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The Tacis non-governmental social welfare organisations project

CO-OPERATION BETWEEN NON-GOVERNMENTAL ORGANISATIONS AND PUBLIC AUTHORITIES IN THE PROVISION OF SOCIAL SERVICES

The legal framework in the Netherlands

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Introduction

This report offers a description of the most important instruments of social partnership in the Netherlands. Social partnership is here understood as co-operation between government and non-governmental organisations in supplying social services. The Dutch structure has developed in specific circumstances. Nevertheless, this structure shows some elements that may be interesting in the Russian situation as well. An important feature of the way social services are supplied in the Netherlands is that they are mostly supplied by non-governmental organisations, though public authorities are in the end responsible for supplying these services and to a large extend pay for them. Social partnership is thus a very important instrument of realising social policies.

In this report in the first chapter an overview will be presented of the structure of social services in the Netherlands, as some understanding of this is necessary to appreciate the forms of co-operation that have developed between public authorities and non governmental organisations in this field. After this overview in chapter two the most important instrument of social partnership, subsidies of different kinds, will be described. After that, in chapter three the regime of tax advantages that applies to non-governmental organisations active in rendering social services, and to their contributors, is discussed. The tax instrument as such is not that much directed towards direct (financial) support, such as subsidies, but rather provides general conditions for the development an effective Third Sector.

Chapter 1. Structure of social services in the Netherlands

1.1. Short historical introduction

The situation in the Netherlands as it is today can only be understood as the product of a historical development, which already started centuries ago. In the past the rendering of social services of all kinds, like assistance to the poor and care of orphans, was organised by private, mainly religious, institutions. If these services were considered to be a responsibility of public authorities at all, then municipal authorities took responsibility. The level of social services supplied could vary greatly between cities.

An important step in the development of social services was taken in 1848, when the new Constitution of the Netherlands for the first time laid down, that the national government is responsible for a minimum level of social services. Though, at that moment of course the services considered necessary, were far below standards accepted today, it was an important development. This provision was also important in establishing a basis for the standardisation of services that up till then could vary greatly in quality and extent. The provision in the Constitution was to be the legal basis of supporting social services until far into the twentieth century.

An important factor in the development of social services in the Netherlands was that an important role was played by non-governmental organisations. Especially religious organisations were active. Often municipal authorities rendered social services through supporting religious organisations. In the actual rendering of services a strong private component has always been present and it was therefore logical for national authorities to continue the practice of supporting already experienced organisations. Another reason for the continuation of support of religious organisations was that religious organisations much wanted to maintain contact with their flock through rendering services and were opposed to a government agency taking over these contacts. Government agencies then kept a strictly neutral attitude towards religion and were thus considered practically anti-religious by churches. The political constellation in the second half of the nineteenth and the first half of the twentieth century was such that the practice of supporting religious organisations was continued. The scope of the services rendered by these organisations was wide, ranging from income support to the poor, to hospitals and other services.

1.2. Short overview of the organisation of social services in the Netherlands

Today in the Netherlands many different activities are considered to be part of social welfare services. These encompass activities like:

- help to elderly or disabled people, who need to be assisted in their home;
- housing for elderly people ;
- consultation to people in psychic distress (alcoholics, drug addicts, gambling addicts etc.);
- consultation to and shelter for women;
- consultation and support to young people;
- consultation and support to families.

The way these services are organised and financed can differ greatly. The services mentioned are all mainly supplied by non-governmental organisations. The most common form is that the actual services are supplied by non-governmental organisations, while the government partly or completely supports these activities financially. Support can also take the form of supplying premises (e.g. in every neighbourhood there is a building that offers room for all kinds of community activities and some social welfare activities), though this happens only on a very limited scale. Most support is financial, and includes the cost of premises.

Some social services are conspicuously absent from the list given above. These are services like income support, medical care and social security insurance. In fact these services and their financing are organised in a specific way, that is different from the way other social services are organised and financed. The 'specific regime' applies to:

- Income support to people who do not have sufficient means of subsistence is exclusively carried out by government agencies. Conditions for income support and the extent of this support are both fixed by law. Municipal authorities carry out the law. Another example of financial support to individuals is an income related financial contribution to the rent of living accommodation.

- Medical care is supplied by private organisations, and (most) financing is done by clients themselves. Usually people have a health insurance. For people with an income beneath a set limit health insurance is compulsory. Above this income limit insurance is not compulsory and different 'packages' can be obtained, for example with or without own risk. Though health care operates mainly in the private sector government strongly intervenes through setting standards for the quality of care, compulsory insurance for certain income groups, and setting rates for certain activities. Thus medical care is much under the influence of government policies.

- Social security insurance (for unemployment and disability) is carried out by privatised institutions, but subjected to careful supervision by government. Furthermore for an important part of the population insurance is compulsory and regulated by law. Social security insurance covers the income consequences of invalidity, unemployment and illness.

The 'ordinary' system that applies to social services is, that they are (mostly) carried out by non-governmental organisations, but that the activities are largely financed by the government. Policy with regard to social services in the Netherlands strongly favours this situation. The role of government is, if possible, limited to financing or stimulating private initiatives on the basis of priorities chosen according to need. Government thus lays down policies and stipulates how much financial means can be used, but generally leaves the execution to non-governmental organisations.

For many social services specific legislation has been developed. For example there is specific legislation for supporting unemployed in finding work, juvenile care and homes for elderly people. The most comprehensive of these laws is the General Law on Specific Welfare. This Law encompasses several broad categories of social services.

The Law itself lists:
- general social work (stimulating personal development of or development of group activities);
- social-cultural work (stimulating social cohesion; the activities are targeted at certain groups or neighbourhoods with special problems);
- social reception centres (e.g. for women);
- emancipation;
- welfare for elderly people;
- welfare for disabled people;
- reception and welfare for refugees;
- sport.

Thus, in fact, the General Law on Specific Welfare covers most social services. The Law stipulates explicitly that, if possible, social services should be rendered through, or in co-operation with, non-governmental organisations. Public authorities should limit themselves to setting the overall policies for social services, and on the basis of these policies make available sufficient financial means to enable non-governmental organisations to realise these policies. The further role of government is to supervise the effectiveness of the services in realising policy goals.

This does not mean that the government is prepared to pay for every social service that is considered desirable, or is by law obliged to do so. In fact government also appeals to society to organise, staff and finance social services as much as possible. In some cases a financial contribution from the clients is asked. This can take the form of membership fees or a partial contribution to the cost of the service rendered. Elderly people living in homes where limited care is supplied are expected to pay an income-related contribution to the cost of this service. In addition to these obligatory contributions there is also a continuous appeal on society to make voluntary contributions to organisations rendering social services.

If the service is completely or partly paid for by public authorities, then this support will usually take the form of a 'subsidy'. As this is in fact the most important 'instrument' of social partnership, special attention will be paid to this in chapter 2. First, however, something needs to be said about the legal framework for government involvement in supplying social services.

1.3 The legal framework for government involvement in supplying social services

As in other fields of government activity the law plays a central role in shaping social policies. The law establishes government responsibility for rendering social services, the scope of this responsibility, access to services, instruments to implement policies.

As a rule responsibility for supplying specific social services is laid down in law. A first example of this can be seen in the Constitution that came in force in 1848. The Constitution of 1848 made it a responsibility of the national government to provide social services. In addition to the general provision of the Constitution this responsibility was further elaborated in statutory law. However, until the mid 1980ies, in fact only part of the government responsibility was elaborated in laws. Though

there were comprehensive laws on several kinds of income support or other financial support, and on the organisation and financing of social security and medical care, still substantial sums were paid from the budget for other social services without a firm legal basis. The laws on specific kinds of social services, like the Juvenile Care Act, covered only part of the social services. Most funds from the budget for social services were thus paid as subsidies to non-governmental organisations without a real legal basis. The only basis was in fact ministerial regulations based on the provision on social welfare in the Constitution. In the course of the 1980's this practice was considered highly unsatisfactory, and it was decided to create a firm legal basis for the execution of all social policies.

Therefore, in addition to the already existing specific legislation like the Juvenile care act, the Law on Elderly People's Homes, or the Law on Provisions for Disabled Persons, in 1987 the General Law on Specific Welfare was issued. This latter Law covers the social services that up till then were not regulated by law. This Law was changed drastically in 1994 to adjust it to changed circumstances. The General Law for Specific Welfare as it is now provides instruments for social policy, and lists the social services that should be rendered. The Law explicitly stipulates that if possible private initiatives should be stimulated. It then establishes the responsibilities of different levels of government (national, provincial and municipal). As a rule the actual rendering of social services should take place under the responsibility of municipal authorities, while the provincial and national authorities are responsible for supporting and facilitating activities. For the relatively small number of services that are rendered directly under the responsibility of the national government the Law stipulates that the responsible minister can grant subsidies. One should think here for example of support to facilities for the children of skippers in inland navigation. Responsibility for such groups of people does not logically resort to the responsibility of municipal or provincial authorities.

The General Law on Specific Welfare establishes responsibilities, but no specific instruments for the execution of municipal and provincial policies. However, the general provisions of the Law make clear that these authorities will have to support private initiatives if possible. The policies they develop, and the instruments they use, will have to be in accordance with this provision. Thus, in practice, on the municipal and provincial level the rendering of social services is done through subsidising non-governmental organisations.

The responsibility for rendering social services in the first place implies the obligation to draw up a policy plan. The Law explicitly obliges the national government to draw up such a plan. This, however, is a plan that only has to contain the main features of policy. Municipal and provincial authorities are not explicitly obliged to draw up plan, but it follows from their responsibility that they should do so, and that it should be a fairly detailed plan. A policy plan contains an overview of existing problems and the ways to address them. The plan will make clear what services are needed, and what level of services. It will also lay down fairly detailed how the execution of the plan is organised: what is expected of organisations rendering services and what financial means are present to pay for delivery of these services. Another duty that follows from the responsibility for social services is that public authorities should monitor the results of their actions: did the subsidised organisations indeed realise policy goals? If not, what are the implications for the future?

This legal framework means that public authorities dispose of a rather flexible system for shaping social policies, because policy plans are reviewed regularly (the national plan for example has to be renewed every four years). As the Law does not fix a duty to render a specific social service, the responsible government authority has some freedom in choosing priorities. This does not lead to arbitrary policies however. The choice to spend scarce financial means for one kind of social service rather than for another, should be well motivated. Policy plans are drawn up under democratic control by representative bodies. Furthermore if the government makes actual decisions about using instruments, in this case deciding whether or not to grant a subsidy, these decisions can be challenged in an administrative court of law. The administrative law demands that decisions are fair and well motivated and that they take into account all relevant interests. The quality of the policy plan underlying the actual decision to grant subsidy is also scrutinised. In fact there thus is a double control on the execution of the law: in addition to the political control by representative bodies, administrative courts of law have jurisdiction over the decisions that are necessary to execute the law. The administrative courts demand that competencies are used well, and are used in such a way that the aim of the law granting these competencies is indeed striven after.

The General Law on Specific Welfare furthermore introduces a system of supervision of quality of the services rendered. In principle the receiver of a subsidy is responsible for rendering services of sufficient quality. Important quality demands are that the services are targeted, efficient and client oriented. Management, personnel and equipment should be sufficient to meet demand. Systematic internal monitoring of results should be part of managerial practice in the organisations. In addition to these requirements, specific quality demands are usually part of the requirements in the decision to grant a subsidy. These specific quality demands are set by the subsidising authority in the subsidy decision. The ratio of leaving quality requirements to subsidising authorities, and not fixing them by law, is that there are a lot of differences between subsidised organisations. Thus it is difficult to set generally applicable standards. In order to get some standardisation of quality monitoring, public authorities encourage the development of national quality-monitoring systems that are organised by the NGO sector itself. The Law on Specific Welfare allows subsidising authorities to approve of such a system of self-monitoring and let it take the place of specific quality demands in subsidy decisions. Systems of self-monitoring are in principle preferred to specific quality demands set by subsidising authorities.

There is an important difference between the regime of the General Law and the specific legislation that is in force with respect to certain kinds of social services, like for example juvenile care. The difference is, that in case of special legislation the funding of certain kinds of services is not subjected to the balancing of interests, while such balancing does take place when planning the activities on the basis of the General Law on Specific Welfare. For example the Juvenile Care Act obliges the responsible public authorities to draw up a specific plan for the rendering of juvenile care, that should aim at supplying sufficient care to meet demand. In this way access to the services is guaranteed in a way that access to the other services under the scope of the General Law on Specific Welfare is not. Furthermore, funding of the activities under the Juvenile Care Act are provided by the national government and funds are specifically put to the disposal of lower levels of government in order to carry out this

law. The planning of activities under the General Law on Specific Welfare is far more dependent on policy choices.

Because of the historical developments most social services are supplied by non-governmental organisations, which are for a more or less important part financially supported by public authorities. Because of the central role that is played by subsidies, these will be treated in more detail. The kinds of social services that can be supported by subsidies are laid down in special statute laws, or in the General Law on Specific Welfare. As a central role is played by the concrete decision to subsidise a certain activity by a certain organisation in addition to these laws the Administrative Code is also important. This law contains all formal rules with respect to decisions of public authorities. This law also contains a special section on subsidy decisions. The special regime that applies to subsidy decisions is treated in more detail in chapter 2.

