

The Eighty Years' War, the Spanish Tax Lease System and Other Netherlands/Spanish Sea and Field Battles

The author, in this article, discusses State aid in the context of the Spanish Tax Lease regime; a similar Netherlands tax structure that combined temporary random depreciation, a tonnage tax regime and what is referred to as the Netherlands shipping CV; as well as the Spanish Tax Lease 2 (STL2), developed in response to Commission actions taken against the original regime.

For the sake of completeness, it should be noted that the information concerning Spain originates from public sources and that the findings have been reviewed by colleagues in Spain. The author would like to thank Ronald van den Tweel – lawyer/partner at Pels Rijcken & Droogleeve Fortuijn, The Hague, specializing in State aid, and also regularly active as a guest lecturer at, among others, Erasmus University Rotterdam, for reviewing the article, in particular section 5.

A similar contribution was published in Dutch in Weekblad Fiscaal Recht, *Over de Tachtigjarige Oorlog, de Spanish Tax Lease en andere Spaans/Nederlandse zee- en veldslagen*, WFR 153 (2015).

1. Introduction

The Dutch and the Spanish have fought numerous battles on the football pitches in recent years. As is well known, Spain won the 2010 World Cup and, during that same event, the Dutch gave an excellent performance after a hesitant first half. In the end, the Dutch did achieve a better result than Spain during the most recent football tournament (but the Dutch have to wonder if they are even going to make the next tournament).

In respect of other, thornier, issues – such as the Eighty Years' War¹ – the battle was fierce and Dutch and Spanish shipyards have since been locking horns. In respect of

these latter situations, it can be hard to appoint a winner,² but this contribution will prove that Spain currently holds the best cards. Spain still has a combination of tax measures that contribute to economic growth. These measures have also been approved by the European Commission. The question is whether or not this contributes to a level playing field within Europe. Although the Netherlands economy is, in essence, healthy, growth in Europe is levelling off and ECB president Draghi is one of many to ask governments to take action.^{3,4} Is it up to the Netherlands legislator to take on this responsibility, or should (the) Europe(an) (Union) take action?

With effect from 1 January 2002, Spanish shipyards were able to build vessels at considerably lower prices, as investors received a tax-friendly treatment by using accelerated depreciation in (successive) combination with the tonnage tax scheme.⁵ In the market, this measure was known as *Sistema Español de Arrendamiento Fiscal*, the Spanish Tax

2. On 25 September 2014, the European School of Law and the European Tax Studies Foundation – both part of Erasmus University Rotterdam – organized a joint seminar “State aid in and around seaports.” During this seminar, which formed part of the Transport and Maritime Tax Law Programme, one of the presentations focused on the STL and the applicability of the Netherlands random depreciation regime since 2009. On 25 September 1639 – 375 years ago – near Dunkirk, a fleet of Spanish vessels was intercepted by 13 small vessels of Tromp, prior to the battle of Duins.
3. Algemeen Nederland Persbureau (General Netherlands Press Agency), 11 Sept. 2014 and *De wereld maakt zich zorgen over Europa*, Financieele Dagblad (11 Oct. 2014). In *Overheid moet niet alleen knijpen, maar vooral ook stimuleren*, Financieele Dagblad (12 Sept. 2014) other measures were also proposed. In November, things seemed reasonable again: *see Nederland haakt met economische groei weer aan bij rest eurozone*, Financieele Dagblad (16 Nov. 2014). The current economic situation is still very vulnerable, not just in Europe, but recovering (Centraal Planbureau (CPB) Netherlands Bureau for Economic Policy Analysis), Centraal Economisch Plan 2015 (Central Economic Plan 2015), 16 March 2015). Among others, the French government will introduce a tax incentive to seduce French companies to increase their investments, *see Fiscale geste verleidt Franse bedrijven tot extra investeringen*, Financieele Dagblad (9 Apr. 2015).
4. In times of crisis, measures to boost the economy seem to have a positive effect (a Keynesian stimulus policy). *See*, for instance, the opinion of D.E. van Sprundel, *Vervroegd afschrijven impuls voor economie*, Financieele Dagblad (25 Mar. 2014) and D.E. van Sprundel, *Belastingplan 2012: Wat zit er (niet) in?*, Forfaitair (Dec. 2011). During “De Grote Nabeschouwing” – a seminar organized by Rabobank on 23 September 2014, the principal economist of Rabobank and professor Wim Boonstra suggested bringing highly necessary infrastructure projects forward, such as the raising of dikes, seawalls and improvements to infrastructure and the greening of the energy supply (the benefits being a strong boost to the economy, the fact that it's good to export knowledge abroad and low interest rates for the government. This is not, however, exactly in line with European (budget) regulations). Juncker has now made plans for a European investment fund (something the Netherlands is highly interested in): *The Netherlands look forward to extra money from European investment fund*, Financieele Dagblad (27 Nov. 2014).
5. European Commission Press Release, IP/11/825 (1 July 2011), mentions discounts of 20% to 30% below the market price.

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1. The Eighty Years' War took place between 1568 and 1648 (with a 12-year reprieve in the middle). There have been numerous sea battles, as evidenced by the collection of tapestries in the Zeeuws Museum in Middelburg available at <http://www.zeeuwsmuseum.nl/museum/collectie/wandtapijten>.

Lease (STL). The European Commission started an investigation into this regime – possibly at the instigation of Netherlands shipyards,⁶ but certainly following complaints from shipyards in European Member States – and ruled that this structure did constitute unlawful State aid. Following these complaints, Spanish Euro commissioner Joaquín Almunia ruled, in a final decision of 17 July 2013, that some aspects of the STL are not consistent with the European State aid regime.⁷ The State aid has to be paid back. It should be emphasized, however, that no repayment is being demanded for a particular period and, therefore, not everyone who enjoyed this benefit has to repay it. The shipyards, for instance, do not have to repay the State aid, but investors partially do: only State aid received after April 2007⁸ has to be repaid.⁹

In their turn, Spanish shipbuilding organizations from the Basque Country and Galicia argue that Netherlands shipyards also received unlawful State aid. They want the Commission to investigate the aid to Netherlands shipyards from 2009, 2010 and 2011 (and possibly also for the second half of 2013).¹⁰ In this non-published complaint, they argue that the Netherlands received unlawful State aid by accommodating and approving tax structures that combine temporary random depreciation, the tonnage regime and what is referred to as the “Netherlands shipping CV”. It is not clear if further steps will indeed be taken, but from what the author understands, the Commission recently asked a second round of questions. As will be explained in section 5., much of the former Netherlands regulations can be compared to the new Spanish Tax Lease 2 (the “STL2”) – which is set out in section 4. – and one may wonder if the Spanish shipbuilding organizations realize that legal proceedings concerning the Netherlands regulations could also affect the STL2 (and possibly vice versa). This complaint may be a reprisal by Spanish shipyards against the earlier suggested complaints from Netherlands interest groups.

6. The author has no explicit proof for this, but it does appear to be so. See also the comments of P. Zoeteman of Netherlands Maritime Technology, in *Scheepsbouw sleept Europese Commissie voor de rechter*, Financieele Dagblad (19 May 2014).

