

## Taxation of crypto currencies in the Netherlands

The Dutch Supreme Court provides for legal shortfall of legislator: only actual return from savings and investments must be taxed in box 3.



On 24 December 2021, the Dutch Supreme Court ruled that the personal income tax levy on income from savings and investment, in 2017 and 2018, violated property rights and the prohibition on discrimination. As a result, the Supreme Court judgment has provided for the legal shortfall by including only the actual return realized from savings and investments in the taxpayer's levy. One of the questions this judgment has raised is: what are the tax consequences for taxpayers who own crypto currencies?

In the Netherlands, individuals' income is taxed at various rates and using various methods, depending on the type of income concerned. Income from savings and investments is in general taxed in 'Box 3'. Examples include savings accounts, stocks, bonds, investment property etc. The taxable income is determined each year on 1 January of the respective tax year. Taxable income is based on a deemed return on investment and a flat tax rate of 31%, after the deduction of an annual threshold of € 50,650 (€ 101,300 for tax partners). This means in 2022 there is the following tax levy, shown in 'Table 1':

Taxable income	Deemed return	Box 3 levy (31%)
€ 0 to € 50,650	1.82 %	0.56 %
From € 50,650 to € 962,350	4.37 %	1.35 %
€ 962,350 and more	5.53 %	1.71 %

Table 1

The Dutch tax authorities believe that crypto currencies should be mainly taxed in Box 3. However, there are three relevant situations that can change this view:

1. The mere possession of crypto currencies;
2. Trading or speculating in crypto currencies; and
3. The 'mining' of crypto currencies.

Most individual taxpayers solely own crypto currencies, without trading or mining them. For them, crypto currencies will be taxed in Box 3, despite no interest or dividends being received.

Taxpayers who are trading or speculating in crypto currencies will not be treated differently from traders in traditional currencies or shares. This means that the crypto currencies will be taxed in Box 3 since no value is added to the underlying crypto currency.

However, if trading or speculating activities exceed normal, active asset management, then there is a risk of the activity being deemed as 'entrepreneurship' and being taxed in Box 1 with a tax rate of up to 49.5% on actual net income and net gains (2022 tax rates). This requires a 'case-by-case' approach to determine each situation.

Mining crypto currencies requires a lot of costly computer capacity and the chances of success are low. As a result, mining activities usually do not lead to a characterization as entrepreneurship and Box 1 taxation as an entrepreneur. However, if the (expected) revenues exceed the costs, then there is a risk of being considered an entrepreneur and being taxed in Box 1. As noted above, this requires a 'case-by-case' analysis.

In the case that was considered by the 24 December 2021 judgment, the actual return on the taxpayer's assets were undisputed because of the straightforward nature of the assets (which were mainly bank accounts). Since it is not clear what should be considered as 'income' for crypto currencies, it is not clear how to apply the Dutch Supreme Court's ruling to crypto currencies. For example, are capital gains also considered as income and is there a difference between realized and unrealized capital gains? Since the returns of crypto currencies usually far exceed the deemed return of Box 3, the Supreme Court ruling will probably have no impact on individual taxpayers' Box 3 levy. However, if the value of the crypto currencies were to drop and result in a loss in a particular tax year, then it is possible that the judgment might reduce an individual taxpayer's Box 3 levy.

We expect that the Ministry of Finance will announce its position on the judgment's consequences for all taxpayers. We hope that the announcement will also clarify what should be considered as income and what will be the consequences for the owners of crypto currencies. In the meantime, we therefore recommend filing a notice of objection against any outstanding final tax assessments.

## AUTHORS

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**Frances Krijnen**  
[fhk@atlas.tax](mailto:fhk@atlas.tax)  
T +31 6 41713715

**Sebastiaan Janssen**  
[sj@atlas.tax](mailto:sj@atlas.tax)  
T +31 6 15872200

**Suzan van Mook**  
[svm@atlas.tax](mailto:svm@atlas.tax)  
T +31 6 30362545

Atlas Fiscalisten  
[www.atlas.tax](http://www.atlas.tax)

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