An important source of funding is, in addition to the subsidies by public authorities, the collection of funds from the public. Of old, in the Netherlands substantial sums have been donated for charitable activities, and this is still continuing. It is furthermore established government policy to encourage as much as possible the organisation of social services by peoples themselves. Government therefore through tax advantages encourages support of charitable organisations, and facilitates some activities. In general tax advantages are linked to the actual undertaking of charitable activities. When charitable non-profit organisations take part in the normal economic life, through running a commercial enterprise, tax-advantages do not cover that activity. Non-profit organisations should not develop into a market-disturbing force and be stimulated to engage in unfair competition. A notable exception is the supply of medical services. Hospitals and clinics that are exploited by non-profit organisations are not taxed for VAT, while the same enterprises exploited by a private person or a commercial organisation are taxed for VAT. The support of 'public interest' activities through tax-cuts is quite substantial, and will be further described in chapter 3.

Concluding it can be seen that in the Netherlands a somewhat different regime applies to various social services. With respect to some social services the regulation is strict. For these services access to care, and the standard of care, are stipulated by law. This regime applies to direct income support and related financial support to people. These services are paid for by the budget and there is no budget limit. Though medical care and social security are almost as strictly regulated with respect to the standard of care, the access to these services is regulated only for a part of the population.

With respect to the other services the organisation is much less strict. Though the standard of care is, if possible, supervised there is not always guaranteed access, except with respect to some specifically regulated social services. For example if funding is not sufficient, demand of a service may be much larger than supply. Especially with respect to activities covered by the General Law on Specific Welfare, funding by the government is restricted by budgetary constraints and therefore policy choices will have to be made. The supply of these services therefore depends on a local balancing of interests and setting of priorities.

Chapter 2. The Dutch system of subsidies

2.1. Several forms of subsidy

Introduction

In practice, over time several forms of subsidy have developed. Each of them in fact represents a tightening of supervision of the organisations that spend government money. Granting subsidies in fact means, that a public authority puts financial means to the disposal of someone in order to enable him to perform activities. These payments should be distinguished from payments for services or delivery of goods to the public authority. The granting of a subsidy is a distinct kind of decision, which is laid down in administrative law.

In practice there are several forms of subsidies. Forms that can be distinguished are: exploitation subsidies; budget subsidies; project subsidies; and appraisal subsidies. These different forms are important with respect to the measure of supervision of the use of the subsidy that takes place. After a discussion of these different forms of subsidies also some other, new, forms of financial support will be outlined.

Exploitation subsidies

Exploitation subsidies are the most traditional form of subsidising social service organisations. In fact this subsidy is given to an organisation to pay for the cost of staff and office expenses. An organisation claims a certain number of 'permanent positions' (the number and composition of staff) and office space, necessary to be able to supply a certain social service. In this system of subsidising, the government does not supervise the activities that are actually executed. The main way to supervise is that the number of 'permanent positions' and office space are more or less related to general notions about the number of clients that can be expected, and the staff needed on the basis of past experiences. If there is a detailed investigation into the effectiveness of an organisation, this can be triggered by complaints, e.g. by the clients, or be the result of more general research into the effectiveness of policies. There is, however, no general system of supervision, other than supervision of the financial accounts. The 'exploitation' subsidy thus leaves a lot of discretion to organisations in how to spend their money and use resources. They have a lot of freedom in choosing priorities in their work and develop their own policies. Supervision is in fact only possible afterwards.

This kind of subsidy is, from a government point of view, mainly important to limit expenses. As the government will fix the amount of money that is to be spent, an increase in demand of the services will not lead to a rise in expenditure for the government. At least not automatically. If a subsidy were attached to the services rendered, an increase in demand would automatically lead to a rise in expenditure.

Of course a disadvantage of exploitation subsidies is that they offer little opportunity for supervising effectiveness of organisations. Only rather indirect means can be used to find out whether the money is indeed well spent. Standards used in practice are

based on the usual number of staff in relation to population or data like that. Supervision is in fact almost only possible afterwards.

Budget subsidies

About fifteen years ago this system of subsidising through 'exploitation subsidies' was considered unsatisfactory, and since then traditional exploitation subsidies are slowly being replaced by 'budget' subsidies. This kind of subsidies still offers a lump sum to organisations. The subsidy, however, is no longer related to the size of the staff of organisations or to their 'exploitation costs', but to the activities they plan to undertake. In the beginning of a new year a 'plan of activities' is submitted, including priorities and, as much as possible, criteria for measuring effectiveness. These subsidies still leave a lot of freedom of execution to organisations, but on the other hand government has more insight in the activities actually undertaken, the choice of priorities and the policy of organisations. Another advantage is that there is more opportunity to supervise the effectiveness of the activities. The actual freedom of organisations is dependent on whether or not a very detailed plan of activities has to be submitted. In shaping the actual execution of the plan of activities still a lot of freedom is present. With respect to supervising, the budget subsidy is probably most difficult to supervise. Where the 'exploitation subsidy' was in the first place an instrument of controlling expenditure, and not so much supervising the effectiveness of money spent, the budget subsidy is much more aimed at supervising effects. This proves in practice a difficult problem, because it is often not easy to set targets for measuring effectiveness. One could think here of setting targets for a public library: these might be the numbers of books lent to a certain group of readers, like the inhabitants of a part of the city. However, this number is only an approximation of the actual use of the library. It says for example little about the kind of books lent and is thus a rather crude measure for estimating how much information is dispersed by the library. Often it is even difficult to establish such crude objective targets. In literature several examples are mentioned:

- A social worker who is consulting groups of people can prove his effectiveness by making agreements with these groups, about the kind of consultation needed, the aims that should be reached and the duration of consultation. In this case, the consultation becomes more tangible and its effects visible.
- A children's day-care centre can be useful for several purposes, like giving opportunity to parents to go to work. Then an indication of success could be the number of participating children coming from one-parent families.

These examples show, that in fact it is necessary to establish standards in individual cases, depending on the kind of service rendered.

Sometimes the public use of a service is considered so important that subsidies are given without measuring effect, or even when measuring shows a small effect only. A good example of this would be the already mentioned library: for reasons that might differ, many people agree that a public library is useful and necessary. Therefore support to the library is often given as an exploitation subsidy.

Project subsidies

A special form of an activity-related subsidy is the 'project' subsidy. This kind of subsidy is awarded for the execution of a well circumscribed activity, which has a

clearly defined purpose and which can be described in phases of activity leading to this purpose. The project description contains clearly defined results that are to be reached in successive phases of the project. This form of subsidy is the most supervised, as both the exact products of the project are described and the activities an organisation has to perform. Project subsidies have their limitations, however. They are only suitable if there is an activity that can be described as a project, like the writing of a report, the execution of a certain research program or an educational program. There should be a beginning, an end and products that can be defined. More continuous activities like helping clients are much more difficult to describe in the form of a project.

Appraisal subsidies

Finally, smaller subsidies are often awarded in the form of an 'appraisal' subsidy. This means that an organisation is awarded a subsidy for its activities, but that this is not explicitly awarded for the execution of a specific activity or the payment of staff. Usually, this kind of subsidy is awarded to organisations, which have other means of subsistence and are in this way stimulated in continuing these activities. In order to spare the government extensive supervising of the use of relatively small amounts of money, this kind of subsidy is not subject to rigorous conditions.

New forms of financial support

A new form of financial support is no longer directed at supporting organisations, and is thus not really a 'subsidy'. The traditional way of giving financial support to organisations is to give them money in order to enable them performing services to clients. A newer form is to place money at the disposal of people in need of services, as a 'personal budget'. They can then themselves decide who they want to perform these services. Of course the 'personal budget' has to be spent on specific social services. In this way an element of competition is brought into play, as non-profit non-governmental organisations may compete, but also commercial organisations. These organisations will all try to deliver optimal services for the money paid by the clients. Another, more or less related, form of giving money to the clients is to give it to insurance companies to enable these to contract with organisations supplying services. By applying these methods public authorities circumvent the difficulty of selecting the most efficient organisation themselves and setting all kind of standards for monitoring efficiency. These new forms of financing resemble the way health services are financed. Though these services are paid for by insurance companies, people can themselves (more or less) decide which doctor or hospitals they want to perform the service.

2.2. The system of the Administrative Code

In the Netherlands the main instrument for social partnership is the awarding of subsidies by government authorities to different non-governmental organisations (NGO's). As was described above, the legal basis for the provision of subsidies is to be found in the General Law on Specific Welfare, in legal acts on specific fields of social welfare and in related policy decisions. The formal regulations on subsidies, on the other hand, are to be found in the national Administrative Code. All subsidies,

including provincial and municipal ones, have to be in conformity with the provisions of the Administrative Code.
The Administrative Code consists of different parts. Every part consists of titles, which on their turn are subdivided in chapters. Title 4.2 regards subsidies. But this does not mean that the rest of the Administrative Code would not be applicable with regard to subsidies. On the contrary, for example subsidy decisions have to fulfil the requirements with regards to decisions in general, which are laid down in title 3. As stated above, decisions should among other things be well motivated and take into account all relevant interests. Also the chapters 6, 7 and 8 of the Administrative Code, concerning objections and appeals, play an important role with regard to subsidies.
The title on subsidies in the Administrative Code gives the legal framework of all subsidies of central and decentralised authorities. The whole title is in principle obligatory, except for the additional optional provisions on subsidies provided per financial year to legal entities in chapter 4.2.8. The present subsidy title in the Administrative Code is introduced in the course of a general revision of administrative law and is effective since 1996. Before 1996 there was no uniform regulation.
The different types of subsidies that have been described in paragraph 2.1 above is a distinction that is made in practice, and is not made for administrative law. In the Administrative Code no formal distinction is made between exploitation subsidies, budget subsidies, project subsidies and appraisal subsidies. Within the framework offered by the Code, all different kinds of subsidies can be accommodated.

The structure of the subsidy title is as follows:

Chapter 4.2.1	Introductory provisions
Chapter 4.2.2	The subsidy ceiling
Chapter 4.2.3	Granting of subsidies
Chapter 4.2.4	Obligations of the subsidy recipient
Chapter 4.2.5	Fixing of subsidies
Chapter 4.2.6	Repeal and alteration
Chapter 4.2.7	Payment and recovery
Chapter 4.2.8	Subsidies granted per financial year to legal entities

The introductory provisions (chapter 4.2.1) contain definitions, determine the scope of applicability of the subsidy title and provide for reporting obligations. One of the main principles that have been laid down in section 4:23 of the subsidy title is that a subsidy should have a legal basis. As also provincial and municipal subsidies have to comply with the Administrative Code, also these subsidies should have an explicit legal basis.
Chapter 4.2.2 about the subsidy ceiling and section 4:34 about budget reservation, provide the main instruments to control subsidy expenditures.
In the Administrative Code a distinction is made between a subsidy grant (chapter 4.2.3) and a subsidy fixation decision (chapter 4.2.5). The difference between the subsidy grant and the subsidy fixation relates to the moment the decision is made. Often both a subsidy grant and a subsidy fixation decision are used in the process of providing a subsidy. If both the subsidy grant and the subsidy fixation can be meant, the term subsidy provision is used.
The term 'subsidy grant' refers to the decision that is made before the subsidised activity takes place or is completed. With the subsidy grant the subsidy recipient is

given a conditional claim to financial means, the amount of which has been indicated but not been finally determined yet. With the subsidy grant decision a conditional obligation comes into existence. The claim is conditional in the sense that it is not clear yet, whether the recipient of the subsidy will actually realise the subsidised activity and meet all conditions. In principle the recipient has the right to choose not to realise the activity; but if he chooses so, he also loses every right to financial means. In case of an implementation agreement (section 4:36) and in case of subsidy obligations (section 4:37 subsection 1 sub a), the recipient does not have the right to renounce and is obliged to realise the agreed activities.

The term 'subsidy fixation' relates to a second decision stating in how far the conditions have been met and what the exact amount of the subsidy is. With the subsidy fixation decision an unconditional obligation to pay the subsidy amount comes into force.

The subsidy fixation decision is taken on the basis of the subsidy granting decision. If the subsidy recipient has performed the task stated in the granting decision according to the conditions and if no irregularities have taken place, the amount of money in the subsidy fixation decision will have to be in line with the amount stated in the granting decision. This shows that the subsidy grant is conditional but not without engagement: once all conditions have been fulfilled, the government must meet expectations.

Sometimes a granting decision is not necessary, and only a fixation decision is sufficient. This is the case when subsidies can be fixed right away; in particular after the activity has already taken place and there is a clear overview of costs involved. The subsidy relationship between government body and recipient is always completed by a subsidy fixation decision. Thus, also if the subsidy recipient decides not to perform the activities for which the subsidy is granted, this fact will be established in a fixation decision.

