Netherlands

Branch Reporters
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Summary and conclusions

Dutch law, including tax law, does not contain a definition of "tax", let alone a definition of tax on income or capital. Each individual state or local tax or levy should be evaluated to determine whether it qualifies as a tax on income or capital.

In the reporters' view, the following Dutch taxes and levies can be considered taxes on income and capital: income tax, wage withholding tax, corporate income tax, dividend tax, bank tax, landlord levy, state profit share (SPS) and premiums for public insurances.

Both the tonnage tax regime and the income tax regime for income from a personal dwelling can be considered as taxation of income on a notional basis. Although the income tax regime for income from savings and investments (box 3) has certain characteristics of a wealth tax, the Supreme Court has qualified this taxation as an income tax.

The cost deduction provisions within the income tax and the corporate income tax apply to both personal taxes and non-personal (or objective) taxes on income or items of income. The Supreme Court has deemed a foreign exchange result on a foreign tax payable as a deductible expense. The participation exemption regime includes a tax test which requires a foreign participation to be subject to profit tax resulting in a "realistic levy" according to Dutch standards. The same test applies to certain foreign permanent establishments (PEs) under the branch exemption regime. The unilateral double taxation avoidance decree, applying a broad concept of income tax, requires that the relevant income is subject to non-personal or objective taxation in the jurisdiction where the income arises.

Most Dutch tax treaties contain provisions similar to article 2(1)–(4) of the OECD model.

The enumeration of article 2(3) of Dutch tax treaties currently typically includes (a) income tax, (b) wage tax, (c) corporate income tax, including the SPS levy, and (d) dividend tax.

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Both the 2001 Income Tax Act (ITA) and the 1969 Corporate Income Tax Act (CITA) contain residence fictions which can be considered as “any criterion of a similar nature” within the meaning of article 4 of the OECD model.

According to the 2011 tax treaty policy memorandum, the Dutch Ministry of Finance favours the approach of considering a person to be liable to comprehensive taxation even if its state of residence does not actually impose tax (similar to paragraph 8(6) of the commentary on article 4 of the OECD model).

However, according to the Supreme Court, corporate entities are not considered to be “liable to tax” if they are exempt from tax under domestic law, unless they are explicitly covered by the treaty (similar to paragraph 8(7) of the commentary on article 4 of the OECD model).

According to the Supreme Court, a company which is no longer subject to unlimited taxation in the Netherlands as a result of the operation of a tax treaty, is also no longer a resident of the Netherlands for purposes of other tax treaties concluded by the Netherlands with third states (similar to the approach of paragraph 8(2) of the commentary on article 4 of the OECD model).

The provisions in Dutch tax treaties dealing with the elimination of double taxation generally specify for each contracting state how double taxation should be eliminated, and these provisions generally refer to the Dutch unilateral rules for the applicable avoidance method.

The provision dealing with the elimination of double taxation in certain Dutch tax treaties includes an anti-abuse provision, resulting in a switch-over to the credit method for passive types of income (e.g. dividends, interest or royalties) attributable to a foreign PE.

A policy decree offers relief for situations in which there is a difference between the time when foreign dividends, interest or royalties become taxable in the Netherlands and the time when the other state levies a withholding tax on those items of income (e.g. a difference between taxation on an accrual basis and on a cash basis).

There are several prominent decisions concerning taxes not covered by treaties in which the Supreme Court has applied tax treaty non-discrimination provisions.

The Netherlands does not normally include a subject-to-tax requirement in articles 6–22 of its OECD-patterned tax treaties.

The Dutch CITA contains several subject-to-tax clauses concerning cross-border situations that require, for instance, a certain item of income or a company to be subject to tax in another state.

The Netherlands adheres to the OECD standards regarding exchange of information. Dutch taxation information exchange agreements (TIEAs) generally cover (a) income tax, (b) wage tax, (c) corporate income tax, including the SPS levy, (d) dividend tax, (e) gift tax and (f) inheritance tax, and they may also include (g) VAT.

1. The notion of tax

1.1. Domestic law meaning of tax

1.1.1. Taxes on income and capital

1.1.1.1. General

Dutch law, including tax law, does not contain a definition of "tax", let alone a definition of tax on income or capital. According to article 104 of the Dutch Constitution, all state taxes (*Rijksbelastingen*) are levied by force of law, whereas all other levies of the Dutch state are regulated by law (the latter enabling the delegation of the authority to tax). However, the terms "taxes" and "levies" are not defined in the Constitution. The General Tax Act (*Algemene wet inzake rijksbelastinge* (GTA)) provides general rules applicable to state taxes. Although the GTA does not contain a definition of tax, it defines state taxes as taxes that are levied on behalf of the Dutch government by the national tax and customs administration.[1] In legislation dealing with levies and taxes other than state taxes, the GTA is often declared applicable *mutatis mutandis*.

A generally accepted definition describes tax as a mandatory payment to the government, for which the government does not perform any direct individual action in return, and which is levied pursuant to general rules.[2] This concept of tax is traditionally juxtaposed to the concept of a charge (*retributie*), which is defined as a payment to the government pursuant to general rules in respect of a specific, individual service performed by the government in its capacity as such (for example the issuance of a permit or passport).[3] The relevance of the distinction between a tax and a charge is debated in academic literature.[4] In a 1990 report, a special committee established by the Association for Tax Studies (*Vereniging voor Belastingwetenschap*) concluded that the traditional concept of tax was too narrow. Accordingly, the committee proposed the following definition of tax: all payments claimed by the government on the basis of public law regulations, mandatorily and based on general rules, excluding agreements governed by private law, which are intended exclusively or partly to obtain revenue for the entities designated in the regulations at issue.[5]

1.1.1.2. Characterization of various Dutch taxes and levies

In the absence of a general definition of tax, each individual state or local tax or levy should be evaluated to determine whether it qualifies as a tax. It must then be determined whether the tax can be considered a tax on income or capital. From a

1 Art. 1(2) of the GTA.
2 R.E.C.M. Niessen, *Inleiding tot het Nederlands belastingrecht*, Deventer: Kluwer, 2010, p. 32.
3 *Ibid.*, p. 33.
4 *Ibid.*, p. 33; A.J.A. Stevens, "Het begrip belastingen", in *Nederlandse regelingen van internationaal belastingrecht*, loose-leaf, p. 19.
5 *Rapport ter bestudering van de Commissie ter bestudering van het begrip "belastingen"*, Geschriften van de Vereniging voor Belastingwetenschap, No. 184, Deventer: Kluwer, 1990, pp. 48–49.

legal perspective, there is no clear-cut distinction between taxes on income and capital and other taxes. It is submitted that this distinction is also of limited practical importance from a Dutch domestic law perspective. Moreover, the reporters observe that the concepts of income and capital are unclear, and open to interpretation both from a legal and an economic theoretical perspective. This is illustrated by the ITA, which – although it taxes various categories of income – does not contain a comprehensive definition of the term "income". However, various theories of the concept of income have been developed in academic literature, such as the consumption theory, the periodicity theory, the source theory, the yield theory and the equity reconciliation theory.[6] The concept of income under the ITA is predominantly based on the source theory, similar to its predecessor, the 1964 ITA.[7] The source theory defines income as all benefits derived from a permanent source of income. According to case law, a source of income is recognized if (a) a taxpayer participates in economic transactions, (b) with the objective of obtaining a benefit, and (c) this benefit can be reasonably expected.[8]

This report does not provide an exhaustive classification of all Dutch taxes and levies; the reporters have taken the above-mentioned concept of income for purposes of the 2001 ITA as a starting point in their categorization of various Dutch taxes. According to academic literature, types of taxes can be classified in various ways.[9] First of all, in their classification of various Dutch taxes and levies, the reporters distinguish between direct taxes and indirect taxes.[10] In the reporters' view, only direct taxes can qualify as taxes on income or capital. Furthermore, taxes on income or profits can generally be distinguished from taxes on consumption and taxes on legal transactions. In the reporters' view, the distinction between personal (or subjective) taxes and non-personal (or objective) taxes is irrelevant, because both types of taxes may qualify as taxes on income or capital (e.g. dividend tax). The reporters suggest that Dutch taxes on income and capital comprise (a) personal (or subjective) taxes on income or capital (or on items of income or capital) and (b) non-personal (or objective) taxes on income or capital (or on items of income or capital), where income is considered as a permanent source of income. At the very least, taxes that are nominally related to income, or items of income, should be labelled as such.

