the law, and are apart from that not considered undesirable.

\textbf{Question 11}

The Netherlands legislator makes occasionally use of the instrument of ‘legislating by press release’. Please note that this instrument is in fact mentioned in the above (see the reply to question 10) mentioned memorandum of the State Secretary at the point that the ‘timing element’ is elaborated. It is however certainly not the case that the instrument is very often used.

There are \textit{grosso modo} two types of situations in which the instrument is used. The first is that the new statute concerned is aimed at (existing or expected) abuse or improper use of tax rules. Without announcing that retroactive effect will be granted to the moment of the announcement of the legislative proposal, it is feared that an announcement effect would take place, i.e. that taxpayers would just quickly make use of the loophole concerned between the moment of announcement and the introduction of the new statute. An example of such a situation in which the instrument of ‘legislation by press release’ is used, can be found in the \textit{Stichting Goed Wonen II} case of the ECJ (C-376/02). The advocate-general Tizzano was very critical with respect to the instrument\textsuperscript{18} and concluded that the retroactivity concerned was contrary to the principle of legal certainty. The ECJ did however not condemn the use of the instrument in general terms, but ruled – amongst others – that the Netherlands court should assess whether the press releases concerned were sufficiently clear to

\textsuperscript{17} The advice of the Council of State does not deal with retroactivity of favourable tax statutes.

\textsuperscript{18} Paragraph 38 “It is true that (…) the practice in some Member States is to give forewarning of legislative measures by means of press releases intended to apprise those affected by the legislation in due time. It appears to me, all other considerations aside, that such a practice cannot be extended to the context of a common market encompassing all European economic operators, in which the practice normally followed is inspired by the principle that the behaviour of citizens is guided and regulated by laws rather than by press releases. Indeed, as the Commission has rightly pointed out, the existence of a particular practice in a must not lead to a situation throughout the Community in which citizens in general and taxpayers in particular are called on to rely more on announcements in the press than on the law in force.”
enable taxpayers to understand the consequences of the legislative proposal for the transactions concerned. Eventually, the Netherlands court ruled that this was the case.19

The second type of situation is that an existing favourable tax policy rule (for example, a fiscal subsidy) is changed or withdrawn. In order to avoid announcement effects and negative consequences for the government’s budget the Netherlands legislator sometimes considers necessary to grant retroactive effect to the change (c.q. withdrawal) till the moment of the public announcement of the change and its retroactive effect. An example is the withdrawal of the so-called personal-computer-facility (which facility made it possible for an employer to grant a (wage and income) tax free allowance to an employee for the acquisition of a computer). This facility was withdrawn with retroactive effect till the moment on which the press release announcing the intention for the withdrawal with retroactive effect was issued. Recently, the Netherlands Supreme Court has ruled that this retroactive effect did not violate article 1 of the First Protocol ECHR.20

Question 12

It does only very incidentally happen that retroactivity goes further back than the moment on which the change concerned and its retroactive effect was announced. There are however three types of situations in which it sometimes happens.

The first type is a rather specific one. The situation arose after to the major and fundamental amendment of the personal income tax system in 2001, namely the replacement of the Personal Income Tax Act (PITA) 1964 by the PITA 2001. After the introduction of the PITA 2001, it appeared that this act contained several, mostly technical, errors and omissions. Therefore, the State Secretary submitted bills to repair the errors and omissions with retroactive effect reaching back to the moment of entry into force of the PITA 2001, i.e., further back in time than the moment on which the reparation was announced. In its advices the Council of State agreed with the retroactive effect because the Council thought that errors and omissions are reasonably not avoidable in case of such a major tax revision. However, according to the Council of State the reparation amendments that are granted retroactive effect should be minor amendments and should be reasonably expected by the taxpayers. Eventually, also Parliament agreed with the retroactive effect of several proposed amendments.

A second type of situation is when legislation contains obvious omissions and errors. Reparation with retroactive effect till the moment the omission or error did arise, not only happens in case of unjust cross-references etc., but sometimes also in case of substantial errors, e.g. if an amendment has the unintended result that a certain item of income is not taxable anymore.

A third type of situation is that new legislation is introduced further to a judgment of the Supreme Court. In case the legislator considers the judgment undesirable, e.g. because the judgment exposes a loophole in the existing legislation and/or because of the drastic negative consequences of the (erga omnes effect of the) judgment for the government’s budget, the legislator sometimes grants retroactive effect to the legislation that ‘overrules’21 the judgment. However, it sometimes happens that when

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19 Supreme Court December 14, 2007, no. 34 514, BNB 2008/37.
20 Supreme Court October 2, 2009, no. 07/10481 and 07/13624.
21 Please note that it is in principle not a genuine overruling, because it is usually provided that the new legislation does not affect the case of the judgment of the Supreme Court. It is a ‘overruling’ in the
the State Secretary submits a bill to overrule a judgment of the Supreme Court, parliament is critical. The result may be that the State Secretary withdraws the bill or amends the bill limiting the retroactivity.