Subsidy relationships can be ended or altered. This topic is covered in chapter 4.2.6.

Payment of a subsidy relates to the actual transfer of money and is dealt with in chapter 4.2.7. Payment is the third step that can be distinguished after grant and fixation decisions. As payment cannot be considered a decision, but simply is a fulfilment of an obligation, it is not an act under administrative law, but an act governed by civil law. This has an implication for the judge who is allowed to regard a possible conflict: acts under the Administrative Code are judged in administrative courts, while civil acts are under the jurisdiction of civil judges. Payments made after the grant but before the fixation decision are considered as advances that have to be settled when the actual subsidy payment is due. Under circumstances payments can be repealed; for a more elaborate discussion, see the provisions of chapter 4.2.7 hereunder.

Chapter 4.2.8 gives a rather specific regulation for subsidies provided per financial year to legal entities. The provisions of this chapter are complementary to the provisions of the other chapters that are also applicable. The chapter mainly regards exploitation and budget subsidies. Unlike the other provisions of the subsidy title, chapter 4.2.8 will not be covered in detail in the following paragraph.

The text and a more detailed discussion of the provisions of the Administrative Code are represented in the paragraph hereunder.

2.3. Provisions of the Administrative Code

Hereunder the subsidy title of the Administrative Code will be looked at more closely. First the text of the respective sections will be given and then their contents will be outlined shortly in a commentary per section.

TITLE 4.2 SUBSIDIES

CHAPTER 4.2.1 Introductory provisions

Section 4:21 / [Definition subsidy and application]

1. *Subsidy means the entitlement to financial resources provided by an administrative authority for the purpose of certain activities of the applicant, other than as payment for goods or services supplied to the administrative authority.*
2. *This title does not apply to entitlements or obligations, which result from a statutory regulation pertaining to taxes or the levy of a contribution or a tax to replace a contribution under the National Insurance Financing Act.*
3. *This title does not apply to a claim to financial resources that has been provided on the ground of a statutory regulation which provides for payment exclusively to legal entities established under public law.*
4. *This title applies mutatis mutandis to the funding of education and research.*

This section gives the definition of a subsidy. In practice subsidies are named differently (e.g. subsidy, contribution, donation, etc.), but for the applicability of the subsidy title this is irrelevant. If the requirements of subsection 1 have been fulfilled, a subsidy is present and the whole title 4.2 on subsidies is applicable.
Subsection 1 limits the notion 'subsidy' to entitlement to financial resources. This includes a conditional entitlement, for example in the case of public sureties. Entitlement to payments in kind is not considered as a subsidy. The provider of the financial resources should be an administrative authority. The applicant is cannot be an administrative authority, as, according to the history of the law payments of one administrative authority to another are not subsidies but internal flows of money within the public body the kingdom of the Netherlands. The applicant thus will be a citizen or another legal entity that is not public. The subsidy must be directed at certain activities. This means that it must be clearly determined what exactly the funds are going to be used for. Payment for goods or services supplied to an administrative authority is no subsidy. Thus, commercial transactions between administration and actors in the private sector are not subject to title 4.2.
Subsections 2 and 3 exclude reduction of tax and National Insurance contribution payments, and payments to government bodies from the notion 'subsidy'.
Subsection 4 refers to the mutatis mutandis applicability of the subsidy title to funding of education and research. The legislator has chosen for a special provision on education and research, because of the special constitutional position of legislation regarding education. It would have been possible, however, to apply the subsidy title directly with regard to funding of education and research without a specific reference.

The practical difference between direct applicability and mutatis mutandis applicability is negligible.

Section 4:22 / [Definition subsidy ceiling]

Subsidy ceiling means the maximum amount available during a given period for the provision of subsidies under a given statutory regulation.

In this section the definition of 'subsidy ceiling' is given. The section determines for the sake of legal security that a subsidy ceiling should be laid down in a statutory regulation. The subsidy ceiling is elaborated in chapter 4.2.2. See this chapter for a further discussion.

Section 4:23 / [Legal basis of subsidies]

1. *An administrative authority may provide subsidies only under a statutory regulation, which specifies the activities for which a subsidy may be granted.*
2. *If such a statutory regulation has been included in an order in council[1] not based on an act[2], the regulation shall cease to have effect four years after it enters into effect, unless a bill[3] has been presented to Parliament before that period in which the subsidy is regulated.*
3. *Subsection 1 shall not apply:*
   (a) pending the introduction of a statutory regulation for a maximum of one year or until a bill presented to Parliament within that year has been defeated or has been passed and entered into effect;
   (b) if the subsidy has been provided directly on the basis of a programme adopted by the Council of the European Union, the European Parliament and the Council together or the Commission of the European Communities;
   (c) if the budget specifies the subsidy recipient and the maximum amount at which the subsidy can be fixed; or
   (d) in certain individual cases, provided that the subsidy is provided for a maximum of four years.
4. *The administrative authority shall publish annually a report of subsidies provided in accordance with subsection 3 (a) and (d).*

This section deals with the fundamental notion that a subsidy may only be provided on the basis of a statutory regulation. Such a regulation may for example be an act, an order in council based on an act, a provincial or municipal decree or an EU directive. For orders in council that are not based on an act, a special regulation is provided in subsection 2, that limits their applicability in time unless a bill is adopted in Parliament in the meantime.
There are however exceptions to the rule that the basis of a statutory regulation is required. These exceptions are enumerated in subsection 3. The first exception of anticipation (sub a) provides a temporary solution for cases in which no statutory basis is available, but action in the form of granting a subsidy is required immediately.

[1] Under Dutch law an order in council is a decision by the Government, with a signature of the Queen. The legal basis of such an order is usually an act. Under certain circumstances no act is required. In that case the Constitution will function as a legal basis.
[2] An act under Dutch law is legislation adopted by the two chambers of Parliament.
[3] A bill under Dutch law is a proposal for an act.

The second exception concerning EU subsidy programs (sub b) is adopted to prevent regulation on both the European and the national levels. The exception regarding a subsidy, the recipient and maximum amount of which have been specified in the budget (sub c) guarantees a form of public control as the budget itself is public and prevents an excess of legislation. And the last exception of incidental subsidies (sub d) only applies to subsidies to individuals and over a limited period of 4 years. Public control over the subsidies that are provided without the basis of a statutory regulation should be guaranteed. In the case of EU subsidy programs this is the case as the conditions to receive a subsidy are generally contained in the subsidy program document. In case of subsidies that have been specified in the budget, public control is also guaranteed as was already mentioned. In case of anticipation (sub a) and incidental subsidies (sub d), this is not the case, however. Public control in these cases is guaranteed by subsection 4 that provides for publication of an annual report of subsidies by the administrative authorities.

Section 4:24 / [Evaluation report]

If a subsidy is based on a statutory regulation, a report shall be published at least once every five years on the effectiveness and the effects of the subsidy in practice, unless it has been provided otherwise by statutory regulation.

With regard to subsidies based on a statutory regulation section 4:24 requires publication of a report at least once every five years by the state authority concerned. This regulation aims at a structural evaluation of subsidy practices. The reporting requirement can be excluded by statutory regulation, for example in case the costs of a report would be disproportionate to the subsidy amount.

CHAPTER 4.2.2 The subsidy ceiling

Chapter 4.2.2 on the subsidy ceiling gives a solution for the problem that on the one hand there is only a limited budget for subsidising and that on the other hand the government is obliged to subsidise on the basis of legitimate expectations aroused by for example a subsidy regulation. In practice this problem occurs mainly in case of 'open-end' subsidy regulations, i.e. subsidy regulations the number of applicants of which can not be determined beforehand. Section 4:25 thus gives the legislator the possibility to introduce a subsidy ceiling, i.e. a maximum to ward off otherwise legitimate claims. The regulation in chapter 4.2.2 aims at protecting the interests of both subsidy applicants and of budget discipline. For the definition of subsidy ceiling see section 4:22 above.

Section 4:25 / [Fixation and legal consequences of subsidy ceiling]

1. *A subsidy ceiling may be fixed only by or pursuant to statutory regulation.*
2. *A subsidy shall be refused in so far as the subsidy ceiling would be exceeded granting the subsidy.*
3. *If a ruling is made out of time or on an objection or appeal or pursuant to a judicial ruling concerning the granting of the subsidy, the obligation in subsection 2 shall apply only in so far as it also applied at the time when the ruling was made or should have been made at first instance.*

A subsidy ceiling, if introduced, requires a legal basis (subsection 1). If the subsidy ceiling is exceeded, a request for a subsidy is rejected automatically (subsection 2). However, there is one exception to this mandatory rule in case a government body is too late to publish the intention of refusal to continue a subsidy that lasted for 3 subsequent years or more already (cf. section 4:51 subsection 2). The moment a subsidy ruling was made or should have been made at first instance is the moment that serves as a touchstone to determine if the subsidy ceiling is applicable or not (subsection 3). This regulation protects the applicant, as the money available might have been spent already if a later moment in the procedure is taken as a reference point.

Section 4:26 / [Manner of distribution]

1. *How the available amount is to be distributed shall be determined by or pursuant to statutory regulation.*
2. *When the subsidy ceiling is published, the manner of distribution shall be stated.*

Section 4:26 states that the manner of distribution will be determined by or pursuant to statutory regulation. Different systems of distribution may be thought of, for example a system in which the first applicants are awarded a subsidy, or a tender system in which the best applications are selected after a fixed deadline. The manner of distribution shall be published together with the announcement of the subsidy ceiling.

Section 4:27 / [Publication of subsidy ceiling]

1. *The subsidy ceiling shall be published before the start of the period for which it is fixed.*
2. *If the subsidy ceiling or a reduction in the ceiling is published later, this publication shall not affect applications previously filed.*

The decision to introduce a subsidy ceiling must be published beforehand, before it enters into force (subsection 1). In order to protect legitimate expectations from the side of applicants a decision to introduce or reduce a subsidy ceiling shall have no effect with regard to applications that were done before the introduction or reduction was published (subsection 2).

Section 4:28 / [Non-applicability of section 4:27 subsection 2]

Section 4:27, subsection 2, shall not apply if:

(a) the applications for the period for which the subsidy ceiling has been fixed must be filed on a date pursuant to a statutory regulation when the budget has not yet been adopted or approved;
(b) it concerns a reduction resulting from the adoption or approval of the budget; and
(c) the possibility of a reduction and the effects thereof on applications already filed were mentioned when the subsidy ceiling was fixed.

There is, however, an exception to the rule contained in section 4:27 subsection 2. In case subsidies are awarded on the basis of a tender system with a fixed deadline (cf.

commentary to section 4:26) and if this fixed deadline lies before the adoption or approval of the relevant budget (subsection 1), the administration may reduce the subsidy ceiling initially fixed. In this case the reduction should, however, result from the adoption or approval of the budget (subsection 2) and the applicants should have been notified in advance of a possible reduction and of the consequences thereof (subsection 3). This last subsection intends to protect the rights of applicants.

CHAPTER 4.2.3 Granting of subsidies

Section 4:29 / [Subsidy grant]

Unless provided otherwise by statutory regulation a decision about the granting of subsidy may be made prior to the fixing of the subsidy if an application has been filed before the end of the activity or the period for which subsidy is requested for.

It follows from the text of section 4:29 that the government authority can take a decision to grant the subsidy before fixation of the subsidy, while also a system of only a fixation decision can be chosen for. By statutory regulation a granting decision may be either explicitly excluded or made obligatory. An application by the applicant for a decision to grant is obligatory and should be made before the activity or period that is to be subsidised is over. In practice the subsidy grant is widely used and very important.
A granting decision should at least contain a description of the subsidised activities (section 4:30) and the subsidy amount (section 4:31). See for extra requirements the sections 4:32 (periodical subsidies), 4:33 (conditions), 4:37-39 (obligations), 4:40 (later elaboration of obligations), 4:41 subsection 1 sub a (compensation in case of accretion of capital), 4:44 subsection 1 sub b and subsection 2 (application for fixation subsidy amount), 4:47 sub a (administrative subsidy fixation), 4:52 subsection 3 (moment of payment) and 4:53 subsection 2 (payment in parts).

Section 4:30 / [Description of subsidised activities]

1. *A decision to grant subsidy shall contain a description of the activities for which subsidy is granted.*
2. *The description may be elaborated later, in so far as this is stated in the decision to grant the subsidy.*

The main thought behind this section that requires description of the subsidised activities is that the mutual rights and obligations of both subsidy provider and recipient should be clear when the subsidy is granted. Later elaboration of the activities to be conducted is possible, but this only implies that making the activities more concrete and detailed is possible and not outright changes. Changes should be made, by changing the granting decision itself. When fixing the subsidy the description of activities in the granting decision will play a central role in determining if all obligations have been fulfilled.

