BULLETIN OF ACTS AND DECREES 640
Decree of 20 December 2000 for the Amendment of Several Implementation Decrees

Article II
The 1965 Implementation Decree for Wage Tax is amended as follows:

SECTION 3 FREE REMUNERATION AND PROVISIONS (SECTION IIA OF THE LAW); EXTRATERRITORIAL EMPLOYEES

Article 8
1. In this section and the schemes based on it the following definitions apply:
2. These are the following:
a. extraterritorial employees: employees who have entered or were transferred out of the country;
b. entered employee: employee hired in another country by an employer or sent to an employer in the sense of Article 2 of the Act, with a specific expertise that is scarce or absent on the job market in the Netherlands;
c. transferred employee: employee in the sense of Article 2 of the Act, transferred by an employer abroad with the intention of
1°. placement as official with a delegation of the Kingdom of the Netherlands abroad (post);
2°. employed as official, judicial officer or military personnel on the Dutch Antilles or Aruba;
3°. employed as military personnel outside the Kingdom of the Netherlands;
4°. employed in a region designated by ministerial order in accordance with Our Minister of Development Cooperation;
5°. the exercise of scholarly activities or the provision of education;
4. Officials at a post are
a. officials transferred by the Foreign Service of the Ministry of Foreign Affairs, being officials who are appointed to work anywhere in the world;
b. officials of the Foreign Service who have not been transferred but who have been temporarily seconded to a post;
c. officials of other ministries who are employed at a post;
d. military personnel and civilian personnel of the Ministry of Defence who have been transferred to a post, as well as flag officers and general officers who are transferred on international staffs abroad;
e. employees who on the basis of an employment contract under civil law work at a post after transfer from the Netherlands.
5. The exercise of scholarly activities or the provision of education is defined as follows:
a. the pursuit of research outside the Netherlands funded by
1°. a grant or scholarship from a Dutch organisation for scientific research or a foundation for the scientific research of the tropics;
2°. a NATO fellowship;
3°. comparable grants, scholarships and fellowships designated by Our Minister;
b. being transferred abroad as teacher or scholarly practitioner by an educational or scientific institution or invited abroad by such an institution located abroad, with the purpose of providing education there at an educational or scientific institution or conducting scientific research for such an institution.

6. Tuition fees are payments for children of the extraterritorial employee to participate in primary or secondary education at international schools and international departments of non-international schools, up to the amounts charged by the school according to its rates for education, with the exception of costs and accommodation expenses but including travelling expenses.

Article 9

1. Remuneration and provisions to extraterritorial employees to compensate or prevent expenses outside the country of origin shall, with respect to employees arriving at the joint request of the employee and the employer, in any case be considered remuneration for extraterritorial expenses up to
(proof scheme):

a. thirty percent of the basis, this being the sum of the wage received regularly associated with the stay outside the country of origin to the extent the entered or transferred employee has no right in this regard to prevent double taxation, and remuneration for extraterritorial expenses;

b. the amount of the tuition fees.

2. In the case of provisions, the valuation schemes shall apply pursuant to Article 13 of the Act.

Article 9a

1. For the evaluation of whether an entered employee possesses specific expertise that is scarce or absent on the job market in the Netherlands, account shall be taken of the interrelationship of the following factors, to the extent relevant:

a. the level of education of the employee;

b. the experience of the employee relevant to the position;

c. the salary of the function concerned in the Netherlands in comparison to that in the country of origin of the employee.

2. An employee of middle management or higher of an international concern with at least two and a half years experience in that concern who is sent in the framework of job circulation to the Netherlands, shall be considered to have specific expertise that is scarce or absent on the job market in the Netherlands.

Article 9b

1. For entered employees the term of the proof scheme is a maximum of ten years, starting on the first day of employment by the employer.

2. For transferred employees the term of the proof scheme is equal to the term of the transfer.

Article 9c

1. Should an entered employee have another employer during the term, the proof scheme shall remain in force at the joint request of the employee and the new employer for the remainder of the term, providing the period between the end of employment by the former employer and the start of employment by the new employer is no longer than three months.

