



 Ministry of Finance

The new tax treaty
between the Netherlands
and Germany

**23rd "Maastricht
Fiscaal Symposium",**
1st of November 2013

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Tax treaty The Netherlands - Germany 2012 | 1 November 2013



Content of presentation  

Introductory remarks

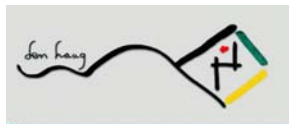
"Background and compromise"
Status of ratification and history of negotiations

"Overview across treaty – Dutch perspective"
Company aspects and anti-abuse
Individual aspects



Introductory remarks

- Brief personal introduction
 - 'Maastricht'
 - Tax treaties division, Ministry of Finance ('the Hague')
 - Contactpoint Foreign Investors ('Rotterdam')



The Hague (NL)

Berlin (D)



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Background:

Status of ratification
and history of
negotiations

Overview:

- A: Company aspects
and anti-abuse
- B: Individual aspects



Status of ratification and history of negotiations

Current status of the treaty (ratification process)

- Proposal and explanation to Parliament (April 2013)
- Questions asked (June 2013), answers expected soon

Note: subject of discussion between Parliament and State Secretary

Entry into force / date of application



Continued: status and history

History of the treaty negotiations

- 16th of June 1959 current treaty
- negotiations since early eighties ...
- 'restart' 2008
- three formal rounds: 2009, 2010 and 2011
- additional and continuing contact
- treaty signed: 12th of April 2012

General perception of the treaty and practical relevance

- 1959 treaty does work
- modernisation appropriate
- influence of OECD-model





Continued: status and history



Memorandum on Dutch
Tax Treaty Policy 2011
Summary

Continued 'general perception' etc.

- some new wishes on both sides
 - NL: note on tax treaty policy, 11th Feb. 2011!
- neighbouring countries: specific issues
- input asked during and before negotiations
- interest for (from different angles) crossborder workers, pensioners, anti-abuse etc.

Short sidestep: texts of treaties not fully in line with national laws, because of OECD-standard, compromise character (mix of two sets of national rules and negotiating character) and longevity of treaties



Continued: status and history

Reactions since signing: "scholars vs. practice" / "company tax related vs. personal income tax related"

- initial reactions: anti-abuse, hybrids, elimination of double taxation, directors' fees
- gradually overtaken by: practical effects for pensioners, crossborderworkers, shipping and aircraft personnel etc.

Topics of 'Maastricht'-seminar of today: [impressive overview](#)

By the way: general intent of NL is to provide as much certainty as possible and support mutual investment (and awareness that some aspects of crossborder investments are also strongly regulated by EU-directives)



A. Company aspects and anti-abuse



Ruhrgebiet



Frankfurt



**Rotterdam
(Pernis)**



Amsterdam



A: Company aspects / page 1

Residency (art. 4; prot. II):

Due to Netherlands' jurisprudence additional protocol provision

Hybrids (prot. I, subpar. 2)

- Treaty benefits if 'picked up' in the resident state (general intent in line with OECD commentary on art. 1)
- Solutions to be found for remaining cases

Offshore (art. 5):

No separate article, (just) additional paragraphs in art. 5 plus no relevance for remuneration of personnel

11



A: Company aspects / page 2

New p.e. rules (art. 7) (one of the first times ever)

OECD-commentary version of par. 3
Importance: capital allocation & internal dealings

Dividends (art. 10)

- participations: 5% (plus EU-directive)
- pension funds: 10%
- other situations: 15%
- 'stiller Gesellschafter', 'partiarisches Darlehen' and 'Gewinnobligationen',
but not: convertible bonds plus regular interest
- Liquidation and purchase of own shares



A: Company aspects / page 3

Interest (art. 11)

State of residence

Royalties (art. 12)

State of residence (and clarity on innovation box)

Capital gains (art. 13)

Compared to OECD:

1. exceptions in source state rights for taxation of alienation of shares in companies with immovable property (75% imm. prop.; stock exchange; business imm. prop.; owning less than 50%; reorganisation)
2. emigrated individual share holders (see later)



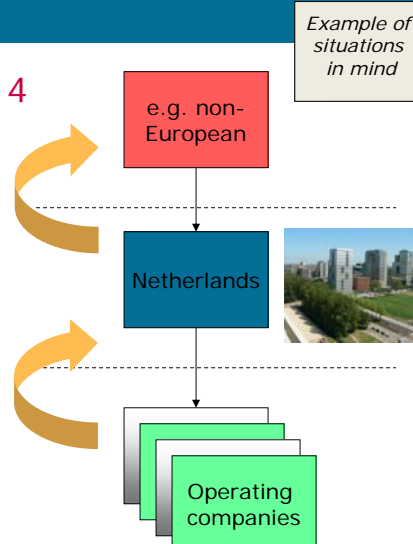
A: Company aspects / page 4

Arbitration (art. 25)

Arbitration is included, an implementing arrangement is signed as well (in addition to EU-directive for transferpricing cases)

General relevance:

Exchange of information / assistance in the collection of taxes





A: Anti-abuse / page 1

General background worldwide / Netherlands perspective:

I Worldwide tendency: tax avoidance / evasion in the public eye →

- OECD / EU / 'G20' / US
- Memorandum on Dutch Tax Treaty Policy 2011

II In recent (Netherlands) treaties*:

- Main purpose (United Kingdom / Switzerland)
- Limitation on benefits (Japan / Panama)
- National rules (Hongkong)



EUROPEAN COMMISSION,
Brussels, 6.12.2012, COM(2012) 722

* *Not 100% precise and complete: (a) sometimes combined anti-abuse rules and (b) sometimes preferred division 'entity based' vs. 'transaction based'.*



A: Anti-abuse / page 2

Treaty the Netherlands – Germany 2012

Starting point: confirmation of national anti-abuse rules
(in art. 23)

Second step: as much certainty and proportionality as possible by

1. explicit mentioning of national rules plus rules for
2. individual substantial shareholders' holdingcompany* &
3. consolidation of associated enterprises* plus
4. mutual agreement procedure upon request
5. Ad 1: Laws of the European Union shall prevail

* Requests / signals of taxpayers



A: Anti-abuse; elimination of double taxation

There is a limited anti-abuse aspect to the method(s) of elimination of double taxation (art. 22)

Germany (par. 1):

- From exemption to credit:
 - reference to 'Aussensteuergesetz' (subpar. c),
 - items of income placed under different provisions (..) or attributed to different persons (..) (subpar. e) and
 - after consultation notification (subpar. e)

The Netherlands (par. 2):

- From exemption to credit:
 - low taxed foreign investment p.e. (subpar. d) → relation art. 15e Wet VPB 1969



B. Individual aspects



B: Individual aspects / page 1

"Capita selecta"

Substantial shareholdings (art. 13)

rules proposed by NL on substantial individual shareholders who emigrate are in both art. 10, par. 6, and art. 13, par. 6

Income from employment (art. 14)

- Specific rules for crossborder workers / precedent in NL-Belgium

Focus on NL resident working in Germany:

- Germany provides for 'Ehegattensplitting' (workfloor equality)
- Netherlands provides for compensation for the possible tax and social security premium *disadvantage* (neighbour equality)

19



B: Individual aspects / page 2

Directors' fees (art. 15)

Modern article (plus definition of 'member of the board')

- insofar as fees have been earned in the capacity of director
- managing directors as well as members of the supervisory board

Artistes and sportspersons (art. 16)

Deviation of NL tax treaty policy

Pensions (art. 17)

- 'Starting point': taxation in state of residence
- Exception: total amount of pensions, annuities and social security payments exceeds € 15.000 → source state taxation
- Minor points: government pensions (ABP) and deduction of premiums



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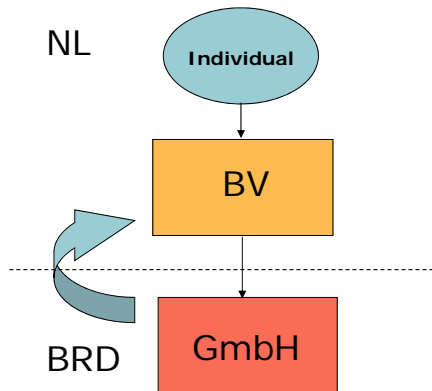
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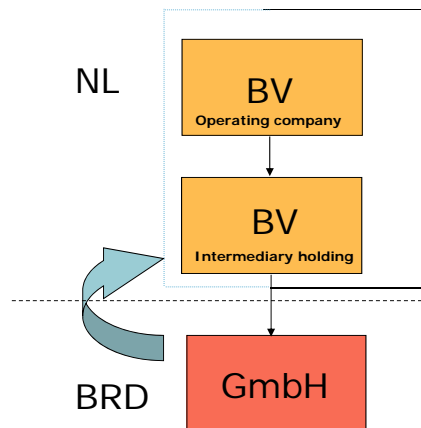
After this: slides I will probably not use
(but possibly helpful for illustration).



Example ad 2



Example ad 3



Two quotes on anti-abuse

"Treaty provisions prevail over domestic law (...). A domestic law that became effective after the treaty, however, may override a treaty provision (...). Section 50d(3) of the EStG contains such an override provision: it is an anti-treaty-shopping provision which denies treaty benefits (mainly reduction of withholding tax) to a non-resident (intermediate) company under certain conditions, if such a company is not the beneficial owner of the income and its shareholders (the beneficial owners) would not be entitled to the treaty benefit if they would have invested directly.

With effect from 1 January 2012, section 50d(3) of the EStG denies treaty benefits to a non-resident (intermediate) company if:

- it is not the beneficial owner of the income and its shareholders (the beneficial owners) would not be entitled to the treaty benefit; and
- the foreign company does not generate its gross income from its own active business companies. (...)"

Source: <http://online.ifbd.org/> "Germany – Corporate taxation", 7.4.1.1.

"22. Other forms of abuse of tax treaties ... and possible ways to deal with them, including "substance over form", "economic substance" and general anti-abuse rules have also been analysed ...

22.1 Such rules are part of the basic domestic rules set by domestic tax laws for determining which facts give rise to a tax liability; these rules are not addressed in tax treaties and are therefore not affected by them. ...

27.7 The Netherlands does not adhere to the statements in the Commentaries that as a general rule domestic anti-avoidance rules and controlled foreign companies provisions do not conflict with the provisions of tax conventions ...

Since tax conventions are not meant to facilitate the improper use thereof, the application of national rules and provisions may be justified in specific cases of abuse or clearly intended use. In such situations the application of domestic measures has to respect the principle of proportionality ..."

Source: OECD Model Tax Convention on Income and on Capital, July 2010; commentary on article 1