7. Commission Decision of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain: Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Lease System, 2014/200/EU, OJ L 114, p. 1 (2014); see also European Commission Press Release, IP/13/706 (17 July 2013).

8. As a similar English case (Commission ruling of 8 May 2001 concerning State aid no. N618/1998 (*Brittany Ferries*), OJ L 12, p. 33 (2002)) may have caused some uncertainty, the State aid received up to 30 Apr. 2007 does not have to be repaid. On that date, the Commission published its ruling with regard to a similar French measure, which it also earmarked as unlawful (European Commission Press Release, IP/06/1852 (20 Dec. 2006), officially published as a ruling on 30 April 2007 (OJ L112/41, 2007/256/EC)). On that date, all existing legitimate expectations ended.

9. Although these issues – the quantification of State aid, which parties should make repayments and for which period – are also interesting, this analysis falls outside the scope of the article. These questions have been discussed in a large number of cases – T-701/13, T-702/13, T-705/13, T-704/13, T-703/13, T-2/14, T-3/14, T-700/13, T-719/13, T-1/14R, T-31/14, T-29/14, T-5/14, T-4/14, T-10/14, T-6/14, T-18/14, T-16/14, T-443/14, T-461/14, T-432/14, T-484/14, T-24/14, T-491/14, T-514/14, T-508/14 and T-515/13. During the seminar (see *supra* n. 2), the audience of a representative of the European Commission indicated her understanding that more than 50 cases are currently pending.

10. *Spaanse scheepsbouwers klagen Nederland in Brussel aan*, Financieele Dagblad (9 Feb. 2013).

Despite this battle not having been fought yet, a new issue has now arisen. On 1 January 2013, Spain introduced a new, financially attractive and tax-friendly measure. This measure – in combination with other measures – has been introduced as STL2. This measure (or combination of measures) was approved by the Commission, as it was allegedly not selective.¹¹ In their turn, Netherlands shipyards brought an appeal against the Commission’s ruling,¹² as the STL2 appears to have a number of similarities with the unauthorized first version – STL – and on top of that they say the approval process was not exactly transparent.¹³

In section 2. of this article, the author first discusses the STL and the effects of this structure. Section 3. discusses a Netherlands tax structure, which combined the temporary random depreciation, the tonnage regime and the Netherlands shipping CV. In response to the resolution of 17 July 2013, the Spanish legislator implemented various legislative changes with the objective of introducing an “EU-proof” successor to the STL. This STL2 is discussed in section 4. In section 5., the author analyses whether or not the Netherlands structure and the STL2 contain features of unlawful State aid.¹⁴ Finally, section 6. contains an overview and summary of the author’s main conclusions. The author demonstrates that, given the current state of EU law and policy, Netherlands aid after 2010 does not fall under the category of prohibited State aid, despite the fact that demand for new seagoing vessels in the Netherlands has increased thanks to these measures.¹⁵ Finally – also given the scope of this article and as not every structure was implemented in the same manner – the author signals that there is a risk that certain structures set up before 2009 and the STL2 constitute State aid.

2. Spanish Tax Lease (1 January 2002 – 30 April 2007)

2.1. Introduction

Following the application of the STL as of 1 January 2002, shipping companies were able to buy seagoing vessels from

11. Commission Decision of 20 November 2012 regarding aid measure SA.34736 (12/N): Early depreciation of assets acquired through a financial leasing, OJ C 384/1, p. 2 (13 Dec. 2012); see also European Commission Press Release, IP/12/1241 (20 Nov. 2012).

12. Following implementation of the Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD (TFEU) and the Treaty on European Union of 13 December 2007, OJ C 306 (2007), EU Law IBFD (TEU), the opinion of the Commission is now documented in a decision. This used to be a ruling. In this contribution, the term “ruling” is used.

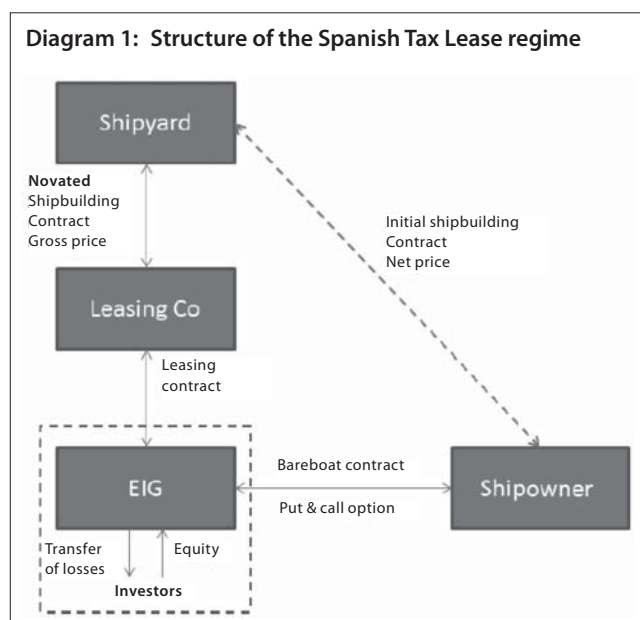
13. *Nederlandse scheepsbouwers slepen Europese Commissie voor de rechter*, Financieele Dagblad (19 May 2014). The hearing in case T-140/13 (Netherlands Shipbuilding Commission (currently: Netherlands Maritime Technology Association) took place on 10 July 2014 and the decision was given on 9 December 2014. See NL: ECJ, 9 Dec. 2014, Case T-140/13, *Scheepsbouw Nederland (Netherlands Maritime Technology Association) v. Commission*.

14. State aid is a particularly “hot” issue. See <http://www.taxlive.nl/web/guest/-/ongeeoorloofde-staatssteun-maakt-alles-vloeibaar> and the author’s blog on www.vankennisnaarkansen.nl/2014/11/14/koffie-koffie-tijd/.

15. Letter from the KNVR (*Koninklijke Nederlandse Vereniging van Reders*, Netherlands Royal Association of Shipowners) to the chairman and members of the Commission for Maritime Politics, Economic and Legal Affairs (CEZ), Financial and Tax Subjects Working Group of 30 November 2010. This study also refers to Monitor 2010, the Netherlands maritime cluster, Nederland Maritiem Land (Netherlands Maritime Land).

Spanish shipyards at prices that were 20% to 30% lower than the usual market price (as confirmed by the Commission). The shipping companies were able to secure these favourable prices upon condition that they agree to buy the seagoing vessels from a Spanish Economic Interest Grouping (EIG) set up by a bank, instead of directly from the shipyard.¹⁶ It should be added that the STL was not submitted to the Commission for approval in advance.

2.2. Structure



In setting up the STL, an important organizational role was reserved for the supervisory bank. The bank set up the EIG and then sold the participating interests to investors. The investors were Spanish taxpayers who had a sufficient tax base. In general, they were not engaged in maritime activities.