**Question 13**

Because most of the cases of retroactivity of legislation concern the above (see the reply to question 11) mentioned phenomenon of ‘legislating by press release’ (and therefore the period of retroactivity is limited to the moment of announcement of the amendment concerned), the retroactive effect does normally not have the effect that pending legal proceedings are influenced.

Only in cases in which the period of retroactivity reaches further back in time than the moment of announcement (see in that respect the reply to question 12), it could in theory happen that the new statute (with retroactive effect) has influence on pending legal proceedings for courts. There are however no clear examples in case law of the Supreme Court.

There is one example of a situation in which the tax authorities took a position in a lower court proceeding that was contrary to existing case law of the Supreme Court but in line with a bill (which included an amendment with retroactive effect) that however still had to be filed with Parliament. The court concerned ruled on a moment on which the bill was still not filed (let alone accepted by Parliament) and ruled in favour of the taxpayer concerned. In addition, the court condemned the tax authorities to pay the full legal costs of the taxpayer because of ‘abuse of the legal proceedings’. In this situation however the statute concerned was not in force yet and as such could not influence the legal outcome of the legal proceedings.

If an amendment is introduced with a far-reaching retroactive effect to ‘overrule’ a decision of the Supreme Court (see the reply to question 13), the legislator usually provides that the new statute is not applicable to the case of the taxpayer who pursued the proceedings that led to the decision concerned of the Supreme Court. This may be done in the bill but it also may be the case that the State Secretary of Finance explicitly confirms this during parliamentary proceedings.

**Question 13**

The Netherlands legislator regularly grants retroactive effect to tax statutes that are favourable to taxpayers. It is difficult to say in which types of situations this happens, because most of the time there is little debate in Parliament if favourable retroactivity is proposed by the State Secretary of Finance in a bill. Furthermore, the above mentioned general memorandum of the State Secretary of Finance gives no attention to this topic. Moreover, in Netherlands tax literature there is little debate and little research with respect to this issue of favourable retroactivity.

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22 Note that the above statements hold for (retroactivity of) substantive statutes. Obviously, new procedural statutes are in principle also applicable to pending legal proceedings, as this general transition rule with respect to procedural statutes (see question 7).

23 Court of Appeal of ‘s-Hertogenbosch, July 16, 2003, no. 00/2803, V-N 2003/36.5.

24 Main exception in recent literature is the article of M. Bravenboer and A.O. Lubbers, Tijd voor uitbreiding van de Notitie terugwerkende kracht en eerbiedigende werking (Time for extension of the Memorandum ‘retroactivity and grandfathering’), Weekblad voor fiscaal recht 2005, p. 964-970.
Nonetheless, it seems that if favourable retroactivity is granted, it happens most of the time in situations in which the field of application *ratione materiae* of a provision has a different scope than expected and intended. E.g., in case of a favourable provision (such as a tax exemption or a tax subsidy): a certain type of situation does not fall in the field of application *ratione materiae* of that statute, while it was expected or intended that it would (‘underinclusiveness’). E.g, in case of a ‘unfavourable’ provision (such as a provision that imposes a tax liability or that denies a tax deduction): a certain type of situation does fall in the field of application *ratione materiae* of that statute, while it was expected nor intended that it would (‘overinclusiveness’). The key factor is whether or not the field of application *ratione materiae* of the provision concerned goes against the expectations and/or intentions with respect that field. For example, when the former article 12 of the Netherlands CITA (which provision was a kind of anti-abuse rule) was withdrawn there was a lot of discussion whether the withdrawal should have retroactive effect, amongst others because that provision was highly criticized from the start. At the end, parliament decided that retroactive effect was not appropriate, amongst others because the arguments *pro* withdrawal with retroactive effect were not new arguments, but were arguments that had already been considered when introducing the provision. In other words: it was not the case that the field of application was different than originally expected and intended. Another example: when the Supreme Court unexpectedly ruled that cable networks should be regarded as immovable property (and not as movable property as was the assumption in practice) and therefore real estate tax was due when transferring cable networks, the legislator amended the real estate tax act, introducing an exemption for transfer of cable networks. This amendment entered into force on January 1, 2006 and was granted retroactive effect till June 6, 2003, being the date of the decision of the Supreme Court.