2. For such a request the new employers shall demonstrate anew that the employee is to be designated as an entered employee.

Article 9d

1. Should the entered employee no longer possess specific expertise that is scarce or absent on the job market in the Netherlands, the term shall be reduced to the time this situation arises but be no less than five years.
2. Starting the sixth year of the term the tax inspector may require the employer to demonstrate that the employee must still be considered an entered employee.
3. Should the employer demonstrate as from the sixth year of the term that the employee should at that time still be considered an entered employee, section two shall no longer apply for the remaining term.

Article 9e

1. Should an entered employee have worked or stayed in the Netherlands prior to the start of employment, the term shall be reduced by the periods of prior employment and prior stay.
2. Periods of prior employment and prior stay that terminated more than fifteen years before the term of employment shall not be taken into account.
3. Periods of prior employment and prior stay that terminated by more than ten years but less than fifteen years prior to employment shall not be taken into account if the entered employee has not worked or stayed in the Netherlands for a period of ten years.
4. For application of section three the entered employee will not have worked in the Netherlands if he worked in the country for a maximum of twenty days in every calendar year for the period of ten years.
5. For application of section three the entered employee will not have stayed in the Netherlands if in every calendar year of the period of ten years he did not stay in the Netherlands for a total of six weeks for holiday, family visit or other personal circumstances, with a one-off period not being taken into account of at most three consecutive months in the Netherlands for holiday, family visit or other personal circumstances.

Article 9f

If a request by the employer for application of the proof scheme as stipulated in Article 9h is not made within four months after the start of employment of the entered employee, the term shall be reduced by the period between the time when the entered employee is employed by the employer and the time when the decree, stipulated in Article 9h applies for the first time.

Article 9g

In the event of reduction of term pursuant to this section, a period for which the term is reduced shall be rounded up to full calendar months.

Article 9h

1. A request for application or continued application of the proof scheme with respect to an entered employee shall be made to the tax inspector. He shall decide on the request for a decision that is eligible for objection.
2. Should the request be made within four months after the start of employment as an extraterritorial employee by the employer, the decision shall be retroactive to the start of employment as extraterritorial employee. If the request is made later, the decision shall apply starting the first day of the month following the month in which the request is made.

EXPLANATION

Article 15a, part k of the Wage Tax Act of 1964, as it reads since 1 January 2001, states that extra costs incurred reasonably during a temporary stay outside the country of origin, known as 'extraterritorial costs,' are part of the free remuneration. It also stipulates that groups of employees designated by an Order in Council that are employed from outside the Netherlands or are sent by an employer outside the Netherlands, it can be decided under conditions set in due course that remuneration of costs incurred staying outside the country of origin are considered at least as remuneration for extraterritorial costs of up to thirty percent of the wage, and the remuneration for extraterritorial cost, as well as up to the amount of the tuition fees to be designated. For employees from outside the Netherlands, this proof scheme is stipulated in section 3 of the 1965 Implementation Decree for Wage Tax for ten years at most. The proof scheme expands on a number of decrees that applied until 1 January 2001, that is, the Decree of 29 May, 1995, no. DB95/119M, BNB 1995/243 (the 35 percent scheme), the Decree of 7 december 1999, no. IFZ99/1060M, BNB 2000/72 (the Nedeco scheme), the Decree of 15 September 1993, no. DB93/2527M, V-N 1993, page 2957, (Dutch diplomates abroad), the Decree of 2 June 1988, no. 88-1160, BNB 1988/201 (the DGIS scheme), the Decree of 9 August 1961, no. Bl/12 635, BNB 1961/346 (to officials seconded to the Dutch Antilles and Aruba) and the Decree of 16 December 1997, no. IFZ97/1563, BNB 1998/60 (the NWO scheme). To the extent terms and concepts are used in section 3 under discussion that are not defined or discussed as differing, they have the same meaning as they have acquired for application of the aforementioned decrees pursuant to the policy and decisions concerned.

Except for where the text of the articles stipulates otherwise, Section 3 applies to all categories designated for extraterritorial employees, and therefore to employees who enter as well as those who are transferred.

