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Duidelijkheid van fiscale wetgeving: een onderzoek naar een nadere invulling van de kwaliteitseis van eenvoud, duidelijkheid en toegankelijkheid voor fiscale wetgeving

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Citation

Heuvel, R. L. G. van den. (2018, November 29). *Duidelijkheid van fiscale wetgeving: een onderzoek naar een nadere invulling van de kwaliteitseis van eenvoud, duidelijkheid en toegankelijkheid voor fiscale wetgeving*. s.n., S.l. Retrieved from <https://hdl.handle.net/1887/67107>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

Cover Page



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Issue Date: 2018-11-29

Summary

Clarity of tax legislation

The objective of my research is to provide an overview of the way in which the requirement of clarity regarding tax legislation has been filled in by the literature, by case law and by organizations working in the field of legislative advice. The reason for my research is the multitude of complaints about the complexity of tax legislation in the Netherlands. While studying these complaints the question arose how this complexity relates to the requirement of clarity. This requirement – resulting from the principle of legal certainty – is one of the essential requirements for legislation. The requirement of clarity implies that legislation must be structured and formulated in a way that offers citizens sufficient guidance to determine their legal position. This requirement is particularly important for legislation that has financial consequences for citizens, such as tax legislation.

Of course, the Dutch government is aware of the importance of clarity as a requirement for legislation. In the past, the government has taken some measures to reduce the complexity of the legal system. One of these measures was the formulation of the so-called legislative quality requirement of simplicity, clarity and accessibility. This quality requirement is based on the principle of legal certainty. According to the quality requirement of simplicity, clarity and accessibility, citizens must have a clear view of the intention of the legislator when they are faced with legal rules. Citizens must be able to determine what they are supposed to do – or not to do – according to the legislation concerned.

In the light of the many complaints about the complexity of tax legislation, it seems that tax legislation often does not meet the requirement of clarity, despite the introduction of the quality requirement of simplicity, clarity and accessibility. That is why I have first investigated how this quality requirement has been worked out by the government. My conclusion is that the current operationalization of the quality requirement does not provide the legislative department with adequate instructions to legislate with clarity. My research question therefore includes to what extent the current operationalization of the requirement of clarity needs to be supplemented, given the principle of legal certainty. Therefore, I first had to investigate how the requirement of clarity should be filled in.

During my research I consulted those sources of law in which – according to the principle of legality – specific conditions are imposed on legislation concerning the aspect of clarity. Given the multiform nature of the principle of legal certainty, I did not make an exhaustive analysis of those cases in which the legal certainty principle has been fulfilled. I have only involved those sources in which

the clarity of (i) the fiscal legal position and (ii) the foreseeability of taxation were discussed.

One of the sources of law I have consulted is the Dutch literature focusing on the criterion of clarity of legislation. In this literature valuable interpretations concerning the terms simplicity, clarity and accessibility have been provided. In addition, the so-called principles of appropriate legislation that have been developed in literature, were useful to get an idea how the literature evaluates the criteria of legal certainty and clarity.

During my research I came across literature discussing the use of the criterion of clarity as used by the governments of Belgium, the United Kingdom and Germany. Although my research focuses on Dutch tax legislation, I thought it could be valuable to note the developments and the measures taken in these countries concerning the clarity of legislation.

To come to a synthesis of the way in which the requirement of clarity should be filled in by the Dutch government, the case law in which the principle of legal certainty – and also the aspect of clarity – is discussed was very important. In particular the judgments from the European Court of Human Rights and the case law of the Court of Justice of the European Union have made an important contribution to my research.

Another useful contribution to get to an operationalization of the requirement of clarity concerning tax legislation, were the opinions from those organizations working in the field of legislative advice. I have consulted documents that have been issued for this purpose by the Advisory Division of the Council of State (Raad van State), the Organization for Economic Cooperation and Development (OECD), various institutions of the European Union and the Committee on Law proposals of the Dutch Association of Tax Advisers (NOB).

Based on the results of my research, the criteria that have to be applied to legislation can be categorized as conditions concerning i) the formulation of legislation, ii) the structure of a legal system, iii) the status of persons at whom legislation is addressed to and iv) the way in which the relevant rules are explained.

The requirement of clarity concerning tax regulation implies that taxpayers should be able to determine their fiscal legal position and to foresee the tax consequences of their activities. According to the results of my research, tax legislation could only meet this requirement if:

- 1) legislation is readable because it is formulated clearly;
- 2) based on the words of the law or the structure of the tax law system, the group of taxpayers at whom tax legislation is addressed can be determined;

- 3) the wording of the law takes into account the status of the group of taxpayers at whom it is addressed and contains language and legal terms understandable to that group;
- 4) legislation is formulated accurately and unambiguously. If this is for any reason not feasible, the explanatory memorandum to the law has to explain in detail the purpose and the scope of the law concerned;
- 5) if a law delegates the setting of further regulations to administrative bodies (such as the tax administration), it has to accurately define the content and scope of this regulatory power;
- 6) new legislation has to be consistent with the existing tax law system and should not lead to inconsistencies with other legislation;
- 7) based on the words and the structure of legislation in combination with the structure of the tax law system, it is possible for taxpayers to foresee the fiscal consequences of their activities;
- 8) the explanatory memorandum to the law concerned clarifies its application with (numerical) examples, schematic texts and/or decision tables.

The analysis of the sources of law as consulted during my research shows that the criterion of clarity of tax legislation has already been worked out to a certain extent. The results of my research could therefore also be used to come to a further elaboration of the legislative quality requirement of simplicity, clarity and accessibility. At the end of my research I also made a concrete proposal to that purpose.