It was the leasing company, not the shipping company, that concluded the contract for the construction of the seagoing vessel with the Spanish shipyard. The EIG then leased the vessel for a period of three to five years. The EIG also undertook to buy the vessel at the end of the lease period (leasing option). When the vessel was completed, usually one to three years later, the EIG would lease it to the shipping company under a bareboat charter agreement. This would contractually stipulate that the shipping company was obliged to take over the vessel at the end of the lease (bareboat charter option).¹⁷

The benefits of the STL were twofold, namely, first, early and accelerated depreciation of the vessel under the regular corporate tax system and, second, a tax exemption in respect of the profits from the sale of the vessel under the Spanish tonnage tax regime. The combination of the provisions for early and accelerated depreciation,¹⁸ enabled the EIG to fully depreciate the vessel within a period of three to five years. This early and accelerated depreciation resulted in a major tax loss for the EIG. As the EIG was transparent from a tax point of view, the losses were attributed to the ultimate Spanish investors. They were able to set off these losses directly against profits from other business operations.

Thanks to the accelerated depreciation, the book value of the vessel was lower than the market value. This created a deferred tax liability. When the new seagoing vessel was (nearly) depreciated in full, the EIG opted for application of the tonnage tax regime.¹⁹ This happened after full depreciation of the vessel, but before implementation of the bareboat charter option between the EIG and the shipping company. As a direct result thereof, the profits from the sale of the vessel fell under the tonnage tax regime.

The Spanish tonnage tax regime contains provisions to prevent extra gains or potential abuse with regard to old and second-hand vessels that opt for the tonnage regime. The Spanish law²⁰ stipulates that, in the first year in which the tonnage tax regime is applied, or the year in which a second-hand seagoing vessel is bought, a reserve is created to the extent of the difference between the market value and the net book value.²¹ A seagoing vessel that became the property of the EIG through the lease option, however, was regarded as new on the basis of a specific provision under Spanish law.²² As a result, the schemes that were approved by the Commission and that served to prevent abuse did not apply and the profits were fully exempt.

3. Netherlands Shipping CV (2009 – 2011 and Second Half of 2013)

3.1. Introductory remarks

The structure applied in the Netherlands provided – to a greater or lesser extent – for the use of temporary random depreciation (meaning the taxpayer is allowed to choose the form of depreciation and can, for tax purposes, for instance, completely write off the investment over two years) in 2009, 2010, 2011 and the second half of 2013,²³ the tonnage tax regime and the CV. The primary goal of the structure was to accelerate the financing for the construc-

16. An EIG (Economic Interest Grouping) is a transparent entity with legal personality set up by various ultimate participants for the execution of certain actions.

17. One has to bear in mind that seagoing vessels that are part of a bareboat charter arrangement (this is an arrangement for the chartering of a vessel whereby no crew or provisions are included as part of the agreement) do not qualify for the tonnage tax regime in the Netherlands by virtue of section 3.22(5) (a.1) of NL: Income Tax Law (*Wet op de inkomstenbelasting*) 2001, National Legislation IBFD. In the Netherlands, by virtue of section 3.22(5)(c) of the Income Tax Act 2001, there has to be a time charter agreement. There are, for that matter, only a few countries in Europe that place bareboat charter arrangements under the tonnage tax scheme. Also, the CV has to carry on an enterprise for the Netherlands structure. In addition, the *OECD Model Tax Convention on Income and on Capital* (15 July

2014), Models IBFD makes a distinction between a full lease, including crew, and a lease of only a ship (bareboat). In the first case, article 8 of the *OECD Model* applies and, in the second, the lease income is seen as a royalty payment, which falls under article 12 of the *OECD Model*.

18. By virtue of article 115 of ES: Income Tax Law (*Texto Refundido de la Ley del Impuesto sobre Sociedades* – TRLIS), National Legislation IBFD.

19. By virtue of articles 124 to 128 of the TRLIS.

20. By virtue of article 125(2) of the TRLIS.

21. This provision is more or less similar to the Netherlands Maritime Untaxed Reserve (section 3.23(2) and (3) of the Income Tax Act 2001.

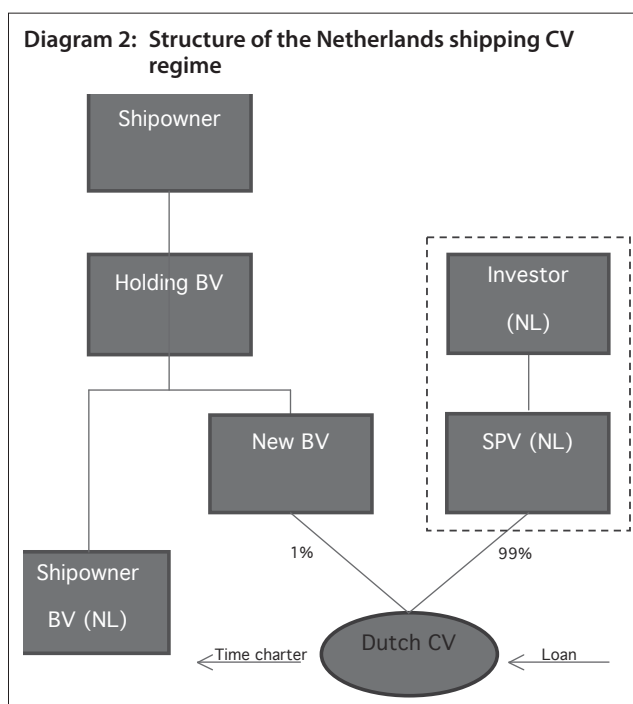
22. By virtue of article 50(3) of ES: Regulation on Corporate Taxation (*Reglamento del Impuesto sobre Sociedades* – RIS). It should be noted that this provision has not been submitted to or approved by the Commission.

23. The author is, for that matter, not aware of any structures from this period.

tion of seagoing vessels. During the period these structures were applied, the banks were hesitant to provide credit, as a result of which shipping companies often encountered problems trying to find funding for a new seagoing vessel.²⁴ With the exception of 2009 – when the legislator addressed²⁵ the theoretical omission²⁶ – the schemes were combined, but not successively, as set out below.²⁷

3.2. Structure

The shipyard²⁸ (Investor) set up a special purpose vehicle (SPV) for the construction of the seagoing vessel. The shipyard and the SPV formed a fiscal unity (group consolidation) within the meaning of section 15 of the Corporate Income Tax Act 1969.²⁹ The shipping company/shipowner (Shipowner) that ultimately wanted to buy the vessel would set up the New BV. SPV and New BV would then enter into a joint venture in the form of a limited partnership (Netherlands CV), with the SPV being the limited partner and New BV the general partner. The CV leased the seagoing vessel to a subsidiary of the shipping company (Shipowner BV) under a time charter agreement.³⁰