Article 8 gives definitions. For section two, part b, a connection is made with the old 35 percent scheme. Part c, under 1° provides for Dutch diplomats abroad and other persons who were covered previously by the Decree of 15 September 1993, no. DB93/2527M, V-N 1993, page 2957. Part c, under 2° concerns officials and military personnel seconded to the Dutch Antilles and Aruba who were covered previously by the Decree of 9 August 1961, no. Bl/12 635, BNB 1961/346 or the Decree of 15 September 1993, no. DB93/2527M, V-N 1993, page 2957, while the part under 3° concerns other transferred military personnel. Part c, under 4° concerns development staff and other employees who are seconded by private organisations or governmental agencies, previously falling under the Nedeco scheme or the DGIS scheme. The condition is that they are transferred to a region that is designated in this context. It stands to reason that in the first instance the regions are designated that were also designated under the Nedeco scheme, that is

- the countries of Asia (including Hong Kong and the part of Turkey east of the Bosporus);
- the countries of Africa;
- the countries of Latin America (including the Dutch Antilles and Aruba);
- the following European countries: Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzogovina, Bulgaria, Estonia, Georgia, Hungary, the Federal Republic of Jugoslavia (Serbia and Montenegro including Kosovo), Croatia, Latvia, Lithuania, the former Jugoslavian republic of Macedonia, Moldova, Ukraine, Poland, Rumania, the Russian Federation, Slovenia, Slovakia, and the Czech Republic. The concept of transfer means that the employee also stays in the country concerned. Part c, under 5°, concerns employees who were covered previously by the NWO

scheme.
Section three is derived from the Nedeco scheme.
Section four is based on the Decree of 15 September 1993, no. DB93/2527M, V-N 1993, page 2957, as well as the Foreign Service Benefits System (Decree of the Minister of Foreign Affairs of 30 December 1992, no. HDBZ/AB-844/92, last amended by the Decree of 12 December 1999, no. HDPO/BO/AR-1086/99). To the extent the proof scheme in question offers, unlike the Decree of 15 September 1993, no. DB93/2527M, V-N 1993, page 2957, insufficient space for free remuneration of all extraterritorial costs actually incurred, the excess can nevertheless be remunerated, only not on the basis of the proof scheme concerned but according to the basic rule of Article 15a, part k, of the Act. Section five is derived from the NWO scheme. Section six, concerning tuition fees, is derived from the older 35 percent scheme.

Article 9, section one, contains the proof scheme as such. This provides that the remuneration to extraterritorial employees of costs of staying outside the country of origin is considered in any case as a free remuneration for extraterritorial costs to an amount equal to the sum of thirty percent of the basis and the amount of the tuition fees.
The basis is the sum of the wages and the remuneration for extraterritorial costs. Wages are in this connection the regular pay for extraterritorial work during the period of extraterritorial employment. Payments that are not related directly, such as pension benefits and golden handshakes, do therefore not belong to wages in this connection. The technique used here was adopted from the old 35 percent scheme. The condition is that the employee and employer submit a request jointly to the tax inspector for application of the proof scheme, according to the rules of Article 9h.
Remuneration for extraterritorial costs is concerned here. This means that such remuneration must be agreed separately from the wage. The administrative division of the wage into a wage part and a remuneration part is therefore not possible. An actual division of the wage is conceivable in the sense that it is lowered by action of employment law, affecting pension and social security accordingly with the simultaneous conferral of a cost remuneration. The foregoing implies that a pension cannot be built up on extraterritorial cost remuneration, nor is this possible on other forms of cost remuneration.

These matters apply analogously to provisions to prevent extraterritorial costs. These are taken into account according to their market value. The proof scheme thus applies to remuneration and provisions together. Section two contains a practical scheme that prevents valuation problems for provisions for which market value is or will be determined in the 2001 Implementation Decree for Wage Tax. For the proof scheme (remuneration to thirty percent is considered remuneration for extraterritorial costs) it is important to know whether a given expense belongs to the extraterritorial entries or to a different category. Moving costs, for example, belong to extraterritorial costs and therefore do not fall outside the thirty percent scheme; if they belong to another cost category, they can be remunerated outside the proof scheme. For the rest, the distinction is just as important outside the proof scheme: costs standards and limitations can apply after all to costs other than extraterritorial costs.
The main rule that applies here, as has always been the case for mixed costs, is that costs must be considered belonging to the most likely category, the most specific cost entry. The moving costs, which were taken as example, could perhaps also be seen as extraterritorial, but fall under the specific cost entry of 'moving' expenses of Article 15a, part g, of the Wage Tax Act of 1964. The

