



# THE CUSTOMARY SALARY SCHEME IN AN INTERNATIONAL CONTEXT

Whitepaper

# Introduction

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**Anyone who owns more than 5% of the shares, certificates or voting rights of a legal entity has a substantial interest. By Dutch law the customary salary scheme applies to this shareholder. The customary salary scheme means that the shareholder is expected to receive a salary that is normal for the degree of his work and duration of his work.**

In principle, this provision also applies to the shareholder who lives abroad and has a substantial participation in a legal entity established in the Netherlands.

The holder of a substantial participation (hereinafter referred to as: shareholder) must receive a salary that is normal for the level and duration of his work. The customary salary is at least the highest of the following amounts:

1. 100% of the salary from the most comparable employment;
2. The salary of the highest earning employee of the company or an affiliated entity; or
3. A fixed amount (in 2023 at least € 51.000).



## International situations

The Netherlands have tax treaties to avoid double taxation with various incomes. Tax treaties limit the possibility to levy taxes that could be levied under national tax legislation to avoid double taxation. Therefore, in the absence of a tax treaty the national law is not limited and double taxation can occur.

## Employee or director?

In tax treaties, a distinction is often made between employees' salaries and directors' fees. Where employees' salaries are commonly taxed where the actual work is performed, the directors' fees are generally levied by the country where the entity is established. Please note that there may be a discussion about whether the activities are performed as a director or as an employee because of the consequences with regard to levy tax.

## Customary salary scheme internationally sustainable?

As a result of the customary salary scheme the Netherlands, the deemed salary from the shareholder will be subject to Dutch (payroll/income) taxation. After all, the shareholder is deemed to receive income from employment which is part of the tax basis in the Netherlands. As result of the Dutch legislation, income is considered by fiction which would shift the possibility to levy taxes to the Netherlands. In international context it is questionable how sustainable this appropriation by fiction by the Dutch national tax law is.

In 2008, the Dutch Supreme Court<sup>1</sup> ruled that the deemed salary provision also applies to a shareholder living abroad who performs work in the Netherlands for a company in which he has a substantial participation. It is not important in



<sup>1</sup> Den Bosch Court of Appeal 8th of May, 2008, no. 05/00242

which country and/ or by which law the entity is incorporated. This legislation could also apply to foreign shareholders with a substantial interest in a Dutch entity.

However, tax treaties may prevent the taxation of this customary salary. Based on case law, the possibility for the Netherlands to levy taxation under this fiction in an international context is allowed, provided that the other country explicitly agrees for all tax treaties that were already in place. For newer tax treaties, the other countries are considered to be aware of this legislation. Based on court rulings, the deemed salary provision does not apply in almost all cases related to foreign shareholders who live in a country with which the Netherlands has agreed a

tax treaty as the tax treaties were in place at the moment the fiction came into Dutch legislation. However, this does not apply to shareholders who are a Belgian resident. The reason for this is that the Belgian government has explicitly recognized the effect of the customary salary scheme to the tax treaty.

### **Customary salary and social security obligation**

The situation is slightly different for the social security contributions. The right to levy is allocated based on a European Regulation. In case a non-Dutch resident director of a company established in the Netherlands is subject to the Dutch social security regulations, the customary salary is included in the basis for the calculations of the social security contributions.

### **Conclusion**

In international situations the discussion mainly revolves around the question of the capacity in which the activities are performed (as a director or as an employee) and whether the Netherlands has unlawfully granted itself the right to levy taxation with the customary salary scheme after the tax treaty has been concluded.

At Schipper Accountants, both our payroll tax and international tax specialists are ready to provide you with advice. Of course we are also happy to help you with your obligations relating to income, corporate and other taxes.



Would you like to receive more information regarding the customary salary scheme in an international context? Please feel free to contact us:

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## About Schipper

Schipper Accountants offers business services and personalized advice to small and medium sized enterprises in the southwest of the Netherlands. With our full-service approach, we support organisations with a full range of services, including accountancy, tax consulting, auditing, pension advice, personnel services and corporate finance.

At Schipper we are committed to your business and stand next to you as a sparring partner, trusted adviser and personal confidant. Optimal customer focus is at the heart of everything we do. Today, we have several branches and a team of approximately 350 employees. Together, we passionately support our clients with a wide range of business services, insights and advice.



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