24. In general, banks only fund 60% of a vessel. As a lot of shipowners were (also) in financial trouble, it was quite a challenge to obtain maritime financing. See also footnote 13 of D.E. van Sprundel & K. Dans, *Whether or Not Interest Income Should Fall under the Scope of the Tonnage Tax Regime*, 51 Eur. Taxn. 12 (2011), Journals IBFD.
25. With effect from 1 January 2010, this is explicitly included in the Random Depreciation Implementation Regulations 2001. See the letter from the Ministry of Finance of 28 November 2009, V-N 2009/62.10, *Geen dubbel voordeel bij investeringen in zeeschepen* and the letter from the State Secretary of 29 January 2010, no. AFP 2009/077BU, V-N 2010/12.3. For more detailed information, see D.E. van Sprundel, *Investeren in zeeschepen: the Netherlands rule the waves*, Forfaitair 212, para. 1.3 (Mar. 2011).
26. See Id. This was a slip of the pen of the legislator and made it – based on the literal wording of the law – possible to combine both measures. It should – however – be clear that this was not in accordance with the intention of the legislator.
27. According to a news article in the NRC of 31 October 2014, *Loss for tax authorities, investigation into investment in ships*, the Netherlands tax authorities are facing a EUR 500 million loss. In his letter of 11 November 2014 (DGB/2014/6169U), the State Secretary states that “it would be premature to conclude if the rules were observed or not and if corrections will indeed be made” and “[g]iven the context of the article, I assume that Member Bashir refers to the ‘tonnage regime’. This is a particular regime for the shipping industry, in which tax profits are determined according to a flat-rate method. The effect referred to by Member Bashir does not occur to the extent assumed in said article, as the tonnage regime can be applied only for the first ten years after an investment. When the tonnage regime can be opted for, the advantage of temporary random depreciation in years 1 and 2 is (nearly entirely) compensated for by the higher tax basis in later years (years 3 to 10)”. The author has determined that (in 2009) structures were set up in the market where both facilities were virtually successively (after three and within ten years) combined (that is, an attempt to that end was made). The tax authorities decided to tackle such structures. The State Secretary is aware of this and recently again indicated that it is still too premature to make any statements about a current investigation by the Netherlands tax authorities (letters of 12 November 2014 (no. AFP/2014/1100) and 2 March 2015 (no. AFP2015/153M)).
28. In contrast to the Spanish scheme, it was the (as far as the author knows) unpublished informal preference of the Netherlands tax authorities for the investor to be active in the maritime sector (or at least had a lot of affinity and common ground with that sector). In respect of the Spanish schemes, the investors were foreign to the sector. As the author understands it, there were some investors in the Netherlands who were foreign to the sector (*Wiebes holds back on ships*, NRC (12 Nov. 2014)) and the question is if this was a smart move, not just for tax reasons, but also with regard to other risks: D.E. van Sprundel, *Investeren in zeeschepen: the Netherlands rule the waves*, Forfaitair 212 (Mar. 2011).
29. NL: Corporate Income Tax Act 1969, National Legislation IBFD.
30. Another consideration that needs to be made in setting up this structure is that – in contrast to the Spanish schemes – a bareboat charter agree-

ment cannot be applied. Under such an agreement, only the (bare) boat, i.e. without crew, is leased. Under such conditions, the CV would not qualify as an enterprise, as making a right of use available to another party is not an active business activity. In addition, complications may arise with regard to the participation exemption by virtue of section 13(12)(c) of the Corporate Income Tax Act 1969.

Because of the transparent nature of the CV, temporary random depreciation would be applied by the ultimate participants and, as such, the Investor in particular.³¹ The losses that accrued to the SPV due to application of random depreciation were set off against the profits of the Investor.³² It should be noted that the origins of those profits are irrelevant. They may have been profits that were not connected to the sale of the seagoing vessel.

After a minimum period of three years, the SPV was sold to the Shipowner, who subsequently became the full owner of the newly constructed seagoing vessel.³³ As the shares in the SPV were sold, not the seagoing vessel itself, no settlement was required for the difference between the book value and the sales price. In effect, the deferred taxation created by the accelerated depreciation remained intact. Any disposal proceeds generated by the sale fell under the holding exemption.³⁴

31. The investors and the tax authorities tried to come to an agreement that the contract price, not the production costs, could be depreciated.
32. See NL: Supreme Court, 30 Nov. 2007, no. 54 577, BNB 2008/32, in which the Supreme Court ruled that a loss caused by random depreciation is, for a limited partner, not restricted to his limited contribution.
33. Usually, the Netherlands tax authorities determine such structures in advance by means of an advance tax ruling. One of the conditions they set is that the structure had to have been maintained for at least three years. This three-year term starts the moment the seagoing vessel is taken into use. Also, no particular price agreements were allowed to have been made with regard to selling the vessel and the investors had to guarantee repayment of the corporate tax benefit they had enjoyed if the random depreciation had to be reduced during the three-year period. As far as the author knows, the Spanish tax authorities did not impose such requirements.
34. When the tax entity is dissolved, the sanction provision of section 15ai of the Corporate Income Tax Act 1969 does not take effect, as no silent reserves are transferred between the investor and the SPV within the fiscal entity. See D.E. van Sprundel & J. van Strien, *Certificering, verpanding en*

In this example, it is assumed that the structure was applied in 2011³⁵ and further that New BV had opted to apply the tonnage tax regime with retroactive effect from 1 January 2011. It was, therefore, by virtue of section 3.22(5)(d) of the Income Tax Act 2001, largely responsible for the maintenance, crew and technical management of the seagoing vessel. The result was that, due to the combined application of the temporary random depreciation and tonnage tax regime, New BV could only make use of the tonnage scheme if the random depreciation was recaptured.³⁶ This scheme stipulated that temporary random depreciation would be recaptured if the party in question switched to the tonnage tax regime within ten years. This confirmed that it would be impossible to create an unwanted tax advantage for investments in seagoing vessels by combining temporary random depreciation and the tonnage tax regime successively or within a period of less than ten years.³⁷

As the SPV *did* apply temporary random depreciation, it was bound by the ten-year term. If it ultimately opted for the tonnage tax regime within that term, the book value of the ship would be the book value that would have existed had no random depreciation been taken. In other words, the SPV could not opt for the tonnage tax regime again until 2021.

The advantage was mainly of a temporary nature. After all, the depreciation would be recovered in later years. In addition – in contrast with the STL or the situation in the Netherlands before 2009 (if and to the extent that the Netherlands tax authorities erroneously issued a tonnage ruling, *see supra* n. 25) – there was no permanent advantage in the short term.

4. STL2 (as of 1 January 2013)

4.1. Introductory remarks

While the Commission's investigation into the STL was still pending, the Spanish government announced changes with regard to the STL.³⁸ On 28 December 2012, the Spanish Official Journal published a set of tax measures with the aim of strengthening government funding and promoting economic growth.³⁹ Among other things, this act changed the tax lease system in respect of the purchase of certain assets that are not manufactured in a series.⁴⁰

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 (lenings)overeenkomsten bij een fiscale eenheid. Blijft de doos van Pandora gesloten?, *Weekblad Fiscaal Recht* 1323 (2010) for more information regarding the tax consequences of an unscheduled dissolution of a fiscal entity.

35. On this basis, the shipowner had to have taken the vessel into use before 1 January 2014, by virtue of article 13(1) of NL: Random Depreciation Implementation Regulations 2001.

36. See the press release from the Ministry of Finance of 28 November 2009, V-N 2009/62.10 and the Ministerial Regulation of 17 December 2009, DB 2009-735M, *Government Gazette* 2009, 20549.