In the view of the reporters, the following Dutch taxes and levies can be considered taxes on income and capital.[11]

1.1.1.2.1. State taxes

- income tax on the basis of the ITA (*Wet inkomstenbelasting 2001*);

[6] For an overview, see L.G.M. Stevens, *Inkomstenbelasting 2001*, Deventer: Kluwer, 2014, pp. 61 *et seq*. These theories are not elaborated in this report.

[7] M.L.M. van Kempen, *Cursus Belastingrecht*, IB.0.0.2. An exception can be made for the income tax regime for savings and investments (box 3).

[8] Stevens, *op. cit*., pp. 93 *et seq*.

[9] Niessen, *op. cit*., p. 43.

[10] Direct taxes are due from the person intended to bear the burden of the tax, whereas the burden of indirect taxes is intended to be passed on to another person.

[11] This report is limited to taxes levied in the European part of the Kingdom of the Netherlands. Taxes levied in the Caribbean part of the Netherlands (Aruba, Curaçao, St Martin and the BES islands) are not discussed.

- wage withholding tax on the basis of the 1964 Wage Tax Act (*Wet op de loonbelasting 1964*);[12]
- corporate income tax on the basis of the CITA (*Wet op de vennootschapsbelasting 1969*;
- dividend tax on the basis of the 1965 Dividend Tax Act (*Wet op de dividendbelasting 1965* (DTA));[13]
- bank tax on the basis of the Bank Tax Act (*Wet bankenbelasting*);[14]
- landlord levy on the basis of the Landlord Levy Act (*Wet verhuurderheffing*).[15]

1.1.1.2.2. Other taxes

- state profit share (SPS) on the basis of the Mining Act (*Mijnbouwwet*);[16]
- premiums for public insurances (*premies volksverzekeringen*) on the basis of the General Old Age Pensions Act, Surviving Dependants Act and Long-term Care Act.[17]

The reporters are of the opinion that the following Dutch taxes and levies cannot be considered taxes on income and capital.

1.1.1.2.3. State taxes

- environmental taxes (e.g. coal tax, energy tax) on the basis of the Environmental Tax Act (*Wet milieubelastingen*);
- motor vehicle and motorcycle tax;
- gift tax on the basis of the Gift and Inheritance Tax Act (*Wet schenk- en erfbelasting*);
- inheritance tax on the basis of the Gift and Inheritance Tax Act (*Wet schenk- en erfbelasting*);
- tax on games of chance on the basis of the Betting and Gaming Tax Act (*Wet op de kansspelbelasting*);[18]
- insurance tax on the basis of the Legal Transactions Act (*Wet belastingen van rechtsverkeer*);
- transfer tax on the basis of the Legal Transactions Act (*Wet belastingen van rechtsverkeer*);
- turnover tax (VAT) on the basis of the 1968 Turnover Tax Act (*Wet op de omzetbelasting 1968*);
- customs duties;
- excise taxes (e.g. on alcohol, tobacco).

[12] Wage tax can be credited against income tax. Wage tax applies to certain items of income, e.g. taxable wage.
[13] Dividend tax can be credited against income tax and corporate income tax.
[14] This tax is due by certain banks. The taxable amount is related to balance sheet totals.
[15] This tax is due by landlords owning more than 10 rented houses in the regulated sector (social housing). The tax is calculated as a percentage of the value of the immovable property.
[16] The Mining Act provides for an SPS levy of 50 per cent on income resulting from mineral production activities. A credit is provided for corporate income tax in connection with the mineral production activity.
[17] These types of premiums can be characterized as so-called "purpose taxes" (*bestemmingsbelastingen*). See Niessen, *op. cit.*, p. 38. The GTA has been declared applicable to these premiums.
[18] This tax is not classified as an income tax, because the object does not concern a durable source of income.

1.1.1.2.4. Other

- premiums for employment insurances (*premies werknemersverzekeringen*) on the basis of the Unemployment Insurance Act, the former Disability Allowance Act, the Work and Income Act and the Sickness Benefit Act;[19]
- provincial taxes and levies, such as the provincial surcharge on motor vehicle tax;
- municipal taxes and levies, such as real estate tax, tourist tax, tax on encroachments, parking tax, sewerage charges;
- agricultural levies;
- area fee (*oppervlakterecht*) on the basis of the Mining Act;[20]
- remittance to the province on the basis of the Mining Act;[21]
- royalties (*cijns*) on the basis of the Mining Act.[22]

Dutch income tax is based on an analytical system, which means that income from various sources is taxed in accordance with specific tax regimes, with their own tax bases and tax rates (so-called "boxes"). Business profits are included in the scope of the income tax regime for income from work and home ownership (box 1). The concept of taxable business profits, which is in principle defined in the ITA, also applies for corporate income tax purposes due to the reference to the relevant provisions of the ITA in the linking provision of article 8(1) of the CITA. The Dutch regime for profits from shipping activities based on tonnage (tonnage tax) is part of the business profits regime. Moreover, notional income from the use of a personal dwelling is taxed under the box 1 regime as income from home ownership. Both the tonnage tax regime and the regime for income from a personal dwelling can be considered as taxation of income on a notional basis. In the view of the reporters, these modalities of income tax can be considered quantifications of a real economic benefit.

The Dutch taxation of income from savings and investments within income tax (box 3) is based on a deemed annual return on investments of 4 per cent, which is taxed at 30 per cent. Actual income and losses are disregarded. Although the box 3 system has certain characteristics of a wealth tax, it is normally considered to be an income tax. Even though the legislator explicitly designated this tax as an income tax, this position is not undisputed.[23] Nevertheless, the Supreme Court considered the Dutch regime for income from savings and investments to be an income tax compatible with tax treaties (see section 2.1).

[19] These premiums may not be characterized as taxes in a strict sense (see section 1.1.1.1), because the scope of these insurances is limited to employed persons and there is a connection between paid premiums and the entitlement to insurance benefits (contrary to the premiums for public insurances).

[20] The holders of production licences and offshore exploration licences are due an annual area fee. The rate is a fixed amount per square kilometre.

[21] A one-time remittance fee is due to the province for an onshore production licence. The fee is based on the size of the area in use for the production installations.

[22] Royalties are charged to onshore licensees (the royalty for offshore licences is set at 0 per cent). This is a fee on the turnover generated by a production licence.