character of moving house as such does not change when an employee moves for the sake of his job, not elsewhere in the Netherlands but abroad. Moving expenses can therefore be remunerated freely in addition to the thirty percent of the proof scheme. This applies to all costs that are not to be considered extraterritorial costs. Extraterritorial costs are expenses that an employee would not have incurred had he not been transferred or had entered for an extended period (but rather temporarily). Costs that he would have incurred in the same employment in his own country are not extraterritorial costs. An ambulatory employee who can have the expenses involved with the ambulatory nature of his work (travelling and accommodation expenses) remunerated free according to the applicable rules, even if he becomes an extraterritorial employee through transfer, but remains ambulant abroad. The extraterritorial status of the employee does not transform these costs into extraterritorial costs, so that the costs of being ambulant can be remunerated according to the schemes that also apply to local employees. Examples include the twenty-day scheme for determining whether or not an employee is ambulant.

In some cases doubt may arise concerning whether a certain type of cost should be considered a primary extraterritorial cost. If an employee retains his home in the country of origin and obtains accommodation in the country of employment, he would have good reason to claim extraterritorial costs providing he can demonstrate that the costs concern housing outside his place of residence in the sense of Article 15b, section one, part j of the Wage Tax Act of 1964. The obvious course in such cases is to make the choice of the most specific entry according to the question of where the origin of the costs predominantly lies (in fiscal terminology predominantly means over fifty percent). The free remuneration of costs of moving outside the place of residence is limited to two years owing to the private aspect that also appertains to the refusal to move to a new place of employment. In the case of transfer to another country the situation is different: the problem is not so much not wanting as not being able. This consideration makes the character of the costs of double accommodation predominantly extraterritorial. This case results on the one hand, that one is not bound for the free remuneration to the period of two years for housing outside the place of residence, and on the other hand, that costs of double accommodation fall inside the proof scheme of thirty percent and cannot therefore be remunerated freely beyond this figure (except to the extent it is demonstrable that extraterritorial expenses total more than thirty percent, in which case the proof scheme is disregarded and the actual costs are taken into account for remuneration). The same applies if an employee shifts his residence to the country where he is transferred. Any extra costs of accommodation, whether or not independent, are in such situations extraterritorial costs that fall under the thirty percent proof scheme.

The point of departure that the costs should be calculated to the most specific cost entry, as worked out above, leads in terms of the costs entries stipulated in Articles 15a and 15b of the Act to the following conclusions. Minor expenditure and work clothes are expenses incurred in the country of origin as well and therefore constitute no extraterritorial costs. Under the relevant schemes, the costs of work clothes are therefore eligible for the free remuneration (and provision, which is not discussed further below) and the costs of other clothes are not. Expenses for representation, courses and suchlike, musical instruments and other equipment are also incurred in the country of origin and are therefore not extraterritorial costs.
An exception applies to integration courses and courses in the language of the country of employment: the most specific entry for this category is that of the extraterritorial costs. The employee would not after all have taken such courses had he not entered or been transferred. The