Section 4:31 / [Subsidy amount]

1. *A decision to grant subsidy shall state the amount of the subsidy or the way in which this amount is to be decided.*
2. *If the decision to grant a subsidy does not state the amount of the subsidy, it shall state the maximum amount for which the subsidy may be fixed, unless provided otherwise by statutory regulation.*

In the granting decision either the amount of the subsidy or the way in which this amount is to be decided has to be mentioned. A nominal amount can be mentioned if the subsidy amount does not depend on the costs to be made or on the performances of the activity to be subsidised. A nominal amount can be determined for example in case a once-only starter's subsidy is granted. In case the subsidy amount depends on the costs to be made, a cost subsidy will be granted. In case it depends on the performances of the activities to be subsidised, a performance subsidy will be granted. When a cost subsidy or a performance subsidy is granted, the way in which the amount is decided will have to be arranged in the granting decision, as this amount is dependent on respectively the costs and performances made in the course of the execution of the subsidised activities.
According to subsection 2, a maximum amount has to be indicated in the subsidy grant if the grant does not indicate a nominal amount but determines the way the amount is to be decided. The legislator did not consider unlimited declarations desirable and introduced this requirement. Exemption of this rule is possible on the basis of a statutory regulation.

Section 4:32 / [Periodical subsidies]

A subsidy in the form of a periodic entitlement to financial resources shall be granted for a particular period, which is stated in the decision granting the subsidy.

The provision that a subsidy in the form of a periodic entitlement to financial resources may only be granted for a particular period, aims at periodical investigation on the desirability of continuation of the subsidy.
Apart from that, the refusal of a subsidy for a new period is restricted by the regulation in section 4:51.

Section 4:33 / [Inadmissible conditions]

A subsidy may not be granted on condition that a particular action is performed only by the administrative authority or only by the subsidy recipient, unless it is a condition that:
(a) the subsidy recipient co-operates in the establishment of an agreement for implementation of the decision to grant the subsidy, or
(b) the subsidy recipient shows that an event - not being an action of the administrative authority or of the subsidy recipient - has taken place.

The section prohibits making a subsidy dependent on an action of a government body, because this would open the road to arbitrariness. Another purpose of this section is to prevent public authorities from unduly influencing the activities or the actions of subsidy recipients. In principle subsidies are meant to enable organisations to

undertake activities and they may not be used to set unrelated conditions. In as far as conditions may be set, these are laid down in the sections 4:37-40.

Section 4:34 / [Budget reservation]

1. *In so far as a subsidy is granted out of a budget which has not yet been fixed or approved, it may be granted subject to the condition that sufficient funds are made available.*
2. *The condition may not be made in so far as this is prevented by the statutory regulation on which the subsidy is based.*
3. *The reservation shall cease to have effect if the administrative authority has not invoked it within four weeks of the date on which the budget is fixed or approved.*
4. *The condition shall be invoked, in the case of a subsidy for an activity, which was subsidised in the previous budget year, by cancellation owing to changed circumstances as referred to in section 4:50.*
5. *In other cases, the condition shall be invoked, by cancellation in accordance with section 4:48, subsection 1.*

Under circumstances it may be deemed necessary to grant a subsidy even though the budget the financing has to come from has not yet been fixed or approved. Section 4:34 contains a regulation for this case: a granting decision under the condition that sufficient funds become available is possible. The government authority thus has the possibility to go back on a subsidy decision if this would be necessary in the light of the budget.
Subsection 2 refers to a situation in which a budget reservation would be in contradiction with the statutory regulation the subsidy is based on. E.g., in case of an open-end subsidy regulation a budget reservation is unsuitable.[4]
Subsection 3 provides legal security to the subsidy recipients: if the administrative authority does not invoke the budget reservation within a certain time limit, the recipients will receive the subsidies granted.
The last two subsections contain a regulation for how the budget reservation should be invoked in case of activities that were already subsidised in the previous budget year (subsection 4) and in other cases (subsection 5). In general the position of subsidy recipients that received a subsidy in the previous budget year is stronger than that of recipients that were not entitled. For more details see the sections 4:50 and 4:48, subsection 1.

Section 4:35 / [Grounds for refusal]

1. *The granting of a subsidy may in any event be refused if there are good grounds for assuming that:*
   (a) the activities will not take place or not take place in their entirety;
   (b) the applicant will not comply with the obligations attached to the subsidy;
   (c) the applicant will not render proper account in respect of the activities performed and the income and expenditure connected therewith, in so far as this may be important in fixing the subsidy.
2. *The granting of a subsidy may also in any event be refused if the applicant:*

[4] See Van Buuren, 1997, p.121; and the parliamentary explanatory notes: MvT, TK 23700, nr.3, p.56-57.

(a) has provided information for the application, which he knew or should have known was incorrect or incomplete, and the provision of this information would have led to an incorrect decision on the application, or
(b) has been adjudged bankrupt or granted a suspension of payment of debts, or if a request to this effect has been submitted to the court.

Particularly policy and budget decisions may have very important implications for the granting of subsidies. If there is no policy or budget to support certain subsidies, no subsidy will be granted at all. Once these general conditions have been met, more practical matters may prevent granting a subsidy. Section 4:35 gives these grounds a subsidy can be refused on. The grounds listed are not exhaustive. Think for example also of refusal on the basis of a subsidy ceiling in section 4:25.
Subsection 1 gives grounds for refusal with a preventive character, and regards events that may take place after the subsidy has been granted. If there are good grounds to assume that sub (a), (b) or (c) applies it is possible not to grant a subsidy. 'Good grounds' means that there should be very concrete indications of likely, not just possible, misuse. Subsection 2 regards events that actually took place before the decision to grant a subsidy is taken and that can also be a ground to refuse a granting decision. See the text of the subsection.

Section 4:36 / [Implementation agreement]

1. *An agreement may be concluded in order to implement the decision to grant a subsidy.*
2. *Unless provided otherwise by statutory regulation or unless it would be contrary to the nature of the subsidy, it may be provided in the agreement that the subsidy recipient is obliged to perform the activities for which the subsidy has been granted.*

Section 4:36 makes it possible to conclude an implementation agreement. On the basis of subsection 2 the obligations of the subsidy recipient may be provided in such an agreement. An implementation agreement provides the subsidy granter with the possibility to demand execution of the subsidised activity in court. Usually agreements are considered in civil courts and thus it is most likely that the civil court and not the administrative court will have jurisdiction. An alternative for the implementation agreement is imposing an obligation under section 4:37 subsection 1 sub a to implement the subsidised activities.
With regard to the relation between the subsidy granting decision and the implementation agreement the following. The granting decision should contain the main futures of the subsidy relationship, i.e. among other things, indication of activities, obligations and subsidy amount. In the implementation agreement, which aims to increase pressure on the subsidy recipient to implement activities, a more detailed description of activities to be performed will be most important.
The condition that the subsidy recipient co-operates in the establishment of an agreement for implementation of the decision to grant the subsidy is permitted (cf. section 4:33 sub a).

CHAPTER 4.2.4 Obligations of the subsidy recipient

Chapter 4.2.4 deals with the obligations that may be imposed on the subsidy recipient. The recipient in principle has the freedom not to implement the subsidised activity and renounce the subsidy amount. However, as long as the recipient does claim the subsidy amount, the subsidy grant can imply certain obligations. The term 'obligations' must be understood in this sense.

Section 4:37 / [Standard obligations]

1. *The administrative authority may in any event impose obligations on the subsidy recipient relating to:*
   (a) the nature and scope of the activities for which subsidy is granted;
   (b) the administration of the income and expenditure connected with the activities;
   (c) the provision before the subsidy is fixed of information and papers which are necessary for a ruling on the subsidy;
   (d) the risks to be insured;
   (e) the provision of security for advances that have been granted;
   (f) the rendering of account in respect of the activities performed and the income and expenditure connected with it, in so far as this may be important in fixing the subsidy;
   (g) the mitigation or removal of the adverse consequences of the subsidy for third parties.
2. *If an obligation as referred to in subsection 1 (c) is imposed, sections 4:3 and 4:4 shall apply mutatis mutandis.*

Section 4:37, subsection 1 states a number of obligations that may be imposed. See the text of the subsection. A few extra remarks. Sub (a) offers an alternative to the implementation agreement of section 4:36. Sub (c) offers a possibility of intermediate control between granting and fixing the subsidy. Sub (d) provides a possibility to oblige for example to provide for liability insurance or fire and theft insurance. Sub (f) provides for a possibility for detailed account requirements in complex cases, besides the general account obligation of 4:45 subsection 2.
Subsection 2 refers to sections 4:3, a provision that provides a limited right to withhold confidential information, and 4:4 that offers the public authorities a possibility to introduce a standard form for provision of information.

Section 4:38 / [Other purpose-related obligations]

1. *The administrative authority may impose on the subsidy recipient other obligations too, which are intended to achieve the purpose of the subsidy.*
2. *If the subsidy is based on a statutory regulation, the obligations shall be imposed by statutory regulation or pursuant to statutory regulation when the subsidy is granted.*
3. *If the subsidy is not based on a statutory regulation, the obligations may be imposed when the subsidy is granted.*

Section 4:38 provides the basis for other obligations, besides the obligations mentioned in section 4:37. The obligations imposed under this section, however, must

be intended to achieve the purpose of the subsidy. Obligations with regard to subsidies based on a statutory regulation (cf. section 4:23) require a statutory basis themselves. As far as obligations, which are not based on statutory regulations, are concerned, it is sufficient to mention them in the subsidy granting decision.

Section 4:39 / [Not purpose-related obligations]

1. *Obligations not intended to achieve the purpose of the subsidy may be attached to the subsidy only in so far as this is provided by statutory regulation.*
2. *Obligations as referred to in subsection 1 may relate only to the way in which or the means by which the subsidised activity is performed.*

Also other obligations that do not fall under the sections 4:37 and 4:38 may be imposed, but these are tied to strict procedural and content requirements. Subsection 1 explicitly requires a statutory basis in all cases of not purpose-related obligations. Subsection 2 states that the contents of the obligation must have a certain relationship with the subsidised activity. The obligations must relate either to the way in which or to the means by which the subsidised activity is performed. An example of a not purpose-related obligation is that a subsidised museum performs its activities in an environmentally sound way.

Section 4:40 / [Later elaboration of subsidy obligations]

The obligations may be elaborated after the granting of the subsidy, in so far as the decision to grant the subsidy states this.

It is possible to elaborate obligations after the granting of the subsidy if this is explicitly stated in the subsidy granting decision. Elaboration does not mean that it is allowed to change or add obligations. For this a change of the subsidy granting decision itself is necessary. The elaboration is to be considered as a decision to which appeal is possible.

Section 4:41 / [Compensation in case of accretion of capital]

1. *In the cases referred to in subsection 2, the subsidy recipient shall, in so far as the granting of the subsidy has resulted in the accretion of capital, owe compensation to the administrative authority, provided that:*
   (a) this has been provided by statutory regulation or, if the subsidy is not based on a statutory regulation, when the subsidy was granted, and
   (b) it was specified at that time how the amount of the compensation should be determined.
2. *The compensation shall be owed only if:*
   (a) the subsidy recipient alienates or encumbers goods used or intended for the performance of the subsidised activities or alters the use made of them;
   (b) the subsidy recipient receives compensation for the loss of or damage to goods used or intended for the performance of the subsidised activities;
   (c) the subsidised activities are ended wholly or partly;
   (d) the decision granting or fixing the subsidy is repealed or the subsidy is ended; or
   (e) the legal entity, which received the subsidy, is dissolved.

3. *The compensation shall be fixed within a year of the date on which the administrative authority becomes aware or could have become aware of the event giving rise to the right to compensation, but in any event within five years of the publication of the last decision fixing the subsidy.*

This section gives the administrative the possibility to be compensated for accretion of capital realised with the subsidy provided. There must be a causal connection between the provision of the subsidy and the accretion of capital. In addition, the compensation is owed only if it has been provided for by statutory regulation or in the granting decision and if the way the compensation will be determined has also been specified. The maximum compensation is of course determined by the height of the accretion. (Subsection 1.)
Subsection 2 gives an exhaustive enumeration of circumstances when compensation is owed. The text of this subsection is self-explanatory. Only with regard to sub (b) it is noted, that compensation received for loss or damage, for example on the basis of insurance, is only owed to the government authority if this compensation is not used to replace the lost goods. Sub (c), (d) and (e) all regard the end of a subsidy relationship in which also the financial relationship between government authority and subsidy recipient has to be settled.
Subsection 3 contains a provision on the term of limitation of the claim of the government authority to receive compensation.
By the way, it is possible to oblige the subsidy recipient under section 4:37 subsection 1 sub c, to provide (periodical) information on accretion due to the subsidy. In case of periodic subsidy payments, compensation of accretion and subsidy payments can be settled.

CHAPTER 4.2.5 Fixing of the Subsidy

Section 4:42 /[Fixing of the subsidy]

A decision fixing a subsidy shall state the amount of the subsidy and confers entitlement to payment of the fixed amount in accordance with chapter 4.2.7.

A subsidy fixing decision shall state the exact amount the subsidy recipient is entitled to and confers entitlement to payment of this fixed amount. The exact amount should be determined, as this is a final decision. Stating the way in which the amount will be decided, as is possible when granting a subsidy (cf. section 4:31), is not possible. The total amount is stated, including earlier advances. Advances will be deducted when actual payment takes place. Payments will be made in accordance with chapter 4.2.7.