Finally, please note that granting retroactive effect is not the only instrument that the government has in case it considers a certain, for taxpayers disadvantageous, (non-)application of a provision undesirable. The same result can de facto be reached in case the tax authorities issue a so-called ‘approving’ tax policy rule. In such a policy rule it is then stated that the tax authorities will apply the provision concerned in an advantageous way on the situations for which the (non-)application of the provision concerned is considered undesirable.

Question 15-16

In Netherlands law, the courts are not allowed to test Acts of Parliament for compatibility with the Constitution, because of a constitutional prohibition to do so. Because of this constitutional prohibition the Netherlands Supreme Court ruled that it is neither allowed to test Acts of Parliament for compatibility with general legal principles that are not laid down in the Constitution.

There are exceptions with respect to the latter. The courts are permitted to test an Act of Parliament for compatibility with a general legal principle in case the principle concerned is incorporated in a provision of an international treaty that has direct effect. So, courts may examine Acts of Parliament for compatibility with the principle of equality as incorporated in article 14 ECHR and in article 1 of the Twelfth Protocol.

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25 See e.g., the arguments of the Member of the Upper Chamber (and tax law professor at the University of Tilburg) Essers in Handelingen I (*Parliamentary Proceedings of the Upper Chamber*), November 29, 2005, no. 357, p. 8, regarding the bill no. 29686.
ECHR\(^{26}\) (while they cannot test for compatibility with the principle of equality that is laid down in the Netherlands Constitution). A second exception is that if an Act of Parliament falls within the scope of European Community law, the retroactivity of such an Act can be tested against the general principles of European Community law,\(^{27}\) e.g., the protection of legitimate expectations and legal certainty.\(^{28}\)

Contrary to Acts of Parliament, the courts are allowed to examine subordinate legislation (i.e. not Acts of Parliament, so, e.g., local legislation) for compatibility with legal principles, even if these principles are ‘unwritten’. Therefore, the courts do examine the retroactivity of subordinate legislation for compatibility against the principle of legal certainty.

**Question 17**

Because the courts are not allowed to test retroactivity of an Act of Parliament for compatibility with the ‘unwritten’ principle of legal certainty (unless EU law is applicable, in which case the Act can be tested against the European law principles of legal certainty and protection of legitimate expectations) taxpayers can only request courts to test the (formal and/or material) retroactivity concerned for compatibility with article 1 of the First Protocol ECHR. In addition, since taxpayers (or at least their advisers) have become more familiar with the possibility to make an appeal on article 1 of the First Protocol ECHR for courts, there is a growing number of cases in which the courts have to judge on the compatibility of retroactivity with that provision.

However, until now the Netherlands Supreme Court has never found (formal and/or material) retroactivity of an Act of Parliament contrary to article 1 of the First Protocol ECHR.\(^{29}\) When testing retroactivity the Supreme Court often bases its analysis on the grounds of the ECHR in the M.A. case.\(^{30}\) The reasons that the Netherlands Supreme Court had never found retroactivity in concrete case incompatible with article 1 of the First Protocol ECHR, is that on the one hand the ECHR has ruled that “a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation” and that the legislator’s assessment is accepted unless it “is devoid of reasonable foundation”\(^{31}\) and on the other hand the Netherlands legislator has, according to the Supreme Court, not exceeded that margin in the cases in which the Supreme Court had to decide.


\(^{27}\) The answer to the question when exactly an Act can be tested for compatibility against a general principle of community law, appears not to be very clear yet. See for a view S. Douma, The principle of legal certainty: enforcing international norms under community law, in: S. Douma and F. Engelen (eds.), *The legal status of OECD Commentaries*, Amsterdam, IBFD, 2008, p. 217-249.

\(^{28}\) E.g., the *Stichting Goed Wonen II* case (ECJ C-376/02).

\(^{29}\) Please note that there is one decision of a lower court – the Court of Appeal of The Hague July 21, no. 04/03463, V-N 2007/2.10 – in which retroactivity of a statute was declared incompatible with article 1 of the First Protocol ECHR. This decision has been discussed by Hans Pijl in European Taxation 2006, p. 453-456. The tax authorities decided not to appeal against this decision at the Dutch Supreme Court, although they did not agree with the grounds of the decision.

\(^{30}\) ECHR June 10, 2003, no. 27793/95 (decision), *M.A. and 34 Others against Finland*.

