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Report from Dr. René Offermanns, IBFD Senior Research Associate

Policy Document on tax treaty policy – Seminar on Dutch tax treaty policy

On 21 March 2011, the University of Leiden and the Dutch Ministry of Finance organized a seminar on the Dutch tax treaty policy as a result of the recent Policy Document on the Dutch tax treaty policy (see TNS:2011-02-17:NL-1). The seminar, held in Leiden, was chaired by Prof. Bender (Leiden University/PwC) and Mr. Visser (Director International Fiscal Affairs Department of the Ministry of Finance).

Treaty network

The first panel, chaired by Prof. Stevens (EUR/Loyens & Loeff) addressed the question with which countries the Netherlands should sign a tax treaty. Mr. Roodbeen of the Ministry of Finance explained that for the decision-making process the following aspects are taken into consideration:

- the interaction between the fiscal systems;
- the economic relations;
- the competition position of employees, entrepreneurs and investors; and
- the coherence with other economic, political and diplomatic factors.

With respect to the signing of new tax treaties, the focus is on developing countries with the aim to:

- further their durable economic growth;
- improve the investment climate for Dutch companies; and
- support the development of the tax administration and the tax system of those countries.

Thereafter, a panel consisting of Mr. Zillikens (Shell), Mr. Felius (Sabic), Mr. Hollander (Triodos Bank/Tax Justice Netherlands) and Prof. Stevens (Ministry of Finance) discussed various aspects of the topic. The most important conclusions were:

- sometimes it could be better to have a sub-optimal treaty than no treaty;
- for economic and political reasons it could be desirable to sign treaties with countries in the Middle East, although those countries have preferential regimes;
- tax treaties with tax havens are not desirable. Instead of a treaty, domestic measures should be taken to improve the investment climate in relation to those countries; and
- tax treaties with developing countries should only be signed if the treaty supports their development.

Treaty application, residence

The second panel, chaired by Prof. Pötgens (Free University of Amsterdam (VU)/De Brauw Blackstone Westbroek), dealt with the treaty application and place of residence. Mr. Monfrooij (Ministry of Finance) explained that tax treaties apply to residents of one of the contracting states which are fully liable to tax. For companies, residence is determined by means of the following criteria:

- the country under whose laws the company was established; and
- the place of effective management.

Under recent tax treaties, the Netherlands aims to expand the definition of residence to:

- pension funds and non-profit organizations;
- foundations and associations, regardless of whether business activities are carried out;
- investment funds; and
- exempt investment companies.

With respect to exempt investment companies and entities benefiting from a preferential regime, the Netherlands is willing to accept a restriction of treaty benefits.

Thereafter, several aspects of the topic were debated by a panel consisting of Mr. Monfrooij (Ministry of Finance), Mr. van Horzen (ABN AMRO), Prof. van Weeghel (University of Amsterdam/PWC), Mr. Bulle (Robeco) and Mr. de Lignie (Loyens & Loeff). The most important recommendations were:

- pension funds should be entitled to treaty benefits, and be exempt from withholding tax on interest and dividends;
- the liable to tax fiction under which a person is deemed to be liable to tax if the income derived is treated as income of that person under the laws of a state may require the insertion of anti-abuse provisions;
- exempt investment companies should be entitled to treaty benefits to prevent economic double taxation;
- hybrid investment funds should also be entitled to treaty benefits; and
- the Netherlands should consider withdrawing its reservation to the OECD Partnership Report.

Further, Prof. Wattel briefly gave his view on the proposed abolition of the provision for professors, the exemption for foreign artistes and sportsmen and the proposed automatic and spontaneous exchange of information.

Anti-abuse

The third penal, chaired by Prof. Bender (University of Leiden/PWC) debated the inclusion of anti-abuse provisions in tax treaties. Mr. Evers (Ministry of Finance/Erasmus University of Rotterdam) explained that anti-abuse provisions in tax treaties, must respect the proportionality and subsidiary principle and should not result in overkill.

He indicated that with respect to dividends, the Netherlands favours taxation in the state of residence and the insertion of an anti-abuse provision because the beneficial ownership requirement is not always sufficient to prevent abuse. With respect to interest and royalties, the Netherlands also favours taxation in the residence state and upon request of the other treaty partner, the Netherlands is prepared to include an anti-abuse provision.

Concerning anti-abuse provisions, a distinction must be made between entity based provisions (e.g. LOB clauses) and transaction based provisions, containing a main-purpose test.

Thereafter a panel consisting of Mr. Beerepoot (Uniliver), Mrs. Marcus (Tommy Hilfiger), Mrs. Klink (Ernst & Young) and Prof. Kemmeren (University of Tilburg/Ernst & Young) dealt with various aspects of the topic. The main conclusions were:

- companies prefer entity-based anti-abuse provisions (LOB clauses) over expanded beneficial ownership and main purpose tests, because the first-mentioned provide more certainty;
- the transfer of the effective management of a company from a tax haven to the Netherlands, should not be considered as treaty shopping if the reduction of withholding tax is only a subsidiary aim;
- treaties should contain a provision which prevents the application of domestic anti-abuse provisions in the context of tax treaties;
- the Netherlands should not propose main purpose provisions even if they are concretely formulated; and
- if the term "beneficial owner" is kept in tax treaties, it could be helpful to define the term.

OECD developments

The last panel, chaired by Prof. Van Raad (University of Leiden/Loyens & Loeff), discussed the effects of OECD developments. Mr. Roelofsen (Ministry of Finance) gave an overview of recent OECD developments and indicated that the Netherlands wants to apply a dynamic approach with respect to the interpretation of tax treaties.

Thereafter, a panel consisting of Mr. Pijl (Deloitte), Prof. Engelen (Leiden University/PwC), Mr. Schipper (ING) and Mr. Van den Brekel (Ernst & Young) gave their views on various aspects of the

topic. The main conclusions were:

- OECD Model Convention (2010)of internal interest within a group of companies with respect to treaties signed before 2008.
- Dutch tax treaties should contain a provision that treaty provision which are based on the OECD Model should be interpreted by means of the latest Commentary;
- the Netherlands should withdraw its reservation with respect to Art. 23A/B of the OECD Model (avoidance of double taxation) in case of classification conflicts;
- with respect to the interpretation of treaty provisions generally a dynamic approach should be followed.

The practitioners in the panel did not favour a dynamic approach with respect to the allocation of capital to a PE and amendments to OECD Transfer Pricing Guidelines.

Reference: TNS:2011-02-17:NL-1; CTA:NL:7.4.; ITA:NL:7.4.

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