Section 4:43 / [Fixing without earlier granting decision]

1. *If no decision to grant a subsidy has been given, the decision to fix a subsidy shall contain a description of the activities for which the subsidy is provided.*
2. *Sections 4:32, 4:35, subsection 2, 4:38 and 4:39 shall apply mutatis mutandis.*

If there was no earlier subsidy granting decision, certain provisions that are usually made in the granting decision will now be arranged for in the subsidy fixing decision. Subsection 1 determines that the activities will be described. This should be a precise

description, and there should not be a provision that the description will be elaborated later, as is possible in a granting decision on the basis of section 4:30 subsection 2. This is so, because a later description will not be possible as the fixing decision is final.
Subsection 2 refers to sections 4:32, 4:35 subsection 2, 4:38 and 4:39. Application of section 4:32 implies that regular payments may only be done for a limited period of time that is clearly defined. Also 4:35 subsection 2 containing non-preventive grounds for refusal is applicable; subsection 1 of this section does not apply, as at the moment the subsidy fixation is decided on, all the requirements (activities, fulfilment of obligations, account) of subsection 1 should have been fulfilled already. Sections 4:38 and 4:39 regard obligations that may be imposed on the subsidy recipient by the fixing decision. Such obligations can also last after the fixing decision, e.g. an obligation to repayment and interest payments in case of a credit.

Section 4:44 / [Application for fixation in case of earlier grant decision]

1. *If a decision to grant a subsidy has been made, the subsidy recipient shall file an application for the fixing of the subsidy after completion of the activities or the expiry of the period for which the subsidy has been granted, unless:*
   (a) the subsidy is fixed by the administrative authority on its own initiative pursuant to section 4:47 sub a;
   (b) it has been provided by statutory regulation or when the subsidy is granted that the application should be filed on each occasion after the end of a part of the period for which the subsidy has been granted; or
   (c) the fixing of the subsidy has been regulated differently under an agreement as referred to in section 4:36, subsection 1.
2. *If no period has been provided by statutory regulation, the application to fix the subsidy shall be filed within a period to be decided when the subsidy is granted.*
3. *If no period has been provided for the filing of the application to fix the subsidy or the application has not been filed by the expiry of the period prescribed for this purpose, the administrative authority may invite the subsidy recipient to file the application within a period prescribed in the invitation.*
4. *If, after the expiry of this period, no application has been filed the subsidy may be fixed by the administrative authority on its own initiative.*

Section 4:44 regulates the procedure in case a granting decision is present and the time has come to take a subsidy fixing decision. The basic rule is that an application should be filed after completion of activities or expiry of the period for which the subsidy has been granted. Subs (a), (b) and (c) provide exclusions to this basic rule. Sub (a) refers to section 4:47 sub a, a provision on fixation by the administrative authority on its on initiative. Sub (b) makes it possible to fix subsidies on an intermediate basis. This is particularly handy if a subsidy has been granted for e.g. 3 years and the administration wants to fix the amount per year for budget or other reasons. On the basis of sub (c) fixation in deviation of the basic rule mentioned above is possible, under an agreement as referred to in section 4:36 subsection 1.
The application to fix the subsidy should, according to subsection 2 of section 4:44, be filed within the period that has been provided by statutory regulation. If there is no period mentioned in a statutory regulation, the application shall be filed within the period mentioned in the subsidy granting decision.

Subsections 3 and 4 indicate what should be done if no period within which the application should be made is mentioned, or if an application is not filed within the given timeframe. If the subsidy recipient does not react to the invitation mentioned in subsection 3, the government authority may fix the subsidy on its own initiative on the basis of subsection 4 (cf. section 4:47 sub b).

Section 4:45 / [Obligation to provide information]

1. *When applying for a subsidy to be fixed, the applicant shall show that the activities have taken place in accordance with the obligations attached to the subsidy, unless the subsidy is fixed before the start of the activities.*
2. *When applying for a subsidy to be fixed, the applicant shall render account in respect of the income and expenditure connected with the activities in so far as they may be important for the fixing of the subsidy.*

With the application mentioned in section 4:44, the subsidy recipient in principle is obliged to provide the government authority with information on the actual performed activities (section 4:45 subsection 1) and on the income and expenditures connected with these activities (subsection 2). These obligations intend to guarantee that the activities that the government authorities wanted to subsidise have actually taken place and that the subsidy amount to be fixed is accurate. The size of the information obligation is of course among others related to the subsidy recipient and size of the subsidy amount. The information obligation should not be disproportionate. If necessary, extra regulations on the provision of information, particularly in case of complicated subsidies, can be made in a statutory regulation or on the basis of section 4:37 subsection 1 sub f.
Of course information on activities that have not taken place yet (subsection 1) and irrelevant financial information (subsection 2) do not have to be provided.

Section 4:46 / [Fixation of subsidy amount]

1. *If a decision to grant a subsidy has been made, the administrative authority shall fix the subsidy in accordance with the decision granting the subsidy.*
2. *The subsidy may be fixed at a lower amount if:*
   (a) the activities for which subsidy has been granted have not taken place or have not taken place in their entirety;
   (b) the subsidy recipient has not complied with the obligations attached to the subsidy;
   (c) the subsidy recipient has provided incorrect or incomplete information and the provision of correct and complete information would have led to a different decision on the application for the granting of subsidy; or
   (d) the granting of the subsidy was otherwise incorrect and the subsidy recipient knew or should have known this.
3. *In so far as the amount of the subsidy is dependent on the actual costs of the activities for which subsidy has been granted, costs which cannot reasonably be regarded as necessary shall not be taken into account in fixing the subsidy.*

The main rule laid down in subsection 1 is that the subsidy amount, determined in the subsidy fixing decision, is the same as the amount mentioned already in the granting decision. However, subsection 2 provides a number of exceptions to this rule on the

basis of which the subsidy amount can be lowered. In all cases the subsidy amount in the fixing decision is lower than in the granting decision, the general principles of administrative law, laid down elsewhere in the Administrative Code, apply. In particular this means that the reduction of the subsidy amount should be in proportion with the subsidy recipient's mistake. Also the interests of the subsidy recipient should be taken into account. A reduction to zero is possible, but should, as any decision, be based on good arguments.
For the application of subsection 2, sub (a) the description of activities in the subsidy granting decision is the touchstone. Sub (b) refers to all obligations under chapter 4.2.2. As far as the applicability of sub (c) is concerned, it is not necessary that the subsidy recipient was aware of the fact that incorrect or incomplete information was provided. An example of an 'otherwise incorrect' subsidy grant as mentioned in sub (d), is a typing error in a decision that states an amount of NLG 10.000[5], where an amount of NLG 1.000 was meant.
Subsection 3 of section 4:46 provides for a limitation in declarable costs: only actual costs that can be regarded as necessary, will be reimbursed.

Section 4:47 / [Administrative fixation]

The administrative authority may fix the subsidy wholly or partly on its own initiative if:
(a) a period has been set by statutory regulation or when the subsidy is granted within which the subsidy will be fixed by the authority on its own initiative;
(b) section 4:44, subsection 4, is applied; or
(c) the decision to grant a subsidy or the decision to fix a subsidy is repealed or altered to the detriment of the recipient.

Section 4:47 contains an exhausting enumeration of cases an administrative authority may fix the subsidy on its own initiative. Sub (a) is meant for situations the administrative authority has got enough information to base the fixing decision on. This may for example be so when intermediary information is provided on the basis of section 4:37 subsection 1 sub c. For sub (b) see section 4:44 subsection 4. And sub (c) is listed, because a subsidy recipient can be reluctant to apply for fixation if his interest disappears because the subsidy is repealed or altered to his or her detriment. In this case the government authority has an instrument to end the subsidy relationship by taking a fixing decision.

[5] 10.000 NLG is approximately 5.000 USD.

CHAPTER 4.2.6 Repeal and alteration

Chapter 4.2.6 deals with repeal and alteration of subsidy grant decisions and subsidy fixation decisions. Sections 4:48 and 4:49 deal with retroactive repeal and alteration of respectively the subsidy grant and the subsidy fixation. Section 4:50 regards repeal and alteration of the subsidy grant in the course of the subsidy, before the fixation decision has been taken. The effects of a decision on the basis of 4:50 are 'ex nunc', i.e. without retroactive force. And finally section 4:51 regulates refusal of subsidy for a new period. Strictly speaking refusal for a new period is not repeal or alteration, but simply a decision containing a refusal to extend a subsidy for a new period.

Section 4:48 / [Retroactive repeal and alteration subsidy grant]

1. *As long as the subsidy has not been fixed the administrative authority may repeal the decision granting the subsidy or alter the subsidy to the detriment of the subsidy recipient if:*
   (a) the activities for which subsidy has been granted have not taken place or have not taken place in their entirety or will not take place;
   (b) the subsidy recipient has acted in breach of the obligations attached to the subsidy;
   (c) the subsidy recipient has provided incorrect or incomplete information and the provision of correct and complete information would have led to a different decision on the application for the granting of subsidy;
   (d) the subsidy was granted incorrectly and the subsidy recipient knew or should have known this; or
   (e) the condition that sufficient funds are made available is cited, applying section 4:34, subsection 5.
2. *The repeal or alteration shall have retroactive effect to the date when the subsidy was granted, unless provided otherwise at the time of repeal or alteration.*

This section gives a possibility to the administrative authority to repeal or alter a subsidy grant before the subsidy is fixed. There are a limited number of grounds on the basis of which a subsidy grant may be repealed or altered. The grounds mentioned in sub (a) – (d) coincide with the grounds to fix a subsidy at a lower amount; see section 4:46 subsection 2. Sub (e) refers to the provisions on budget reservation.
In principle the repeal or alteration has retroactive effect on the basis of subsection 2. However, if reasonableness requires so, taking all relevant circumstances into account, moderation of this full retroactive effect is possible.
Before taking the decision to repeal or moderate, the government authority has the power to stop all payments directly if the conditions of section 4:56 are met.

Section 4:49 / [Retroactive repeal and alterations subsidy fixation]

1. *The administrative authority may repeal the decision fixing the subsidy or alter it to the detriment of the recipient:*
   (a) on the ground of facts or circumstances of which it could not reasonably have been aware when the subsidy was fixed and on the basis of which the subsidy would have been fixed at a lower amount than that specified in the decision fixing the subsidy;

(b) if the subsidy was fixed incorrectly and the subsidy recipient knew or should have known this, or
(c) if, since the subsidy was fixed, the subsidy recipient has not complied with the obligations attached to the subsidy.

2. *The repeal or alteration shall have retroactive effect to the time when the subsidy was fixed, unless provided otherwise when the decision is repealed or altered.*
3. *The decision fixing the subsidy may no longer be repealed or altered to the detriment of the recipient if five years have passed since the date on which it was published or, in the case referred to in subsection 1 (c), since the date on which the act in breach of the obligation was committed or the day on which the obligation should have been complied with.*

Section 4:49 gives provisions for what a government authority can do in case of irregularities, in case a fixation decision has already been taken. In subsection 1, sub (a) – (c), a number of circumstances has been enumerated on the basis of which the fixation decision may be repealed or altered. See for the relationship between 4:46, 4:48 and 4:49 the commentary with section 4:48.
The 'facts or circumstances' mentioned in subsection 1, sub (a) may have occurred before the fixation decision and not necessarily only after. Sub (b) refers to, for example, obvious miscalculations. Sub (c) is about obligations that last after the fixation decision, such as repayments or interest payments.
On the basis of subsection 2 the repeal or alteration shall have retroactive effect, unless otherwise provided.
Subsection 3 gives a period of limitation for the sake of legal security. The basic rule is that no repeal or alteration to the detriment of the recipient is possible five years after publication of the fixation decision. Special provisions have been given with regard to subsection 1 sub (c).
Before taking the decision to repeal or moderate, the government authority has the power to stop all payments directly if the conditions of section 4:56 are met.

Section 4:50 / [Repeal and alteration of subsidy grant ex nunc]

1. *As long as the subsidy has not been fixed the administrative authority may repeal the decision granting the subsidy or alter the subsidy to the detriment of the subsidy recipient, subject to observance of a reasonable period of notice, in so far as:*
   (a) the subsidy was granted incorrectly;
   (b) circumstances or views have changed to such a considerable extent that the subsidy cannot be continued or cannot be continued unaltered; or
   (c) other cases provided by statutory regulation apply.
2. *In the event of repeal or alteration under subsection 1 (a) or (b), the administrative authority shall pay compensation for the damage which the subsidy recipient suffers as a result of acting differently than he would otherwise have done in the belief that he would receive the subsidy.*

Section 4:50 deals with the situation that a subsidy has been granted but not yet been fixed and the government authority wants to repeal or alter the granting decision. In contrast with section 4:48, however, the repeal or alteration decision will only have

effect 'ex nunc', i.e. will not have retroactive effect and only take effect after a reasonable period of notice.
The grounds on which a repeal or alteration decision can be taken have been laid down in subsection 1, sub (a) – (c). Sub (a) regards incorrect subsidy grants of which the subsidy recipient was not and should not have been aware. If, on the other hand, the subsidy recipient was or should have been aware, application of section 4:48 subsection 1 sub d is possible. This last section does have retroactive effect. Sub (b) regards changes in circumstances or views because of which the subsidy cannot be continued or continued unaltered. These changes have to be 'considerable'. This is important, as it protects the subsidy recipient, who had a legitimate basis to rely on the subsidy. Sub (c) gives an opportunity to repeal or alter on the basis of statutory regulations.
Subsection 2 also provides protection to the legitimate expectations of the subsidy recipient, by obliging the administration to pay compensation for damage. This obligation is limited to damages caused under application of subsection 1 sub (a) or (b). However, damages may also be provided for in the statutory regulations mentioned under subsection 1 sub (c).