\(^{31}\) ECHR June 10, 2003, no. 27793/95 (decision), *M.A. and 34 Others against Finland*. See also ECHR October 23, 1997, no. 21319/93, 21449/93 and 21675/93, *National & Provincial Building Society c.s.*, paragraph 80.
The Netherlands courts can test retroactivity of subordinate legislation (i.e. legislation not from national parliament, but e.g. local legislation) against the principle of legal certainty.

The Supreme Court refers to “the legal principle based on the requirements of legal certainty that legislative measures should only apply for the future.” The Supreme Court has ruled that deviation from this principle in disadvantage for taxpayers is only justified in case of “special circumstances.” 32 It is however not yet entirely crystallized out which circumstances could qualify as special circumstances. It is clear though that ‘foreseeable’ could qualify as such a special circumstance. So, in case the taxation, for which the retroactive rule provides, was foreseeable for taxpayers, the retroactivity concerned could be justified. 33 Please note that the Supreme Court has never ruled in a concrete case that the retroactivity concerned was incompatible with the principle of legal certainty; in most of the cases the taxation concerned was considered foreseeable for the taxpayer concerned.

The courts are not only permitted to test formal retroactivity but also material retroactivity (i.e. the case of not providing for a grandfathering provision) for compatibility with the principle of legal certainty. The Supreme Court has noted that “for the principle of legal certainty (...) also respecting legitimate expectations is important.” 34 However, the courts seem to be reluctant to accept the existence of legitimate expectations; a change of the tax rate is for example not considered as violating the principle of legal certainty. 35 There is only one case in which the Supreme Court ruled that legitimate expectations were violated by the immediate effect (without grandfathering) of an amendment. 36 That case concerned a municipal tax that should be paid for the granting of a licence by the local authorities. The tax regulations concerned provided for an exemption for certain licences. This exemption was withdrawn at a certain moment, without however providing for grandfathering licences for which the application was already filed, even not for the licences for which the application was filed prior to the moment that the intention to withdraw the exemption was announced by the local legislator. The Supreme Court ruled that the exemption still applied to these latter licences, because of the principle of honouring legitimate expectations.

There are no clear indications that the courts use interpretations that avoid what might be retroactive applications. The determination of the courts whether a statute has retroactive effect whether the retroactive effect of a statute also applies to the case at hand, seems not to be handled differently from cases in which the field of application ratione materiae of a statute has to be determined. Similar to these cases, the common interpretation methods are used by the courts when there are questions of transition.

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32 E.g., Supreme Court October 24, 1984, no. 22 456, BNB 1985/59, and Supreme Court April 24, 2009, no. 43 936, BNB 2009/158.
33 E.g., Supreme Court October 24, 1984, no. 22 456, BNB 1985/59, and Supreme Court April 24, 2009, no. 43 936, BNB 2009/158.
34 E.g., Supreme Court October 7, 1992, no. 26 974, BNB 1993/4.
35 E.g. Supreme Court May 7, 1997, no. 31 920, BNB 1997/211.
36 Supreme Court October 7, 1992, no. 26 974, BNB 1993/4.
law. So, it may happen that according to the wording of the provision and its transition provision a certain case would fall under the retroactive effect of the provision, but that the court nonetheless decides otherwise because parliamentary history shows that the retroactive effect is meant for a different type of situation than the situation at hand.\textsuperscript{37} Conversely, even if a statute does not explicitly provide for its retroactivity, the court can conclude, e.g. on the basis of the purpose of the statute and/or the history of its establishment, that the statute has retroactive effect. Notwithstanding the previous remark(s), as the starting point is that statutes do normally not have retroactive effect, the courts do not easily assume that a statute has retroactive effect in case there is no indication in the statute itself that it has retroactive effect.

Question 20

As can be inferred from the answers to the previous questions, the Netherlands courts do only set little limits on the use of retroactivity of Acts of Parliament. Unlike the question suggests, the main reason seems not to be that the legislator is to be sufficiently self-disciplined.

The main reason is that, as mentioned above (see the replies to question 15-16), the courts have little possibilities to test retroactivity of Acts of Parliament because of constitutional constraints. In principle, they can only test it for compatibility with article 1 of the First Protocol ECHR (unless EU law is applicable, in which case the retroactivity can also be tested for compatibility with the EU principle of legal certainty), which possibility does however not provide serious latitude for the courts, because of the ECHR’s doctrine of ‘wide margin of appreciation’.

Subordinate legislators, though, seem to be more disciplined. As shown above, the Supreme Court has never found the (formal) retroactive effect of a subordinate statute incompatible with the principle of legal certainty (see the reply to question 18). The reason may well be that the draftsmen of subordinate tax legislation (e.g. the local authorities such as the municipality) are relatively self-disciplined.