[23] See e.g. P.J. Wattel and O. Marres, "Characterization of Fictitious Income under OECD-Patterned Tax Treaties", *European Taxation* March 2003, p. 78, and the annotation of P. Albert to *BNB* 2007/68.

1.1.2. Unilateral provisions for the elimination of double taxation

1.1.2.1. Introduction

Foreign taxes and levies play a role in various Dutch unilateral provisions for the elimination of double taxation. This report examines (a) the personal and corporate income tax provisions dealing with deduction of foreign taxes as expenses (article 3.14(6) of the ITA and article 10(1)(e) of the CITA), (b) the participation exemption (article 13 of the CITA), (c) the branch exemption (article 15e of the CITA), and (d) the unilateral 2001 double taxation avoidance decree.

1.1.2.2. Cost deduction

Article 3.14(6) of the ITA and article 10(1)(e) of the CITA can be considered a "last resort" unilateral measure for the avoidance of double taxation if no other relief is available.[24] Both article 3.14(6) of the ITA and article 10(1)(e) of the CITA refer to "taxes levied outside the Netherlands in any form on profits or profit components".[25] Pursuant to these two provisions, foreign taxes are only deductible as expenses from a taxpayer's taxable profits if avoidance of double taxation by other means is unavailable, e.g. unilaterally, under a tax treaty or under the Tax Arrangement for the Kingdom (TAK; the quasi-tax treaty between the Netherlands and the former Netherlands Antilles). As an additional restriction for corporate income tax purposes, the deduction of these taxes is disallowed if the pertinent profit items are not included in the taxable basis. Before 1 January 2004, these provisions referred to "tax on profits or income". As of 1 January 2004, the wording of these provisions has been slightly amended, referring to "taxes … on profits or profit components". According to the parliamentary explanations, this change was intended to clarify that foreign withholding taxes are within the scope of these provisions.[26] According to their wording, article 3.14(6) of the ITA and article 10(1)(e) of the CITA apply to both personal taxes and non-personal (or objective) taxes on income or items of income.

The concept of "taxes levied outside the Netherlands in any form on profits or profit components" is not further defined in these two provisions. However, case law provides some guidance on the scope of this notion. In its decision of 27 April 1960, *BNB* 1960/161, the Supreme Court held that a foreign exchange loss on a Belgian business tax attributable to a Dutch taxpayer's permanent establishment (PE) in Belgium was deductible from the Dutch taxable profits (even though the tax itself was not deductible). Therefore, this type of foreign exchange result did not fall within the scope of the deduction limitation. Another example is provided by the decision of the Leeuwarden Court of Appeal of 20 September 1996, *V-N* 1997/456, 5. This decision concerned a state income tax levied by a state of the

[24] Under various provisions of the 2001 double taxation avoidance decree (DTAD), taxpayers can opt for cost deduction instead of the credit method. Furthermore, based on the Decree of 18 July 2008, no. CPP2007/664M, *BNB* 2008/261, taxpayers can elect to apply cost deduction under tax treaties.

[25] See also art. 4.15(4)(b) of the ITA for a similar provision within the framework of the regime for income from substantial shareholdings (box 2). This provision is not discussed separately.

[26] Parliamentary documents, Second Chamber, 2003–2004, 29,210, no. 8, p. 16.

USA. The state income tax was not within the ambit of the former 1984 Netherlands–USA tax treaty, which according to article 2 of the treaty applied only to US federal income tax, and therefore this tax was not covered by any other regulation for the avoidance of double taxation.[27] As a result, the tax was considered deductible from the taxpayer's income under the predecessor of article 3.14(6) of the 2001 ITA (i.e. article 43(b) of the 1964 ITA).

1.1.2.3. Participation exemption

The Dutch participation exemption (article 13 of the CITA) exempts income from qualifying shareholdings (e.g. dividends and capital gains), provided that the shareholding does not qualify as a (deemed) passive investment. If the latter condition is not satisfied, a participation can still be eligible for the participation exemption, *inter alia*, if the participation is subject to profit tax resulting in a "realistic levy" according to Dutch standards ("tax test"). The taxation of a participation may therefore be relevant for purposes of the participation exemption.

Both taxes levied at national level and taxes at local (provincial or municipal) level should be taken into account for purposes of the tax test.[28] According to parliamentary explanations, registration taxes, capital duty, transfer taxes, taxes withheld at source and similar taxes are not profit taxes and therefore these taxes do not qualify for purposes of the tax test.[29] This has been reconfirmed in respect of non-creditable withholding tax.[30]

According to the parliamentary explanations, a participation is subject to realistic taxation if it is subject to a profits-based tax with a regular statutory rate of at least 10 per cent, provided there are no tax base deviations in comparison to the Dutch system resulting in an effective tax rate below 10 per cent.[31] However, if the statutory tax rate is lower than 10 per cent, the tax test may still be met if the effective tax rate is higher than 10 per cent, for example if the tax basis is broader than the Dutch tax basis. This requires a recalculation of the taxable profit according to Dutch standards.[32] Tax base deviations which do not affect the taxation of passive income, such as deviations resulting from different depreciation rules, special investment deductions, loss compensation or tax consolidation rules will not cause a tax to be disqualified as a realistic levy. However, tax base differences caused by, e.g. tax holidays or deductible dividends, may cause a levy not to qualify as a realistic taxation. The same is true in cases where taxation is deferred until profits are distributed and in situations in which a domestic participation exemption system applies that is significantly broader than the Dutch system.[33]

[27] The Court also considered that the former 1965 DTAD did not apply to this tax, since the tax was levied at the state level and not at the federal level. Therefore, the tax at issue could not be considered a "tax levied by another jurisdiction" within the meaning of the 1965 DTAD.

[28] Parliamentary documents, Second Chamber, 2009–2010, 32,129, no. 3, p. 61.

[29] *Ibid.*

[30] Parliamentary documents, Second Chamber, 2009–2010, 30,572, no. 8, p. 98.

[31] Parliamentary documents, Second Chamber, 2009–2010, 32,129, no. 3, pp. 64–65. See the decision of the Amsterdam Court of Appeal of 8 January 2015, V-N 2015/13.2.2, for an example of the application of the tax test.

[32] Parliamentary documents, Second Chamber, 2009–2010, 32,129, no. 3, p. 63.

[33] Parliamentary documents, Second Chamber, 2009–2010, 32,129, no. 3, pp. 62–63.

The participation exemption regime that was in force between 1 January 2007 and 1 January 2010 also contained a tax test, although the interpretation and application of this test was slightly different from the regime as of 1 January 2010. Under the pre-2010 regime, it was unclear whether the Saudi Arabian *Zakat* qualified for the purposes of the tax test.[34] In a decree of the State Secretary of Finance, the Cypriot tax based on the Special Defence Contribution Law, which had characteristics of both an income tax and a withholding tax, was considered a profit tax. Therefore, this tax in principle qualifies for purposes of the reasonable taxation test.[35]

1.1.2.4. Branch exemption

Under the branch exemption (*objectvrijstelling*) within the corporate income tax, the results of, *inter alia*, foreign PEs are not included in the worldwide profit of a Dutch company (article 15e of the CITA), unless the PE qualifies as a so-called low-taxed passive branch (in which case only a credit is available). The exception for passive low-taxed branches applies only if a double tax treaty does not apply (or if this exception is explicitly allowed under the relevant tax treaty). A foreign PE qualifies as a low-taxed passive branch if, *inter alia*, the profit of the PE is not subject to a profit tax resulting in a realistic levy in the state where it is situated according to Dutch standards (article 15g(1)(a) and (b) of the CITA). According to parliamentary history, the latter condition should be interpreted in the same way as the tax test within the framework of the participation exemption (article 13(11)(a) of the CITA).[36] Reference is made to section 1.1.2.3 of this report.