37. See *supra* n. 25.

38. With regard to the announcement regarding the STL2, see the parliamentary questions from Belder (EFD) to the Commission of 10 November 2011, E-010269/2011 and 19 April 2012, E-004075/2012.

39. The changes to the Spanish tax law were recorded in Act 16/2012 of 27 December 2012.

40. This relates, in particular, to article 115 of the TRLIS, which provides for early and accelerated depreciation.

The new legislation regarding the STL came into effect on 1 January 2013.

4.2. Structure

In essence, the structure has not changed. The changes mainly relate to formal and implementation aspects of the structure. Before the legislative change of 27 December 2012, for instance, the application of early and accelerated depreciation required permission from the Ministry of Finance. In effect, the Ministry decided who and with effect from what date early depreciation could be taken. From what the author understands, foreign parties would not qualify. In addition, it emerged that, in practice, early and accelerated depreciation was available only for seagoing vessels that had been purchased by an EIG. The legislative changes aimed to expand the scope of taxpayers that can invoke early and accelerated depreciation. This means the scheme is now also available in respect of trains, airplanes and other assets not manufactured in a series. It does not matter whether or not the asset is manufactured⁴¹ in Spain or abroad and the early and accelerated depreciation applies automatically. The only formal requirement is that the taxpayer must notify the Ministry of Finance in advance by way of an application.⁴² The Spanish law was amended in several areas and now stipulates that every lessee can start depreciating the moment construction of an asset commences, if the following conditions are cumulatively met:

- the construction must concern tangible fixed assets that are covered by a financial lease agreement, the lease instalments of which are paid mostly before construction is completed;
- the construction period must last at least 12 months; and
- the assets must not be manufactured in a series, which means the assets are subject to a unique design and construction requirements.

In addition, the requirements that stipulate that the assets covered by a financial agreement have to be leased to a third party that is not affiliated with the EIG and are used for its business activities have been abolished. Furthermore, it is no longer a requirement for the ultimate participants in the EIG to remain committed until the end of the tax period in which the lease agreement ends.

Finally, the formal requirements with regard to early and accelerated depreciation of certain assets have been withdrawn. Another thing that has been deleted is the provision that seagoing vessels, when purchased as a result of exercising a bareboat option, do not qualify as used when opting for the tonnage tax regime.⁴³ As a result, the thus created deferred taxation is included as a debt, which is

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 41. The STL appears to have been applied in respect of 273 seagoing vessels and these vessels were – with one or two exceptions – all built in Spain.

42. Article 115(11) of the TRLIS: the Commission deems it relevant that only prior notification is stipulated and, as such, not prior consent of the authorities; see mn. 36 of the Commission's decision of 20 November 2012, *supra* n. 11.

43. Articles 49 and 50(3) of ES: Corporate Income Tax Act (*Reglamento del Impuesto sobre Sociedades* – RIS), National Legislation IBFD, have been abolished.

made up within a certain period. In that scenario, there is no permanent advantage. In essence, the STL2 works roughly in the same way as the Netherlands shipping CV discussed in section 3.2. From what the author understands, the deferred taxation resulting from accelerated depreciation under the Spanish version can remain intact during the sale; this may be possible by simply adding a holding company or by silently converting the EIG into a capital company (*sociedad de responsabilidad limitada*). It appears that neither process has any immediate tax consequences in Spain, as capital gains tax may be avoided, regardless of whether or not the tonnage tax regime is applied.⁴⁴ One may wonder if this is, indeed, the case (the Spanish literature is not exactly unanimous or transparent on this subject).⁴⁵ Whatever the case may be, because the (temporary) advantage could be made permanent, the combination of measures is similar to the old, unauthorized STL structure. In the author's opinion, it could, therefore, be argued successfully that the measure was unlawfully approved, especially given the selective character discussed in section 5.3. Accelerated depreciation and capital gains tax may be avoided at the same time or accelerated depreciation and the tonnage tax regime are combined successively, as a result of which the European Commission may want to intervene – void the STL.

5. Analysis of Further State Aid

5.1. Introductory remarks

As set out in section 2., the STL offered substantial tax advantages, enabling Spanish shipyards to produce their products cheaper as a result of State aid that had not been reported and had been obtained unlawfully. In 2012, however, the STL2 was approved by the Commission, as there was no selectivity. By virtue of article 107 of the Treaty on the Functioning of the European Union (TFEU) (2007), State aid or support measures are, ultimately, taken to mean (1) measures instigated by the EU Member States, (2) that, financed in whatever way, (3) distort or appear to distort (4) competition by favouring certain businesses or certain types of production (selectivity), (5) insofar as this aid negatively affects trade between the EU Members States.⁴⁶ State aid is incompatible in the common market, unless one of the exceptions referred to in article 107(2) of the TFEU applies (such as aid of a social nature for individual users, aid in respect of recovery from natural disasters or encouraging certain disadvantaged regions) or if

44. It seems that the claim has been suspended indefinitely. The author is unaware of any Spanish anti-abuse regulation – such as a concurrence provision between early and accelerated depreciation or any other means of reconciliation before entering into the tonnage tax regime. Perhaps the Spanish legislator intentionally missed this.

45. M. Villar Ezcurra, *State Aid and Tax Lease Regimes in the Shipbuilding Industry: Lessons Learned from a Spanish Case*, 54 Eur. Taxn. 10 (2014), Journals IBFD.

46. The literature follows two approaches in assessing whether or not there is State aid: a generous approach and a strict approach. Put briefly, under the strict approach, all five conditions (a to e) have to be met and under the generous approach, only the first three conditions are necessary to call it State aid. For more background information, see B. Hessel & A. Neven, *Staatssteun en het EG-recht* p. 25 et seq. (Kluwer 2001) and P.C. Adriaanse, *Handhaving van EG-recht in situaties van onrechtmatige staatssteun*, Europese Monografieën 82, pp. 16-20 (Kluwer 2006).

it has been reported in accordance with article 108(3) of the TFEU and approved by the Commission by virtue of article 107(3) of the TFEU (for example, to encourage economic activity). State aid can be assessed at two different levels: (1) at the level of the individual tax measures applied, regardless of the role of these (support) measures in the structure in question; and (2) at the level of the tax structure as a single unit.⁴⁷

5.2. Analysis of further State aid and the STL

The Commission is of the opinion that the STL met the five cumulative conditions in article 107(1) of the TFEU as described herein, and that it, therefore, was State aid. It seems⁴⁸ that the STL was exclusively used for transactions wherein shipping companies purchased vessels – that qualified for application of the tonnage tax regime⁴⁹ – from Spanish shipyards, with one exception.⁵⁰ One of the conditions to be able to make use of this scheme was explicit prior approval from the Spanish Ministry of Economics and Finance.

Furthermore, the information available shows that a leasing contract, in combination with early depreciation, is the only circumstance under which the Spanish tax authorities would approve such a contract. All in all, it follows that without approval from the Spanish tax authorities, the effect of the leasing contract was not approved in advance, the purchased vessel was not regarded as new under Spanish law and,⁵¹ as such, the protection measures⁵² applied and the disposal proceeds were taxable.⁵³

47. See also the various articles published by P. Kavelaars & R. H.C. Luja in the Netherlands tax literature, in particular, P. Kavelaars, *Staatssteun in the picture*, NTFR-B 2012/8 and R.H.C. Luja, *Assessment and Recovery of Tax Incentives in the Commission and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation*, Metro: Intersentia 2013.