Question 21

First of all, please note that, perhaps differently from courts of some other countries, the Netherlands Supreme Court more or less explicitly makes clear whether a certain consideration in its judgment has an \textit{erga omnes} effect, i.e. is a general rule.\textsuperscript{38}

If the Netherlands Supreme Court deviates from a rule that it laid down in an earlier judgment, the court nowadays tends to do that explicitly. Furthermore, most of the times the court explains why he deviates from existing case law. In case the new rule is unfavourable to taxpayers (compared to the old rule), the court sometimes provides for a transition rule. This latter seems even to be standard practice in the field of case law on the concept of ‘sound business practice’ (\textit{goed koopmansgebruik}) to determine the yearly profit of an enterprise. For example, when the Supreme Court rules that a certain type of earnings should be taken into account as taxable income at

\textsuperscript{37}Supreme Court February 3, 2006, no. 39 617, BNB 2007/70.

\textsuperscript{38}See on the issue how to find out whether a judgment of the Dutch Supreme Court contains a general rule A.O. Lubbers, Belastingarresten lezen en analyseren (\textit{Reading and analysing tax judgments of the Supreme Court}), Amersfoort, Sdu Fiscale & Financiële Uitgevers 2007.
an earlier time than it should have been according to previous case law, the Supreme Court often provides in a transition rule. Such a transition rule usually states that the new rule is only applicable to situations that arise after a certain future date. Such a rule, therefore, contains in fact two elements of transition law. First of all, the new rule has delayed effect - i.e. the rule is applicable as from a date in the future; also called ‘prospective overruling’. The second element is that situations, for example contractual obligations, that exist at that future date, are grandfathered; so, even after the future date, not the new rule but still the old rule applies to those situations. If the Supreme Court provides in such a transition rule, he usually justifies this decision by referring to the taxpayers’ legitimate expectations based on the old case law.

However, in case the Supreme Court abandons existing case law and provides for a new rule that is favourable to taxpayers (and therefore unfavourable to the governments’ budget), the Supreme Court does not provide in a transition rule. This implies that the new rule is directly applicable and has in fact retroactive effect. Such a ruling sometimes provokes a reaction of the Netherlands State Secretary of Finance, i.e. he submits a bill containing retroactive effect to ‘overrule’ the retroactive erga omnes effect of the Court's judgment in order to avoid the negative budgetary consequences (see also the reply to question 12).

Question 22
In literature there seems not to be a communis opinio with respect to the question when retroactivity of tax legislation is justified. However, the view that retroactive legislation that is disadvantageous to taxpayers, is never justified or only in extreme circumstances, loses ground. E.g., the line of two recent PhD-theses is grosso modo that the question whether retroactivity is permitted, cannot be answered in abstracto but should be answered by balancing the interests concerned and by taking into account the circumstances. More in general, in Netherlands literature it seems to be accepted that retroactive effect may be granted to anti-abuse rules if there is fear of announcement effects, provided that the period of retroactivity effect is limited to the moment of the announcement and that the announcement is sufficiently clear.

Nevertheless, the general opinion in Netherlands literature seems to be that there should be weighty arguments to justify retroactivity of tax legislation, also in case the period of retroactivity is limited to the moment of the announcement of the bill concerned (the phenomenon of ‘legislating by press release’). This latter may be remarkable as it seems that in some other countries it is quite common that legislation is granted retroactive effect till the moment of the announcement of the bill. Therefore, it seems that the appreciation of retroactivity partly depends on the legal culture of a country.

39 Or that a certain type of expenses can only be taken into account as tax deductible costs at a later moment than it could have been according to previous case law.
The law and economics view on tax transition law has provoked very little debate in Netherlands legal discourse. E.g., in parliamentary debate no typical law and economics arguments have been used. Also in literature there is little attention for the law and economics view.

If attention is provided in literature, it is most of the times noted that some elements of the view are interesting and have added value (e.g. the attention for behavioural effects of transition policy – such as the fact that standard practise that also in case of anti-abuse legislation retroactivity does not goes beyond the date of announcement, has the effect that there is no incentive for taxpayers not to look for loopholes as the period until the announcement will not be affected –, and the notion that grandfathering could have the (negative) effect that some taxpayers get a ‘windfall gain’). But the view itself usually gains little support because of the strong utilitarian approach of law, in which there is little attention for fairness arguments and e.g. the intrinsic legal value of legal certainty.

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