1.1.2.5. DTAD

The DTAD provides the Dutch unilateral regulations for the avoidance of double taxation. The DTAD applies only if double taxation is not prevented in another manner, for example on the basis of a tax treaty.[37] Nevertheless, the DTAD is also relevant for the application of Dutch tax treaties, because Dutch tax treaties generally refer to the DTAD for the calculation of the exemption or credit to be provided by the Netherlands as residence state.[38] In its various chapters, the DTAD provides rules relating to income tax, specified according to the respective income tax regimes (or boxes), wage tax, corporate income tax, inheritance tax, gift tax, tax

[34] Parliamentary documents, Second Chamber, 2005–2006, 30,572, no. 8, pp. 89–90.

[35] Decree of 12 July 2010, no. DGB2010/2154M, *BNB* 2010/278. The defence contribution is withheld at source if the distributing company is a resident of Cyprus and to the extent that the shareholder is also a resident of Cyprus. The defence contribution, therefore, does not apply on a worldwide basis, which is one of the characteristics of a withholding tax. Furthermore, a foreign shareholder will be eligible for a refund of the entire amount of the defence contribution that has been withheld previously due to the deemed distribution rules.

[36] Parliamentary documents, Second Chamber, 2011–2012, no. 33,003, no. 3, p. 99.

[37] Art. 1(2) of the DTAD.

[38] In relation to the corporate income tax, the exemption method prescribed by tax treaties is no longer relevant due to the introduction of the branch exemption in the CITA as of 1 January 2012; see section 2.2.

on games of chance and bank tax. This report is limited to the DTAD provisions on income tax, wage tax and corporate income tax.

The two basic methods of avoidance of double taxation under the DTAD are the exemption method and the credit method. The various provisions of the DTAD dealing with the exemption method and the credit method refer to "tax levied by a foreign jurisdiction". These provisions contain a subject-to-tax requirement, demanding that the relevant income be subject to a tax on income or profit. Additionally, the credit provisions stipulate that this may or may not be a tax withheld at source.[39] The formulation of these provisions demonstrates that the DTAD applies a broad concept of income tax.[40] The DTAD requires that the income be subject to tax in the jurisdiction in which the income arises. The subject-to-tax requirement involves a non-personal or objective taxation (i.e. the item of income or profit is subject to tax, regardless of the person receiving the income).[41] This test entails that the income should be included in the taxable basis according to the applicable foreign tax law. This does not require that tax be actually paid on the income, or that the full amount of tax or profit is subject to tax.[42]

The concept of foreign jurisdiction in principle refers to sovereign states, but also covers administrative units that can levy taxes (see article 3(1) of the DTAD and article 2(2)(c) of the GTA). Local authorities do not qualify as foreign jurisdictions. This is demonstrated, for example, by the Supreme Court decision of 12 July 2013, *BNB* 2013/195, in which the Belgian additional municipal tax was not considered to be a tax levied by a foreign authority (within the meaning of article 2(5) of the Wage Tax Act), because a Belgian municipality is not a sovereign and autonomous entity.

The Decree of the State Secretary of Finance of 18 December 2000, no. IFZ2000/1329M, *Infobulletin* 2001, 2, deals with the subject-to-tax requirement in the DTAD. According to the decree, in principle, it is not required that tax be actually paid in respect of the foreign income or profits. Moreover, it is not required that the full amount of the income or profits be taxed, because, similar to the applicable tax rate, this is a matter which concerns the other jurisdiction involved. However, the decree stipulates that a taxpayer cannot suffice with a general reference to the tax rules of the other jurisdiction. In order to demonstrate that the income is subject to tax, it may be required that the taxpayer – in addition to citing the relevant rules – produces a tax assessment or another official document issued by the tax authorities of the other jurisdiction, showing that the income is subject to tax. If such documents cannot be provided, the tax authorities will assume that the subject-to-tax test is not satisfied.[43] This interpretation of the subject-to-tax

[39] For the exemption method, see e.g. art. 9(1). The relevant income is exempt "to the extent" that it is subject to tax. Art. 23(3) stipulates that the exemption for income from the foreign box 3 basis only applies to the extent that the income at issue is subject to a tax on income levied by the other jurisdiction. For the credit method, see e.g. arts. 15(1), 19(1), 21a(1), 25(1), 25b(1), 36(1), 36a(1) of the DTAD. The credit is provided if the income is subject to tax. Arts. 13(1) and 13a(1) also refer to tax levied by a foreign jurisdiction.

[40] G.T.W. Janssen, *Cursus Belastingrecht*, IBR.2.2.2.E.

[41] In other words, the item of foreign income, and not (only) the taxpayer, should be subject to tax in the other jurisdiction; see Supreme Court, 16 October 1996, *BNB* 1996/396.

[42] Some provisions of the DTAD, however, require that foreign tax is actually paid; see, for example, art. 9(4).

[43] Decree of 18 December 2000, no. IFZ2000/1329M, para. 2.

requirement appears to be superseded by the Supreme Court decisions of 16 January 2009, *BNB* 2009/92 and 93 (see section 2.1).[44]

Additionally, the decree confirms that a branch profit tax – i.e. a tax on the net profit of a PE which is subject to taxation at source at the moment the profit is transferred to the head office – qualifies as a tax on income or profits within the meaning of the relevant provisions of the DTAD. The taxpayer will also have to demonstrate this taxation.

1.2. Taxes covered by tax treaties' distributive rules

1.2.1. Taxes covered by Dutch tax treaties

As a starting point, the Netherlands follows the OECD model in its tax treaty negotiations, where necessary tailored to the specific requirements of the case.[45] The Netherlands published memoranda regarding its tax treaty policy in 1987, 1996, 1998 and 2011.[46] The 1987 tax treaty policy memorandum was accompanied by a standard tax treaty (the Netherlands standard treaty (NST)), which was drafted along the lines of the 1977 OECD model. In view of the revised policy of adhering in principle to the OECD model, where necessary amended, the Netherlands no longer uses the NST in tax treaty negotiations.[47] The 1996, 1998 and 2011 tax treaty policy memoranda did not deal with the "taxes covered" by article 2 of the Dutch tax treaties. Therefore, even though the NST no longer serves as a template in Dutch tax treaty negotiations, it still provides a useful starting point to examine the scope of article 2 of Dutch tax treaties.

Article 2(3)(a) of the NST lists the following Dutch taxes to which the tax treaty applies:

- income tax;
- wage tax;
- corporate income tax, including the government share in the net profits derived through the exploitation of natural resources levied on the basis of the 1810 Mining Act with regard to concessions issued as of 1967, or levied on the basis of the 1965 Continental Shelf Mining Act;
- dividend tax;
- capital tax.