48. See http://ec.europa.eu/competition/state_aid/cases/241188/241188_1245123_41_2.pdf, "(73) According to complainants, informal contacts take place between the tax administration and the arranging banks in the context of the filing of the requests pursuant to article 115, paragraph 11, TRLIS (pre-filing contacts). These contacts would allegedly be responsible for the refusal by Spanish banks to arrange appropriate STL structures in certain circumstance, among others when the vessel is intended to be built outside Spain. No legal rule de jure prevents the financing of vessels built in non Spanish shipyards but despite the publication of a ruling clarifying this point, only one small contract involves a French shipyard. As this contract concerns a vessel built on behalf of a Spanish shipping and shipbuilding group, the Commission doubts that this can even be considered as an exception. The Commission has doubts that the quasi-absence of contracts involving foreign ships can be explained by pure commercial considerations from the banks involved. The advantage granted to the shipping companies would therefore seem to be further selective in favour of those companies investing in vessels built in Spain".

49. The STL was only used for those types of vessels and not for vessels that did not qualify for application of the tonnage tax regime, such as second-hand ships, inland shipping vessels and other assets, new or second-hand.

50. The information provided by the Spanish authorities indicates that a total of 21 different Spanish and one French shipyard profited from the STL. The Commission also notes that the seagoing vessel built at the French shipyard was constructed by order of a Spanish shipbuilding group. The Commission doubts it was merely a single exception (one exception in 273 ships!).

51. Article 50(3) TRLIS.

52. Article 125(2) TRLIS.

53. Commission decision C (2011) 4494 final of 29 June 2011, Spain: Tax regime applicable to certain finance lease agreements also known as the Spanish Tax Lease System, legal grounds 67-70.

In investigating the STL, a provisional opinion⁵⁴ and final ruling⁵⁵ were issued by the Commission. In its provisional opinion, the Commission concluded that unlawful support, to certain EIGs and their ultimate investors, the shipping companies, the shipyards, the leasing companies, the banks and other agents had been granted. What is striking is that, in its final decision of 17 July 2013, the Commission ruled that only the support granted that ended up with the EIG and its ultimate investors had to be claimed back (i.e. from the period from April 2007: for more details, see *supra* n. 8). The main reason for this action is that the Commission is of the opinion that the advantage was granted to the shipowners by the EIG and that it was, therefore, not funded through state resources. Under the Spanish scheme, the EIG is not obliged to pass on the advantage. Passing on an advantage forms part of an agreement between third parties to which the government was not a party and, as such, the advantage to the shipowners cannot be attributed to the Spanish government.⁵⁶

5.3. Analysis of further State aid and the STL2

The Commission has already concluded that the STL2 is a general measure that does not violate EU law.⁵⁷ The Spanish scheme seems to be an “open ended” scheme, offering tax incentives for the acquisition of trains, airplanes and other assets not manufactured in a series. Although the Commission has approved the scheme, one might question whether or not this is right. Can a taxpayer rely on the argument that there is no State aid?

It is questionable whether or not the provision allowing for the scheme to be invoked in respect of certain assets not manufactured in a series is too vague. It seems these measures are not horizontal support measures, but rather sectoral schemes that disrupt the market. In its decision approving the scheme, the Commission notes that it investigated whether the measures were not exclusively geared to certain sectors or activities. According to the Commission, all tax paying companies in Spain can use the scheme, regardless of sector, location, size, legal form or location of assets. The Commission itself concludes that the general measures could, to some extent, have a selective effect. The author did not conduct a further study into the use of the scheme during the year in question,⁵⁸ but is not entirely

convinced. One important obstacle – prior approval by the Spanish tax authorities – may have been removed, but before investors are going to join, they will want some security, especially in view of the large amounts involved in shipbuilding. Among other things, that security arises when the Spanish tax authorities pass a ruling.⁵⁹ Perhaps the Spanish tax authorities do implicitly have a certain degree of discretionary power. Based on existing case law, this may result in State aid risks after all.⁶⁰ In the author's opinion, the public information concerning the Spanish tax scheme is not entirely complete and transparent on these subjects, hence the questions. In an ideal world, such approval from the Commission should be of a temporary/conditional nature; people may be able to rely on the scheme, but it should be evaluated after, say, three years in connection with continuous supervision by the Commission of approved aid schemes (within the meaning of article 108(1) of the TFEU). In theory, the Commission can demand changes to the scheme before issuing its approval or may grant approval and impose obligations that facilitate monitoring compliance with the decision.⁶¹ This has not happened, however, in respect of this ruling.

In the meantime, the Netherlands Maritime Industry has appealed to the Court against the Commission's decision.⁶² In brief, this organization of Netherlands shipyards is of the opinion that the Commission's preliminary investigation was not complete and sufficient and that not enough information was available to the Commission for it to qualify the STL2 as an approved and reported measure. In other words, the Commission should have opened a formal investigation procedure under article 108(2) of the

54. *Id.*, at p. 5.

55. European Commission Press Release, IP/13/706 (17 July 2013).

56. The selective advantages were obtained by means of state resources. They can clearly be attributed to the Spanish state, as they favour the EIGs and their investors. This is not, however, the case for the advantages enjoyed by the shipping companies and, a fortiori, for the indirect advantages ensuing for the shipyards and agents (*see mn.* 169 of the decision of 17 July 2013, *supra* n. 7). One of the other speakers at the seminar – A. Gunn – discussed this matter in more detail. The Netherlands magazine *Weekblad Fiscaal Recht* has published a report on the seminar *Staatssteun in een rondom zeehavens*, WFR 165 (2015).

57. European Commission Press Release, IP/12/1241 (20 Nov. 2012) and European Commission, SA.34736 (12/N): Early depreciation of assets acquired through a financial leasing, OJ C 384/1, p. 2 (13 Dec. 2012).

58. The Spanish economy is about twice the size of the Netherlands economy and there should be plenty of other sectors that could make use of this scheme. See www.spainbusiness.com for an overview of the most important industrial focus areas in Spain. What the author has been able to conclude is that turnover in the Spanish shipbuilding industry has increased six-fold over a period of three years (2003-2005)!