Section 4:51 / [Refusal of subsidy for new period]

1. *If subsidy has been provided to a subsidy recipient for three or more successive years for the same activities or for activities which are largely the same, the subsidy may be refused for a following period, on the ground that circumstances or views have changed to the extent that the subsidy cannot be continued or cannot be continued unaltered, only if a reasonable period of notice is given.*
2. *If, at the end of the period for which subsidy has been granted, a reasonable period has not expired since the publication of the intention to refuse subsidy for a following period, the subsidy shall be granted for the remaining part of this reasonable period, if necessary in derogation from section 4:25, subsection 2.*

In case a subsidy is provided for a subsequent number of years, the subsidy recipient develops a certain expectation to keep on receiving the subsidy for the future. Section 4:51 tries to take into account this legitimate expectation on the side of the subsidy recipient, but also to give the government authority a good possibility to stop subsidies, if circumstances or views have changed and other goals seem more appropriate to be subsidised.
The requirements for refusal in section 4:51 are less rigid than the requirements under section 4:50 subsection 1 sub b. No 'considerable' change is required to refuse a renewed subsidy. Simple change of circumstances or views will be enough for refusal. In order to protect the subsidy recipient's interest, however, a reasonable period of notice should be observed. Subsection 2 provides for the sanction in case this period is not taken into account; under subsection 2 the subsidy recipient is entitled to a subsidy, even after the subsidy that was not extended has ended. This claim, however, is limited and lasts only until the reasonable period of notice mentioned has expired. After the end of both the original subsidy and of the reasonable period of notice, the subsidy recipient has no claim whatsoever. As the government authority should be liable for these 'damages', a subsidy ceiling (section 4:25) cannot be invoked as a ground to refuse the payment of the subsidy for the reasonable period after the end of the subsidy that was not continued.

CHAPTER 4.2.7 Payment and recovery

Section 4:52 / [Payment of subsidy amount]

1. *The amount of subsidy paid shall be as specified in the decision fixing the subsidy, after deduction of the advances paid.*
2. *The amount of the subsidy shall be paid within four weeks of the decision fixing the subsidy, unless provided otherwise by statutory regulation.*
3. *If the subsidy is not based on a statutory regulation, a different period within which the amount of the subsidy must be paid may be determined when the subsidy is granted or, if there has been no decision granting the subsidy, when the subsidy is fixed.*

Subsection 1 contains an enforceable obligation for the governmental authority to pay the subsidy amount fixed on the basis of 4:42 and 4:46. Advances paid on the basis of section 4:55 are deducted. If the amount of advances paid is higher than the subsidy amount, payments are recoverable on the basis of section 4:57.
Subsections 2 and 3 contain provisions with regard to the moment payment should take place. The basis rule of payment within four weeks after the fixing decision has been laid down in subsection 2. Exceptions are possible on the basis of a statutory regulation, or if there is no statutory regulation, on the basis of the granting or fixation decision.

Section 4:53 / [Payment in parts]

1. *The amount of the subsidy may be paid in parts, provided that it has been decided by statutory regulation how the parts are to be calculated and at what times they are to be paid.*
2. *If the subsidy is not based on a statutory regulation, the amount of the subsidy may be paid in parts provided that it has been decided when the subsidy is granted or, if there has been no decision granting the subsidy, when the subsidy is fixed, how the parts are to be calculated and at what times they are to be paid.*

It is possible to pay the subsidy amount in parts. In order to protect the position of the subsidy recipient, in all cases the way the parts are calculated and the times they are to be paid have to be explicitly decided on.

Section 4:54 / [Granting of advances]

1. *The administrative authority may pay advances to the subsidy recipient in so far as this has been provided for by statutory regulation, or when the subsidy is granted.*
2. *A decision granting an advance shall specify the amount of the advance or the way in which this amount is to be determined.*

This section provides the basis on which advances may be granted and paid. In practice advances play an important role, as subsidised activities often cannot be implemented, in case no funds have been made available beforehand. Subsection 1 determines that advances may only be granted in case this has been provided for by

statutory regulation, or when the subsidy is granted. A simple statement in a law 'that advances may be granted' will already be sufficient. In the advances granting decision, the amount of the advance or the way in which this amount is to be determined will be laid down (subsection 2).[6]

Section 4:55 / [Payment of advances]

1. *Advances shall be paid in accordance with the decision granting the advance.*
2. *An advance shall be paid within four weeks of the date on which it is granted, unless provided otherwise by statutory regulation or when the advance is granted.*

The advances granting decision obliges the government authority to pay advances in accordance with this decision. In order to guarantee legal security, the basic rule is that advances shall be paid within four weeks after the granting decision. Another moment may, however, be laid down in a statutory regulation or in the granting decision.

Section 4:56 / [No payment in case of planned repeal or alteration of subsidy]

The obligation to pay an amount of subsidy or an advance shall be stayed with effect from the day on which the administrative authority notifies the subsidy recipient in writing of the existence of a grave suspicion that there are grounds for applying section 4:48 or 4:49 up to the date on which the decision concerning repeal or alteration is published or the day on which thirteen weeks have expired since the notification concerning the grave suspicion.

This section gives a limited possibility to stay payment of subsidy amounts and advances in case the administrative authority plans to repeal or alter the subsidy on the basis of section 4:48 or 4:49. It is in many cases desirable to stay payments immediately in order to prevent later re-claims, or even, impossibility of later re-claims. However, the competence under the present section is so radical, that grave suspicion that there are grounds to apply section 4:48 or 4:49 should be present. For the same reason, the possibility to stay payment is limited to a maximum of thirteen weeks since notification with regard to the grave suspicion. Thus, the competence to stay payments is a temporary measure. Within thirteen weeks a decision on repeal or alteration of the subsidy should be taken.

Section 4:57 / [Recovery of payments not owed]

Amounts of subsidy and advances that have been paid without being owed may be recovered in so far as five years have not expired since the date on which the subsidy was fixed or the act as referred to in section 4:49, subsection 1 (c), took place.

On the basis of this section it is possible to recover subsidy payments or advances that were paid without being owed. The period of limitation under this article is five years,

[6] This regulation is identical to that regarding the amount in the subsidy granting decision; cf. section 4:31 subsection 1.

either from the moment of publication[7] of the subsidy fixation decision, or from the moment an obligation under section 4:49 subsection 1 (c) was not being fulfilled.

[7] Even though the text of the section does not mention the publication as the decisive moment, it is argued that a parallel should be drawn with section 4:49 subsection 3. See Van Buuren, Polak, 1997 p.151.

3. Taxation of foundations and associations under Dutch law

3.1 Introduction

Tax legislation can be an instrument to stimulate favourable conditions for the development of the provision of social services by non-governmental organisations. While subsidies are a very directed form of support with regard to individual organisations, tax exemptions are an instrument that can be used to stimulate the development of certain sectors in society in general. Thus, tax exemptions can also be used to create favourable conditions for the development of provision of social services by non-governmental organisations. For example, if you want to stimulate the activities of organisations for homeless children, you can exempt these organisations from certain taxes. Exemption of these organisations from taxes will make it easier for those organisations to work, as their tax expenses will be lower and more money will be available for their core activities. In addition exemptions of gifts to such organisations from taxes will make gifts to the organisations cheaper. Unlike subsidies, the tax instrument does not necessarily lead to extra cash flows to organisations but only provides for favourable conditions for this to happen.

In the Netherlands NGO activities are as a basis rule carried out by foundations and associations[8]. In this chapter the most important taxes, which can be levied in the Netherlands from foundations and associations, i.e. profit tax, VAT, and gift and inheritance duties, will be dealt with in the paragraphs 2, 3 and 4 respectively.[9] Paragraph 4 relates to the possibility for contributors / sponsors to foundations and associations to lower the amount of income or profit tax they have to pay. Under certain circumstances, which will be further described in paragraph 5, donations to foundations and associations are deductible from income or profit tax. In all paragraphs, tax exemptions with regard to foundations and associations active in the social sector will get special attention.

Under Dutch legislation there are a number of cases that clearly show that taxes are used as an instrument to provide conditions for development of the social sector. Specific types of organisations and activities are stimulated through tax exemptions. A number of organisations, that meet certain requirements, enjoy exemptions under for example profit tax law, VAT legislation and with regard to inheritance and gift duties, and donations to these organisations are also often deductible of the income or profit tax contributors are liable to pay.

Exempted organisations that are relevant for the social sector include particularly church, charity, cultural, and scientific institutions and institutions aiming at a public benefit. This range of organisations is for example (partly) exempted of inheritance and gift duties.[10] In profit tax law, par.2f, of this list only charity organisations and organisations aiming at public benefit are exempted. The church, cultural, scientific institutions (see above) have been left out. Section 5 sub c of the Profit Tax Law of 1969 only mentions charity institutions and institutions aiming at a public benefit and

[8] The discussion will be limited to associations being a legal entity with full legal competence.
[9] Other taxes, such as for example dividend tax, immovable tax and the taxation of games of chance have not been taken into account, as they are of minor importance in this context.
[10] Cf. paragraph 3, on the 11% rate and exemptions.

in addition precisely determines the activities such organisations should be involved in, in order to be eligible for exemption of profit tax. The same types of institutions and activities are required for exemption under section 4 of the Executive Act on Profit Tax Law, which section actually executes section 5 sub c of the Profit Tax Law of 1969.[11] As far as deductibility of gifts is concerned the following is interesting to note in this context. Contributors may reduce their taxable income with gifts to church, charity, cultural, and scientific institutions and to institutions aiming at a public benefit, i.e. to the categories listed above.[12] Note, however, that under profit tax regulations, gifts are also deductible if they are given to ideological organisations.[13]

Institutions aiming at a public benefit are institutions, the activities of which are directly touching upon the common interest. Institutions servicing individual interests are not institutions of public benefit, even if their activities might indirectly have an impact on the common interest. Examples of institutions of public benefit are associations working in the field of care to elderly, handicapped or sick, protection of animals, public health, protection of children, foreign aid, etc. Also political parties are considered to be such institutions.

As far as profit tax and VAT are concerned, it must be noted that the concept 'enterprise' has got a different connotation in profit tax and VAT legislation. This is important, as associations and foundations are liable for profit tax and VAT only if the legal entity is running an enterprise. The exact connotation of the concept 'enterprise' in profit tax and VAT will be discussed in detail in the respective paragraphs.

[11] For more details on the Profit Tax Law of 1969 and the Executive Act on Profit Tax Law, see paragraph 1 sub g.
[12] Cf. paragraph 4 sub a.
[13] Cf. paragraph 4 sub b.

3.2. Profit tax

Introduction

The Law on Profit Tax of 1969 determines that certain legal entities such as joint stock companies are liable to profit tax for all their activities, while other legal entities such as associations and foundations are obliged to pay profit tax only in as far as they run an enterprise.[14] As has been stated in the introduction to this chapter, the concept 'enterprise' has no unequivocal meaning in Dutch legislation. As far as profit tax is concerned, the concept has been mentioned but not been elaborated in the Law on Profit Tax of 1969. The contents have been outlined in jurisprudence. An enterprise is present if four criteria have been met:

1. There is an organisation of capital and labour
2. with a certain continuity
3. aiming at participation in the economic circuit
4. with the goal to make profit.

If one criterion is not met, there is no enterprise.

However, there is an exception. The Law on Profit Tax states that also 'similar activity that implies competition' brings along tax liability.[15] In practice this means that the fourth criterion mentioned above of a goal to make profit, can be substituted by the criterion of competition with other persons or organisations.

It must be stressed that only the enterprise activities of an association or foundation are taxable. Activities that cannot be characterised to be enterprise activities will not liable for profit tax. See on the division of activities into activities related to the enterprise and those not related to it, the introduction of sub f. hereafter.