The capital tax (*vermogensbelasting*) concerns a net wealth tax which has been abolished with effect from 1 January 2001, without being replaced by a substantially similar tax.[48] Therefore, as of that date, the Netherlands no longer has the authority to tax capital under its domestic law. The 1810 Mining Act and the 1965 Continental Shelf Mining Act have been replaced with the Mining Act as of 1 January 2003. The SPS levy based on the Mining Act can be considered an ident-

44 See the annotation of De Vries to *BNB* 2009/92 and 93.
45 2011 tax treaty policy memorandum, pp. 9–10, 22, 23.
46 Parliamentary documents, Second Chamber, 1987–1988, 20,365, no. 2; Second Chamber, 1996–1997, 25,087, no. 1; Second Chamber, 1997–1998, 25,087, no. 4; and Second Chamber, 2010–2011, 25,087, no. 7.
47 2011 tax treaty policy memorandum, pp. 9–10.
48 With regard to the tax treaty qualification of the box 3 regime, see section 2.2.

ical or substantially similar tax imposed after the date of signature of tax treaties predating 1 January 2003 within the meaning of article 2(4) of the OECD model.

An example of a legal decision concerning substantially similar taxes can be found in the Supreme Court decision of 27 February 2015, *V-N* 2015/14.7. Article 30(1) of the Netherlands–Malta tax treaty provides that the treaty is not applicable to entities that are exempt from tax under a special regime. In 1995, the contracting states designated the former Malta International Business Activities Act (MIBA) as such a special regime. According to the Supreme Court, the combination of the Maltese flat rate foreign tax credit (FRFTC) and the Maltese credit system under the Income Tax Management Act (ITMA) was substantially similar to the regime of the former MIBA. As a result, the FRFTC was deemed to be a special regime within the meaning of article 30(1) of the Netherlands–Malta tax treaty.

Based on a review of article 2 of the Dutch tax treaties, the reporters have the following observations.

Most Dutch tax treaties contain provisions similar to article 2(1)–(4) of the OECD Model. However, there are some exceptions to this rule. For example, the treaties with Australia (1986), South Korea (1978), Malaysia (1988), Mexico (1993), the USA (1992), Zambia (1977) and Nigeria (1991) do not contain provisions substantially similar to both article 2(1) and 2(2) of the OECD model, whereas the treaties with Bermuda (2009), Brazil (1990), Germany (1959), Ireland (1969), Chinese Taipei (2001), and Tajikistan (1986) lack a provision equivalent to article 2(2) of the OECD model. The equivalent of article 2(4) of the OECD model is included in all Dutch tax treaties, with the notable exception of the TAK (the quasi-tax treaty between the Netherlands and the former Netherlands Antilles).

The enumeration in article 2(3) of Dutch tax treaties currently typically includes (a) income tax; (b) wage tax; (c) corporate income tax, including the SPS levy, and (d) dividend tax.[49]

In line with Dutch treaty policy, the SPS levy is normally included in the enumeration of article 2(3) of Dutch tax treaties, where it is phrased as an addition to corporate income tax.[50] However, a substantial number of Dutch tax treaties do not refer to the SPS levy at all. Consequently, the tax treaties at issue do not apply to this tax.[51]

A number of tax treaties still contain a reference to capital tax, which has become redundant due to the abolition of this tax.[52] Certain treaties, however, do not contain a reference to capital tax, even though that tax was still in force at the time of sign-

49 The tax treaty with Bermuda (2009) only applies to income tax and wage tax.

50 A notable exception can be found in art. 2(3) of the 2013 Netherlands–China tax treaty, which expands this provision to similar taxes of the BES islands.

51 This concerns, for example, the tax treaties with Australia (1986), Bermuda (2009), Bosnia Herzegovina, Serbia and Montenegro (former treaty with Yugoslavia) (1982), the Czech Republic (1974), France (1973), Greece (1981), Ireland (1969), Israel (1973), South Korea (1982), Kosovo (1982), Luxembourg (1968), Malta (1977), Morocco (1977), New Zealand (1980), Pakistan (1982), the Philippines (1989), Singapore (1971), Slovakia (1974), Spain (1971), Sri Lanka (1982), Suriname (1975),Tajikistan (1986), Thailand (1975), Venezuela (1991), Zambia (1977) and the TAK.

52 Moreover, the treaties with Austria (1970), Germany (1959), Ireland (1969), Luxembourg (1968), Singapore (1971) and the TAK apply to the tax on fees of directors of companies (*commissarissenbelasting*), which was abolished as of 1 January 1969.

ing the treaty.[53] The Netherlands was therefore not restricted in levying capital tax under these treaties when this was still possible under domestic legislation.

The Netherlands does not normally include provincial or municipal taxes in the taxes mentioned in article 2. However, exceptions to this rule can be found in the treaties with Austria (1970), Germany (1959), Italy (1990) and Luxembourg (1968). Article 2(2) of the 1959 Netherlands–Germany tax treaty contains an elaborate list of taxes, including various local taxes (most of which have been abolished).[54] The 1970 Netherlands–Austria tax treaty contains an identical list of taxes covered. The treaty with Italy (1990) also refers to municipal tax on immovable property,[55] whereas the treaty with Luxembourg refers to the former land tax. As a result of the inclusion of these local taxes, various treaty provisions apply to these taxes, such as the non-discrimination clause and the mutual agreement clause.

2. Relevance of the notion of tax in the elimination of international double taxation

2.1. Tax treaty resident concept

2.1.1. Domestic law

Pursuant to article 2.1(1)(a) of the ITA, individuals "residing" in the Netherlands are liable to income tax. According to article 4(1) of the GTA, where an individual resides should be determined on the basis of the circumstances. In assessing Dutch residence, it is especially relevant whether there are durable personal ties between an individual and the Dutch territory. According to the Supreme Court, it is decisive whether it appears from externally discernible factors that the ties of the taxpayer with the Netherlands are sufficiently strong to assume that this person has his/her durable centre of vital interests in the Netherlands.[56] Moreover, article 2(2) of the ITA contains various fictions deeming an individual to be a resident of the Netherlands, for example: (a) an individual ceasing to reside in the Netherlands, but becoming a resident of the Netherlands again within a one-year period, without

[53] See, for example, the treaties between the Netherlands and Australia (1986), Bangladesh (1993), Bosnia Herzegovina, Serbia and Montenegro (former treaty with Yugoslavia) (1982), Brazil (1990), Canada (1986), Egypt (1999), Malaysia (1988), Mexico (1993), New Zealand (1980), Nigeria (1991), Norway (1990), Pakistan (1982), the Philippines (1989), South Korea (1978), Tunisia (1995), Turkey (1986), the USA, Venezuela (1991), Vietnam (1995), and Zimbabwe (1989).

[54] Art. 2(2) of the treaty refers to income tax, wage tax, corporate income tax, dividend tax, tax on fees of directors of companies (abolished as of 1 January 1969), capital tax, land tax (abolished), municipal profit tax (abolished), municipal building site tax (abolished), road, street and waterway taxes and mine tax (abolished). The 2012 Netherlands–Germany tax treaty (not yet in force) follows the standard pattern of current Dutch tax treaties.

[55] As of 1 January 1995, this tax was replaced with the real estate tax. This tax can be considered a substantially similar tax within the meaning of art. 2(4) of the Netherlands–Italy tax treaty.

[56] See e.g. Supreme Court, 5 April 2015, *V-N* 2015/21.1.7, sanctioning the decision of the The Hague Court of 23 December 2011.

having have lived in another state or on the BES islands, or (b) a Dutch national diplomat who is seconded abroad as a member of the diplomatic representation of the Kingdom of the Netherlands. These residence fictions can be considered as "any criterion of a similar nature" within the meaning of article 4 of the OECD model.