59. In quite a few countries, it is possible to obtain a ruling. Generally, an advance tax ruling is an agreement in the form of written confirmation by the tax authorities with regard to the tax consequences of transactions or situations involving a specific taxpayer. In Spain, however, it is not an agreement, but a formal consultation procedure with the tax authorities and the answer obtained is binding on the tax administration. According to ES: General Tax Code 2003, articles 88 and 89, National Legislation IBFD – taxpayers can submit a formal request for consultation. One of the advantages of an advance tax ruling is that the tax authorities provide certainty upfront based on certain facts and assumptions regarding the tax position of a taxpayer before the investment has been made. In Spain, the system works at the three levels – national, regional and local – depending on the rules in question. All taxes are covered in the ruling at hand. The taxpayer must include in his ruling application, inter alia, background information and the specific circumstances of his case, the facts, circumstances and assumptions made, a thorough tax analysis of the transactions or situations and the tax conclusions based on the information recorded in the tax ruling. The Spanish tax authorities must reply within six months from the date the ruling request is submitted. In practice, however, this period is normally exceeded by the Spanish tax authorities. There are no fees or charges for submitting tax rulings in Spain. The effects of the ruling requests are, as a general rule, binding, for the Spanish tax authorities, while the taxpayer may choose whether or not to follow the opinion stated in the reply, any adjustments that may be made by the authorities notwithstanding. In Spain, rulings are generally published and may not be appealed. More information is available at <http://www.minhap.gob.es/es-es/normativa%20y%20doctrina/doctrina/paginas/consultasdtg.asp>.

60. See FR: ECJ, 26 Sept. 1996, Case C-241/94, *Republic of France v. the Commission of the European Communities* and IT: ECJ, 17 June 1999, Case C-295/97, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA and International Factors Italia SpA – (Ifitalia), Dornier Luftfahrt GmbH and Ministero della Difesa*.

61. See article 7(3) and (4) of Regulation no. 659/1999 (the Procedural Regulation, OJ L 83, p. 1 (1999), as subsequently amended).

62. *Netherlands Maritime Industry v. Commission* (T-140/13).

TFEU. The hearing took place on 10 July 2014. The ruling was passed on 9 December 2014.⁶³

5.4. Ruling regarding the European Commission/Netherlands Maritime Industry (T-140/13)

To cut a long story short, the ECJ denied the appeal by the Netherlands Maritime Industry. According to the Court – despite the fact that the investigation period lasted for more than two months – no additional circumstances have come to light that demonstrate that the Commission encountered serious problems during the analysis of the STL2. The mere fact that an investigation took more than two months – six months in this case – is not enough. The ECJ rejected the argument that the investigation by the Commission was incomplete or insufficient – taking into account the other facts and a comparison between the STL and the STL2. Then there was the issue of selectivity, to which an objection was also raised. The ECJ denied this argument for several reasons.⁶⁴ An appeal can be brought within two months. That means the deadline expired in February 2015, however, the Appellant filed its appeal on time.⁶⁵ Although there is plenty to argue against this ruling, in the author's opinion – the procedural documents have not been published – there are several arguments (as set out herein) that have not been discussed in detail in the ruling, particularly with regard to selectivity. It would also have been nice if more attention had been paid to why the Commission decided not to instigate a formal investigation procedure. In the event of a formal investigation procedure, the parties would have been able to provide comments in advance. This would have reduced the chances of any proceedings, particularly in respect of this sensitive issue. As there has been so much debate about the STL, would it not have been better to investigate STL2 in more detail? Also, in the event of a dispute, a party would have had to go through a lot of effort to successfully prove the fact that it had been directly and individually affected. Moreover, as described in section 4.2., it may appear that STL2 offers a *de facto* selective advantage. The requirement to notify the Ministry of Finance, as well as the common practice of requesting tax rulings in relation to significant investment projects, still makes a certain degree of control by the Spanish government possible. Given the scope of this contribution, the author will refrain from engaging in a more detailed analysis.

Apart from the final outcome, it seems that business owners can use the STL2 without any worries. A conservative businessman has to ensure that aid is granted lawfully. Confidence inspired by the national government is not acceptable. Confidence inspired by EU institutions, however, is: *see also* the Commission's considerations with regard to claiming back the advantages from the STL in light of *Brit-*

63. The case has been brought before the courts. Other than at the ECJ level, in these proceedings, the Advocate General does not give an Opinion.

64. *See Netherlands Maritime Industry. Commission (T-140/13)*, legal grounds p. 93 et seq.

65. The appeal has been filed.

tany Ferries (2001).⁶⁶ This ruling merely strengthens the position of these businessmen.

5.5. Analysis of further State aid and the Netherlands shipping CV

As a result of the random depreciation measure from the 2009-2011 period and the second half of 2013, the Netherlands allowed for temporary accelerated depreciation. During the Netherlands parliamentary debate, it was concluded, on several occasions, that the scheme was of a temporary nature and should serve as an emergency measure. Temporary random depreciation, constitutes, in essence, interest-free deferred taxation.⁶⁷ When this temporary random depreciation was introduced in 2009, the business community was thought to enjoy an estimated liquidity boost of EUR 1.75 billion (in 2009 and 2010 combined) due to the scheme.⁶⁸ This amount does raise some questions, as upon the temporary reintroduction of the random depreciation measure in 2013, the liquidity advantage for 2013 and 2014 together was estimated at EUR 400 million.⁶⁹ The missed interest⁷⁰ on this deferred taxation is at the direct disadvantage of state resources. This also applies to the remaining deferred taxation that will disappear by operation of law when the vessel is disposed of after the first 10-year period of the tonnage tax regime.

These state resources are transferred by way of application of Netherlands tax legislation and, in some instances, by means of security provided by the Netherlands tax authorities upon the request of the taxpayer. Advance tax rulings are concluded, under which the Netherlands tax authorities stipulate additional conditions, such as the extent of the minimum net equity to be contributed. Thus, the above conclusions clearly show that the aid can be attributed to the Netherlands state.

The participating parties and beneficiaries of this structure operate in an environment that, in the European Union and European Economic Area, is characterised by fierce competition at a global level, in shipbuilding and shipping, among other things. Tax benefits will, to a(n) (great) extent, be converted into a discount. According to the Commission, under the STL procedure, some of the discount granted to the shipowner did not have to be claimed back, as it was not paid by the state, but by the EIG/investors. Perhaps one could think that the advantage was not financed by the state. It is, however, very plausible for these advantages to have a disruptive effect on competition between the various shipping companies. As the

66. Commission Decision of 8 May 2001 in C 31/98 *Brittany Ferries*, OJ L 012 (15 Jan. 2002).

67. For the latest state of affairs regarding interest-free deferment of payments, see Y.M. Tigelaar – Klootwijk, *De onrechtmatigheid van renteloos uitstel van betaling*, Weekblad Fiscaal Recht 972 (2014). On Budget Day it was announced that an interest scheme will be introduced for dividend withholding tax as well.

68. Ministerial Regulation, 10 Dec. 2008, no. DB2008/697M, Government Gazette 2008, 246, V-N 2008/62.18.

69. Announcement from the Ministry of Finance of 28 June 2013, no. DB2013/335M, Government Gazette 2013, 18345, V-N 2013/32.16.

70. Given, in part, the fact that Netherlands state loans have a very low interest rate, the deficit for the Netherlands treasury shrunk, however, by more than originally anticipated.

advantages relate to assets with a significant lifespan it is highly likely for the discounts to result in lower operational costs. This will enable the beneficiaries to permanently strengthen and retain their market positions. It is, therefore, obvious that the structures discussed disrupt competition and negatively affect trading between the Member States. This does not lead to the conclusion that State aid is being granted because all the State aid criteria must have been met.

When an aid measure favours certain businesses or forms of production over others that – given the objective of the measure – are in a factually and legally similar position, the measure is selective.