The four criteria that lead to taxation of profit, and tax liability in the case of competition will now be elaborated in sub a-e. Subsequently taxable profits and the profit tax rate will be discussed in sub f. and tax exemptions will be dealt with in sub g.

a. Organisation of capital and labour

Both capital and labour are necessary conditions for the presence of an enterprise. Capital may for example be present in the form of owned or rented means of production and labour in the form of employees or temporarily attracted forces.

b. Continuity

In addition, the organisation of capital and labour should have certain continuity. In the case of once-only activities to raise funds, presence of an enterprise will not be likely. However, if the same activity is repeated several times, for example every

[14] Cf. section 2 of the Profit Tax Law of 1969.
[15] Cf. section 4 sub a of the Profit Tax Law of 1969.

year, an organisation with certain continuity can be present. This will lead to liability for profit tax, if all other conditions that are described hereafter have also been met.

c. Participation in the economic circuit

The third condition is participation in the economic circuit. This means that the activities of the association or foundation must reach beyond the circle of the association or foundation and have an impact on other persons or organisations. For example, foundation A delivers services to construction companies and thus increases their effectiveness compared to other construction companies who have no relation to foundation A. As the activities of foundation A have an impact on these other construction companies, foundation A is considered a participant in the economic circuit.[16]

d. Goal to make profit

One of the conditions to be able to classify activities as taxable activities in the course of an enterprise, is the presence of the goal to make profit. Not only the by-laws of an association or foundation give an indication of the presence of such a goal, but also the way of acting in practice is an important indicator. Thus, even if the by-laws state no profit is aimed at, an enterprise may still be present and profit tax may be levied, in so far as the association or foundation aims at making profit in practice. Profits and positive balances on a regular basis are strong indicators that the goal to make profit is present.

e. Competition

In addition to the enterprise that is present if the four criteria described under sub a-d above have been met, the Law on Profit Tax of 1969 states that an enterprise and thus tax liability are also present in case of a 'similar activity that implies competing'.[17] A 'similar activity' is present if an organisation with capital and labour with certain continuity aims at participation in the economic circuit. If the organisation's activities in addition compete with the activities of other persons or organisations, an enterprise is present. This implies tax liability. The competition criterion thus replaces the profit criterion described in sub d. above, while the criteria of organisation of capital and labour with continuity (sub a, b) and participation in the economic circuit (sub c) are required also in this case.

f. Taxable profits and rate

Profit tax is levied only over profits related to the enterprise activities of an association or foundation.[18] Taxable profits are all profits minus deductible gifts[19] and

[16] Cf. Dutch High Court, 6 March 1985, BNB 1985, 213.
[17] See section 4, sub a. of the Law on profit tax of 1969.
[18] For the criteria regarding the presence of an enterprise, see the discussion above.
[19] See also paragraph 4 sub b of this chapter.

minus deductible losses. Tax exemptions are provided for; these are elaborated in sub g. hereafter.

It is very important that only the profit related to an association's or foundation's enterprise is taxable and not the organisation's revenues beyond the enterprise. It is thus very important to divide all assets and activities of an association or foundation in assets and activities related to enterprise activities and assets and activities not related to enterprise activities. In Dutch tax practice this is called 'labelling of assets'. The association or foundation on the one hand and the tax inspector on the other hand may have different interpretations when labelling assets.[20]

The profit tax rate is 35%.[21]

g. Profit tax exemptions

In a number of cases the legislator desired to provide the possibility to exempt organisations completely from profit tax, even if they operate an enterprise. Besides other organisations[22] the Profit Tax Law opens the possibility to exempt a number of organisations active in the social welfare sector.[23] This particularly refers to the exemption of **charity institutions** and **institutions aiming at public benefit** that display for at least 90% activities in:

- the healing or treatment of ill people, women in childbed and new mothers, infirm or mentally handicapped persons;
- providing elderly, infirm people or orphans with housing;
- providing of suitable work to unsociable or physically or mentally disabled people;
- granting of small credits to persons belonging to the economically weak groups in society.

The actual exemption is made in an Order in Council.

Even though these organisations may be an enterprise that is competing on the market, they do not have to pay profit tax. However, this applies only if they engage in the activities listed above. These activities must have been laid down as a statutory goal in the by-laws of the charity organisation or organisation aiming at public

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[20] The Dutch High Court has decided that in case it is not possible to make a clear distinction, the tax service may not tax all activities as if they were performed in the course of the enterprise, but that in that case an objective estimate has to be made. (See: Bloedbankarrest, Beslissingen Nederlandse Belastingrechtspraak, 1990 / 48.)

[21] Cf. section 22 of the Profit Tax Law of 1969.

[22] See: sections 5 and 6 of the Profit Tax Law of 1969; and Wessels, 1996, par.196. However, none of these organisations regard the provision of social services and thus will not be elaborated extensively.

[23] Profit Tax Law of 1969, section 5 sub c:

[Possibly exempted from profit tax on the basis of an executive Order in Council:] *Bodies, acting as charity institutions or institutions aiming at public benefit, only or for the major part carrying out activities consisting of:*

- *the healing or treatment of ill people, women in childbed and new mothers, infirm or mentally handicapped persons;*
- *providing elderly, infirm people or orphans with housing;*
- *providing of suitable work to unsociable or disabled people;*
- granting of small credits to persons belonging to the economically weak groups in society.

benefit, that wants to be exempted from profit tax. Factual activities play a decisive role in determining if an exemption is applicable.

The Executive Act on Profit Tax Law states that organisations mentioned in section 5 sub c of the Profit Tax Law of 1969[24] will be exempted only, if profits made are used for the purpose of support of organisations exempted under the Executive Act or for the good of common interests in society. Thus, activities listed under section 5 sub c of the Profit Tax Law that are commercially undertaken will not be liable for a profit tax exemption.

Section 6 of the Profit Tax Law of 1969[25] opens the possibility to exempt organisations that do not fulfil all the conditions that have been laid down in section 5 sub c of the Law. This gives the system some flexibility. Actual exemptions are again granted in an executive Order in Council. Organisations should, in order to be exempted from profit tax under section 6, have as a main goal the protection of the common interest of society. And in addition they should not, or only secondarily, pursue profits.

[24] Executive Act on Profit Tax Law of 14 September 1971, section 4:
A body mentioned in section 5 sub c of the Law is exempted, if ... this body, in case it makes profits, uses these profits only for the good of a body exempted under the present section or for a common interest in society.

[25] Profit Tax Law of 1969, section 6 subsection 1:
We reserve the right to exempt of taxes by Order in Council, organisations that mainly work in the common interest of society and that do not or only secondarily strive for profit.

3.3. VAT[26]

Introduction

In the European Union sales tax is levied in the form of a Value Added Tax (VAT). In the Netherlands this tax is regulated in the Law on Sales Tax of 1968. The VAT is to be paid over goods and services provided by an enterprise. Every enterprise has to pay 0, 6 or 17,5% VAT over goods and services delivered to their clients.[27] Some goods and services have been exempted completely; see the paragraph hereafter.[28,29] Clients may be either enterprises that in their turn deliver to their clients, or end-consumers of the goods or services provided. Enterprises pass VAT expenses to their clients. These clients receive bills stating the amount of VAT that the enterprise is obliged to pay to the government and charges to its clients.[30] Even though enterprises thus are obliged to pay to the tax service, it is actually the end-consumer that in the end foots the VAT bill.

While enterprises pay the full amount of VAT over goods and services to the tax service, they also have the right to deduct the tax that was charged to them by their providers of goods or services. VAT is paid per month, quarter or year. From this periodical payment all the VAT that has been charged to an enterprise in this period may be deducted. This means that they on balance only pay tax over the value they added to goods or services. That is also the reason that the sales tax that is levied in the European Union is called Value Added Tax.

An 'enterprise' in VAT law is generally interpreted in jurisprudence as (1) an organisation of capital and labour, (2) aiming at the satisfaction of needs (3) in an enduring manner (4) by participation in society.[31] As in profit tax law, there should be an organisation of capital and labour (criterion 1) in an enduring manner (criterion 3)[32]. This organisation should be aimed at the satisfaction of needs in accordance with criterion two. The fourth criterion of 'participation in society' is in place to prevent

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[26] In this paper, attention will be paid to VAT regulations regarding transactions within the Netherlands. No special attention will be paid to transactions within the European Union and international transactions.

[27] The height of the rate depends on the kind of goods or services. Cf. section 9 of the Law on Sales Tax of 1968 and the Tables referred to in this section.

[28] See for the enumeration of the goods and services under the exemption rules section 11 of the Law on sale tax.

[29] The difference between the 0% rate and an exemption is that in case of the 0% rate deduction of VAT paid earlier is possible, while this is not allowed in case of an exemption. See also the paragraph on exemptions.

[30] A bill with an explicit statement of the VAT amount is obliged in case of delivery of goods or services to enterprises that in their turn deliver to clients. In case of delivery to end-consumers an explicit statement is not required. In this case the amount of VAT will be determined on the basis of the total amount mentioned on the bill.

[31] Under circumstances the requirements are less rigid. Cf. Schwarz, 1996, p.24; Belastingdienst/Directie ondernemingen Noord, 1996, p.7.

[32] In profit tax law this criterion is described so: 'with a certain continuity'.

taxation of goods or services rendered in private. In practice, participation in society is presumed rather easily.[33]

It must be noted that there is an important difference between the concepts of enterprise as contained in profit tax and in VAT law. The VAT definition of 'enterprise' does not include the goal to make profit, as is the case in profit tax law.

Exemptions

In section 11 of the Law on Sales Tax the goods and services that have been exempted from VAT have been enumerated. The choice of the legislator shows once more that a directed tax policy is possible. This, of course, also holds good for tax policy in the field of the provision of social welfare. Hereafter a number of issues covered in section 11 will be discussed, that are related to the provision of social services.

First, however, it must be noted that exemption from levying VAT from clients is not necessarily advantageous, as exemption implies that no deduction of VAT paid earlier to other organisations is allowed. It depends on the circumstances. In certain cases being exempted from levying VAT from clients and not being allowed to deduct VAT paid earlier to other organisations is preferable. In other cases it is financially more advantageous to levy VAT from clients and to have the related right to deduct VAT paid earlier. An example: A foundation decides to restore its office. The VAT they have to pay over construction materials, services by carpenters and painters and the like are considerable. If the foundation itself delivers goods or services liable to VAT, the foundation may deduct the VAT related to the restoration, which may even result in restitution of paid VAT. If the foundation's goods and services are not liable to VAT, the foundation has to pay all VAT costs related to the restoration itself.

Of course associations and foundations have only a limited influence on the applicable regime, as this regime is related to the existence of an enterprise. However, for example an association or foundation that can not or not fully be considered to be running an enterprise, has the possibility to apply to the tax inspector with a request to be regarded as an organisation running an enterprise. If this request is awarded, the association or foundation will be allowed to levy VAT with regards to its services and products provided and also to deduct VAT paid earlier to supplying organisations.

With regard to social services section 11 of the Law on Sales Tax contains a number of provisions. These will now be regarded in more detail.

1. Subsection 1 sub f

[Exempted from VAT:] ***services and goods*** *indicated in an Order in Council* ***of a cultural or social kind****, under the conditions that the entrepreneur does not aim at profit and no distortion of competition takes place with regard to entrepreneurs who do aim at profit.*

[33] However, if goods and services are rendered and nothing is done or given in return, there is no matter of participation in society, according to jurisprudence of the Dutch High Court. See Wessels, 1996, par. 215.

Under this section services and goods of a cultural or social character are exempted from VAT. The entrepreneur, who delivers these services or goods, however, is not to aim at profit, and no distortion of competition is allowed for. The sanction is that the exemption is not applicable.

2. Subsection 1 sub t[34]

[Exempted from VAT:] *services and delivery of goods closely related to them by [...]* ***charity organisations*** *to their members for a contribution fixed in the by-laws; in an Order in Council the exemption may be declared not applicable, if it would lead to a serious distortion of competition.*

Charity organisations are exempted from VAT in case of delivery of services and goods closely interconnected with these services to their members under the condition that the members pay a contribution that has been fixed in the by-laws of the charity. If the exemption would lead to a serious distortion of competition it is not considered desirable and does not apply.

3. Subsection 1 sub u[35]

[Exempted from VAT:] *services indicated in an Order in Council delivered by* ***independent groupings*** *consisting of persons or bodies [...] delivering performances that have been exempted or with regard to which they are not an entrepreneur, to their members, which services are directly necessary to realise the performances mentioned, as long as the groupings claim repayment by their members of their share in the collective expenses only and as long as no serious distortion of competition occurs.*

The goal of the present sub-section is to make it possible to establish groupings of tax exempted organisations. These groupings are set up to deliver services to their member organisations, such as for example administrative or technical services, as it is often cheaper and more efficient to have one common provider of certain services to a number of organisations. Like their member organisations, also the groupings are exempted from VAT.

The conditions put for exemption of the grouping are understandable. (1) The member organisations should not be liable for VAT as far as their main activity is concerned. (2) The services delivered by the grouping should be necessary to realise the activities of the members. (3) Members are allowed only repay the grouping's expenses and for example no extra fee, as the grouping is not to make any profit. (4) The activities of the grouping should furthermore not lead to a serious distortion of competition with other organisations providing the same service.

[34] This subsection should be read together with subsection 2 of section 11. Subsection 2 states, that the exemption mentioned in subsection 1 sub t, only applies if no profit is aimed at with the performances mentioned.