Corporate entities are liable to corporate income tax as domestic taxpayers, provided they are resident in the Netherlands (article 2(2) of the CITA). Similar to individuals, where a corporate entity resides should be determined on the basis of the circumstances by virtue of article 4(1) of the GTA. The decisive criterion is the place of effective management.[57] In addition, pursuant to article 2(4) of the CITA, if the incorporation of a corporate entity has taken place under Dutch law, that entity is deemed to be a resident of the Netherlands.[58] This deeming provision can be considered as "any criterion of a similar nature" within the meaning of article 4 of the OECD model.

2.1.2. Treaty residence/liable to tax

The Dutch interpretation of the term "liable to tax" is not unequivocal. According to the 2011 tax treaty policy memorandum,[59] the Dutch Ministry of Finance favours the approach of considering a person to be liable to comprehensive taxation even if its state of residence does not actually impose tax. This approach is reflected in the policy objective to regard as treaty residents exempt pension funds and charities, associations and foundations (regardless of whether and to what extent they carry out an enterprise), exempt investment institutions and fiscal investment institutions. For example, article 4(2) of the 2010 Netherlands–Panama tax treaty reflects this policy objective:

> "A person, other than an individual, which has its place of incorporation or its place of management in a Contracting State, shall be deemed to be liable to tax in that State provided that income derived by that person is treated under the tax laws of that State as the income of that person and not as the income of its beneficiaries, members or participants."

In its *Association* decision,[60] the Supreme Court seems to take a different approach, which could imply that corporate entities are not considered to be "liable to tax" if they are exempt from tax under domestic law, unless they are explicitly covered by the treaty. The case concerned an association incorporated under Dutch law. The association was not considered a taxpayer for Dutch corporate income tax purposes by virtue of article 2(1)(e) CITA 1969. Based on this provision, an association is taxable if and to the extent that it carries out business activities, which the association in question did not. Central to the decision was the issue of

57 Supreme Court, 23 September 1992, *BNB* 1993/193.

58 Certain CITA provisions are excluded from the scope of this deeming clause, such as the Dutch participation exemption and the Dutch fiscal unity regime. As a result, for example, a taxpayer cannot form a fiscal unity with a subsidiary that is incorporated under Dutch law, but has its place of effective management in another state.

59 2011 tax treaty policy memorandum, pp. 31–33.

60 Supreme Court, 4 December 2009, *BNB* 2010/177.

whether the association qualified as a resident of the Netherlands under the 1992 Netherlands–USA treaty. If so, the Netherlands would have been able to tax the fees paid to one of the association's directors, who resided in the USA, pursuant to article 17 of the treaty (directors' fees). Article 4 of the treaty contains a "liable to tax" criterion similar to article 4(1) of the OECD model, and it also determines that an exempt pension trust or an exempt organization within the meaning of articles 35 and 36 of the treaty, respectively, are considered a resident of a contracting state, provided that they are considered a resident of that state according to the laws of that state. According to the Supreme Court, the fact that article 4(1) of the 1992 Netherlands–USA treaty referred to, *inter alia*, articles 35 and 36 of the treaty, dealing with exempt pension funds and exempt organizations, implied that the trusts and organizations mentioned in these articles could not be considered resident of a contracting state solely on the basis of the "liable to tax" criterion. On this basis, the Supreme Court held that an association that did not meet the requirements of articles 35 and 36 of the 1992 Netherlands–USA treaty, and that did not satisfy the conditions to be considered a taxpayer for corporate income tax purposes under Dutch law, could not be considered "liable to tax" within the meaning of article 4(1) of the treaty.

In its landmark *Three State* decision, the Supreme Court addressed the requirement of "liable to tax" in the context of a dual resident conflict situation.[61] A Dutch limited liability company (BV) that was incorporated under the laws of the Netherlands with its place of effective management in the Netherlands Antilles distributed a dividend to its Belgian resident shareholder. Pursuant to the tie-breaker rule of article 34(2) of the TAK, the BV was considered to be resident in the Netherlands Antilles for purposes of the DTA. According to the Supreme Court, the BV did not satisfy the requirement of "full tax liability" in the Netherlands pursuant to article 4(1) in conjunction with article II of the Protocol to the former 1970 Netherlands–Belgium treaty, because it was only taxable in the Netherlands on those items of income for which the right to tax was allocated to the Netherlands under the TAK. This judgment demonstrates that a company that is no longer subject to unlimited taxation in the Netherlands as a result of the operation of a tax treaty, is also no longer a resident of the Netherlands for purposes of other tax treaties concluded by the Netherlands with third states. The outcome of this case is similar to the approach of paragraph 8(2) of the commentary on article 4 of the OECD model, which was included in 2008, although it is based on a different rationale (the Supreme Court decision was based on the first sentence of article 4(1) of the former 1970 Netherlands–Belgium tax treaty, which did not include a provision comparable to the second sentence of article 4(1) of the OECD model).

There are several other Supreme Court decisions concerning the burden of proof in determining whether a person is "liable to tax" in another state.[62] For instance, the Supreme Court decision of 16 January 2009, *BNB* 2009/92 concerned the question of whether the taxpayer was liable to tax in Sri Lanka, and thus a resident of Sri Lanka under article 4 of the Netherlands–Sri Lanka tax treaty. According to the Supreme Court, the tax authorities or a tax judge should in principle verify the con-

[61] Supreme Court, 28 February 2001, *BNB* 2001/295.

[62] See, for example, the Supreme Court decisions of 12 May 2006, *BNB* 2007/38 and 39; and the decisions of 16 January 2009, *BNB* 2009/92 and 93.

tents of the law of the other state. However, if a taxpayer is actually taxed as a resident in the other state, it can be assumed that the taxpayer is liable to tax as a resident in that state based on that state's legislation. Liability to tax is in principle a given if a tax assessment is imposed, and any other official document may provide an indication of a person's liability to tax, but such documents are not decisive for determining whether a taxpayer is taxed as a resident in the other state. In the case at hand, an opinion from the IBFD was sufficient to conclude that the taxpayer was a resident of Sri Lanka.

In his annotation to *BNB* 2009/92, De Vries summarizes the framework for establishing tax liability in another state as follows:

> "It should be determined on the basis of the foreign (tax) law whether there is a "full tax liability", i.e. the taxpayer should be subject to an unlimited tax liability in the other state concerned;
>
> If the taxpayer is actually taxed as a resident abroad, the starting point for the tax judge is that the taxpayer is subject to tax as a resident on the basis of the foreign laws and can therefore rely on the applicable treaty;
>
> Nevertheless, the tax inspector may deny the taxpayer's residence for treaty purposes if he can substantiate that:
> - the information on the basis of which the foreign tax authorities have assumed the residence of that taxpayer in that state is incorrect or incomplete;
> - the taxation cannot reasonably be based on any rule of the foreign law."

The initial determination, and the subsequent resolution, of dual residence situations is not relevant if it has not been established first that, in addition to a person being a Dutch resident, that person is also a resident of the other contracting state by virtue of article 4(1) of the OECD model. For example, according to the Amsterdam Court of Appeal in its decision of 9 June 1999, *V-N* 1999/36.10, the Dutch tax inspector wrongly assumed that merely stating that a company incorporated under Dutch law had its place of effective management in France was sufficient to render the tie-breaker provision of the Netherlands–France tax treaty applicable.