'moving' entry was already discussed above, when the conclusion was drawn that this is not an extraterritorial entry. The fees for training or studies are not extraterritorial costs either, with the possible exception of training that relates specifically to the transfer, which point was already discussed above in connection with courses. A right to private travelling by public transport is so specific that it falls exclusively under Article 15a, part i. Transport to and from stops for public transport are related to commuter traffic and should therefore be considered the same as the commuter traffic itself (see below).
Commuter traffic in a country that is comparable in this respect to the Netherlands falls under the relevant entries of Article 15b, section one, part a (regular commuter traffic) and b, (commuting by car) and therefore constitutes no extraterritorial costs. If local circumstances, however, are such that it may be assumed that the entries in the aforementioned stipulations would be formulated differently if these circumstances had occurred in the Netherlands, the costs would be considered more as extraterritorial costs than costs for commuting, so that the majority principle implies that they should fall under the extraterritorial entries. The same applies to day care centres: in comparable situations they fall under the day care centre entry; if the situation is different, they are extraterritorial costs. In the latter case they fall under the thirty percent proof scheme; if this does not apply, they can be remunerated free without limit. Meals, company fitness, work areas at home, telephone subscriptions, personal care and personnel associations are so specific that they do not come under extraterritorial costs. Accommodation outside the place of residence has already been discussed, and it was concluded that this expense is an extraterritorial cost. In conclusion, WAZ premiums, wage tax and social security premiums, fines, crimes, armaments and dangerous animals are so specific that they cannot be considered extraterritorial entries.
Concerning the question of whether the proof scheme tallies with the equality principle for both the thirty percent level of the proof scheme and the limitation to designate certain categories of employees, the following should be taken into account.

The thirty percent scheme is the successor of the 35 percent scheme and the Nedeco scheme. In both cases a level of 35 percent was maintained, which has since been reduced to thirty percent. This level, which was negated by actual costs when they were higher, proved on the one hand to be sufficient in many cases. On the other hand, extraterritorial costs were incurred, particularly by representatives of the Crown abroad, that exceed thirty percent. Thus, there is and remains a number of cases for which the proof scheme is inadequate, and the actual costs thereby come into question. Under the new scheme this number will not increase. The picture presented is inherent to the fixed tax-deduction scheme under discussion. Characteristic of the deduction is that it is too high for the one employer and too low for the other. The desire to give the deduction as large a range as possible has led to the setting of the percentage as too high rather than too low. The possibility of proof to the contrary increases still further the practical importance of a relatively high level. As a result, fewer employees are forced to resort to proof to the contrary, which is also in the practical interest of the tax authorities. This point will be discussed further.

With respect to limiting the proof scheme to certain groups of employees, it should be borne in mind that a scheme concerning content is not concerned, but rather a proof scheme. It is evident that employees who fall under the proof scheme as well as those that do not may be subject to extraterritorial costs. For certain categories (scarce experts who stay in relevant areas for more than 45 days), however, it is acceptable in advance that there will be such costs, as experience has

shown. For them the thirty percent proof scheme applies. This does not change the fact that all other employees are free to demonstrate that they have extraterritorial expenses, if necessary to a level of thirty percent or more. This situation also applies to extraterritorial employees who are subject to the proof scheme. The regulation can therefore work to the disadvantage of no one. At most, some may derive a certain advantage from the thirty percent proof scheme. As already pointed out, however, this is inherent to a fixed tax-deduction scheme such as this, which by its very nature may offer too much to the one and too little to the other, in which case the actual costs are refundable tax free. The inequality that can arise here, in the sense that some obtain too much but no one too little, is justified by the requirement of the practical applicability of the tax laws. Any unequal treatment is thus justified by a good and objective reason.

Article 9a prescribes the factors that should at least be taken into account when evaluating the question of whether an entered employee has specific expertise that is scarce or absent on the job market in the Netherlands. This provision is based on the old 35 percent scheme.

Article 9b, section one, sets the terms of the proof scheme for entered employees in accordance with the old 35 percent scheme at a maximum of ten years. For longer periods of employment the main scheme of Article 15a, part k of the Act applies. According to section two, the term of the proof scheme for transferred employees is equal to the duration of the transfer period. A maximum of ten years does therefore not apply, which was not the case for the old Nedeco scheme either.

Article 9c, section one, provides that if the entered employee changes employer within ten years after his first period of employment, he can submit, together with his new employer for the remaining term of employment, a new request for application of the proof scheme. If the application is accepted, the employee will be able to take advantage of the scheme for a maximum of ten years. Under section two, this is possible only if the employee still possesses scarce, specific expertise. This means an extra check to confirm the scarce, specific expertise of the employee. Obviously, the employee can still be considered to have been recruited in, or sent from another country. The last sentence of section one provides that a request to continue the proof scheme cannot be complied with if the employee has taken over three months to find other employment. The reason for this is that the expertise of the entered employee would then be manifestly less scarce, so that he would no longer qualify for application of the scheme, while in that case the employee could not be considered as entered with respect to the new employer.