[35] See the discussion of this subsection in: Wessels, 1996, p.174, nr.221.

4. Subsection 1 sub v[36]

[Exempted from VAT:] *delivery of goods and services of subordinate character by organisations, the performances of which have been exempted on the basis of sub c, d, e, f, o sub 1 or t, as long as this delivery of goods and services arises out of activities to obtain* ***financial support*** *for these organisations, provided that the receipts for delivery of goods are not more than NLG 150.000 per year and for services not more than NLG 75.000 per year [...]. This sub does not apply to delivery of goods and services, which are defined in a Ministerial Decree[37], issued to prevent distortion of competition.*

Delivery of goods and services for fundraising is exempted from VAT, if they are delivered by, among others, organisations providing goods and services of social and cultural character and charity organisations, which are exempted on the basis of subs f and t of subsection 1 respectively. Delivery of goods and services for fund-raising is possible as long as these deliveries have a subordinate character, i.e. should not become a main activity, and do not exceed the financial limits as laid down in the subsection. Again, distortion of competition also is a ground for non-applicability of the exemption, but only with regard to goods and services mentioned in a Ministerial Decree.

Exemption of canteen activities

Besides the exemptions mentioned above, special exemption rules with regard to canteen activities have been laid down in a 1989 Resolution[38]. This Resolution regards the exploitation of canteens by associations or other organisations active in the field of sports or recreation or in the social or cultural fields. Canteen activities of such organisations, which may thus also be an association or foundation providing social services, are exempted from VAT under the following conditions: (1) the main activities of the organisation are exempted from VAT; (2) only activities related to the normal activity of the organisation take place in the canteen, i.e. for example wedding parties in a sport club are not allowed for; (3) the turnover of the canteen is not more than NLG 150.000; (4) any balances of the canteen are used in the course of the main activities of the organisation.

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[36] See the discussion of this subsection in: Wessels, 1996, p.175-176, nr.224.

[37] A Ministerial Decree is a decision by one or more members of the Government, without a signature of the Queen.

[38] Resolution of 11 December 1989, in: V-N 1989, p.3676. A renewed regulation entered into force 1 January 1990. See on the canteen issue: Belastingdienst Directie ondernemingen Noord en de uitvoeringsinstelling BVG/Detam B.V., 1996, p.8-12; Schwarz, 1996, p.24-25; Wessels, 1996, p.174-175.

3.4. Inheritance and gift duties[39]

Introduction

The Law on Inheritance and Gift Duties of 1956 gives provisions about taxation of inheritances and gifts, which also apply to foundations and associations. Foundations and associations can receive an inheritance or a legacy by will, or a sum of money or goods as a gift. According to the Law, inheritance duties are to be paid with regard to the value of everything obtained from a person who lived in the Netherlands when he died. Gift duties are levied over the value of everything that is obtained as a gift. Inheritance and gift duties are paid by the receiver of the inheritance or gift respectively.

The ordinary rate of inheritance and gift duties varies from 41-68%. However, the tax rate for certain organisations is 11%. Under conditions full exemptions of duties are made. In addition there are possibilities of discharge of the obligation to pay inheritance and gift duties. The mitigating 11%, exemption and discharge regulations show clear choices by the legislator. Church, charity, cultural, and scientific institutions, and particularly institutions aiming at the public benefit enjoy advantages as far as levying of inheritance and gift duties are concerned.

In case of all gifts the following regulation in the Law on Inheritance and Gift Duties of 1956 has to be taken into account: all gifts done by one donator in the course of two years are totalled up and taxed as one gift.[40] This regulation prevents evasion of the higher gift duty rates in case of bigger gifts, by splitting one gift into a number of smaller gifts.

41-68% and 11% rates

As stated above duties comprise 41-68% of the total inheritance or gift if no mitigating circumstances are present. The exact percentage depends on the height of the inheritance or gift. Cf. the following rates[41]:

Amount				**Rate**
NLG	0	–	41.277	41%
NLG	41.277	–	82.546	45%
NLG	82.546	–	165.082	50%
NLG	165.082	–	330.154	54%
NLG	330.154	–	660.297	59%
NLG	660.297	–	1.650.724	63%
NLG	1.650.724	–	more	68%

However, if an organisation is a church, charity, cultural, or scientific institution or an institution aiming at a public benefit, located in The Netherlands the 11% rate is

[39] See on inheritance and gift duties: Wessels, 1996, p.117-123.
[40] Cf. section 27 of the Law on Inheritance and Gift Duties.
[41] Excerpt of section 24 of the Law on inheritance and gift duties of 1956.

applicable.[42] The inspector of registration and succession determines if the 11% regime is applicable to an organisation. In his judgement he takes into account the by-laws of the organisation, including among other things the statutory goal of the organisation, composition of the board and the destination of liquidation credit balance and he will also consider the organisation's activities in practice.

If a gift or inheritance is given under a condition that makes it impossible to categorise the donation as being in the **'common interest'** the 11% rate will not be applicable. For example, the Foundation for care of the handicapped receives a gift of NLG 10.000. One would expect the 11% rate to be applicable, as the Foundation is an institution aiming at public benefit. However, the gift to the Foundation is aimed specifically at providing handicapped X with certain services. And as the character of the donation is not in the 'common interest' but rather has a private aim, the 11% rate is consequently not applicable and the gift will be taxed on the basis of the 41-68% rate. If a gift represents **both common and private interests**, the part that regards the common interest is taxed at an 11% rate and the part regarding private aims at 41-68%.

Exemptions

In this paragraph a distinction will be made between exemptions of inheritance duties and of gift duties.

A church, charity, cultural or scientific institution or an institution aiming at a public benefit is exempted from inheritance duties if there is no assignment connected to it, because of which it is not possible anymore to characterise the inheritance as serving the common interest. In addition, the inheritance may not be more than NLG 16.507.[43] If this amount is exceeded, the whole inheritance will be taxed.

As for gifts, organisations are exempted under the same conditions, as is the case with inheritance exemptions as described above. Only the maximum exempted amount is lower: NLG 8.254.[44]

Section 35 of the Law on Inheritance and Gift Duties contains the following regulation in case the maximum amount is superseded. The total tax amount will not be higher than three fourths of the difference between the total value of the

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[42] Cf. Law on Inheritance and Gift Duties, section 24 subsection 4:
In case of an inheritance or a gift to a church, charity, cultural or scientific institution or an institution aiming at a public benefit, located in The Kingdom, 11% will be charged over the inheritance or gift, as long as no assignment is connected to it, that would cause that the inheritance or gift cannot be said to have been obtained in the common interest.

[43] Section 32, subsection 1, sub 3:
[Exempted from inheritance duties:] An institution as indicated in section 24 subsection 4, if and in so far as no assignment is connected to the inheritance, that would cause that the inheritance cannot be said to have been obtained in the common interest, and if the inheritance does not exceed NLG 16.507.

[44] Section 33, subsection 1, sub 4:
[Exempted from gift duties:] *An institution as indicated in section 24 subsection 4, if and in so far as no assignment is connected to the gift, that would cause that the gift cannot be said to have been obtained in the common interest, and if the gift does not exceed NLG 8.254.*

inheritance (or gift) minus the amount of 15.310 NLG (or NLG 8.254). That means that if for example the total value of an inheritance is only slightly higher than NLG 15.310, a total tax amount has to be paid that will be considerably lower than under the 11% regime. This regulation that limits the tax amount is called the 'three-fourth regulation'.

Discharge[45]

Discharge of the obligation to pay inheritance or gift duties is given on the basis of (1) the 1988 Discharge directive or (2) by the Minister of Finance on the basis of his competence provided by law.

The 1988 Discharge directive is often used to discharge legal entities that are not settled in the Netherlands and that work in the supranational sphere. An example of such a legal entity is an international organisation providing development aid to underdeveloped countries. These legal entities are discharged of the 41-68% regime and subject to the 11% regime. The 1988 Discharge directive also provides the basis for discharge in several situations, e.g. change of legal entity, merger or split up of legal entities, establishment of a foundation for the support of a legal entity aiming at public interest, etc. A discharge of inheritance or gift duties in such cases is mainly effected if the legal entities concerned, that are to be discharged from inheritance or gift duties, aim at working in the **public interest**.

In addition the law gives the Minister of Finance the competence to provide for partial or full discharge of inheritance and gift duties in individual cases. These cases regard art and science. Also gift duties in the case of a gift for the **public benefit** to an association or foundation based in the Netherlands can be discharged. In the latter case public benefit is not enough: there should also be a special event as a cause for the gift, such as a disaster, a jubilee, etc. Generally, the discharge competence in individual cases is not particularly directed at the provision of social services. The special event discharge may be used in the social sphere, however.

[45] See more detailed: Wessels, 1996, par.122, 123.

3.5. *Deduction of contributions to NGO's*

Introduction

In this paragraph tax exemptions in case of (partial) transfers of income or profit by contributors and sponsors to NGO's will be regarded. Both income tax and profit tax exemptions will get attention. In practice these exemptions are important, as they make gifts to NGO's 'cheaper'.

a. Income tax[46]

In general income tax is levied over the whole income of persons. However, certain deductions from the total taxable income are allowed in case of contributions to NGO activity. The most important deductions regard gifts on the one hand and costs of profession / enterprise and costs in case of employment on the other hand.

- *Deductible gifts*

Law on Income Tax, excerpts of section 47 subsection 1:
Deductible gifts are...gifts to church, charity, cultural, and scientific institutions and to institutions aiming at a public benefit...which are located in the Netherlands...which gifts have been proven with written documents...

Gifts can be an important source of income for foundations. That is why it is important to know what the tax regulations with regard to these gifts are. In this section the most important regulations concerning possibilities of deduction of gifts from the total taxable income of contributors / sponsors will be discussed.

Only gifts to certain categories of organisations, i.e. to **church, charity, cultural, and scientific institutions and to institutions aiming at a public benefit**, which are located in the Netherlands, can be deducted from the taxable income.

The amount that can be deducted from the income is defined by a **minimum** and by a **maximum**[47]. The minimum amount to be deducted is 1% of the income and it should also be higher than the absolute amount of NLG 120. The maximum amount of gifts that is deductible is 10% of a person's income before tax.

Gifts can only be deducted if **written documents**, such as bills, letters or bank statements are available to proof the gift.

Gifts can among other things be made (1) in money, (2) in the form of not declaring costs and (3) in kind.[48] A gift in money can be deducted if all the general conditions that have been described above are met. Not only gifts in the form of

[46] See on this topic Wessels, 1996, p.106-115. This publication only regards regulations with regard to foundations.
[47] See Wessels, 1996, p.108
[48] Among other things, special provisions with regard to gifts of installments of annuities and gifts of objects of art will not be dealt with in this paper.

money can be deducted. Also not declaring costs that are in principle declarable when working for a foundation, is under circumstances considered to be a deductible gift. For example volunteers and members of the board of an organisation frequently do not declare costs they make in the course of the work they do. As far as those costs are under normal circumstances declarable from the organisation, they are regarded as a deductible gift.[49] The third main form of deductible gifts is gifts in kind, such as furniture or other goods, which are deductible if the general conditions that have been outlined above are met. In this respect it should be noted that also here written proof of the gift is needed, preferably stating the economic value the gift represents.

- *Deductible costs of profession / enterprise*

An entrepreneur can make donations to foundations in the course of his profession or enterprise. These gifts are deductible from his or her total taxable income if they are directly related to the interest of the profession or enterprise. The interest of the enterprise shall be involved rather easily; for example when a donation is given for advertisement purposes, in the light of goodwill or when the entrepreneur has got an interest in the goal the foundation strives after.

b. Profit tax[50]

Profit Tax Law of 1969, section 16:
Subsection 1. Deductible gifts are gifts in the course of one year, that have been laid down in written documents, to church, ideological, charity, cultural or scientific institutions or to institutions aiming at a public benefit, located in the Netherlands, in as far as they do not exceed NLG 500. The maximum deductible amount is 6% of the profit.
Subsection 3. The Minister can point out gifts to institutions that are not located in the Netherlands, but that do otherwise comply with all the requirements of the first sentence of subsection 1, and determine that they are deductible.

Gifts that have not been deducted on the basis of costs of profession / enterprise (see the last subsection of paragraph a. above), are deductible from profit tax if the following conditions are complied with:[51]

- The gifts must have been donated to **church, ideological, charity, cultural or scientific institutions, or to institutions aiming at a public benefit**, located in the Netherlands.
- The gift must exceed the **minimum** of NLG 500, while only the amount exceeding NLG 500 is deductible up to a **maximum** of 6% of the profit.
- The gifts have to be demonstrated with **written proof**.

Under circumstances also gifts to institutions not located in the Netherlands are deductible. This, however, requires a special ruling from the Minister concerned.

[49] Examples of gifts in the form of not declaring costs: not declaring lunches; not declaring costs of having workroom at home.
[50] See: Toelichting aangifte Vennootschapsbelasting kalenderjaar 1998 of boekjaar 1998/1999, p.22.
[51] See above the paragraph on gifts deductible for income tax above, for a comparable regulation.

Bibliography
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