In principle, random depreciation was available to every taxpayer.⁷¹ Nevertheless, by virtue of articles 13 to 15 of the Netherlands Random Depreciation Implementation Regulations 2001, various conditions were stipulated with regard to application of this facility. Furthermore, by virtue of article 13(2) of these Regulations, certain categories of operating assets were excluded, including buildings, houseboats, mopeds, motorcycles, passenger cars, animals and intangible assets. Sectors that dealt with such assets were, in effect, excluded from random depreciation. These exclusions were not explained at all.⁷² What was pointed out was that the exclusions largely corresponded to the exclusions that applied within the framework of the former Netherlands Investment Account Act. Those exclusions were also never explained.

In the period during which random depreciation could be applied, similar structures were introduced under which airplanes and wind farms, instead of seagoing vessels, were financed.⁷³ Taxpayers with enough tax capacity acted as investors and made use of the random depreciation scheme. After the term agreed on with the Netherlands tax authorities, the SPV, including the relevant asset, was deconsolidated and sold to the ultimate buyer. The only difference with the shipping CV is that none of the parties applied the tonnage tax regime as part of these structures. This is logical, as application of the tonnage tax regime, by virtue of section 3.22 of the Income Tax Act 2001, requires profits from shipping.

Under the structures described in this contribution, a CV was used to finance the construction and operation of a seagoing vessel. Financing by means of concluding a CV is a financing method that can, in principle, be used to finance any operating asset or activity. As such, this financing method is not restricted to (seagoing) vessels, but also applies to property or airplanes. Also, the CV is one of the legal forms available to run a business, just like a Netherlands *Vennootschap onder firma* (general partnership), for instance. In addition, from a tax point of view, the taxation of CVs is subject to the normal rules, as there are no special facilities that only apply to CVs. There does not appear to

71. At the time, the random depreciation measure had not been reported as possible State aid due to its general character.

72. Ministerial regulation, *supra* n. 68.

73. The Netherlands authorities have actively concluded advance tax rulings in this regard, thereby providing security with regard to the tax risks and consequences.

be any selectivity in respect of the Netherlands scheme. As such, not all conditions for State aid have been met.

6. Conclusion

In this contribution, the author compared the STL, STL2 and Netherlands shipping CV schemes that have been employed in the past decade. It is now evident that the Commission feels that the STL constituted unlawful State aid, (some of) which should be paid back. Apparently, the STL2 is permitted according to the Commission – and also according to the ECJ as evidenced by the ruling of 9 December 2014 – but based on information available to the author, this conclusion is not as cut and dried as it seems.

Spain may run the biggest risk, but not in terms of recovery of unlawful State aid. If the structure is popular and foreign parties are also permitted to take advantage of it (or have to be permitted), Spain may be the victim of its own legislative success. After all, if the advantage is 20% and vessels of EUR 100 million are contributed, EUR 20 million will be charged to the treasury (if the tax advantage does indeed turn out to be permanent). In that situation, Spain may even claim that the scheme constitutes State aid (although a (major) deficit to the treasury is not a justification according to the ECJ).

The fact is, however, that the Netherlands shipping CVs were not reported at the time and are not under attack from Brussels. The author does, however, anticipate risks for certain structures from 2009 in respect of which temporary accelerated depreciation was immediately combined with the tonnage scheme. Given the current state of EU law and policy, however, it can be concluded that the Netherlands aid measures that applied in 2010, 2011 and the second half of 2013 (and the structures from 2009, which also did not combine the tonnage scheme with the temporary accelerated depreciation at the same time) do not lead to the conclusion that State aid was being granted, despite the fact that it has emerged that demand for the construction of new seagoing vessels in the Netherlands increased as a result of these measures. The author's findings are summarized in the Table.

Finally, the author was and is of the view that the accelerated random depreciation dating back to the crisis years of 2009, 2010, 2011 and the second half of 2013 was a good (temporary) measure in the Netherlands. Spain has, however, appeared to have found possibilities to sort out its budget and to boost its economy at the same time. France⁷⁴ has taken some measures and other countries are considering doing the same. The Netherlands

74. The French government will introduce a tax incentive to seduce French companies to increase their investments; see *Fiscale geste verleidt Franse bedrijven tot extra investeringen*, *Financieel Dagblad* (9 Apr. 2015).

| Scheme | Type of advantage | Extent of tax advantage | State aid? |
|---|--|--|--|
| STL (2002) | Permanent tax advantage with a selective outcome | A 20-30% discount on the seagoing vessel | State aid, <i>see also</i> Commission decision |
| DTL (2009) | Permanent tax advantage with a possible selective outcome | Advantage that should be comparable to STL | Possible State aid (like the STL) |
| DTL (2010, 2011, 2012 and part of 2013) | Financing advantage | Not applicable | No State aid |
| STL 2 (2013) | Financing advantage, Permanent tax advantage with a possible selective outcome | Not applicable | No State aid (reported) Justified? |

cannot stay behind, particularly because economic growth in Europe seems to be slowing down again and the Netherlands currently does not have a true tax facility that boosts economic growth.⁷⁵ The author, therefore, recommends that the Netherlands legislator think carefully about possibilities to keep the Netherlands economy going, more so since the Budget Memorandum did not offer any incentives.⁷⁶ In times of crisis, measures to boost the economy seem to have a positive effect (a Keynesian stimulus policy). Also, given the discussion about the previous schemes (*see supra* n. 53), a better framework for such tax measures seems desirable.

In an ideal world, there would be European, uniform legislation. At the moment, European shipbuilders

are competing with each other through tax measures – Spain has the approved STL2 and the Netherlands is left without incentives – which leads to a mutual lack of clarity. Granted, there are EU Guidelines,⁷⁷ which should create a level playing field throughout Europe, but studies show that the practice seems to be quite different.⁷⁸ A lack of clarity is bad for the market. Ideally, Europe should intervene in order to ensure a level playing field. (The) Europe(an) (Union) is, however, unlikely to intervene. Those sitting pretty are the countries in Asia and America, which (again) is at the expense of the European economy.

75. On the surface, the Spanish scheme seems to be working. *See, for instance, Goedkope Spaanse scheepswerf wekt wrevel Nederlandse rivalen op*, *Financieele Dagblad* (7 Jan. 2015), “[a]ccording to the (Dutch) party that placed the order with the Spanish shipyard, the tax construction did not play a role in awarding the contract. Based on public information, it seems the STL2 does not seem to be working to the disadvantage of the Spanish shipyard”.

76. *Geen plussen maar ook geen minnen voor het bedrijfsleven in de Miljoenennota*, *Financieele Dagblad* (12 Sept. 2014). This is now also apparent from the information that has been made public. Recent debates in the Lower House have not changed this.

77. For transport by sea: Community guidelines on State aid to maritime transport, OJ C 205/5 (5 July 1997). For shipbuilding until 1 June 2014 *see*: Framework on State aid to shipbuilding, OJ C 364/9 (2011) and after 1 June 2014: Communication from the Commission, Framework for state aid for research and development and innovation, 27 June 2014, OJ C 198/1 (2014).

78. *See, for instance, Van Sprundel & Dans, supra* n. 24.