Pursuant to Article 9d the term of the proof scheme is reduced if the entered employee can no longer be considered as such because his expertise is no longer scarce. This may be the result, for example, of developments on the job market. The proof scheme no longer applies from the time it emerges that the entered employee is no longer scarce. The minimum term, however, is always five years, unless it is shorter than five years owing to another discount scheme. The maximum reduction of the term is therefore five years. The reason for this is that for practical considerations, the scarcity can be considered to exist for the first five years of the term.
Section two provides that the tax inspector can request the employer to demonstrate from the sixth year of the term that the employee is still scarce. The burden of proof therefore lies with the employer.
According to section three, as from the sixth year of the term an employer can also demonstrate at

his own initiative that the employee should still be considered an entered employee. If the employer succeeds in this effort, the tax inspector cannot apply section two. In this way the employer and the entered employee are assured of the application of the decree to the remainder of the term. As under the old scheme, I have no objection to this check being used marginally in both cases.

Article 9e provides that the term is reduced for entered employees if the employee had already stayed or worked in this country at a time that did not immediately precede employment with the employer. In this way the situation is reached in which the scheme is not applicable, or that the term is shortened for employees who stayed or worked in the Netherlands in the past. This article was derived from the discount scheme used in the old 35 percent scheme. Section one provides that the term is reduced by the periods of previous residence or employment.
Section two provides that periods of previous residence or employment that preceded present employment longer than fifteen years are not eligible. This mitigation of the effects of section one is included to facilitate implementation of the discount scheme.
Section three provides that periods of previous residence or employment that are shorter than fifteen years but longer than ten years that preceded present employment by the employer, are not taken into account if the employee did not stay or work in the Netherlands in that period of ten years. This provision as well mitigates the effect of section one. Section three means that in the event an employee stayed or was employed in the Netherlands during this period of ten years prior to employment by the employer, in addition to this period, periods or a stay of employment prior to the ten year period will be subtracted from the term.
Section four provides that certain short periods of previous employment in the Netherlands do not negate mitigation of section three. Section four is thus another mitigation of section three. An employee can work a maximum of twenty days in the Netherlands without being subject to a discount; this relaxation has proven necessary in practice with respect to the maximum of five days that applied previously. It should be pointed out that these periods of employment must be subtracted from the term, pursuant to section one.
Section five provides that certain periods of previous stays in the Netherlands for holiday or the like, do not cancel relaxation of section three. Section five, like section four, is thus a mitigation of the effect of section three. It should be pointed out that these periods of employment must be subtracted from the term, pursuant to section one.

Article 9f provides that for entered employees the term is reduced if the request to apply the proof scheme is not submitted within four months after the employer first employs the extraterritorial employee.

Article 9g provides that all reductions of the term are rounded up to full calendar months. The reason for this is that Section 3, as in the case of the old 35 percent scheme, fits a monthly framework for practical considerations. The result of this is that if the term must be shortened by a few days pursuant to one of the aforementioned articles, the term is shortened under Article 9g by a month. If the term is to be shortened by another period, this period would likewise have to be rounded upward to a whole calendar month, etc. This approach prevents uncertainty on the application of the discount in the event an employee was employed in the Netherlands from abroad in the past for one day per week for a year. In that case 52 weeks (and hence twelve months) would be deducted and not 52 days. What is concerned here is continuation of the

existing arrangement.

Article 9h provides rules for the request for application or continued application of the proof scheme. Such a request must under section one be submitted to the competent tax inspector. For transferred employees, this is the inspector 'of' the employer; for entered employees, as is now the case, the BPO inspector abroad would be designated for this purpose. The inspector decides on the request by a decision that is eligible for objection.
According to section two, the decision issued by the inspector would have retroactive effect to the start of employment as extraterritorial employee by the employer, providing the request is made within four months after the start of this employment. If the request is made later, the decision would apply starting the first day of the month following the month in which the request is made.