2.2. Methods for the elimination of international double taxation

2.2.1. The exemption system (based on distributive articles or article 23A of the OECD model)

With respect to the elimination of double taxation, tax treaties concluded by the Netherlands typically deviate from article 23A of the OECD model. The avoidance provisions of Dutch tax treaties generally specify for each contracting state how double taxation should be eliminated, and these provisions generally refer to the DTAD for the applicable avoidance method. Treaties concluded by the Netherlands generally contain a "basis of taxation" clause, allowing the Netherlands to take into account foreign income before applying an exemption, for instance to enable the progression in tax rates to be reflected or to allow losses to be deducted. Treaties do not oblige the Netherlands to include foreign income in the basis of taxation. Certain income items are exempt under domestic law, for instance under

the participation exemption. There is debate in academic literature whether the branch exemption (see section 1.1.2.4) implies that the Netherlands is no longer obliged to exempt such income under the applicable tax treaty, or whether this method of relief should be regarded as the Dutch domestic implementation of the exemption method required under the treaty.[63]

Unlike the DTAD, Dutch tax treaties normally do not contain a subject-to-tax requirement equivalent to article 23A of the OECD model (see also section 3.1). However, an important exception can be found in article 25(2) of the 1992 Netherlands–USA tax treaty. Moreover, the avoidance provision of certain Dutch tax treaties includes an anti-abuse provision (sometimes referred to as the "black hole provision"), which restricts the application of the exemption method for passive types of income (e.g. dividends, interest or royalties) attributable to a foreign PE.[64] Under this anti-abuse provision, the credit method is applied to the profits of the PE, instead of the exemption method.

Dutch social security premiums and income tax are levied jointly. The decision of the Amsterdam Court of Appeal of 4 August 1993, *V-N* 1994/695, concerned a Dutch taxpayer who received a Dutch state pension and a German pension, which was taxable in Germany under the 1959 Netherlands–Germany tax treaty. The taxpayer paid Dutch income tax and premiums under the Exceptional Medical Expenses Act (AWBZ) in the Netherlands. The Court decided that the premiums did not constitute taxes covered by the treaty. These premiums could therefore be ignored when calculating the amount of exempt income.

In certain treaties the SPS levy is listed as one of the "taxes covered" (see section 1.2). The purpose of this inclusion, sometimes in combination with a special "elimination of double taxation" provision (see for example article 25(5) of the 1992 Netherlands–USA tax treaty), is to ensure that double taxation relief is available in the other contracting state.

A treaty only confers an obligation on the contracting states to avoid double taxation with respect to the taxes covered by that treaty. If a contracting state levies a tax that is not covered by the treaty, a Dutch resident taxpayer may rely on the unilateral relief on the basis of the DTAD (see section 1.1.2.5). Moreover, if no treaty has been concluded with the other jurisdiction concerned, the exemption method may be applied unilaterally, for example on the basis of the DTAD.

With regard to the exemption method in relation to the income tax regime for taxation of income from savings and investments (box 3), in its decision of 21 December 2006, *BNB* 2007/68, the Supreme Court decided that this tax should be considered an income tax for treaty purposes instead of a wealth tax, resulting in the application of the exemption method under the 1973 Netherlands–France tax treaty.[65]

63 See G.T.W. Janssen, *Cursus Belastingrecht*, IBR 3.3.2.B.Cc2; F.P.G. Pötgens and J.W. Bellingwout, "Objectvrijstelling voor vaste inrichtingen: Much Ado About Nothing?", *WFR* 2012/654.

64 See, for example, the Dutch tax treaties with Denmark (1996), Egypt (1999), Ghana (2008), Poland (2002), Portugal (1999) and the UK (2008).

65 See also the Supreme Court decision of 21 November 2008, *BNB* 2009/88, in respect of the Netherlands as source state, and the decision of the 's-Hertogenbosch Court of Appeal, 17 October 2008, *V-N* 2009/13.14. Compare the joint explanatory memorandum to the 2001 Netherlands– Belgium tax treaty, *V-N* 2002/15.4, demonstrating that both contracting states agreed that the regime for

2.2.2. The credit system (article 23B of the OECD model)

If a treaty has been concluded with the other state, a credit may be granted for the foreign taxes covered by that treaty. The amount of the credit is, *inter alia*, capped at the amount of tax levied by the other state. Certain tax treaties contain a "tax sparing credit": the taxpayer is entitled to a credit of a certain amount, even if no (or a lower amount of) tax has been paid (see, for example, article 23 of the 1990 Netherlands–Brazil tax treaty). In accordance with the Dutch tax treaty policy, the Netherlands is currently reluctant to include tax sparing credits in its tax treaties.[66] If no treaty has been concluded with the other state, a credit may be available on the basis of the DTAD (see section 1.1.2.5).

There is no guidance as to when a foreign tax is considered to be paid for purposes of the credit provision of tax treaties. In the Decree of 18 July 2008 no. CPP2007/664M, *BNB* 2008/261, however, the State Secretary of Finance offers relief for situations in which there is a difference between the moment when foreign dividends, interest or royalties become taxable in the Netherlands and the moment when the other state levies a withholding tax on those items of income (i.e. a difference between taxation on accrual basis and on cash basis). Under the Dutch credit method, such timing mismatches could lead to partial non-creditability of the foreign tax. The State Secretary of Finance approves that in the year in which the foreign tax is withheld, a reduction of Dutch taxation is granted that corresponds to the amount of the credit that would have been granted if the taxation of the income in the Netherlands and the withholding of the tax in the other state had taken place in the same year.

The Supreme Court decision of 9 October 2009, *BNB* 2009/310 involved a corporate taxpayer entitled to a tax sparing credit under the 1990 Netherlands–Brazil tax treaty in respect of income included in taxable profits in 1997. However, the taxpayer did not have a creditable basis in the Netherlands in that year, or in subsequent years (due to negative other income). In 2001, the taxpayer reported positive profits and thus claimed the tax sparing credit. However, the Supreme Court held that the relevant income was included in the Dutch taxable profits in 1997, and that the tax treaty did not impose an obligation on the Netherlands to grant the tax sparing credit in a different year than the year in which the income was earned. The Supreme Court did not find any support in, *inter alia*, the OECD commentary for an obligation to carry forward the credit to a later year.

cont.

taxation of income from savings and investments (box 3) could be considered an income tax. See also Rev. Rul. 2002-16, 2002-15 IRB 740, IBFD Administrative Documentation (including US IRS), in which the IRS confirms that the USA provides a credit for the Dutch box 3 taxation under the Netherlands–USA tax treaty. Reference is also made to the press release of the Dutch Ministry of Finance of 4 April 2002, no. 2002/85, *V-N* 2002/19.11. The classification of notional income from shares by virtue of the Dutch income tax regime for income from savings and investments (box 3) under art. 10 of OECD patterned tax treaties was confirmed in the judgment of the Supreme Court of 23 May 2014, *BNB* 2014/170.

66 2011 Tax treaty policy memorandum, p. 63.

2.2.3. Deduction system

The possibility of deducting foreign taxes should be viewed as a measure of last resort, as it is inherently less favourable than the exemption or credit method (see section 1.1). Article 38 of the DTAD enables taxpayers to relinquish the credit method and opt for the deduction of foreign taxes as costs, subject to several conditions (see section 1.1.2.5). In the Decree of 18 July 2008, no. CPP2007/664M, *BNB* 2008/261, it has been approved that article 38 of the DTAD can be applied by analogy under tax treaties, on a per country basis, and upon written request.

2.2.4. Mutual agreement

There seems to be no reason why disagreement between contracting states on the qualification of a levy as a tax covered by the treaty should not be regarded as one of the "cases of double taxation that do not come within the scope of the provisions of the Convention" within the meaning of article 25(3) of the OECD model, although this is not listed in the Dutch mutual agreement procedure (MAP) Decree of 29 September 2008, *BNB* 2008/310, as one of the typical cases where a MAP could offer a solution.[67] The reporters are not aware of any examples of MAP consultation on this point.

2.3. Non-discrimination

There are several prominent decisions concerning taxes not covered by treaties in which the Supreme Court applied tax treaty non-discrimination provisions, for example, to extend an exemption of real estate transfer tax on the basis of article 25(4) of the former 1948 Netherlands–USA tax treaty (share ownership discrimination).[68] Article 25(5) of this tax treaty reads as follows: "As used in paragraphs 2, 3 and 4 of this Article the term "taxes" means taxes of every kind and whether imposed at the national, state or local level." This provision is similar – but not identical – to article 25(6) of the OECD model. In a 2000 decision,[69] the Supreme Court refused to extend an exemption of capital duty on the basis of article 24(3) of the 1986 Netherlands–Canada tax treaty. Article 24 of that tax treaty lacked a provision similar to article 25(6) of the 1977 version of the OECD model, pursuant to which the non-discrimination provisions apply to "taxes of every kind and description, notwithstanding the provisions of article 2". The central point of the Supreme Court's reasoning was that the treaty, according to its wording and article 2, only concerns taxes on income, as a result of which it had to be assumed that the words "any taxation" in article 24 of the treaty only refers to such taxes.

To the reporters' knowledge, there are no decisions in which a treaty non-discrimination provision was applied to eliminate double taxation in regard of a tax not covered by article 2. In the Decree of 21 January 2004, no. IFZ2003/558M,

[67] S. 1.3 of the Mutual Agreement Procedure Decree.

[68] Supreme Court, 23 December 1992, *BNB* 1993/71, and Supreme Court, 12 October 1994, *BNB* 1995/59.

[69] Supreme Court, 1 November 2000, *BNB* 2001/19.

V-N 2004/10.8, it has been approved that a non-resident taxpayer with a Dutch PE is entitled, in the same way as a resident taxpayer, to credit foreign taxes on dividends, interest and royalties attributable to that PE. This approval, inspired by the ECJ's *Saint-Gobain* decision (21 September 1999, C-307/97) applies to non-resident taxpayers who have access to a treaty that guarantees the freedom of establishment similarly to the EU treaty (in the reporters' view, this implies that the treaty contains a provision corresponding to article 24(3) of the OECD model), and to non-residents who have access to a treaty that does not guarantee the freedom of establishment similarly to the EU treaty. The approval does not appear to extend to taxes not covered by article 2.

3. Relevance of the notion of tax in the elimination of double non-taxation situations

3.1. Tax treaty subject-to-tax clauses

The Netherlands does not normally include a subject-to-tax requirement in the articles 6–22 of its OECD-patterned tax treaties. However, the pension article of certain Dutch tax treaties contains a subject-to-tax clause assigning tax jurisdiction in respect of pension payments to the source state, *inter alia*, if the pension is not sufficiently taxed in the residence state; see for example article 18 of the 1999 Netherlands–Portugal tax treaty and article 18 of the 2001 Netherlands–Belgium tax treaty. Moreover, article 21 of the 2001 Netherlands–Belgium tax treaty (the "other income" article) contains a subject-to-tax clause. The joint explanatory memorandum to the 2001 Netherlands–Belgium tax treaty distinguishes between including income in the tax basis and actually taxing the income.[70] Furthermore, the Supreme Court decisions of 5 September 2003, *BNB* 2003/379 and 381, and 18 June 2004, *BNB* 2004/314 are relevant in the context of subject-to-tax requirements. In these cases, the Supreme Court considered that the "other income" article of the former 1970 Netherlands–Belgium tax treaty could not be applied, because the Dutch fictitious wage and interest concepts did not result in the emergence of income susceptible to taxation by Belgium as the residence state. Therefore, the Supreme Court appeared to read a subject-to-tax requirement into the former 1970 Netherlands–Belgium tax treaty, even though such a requirement was not included in article 22 of that treaty.

3.2. Domestic law anti-avoidance provisions

The Dutch CITA contains several subject-to-tax clauses concerning cross-border situations that require, for instance, a certain item of income to be subject to tax in another state, e.g. an interest payment that was deducted against the Dutch taxable base (see the anti-base erosion rule of article 10a CITA). Alternatively, a

[70] See joint explanatory memorandum, Parliamentary Proceedings, Second Chamber, 2001–2002, 28 259, no. 3, p. 52: an item of income is taxed within the meaning of article 21 if it is actually included in the taxable basis, i.e. without being exempt.

subject-to-tax requirement may be imposed on a company, for example to qualify for the participation exemption. The anti-base erosion rule of article 10a CITA requires, in pertinent part, that the relevant interest paid is, on balance, subject to a profit or income tax that results in a "realistic levy" according to Dutch standards. According to the State Secretary of Finance, this requirement must be interpreted in the same way as the "tax test" within the framework of the participation exemption.[71] For a discussion of this test, see section 1.1.2.3.

The *fraus legis* doctrine is a general anti-abuse measure developed in Dutch case law. Under this doctrine, a tax inspector may substitute a fact pattern that does not lead to taxation by a fact pattern that does so lead if (a) the taxpayer has created a situation in which tax cannot be imposed, but which approximates to one in which tax could be imposed; (b) tax avoidance is the taxpayer's predominant motive; and (c) the object and purpose of the tax law would be frustrated if the non-taxable fact pattern is not treated as a taxable fact pattern. Various Supreme Court decisions demonstrate that there is no avoidance of taxation contrary to object and purpose where interest income is subject to Dutch taxation.[72] The Supreme Court also held that the deduction of interest is not contrary to object and purpose of the law when interest income is, at the level of a foreign creditor, subject to reasonable taxation in accordance with Dutch standards.[73]

3.3. Administrative assistance

The Netherlands adheres to the OECD standards regarding exchange of information. Thus, the Netherlands strives to include provisions similar to article 26 of the OECD model in its tax treaties, or to enter into separate TIEAs, which are generally modelled after the OECD model agreement on exchange of information.[74] The Netherlands has concluded TIEAs with, for example, the Isle of Man (2005), Jersey (2007), Guernsey (2008) and Bermuda (2009). The Dutch TIEAs generally cover the following Dutch taxes: (a) income tax, (b) wage tax, (c) corporate income tax, including SPS levy, (d) dividend tax, (e) gift tax and (f) inheritance tax, and they may also include (g) VAT (see e.g. the TIEA with Bermuda).

[71] Parliamentary documents, Second Chamber, 2005–2006, 30,572, no. 8, p. 45.

[72] Supreme Court, 10 March 1993, *BNB* 1993/194 and 196.

[73] Supreme Court, 20 September 1995, *BNB* 1996/5. However, in its decision of 8 October 2015, *V-N* 2015/53.10, the Amsterdam Court of Appeal took a different position. According to the Court, the fact that the relevant interest income was taxed in another country (i.e. the UK) did not preclude application of the *fraus legis* doctrine, resulting in the non-deductibility of the interest for Dutch tax purposes.

[74] 2011 Tax treaty policy memorandum, pp. 63–64.