Chapter 15: Netherlands

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An overview

The Netherlands has always been a front-runner in international trade and relationships. This is reflected in legal ingenuity. For example, the *Vereenigde Oostindische Compagnie* (VOC), the world's largest trading company in the 17th century, became the first publicly traded company in 1606. With the famous port of Rotterdam as gateway, the Netherlands is still a prominent trading nation. In 2012, the Netherlands was the fifth largest exporting country in the world. This position can be explained by the Netherlands being geographically attractive for transit, but also by the fact that the Netherlands is a stronghold in many sectors of industry. For example, the Netherlands was the second exporter (after the United States) of agricultural products in 2011.[2] Therefore, it will give rise to little surprise that export accounts for almost half of the employment in the Netherlands.[3]

In order to facilitate international trade and commerce, the Netherlands developed an extensive treaty network. As a founding member country of the OECD, the Netherlands strongly adheres to the OECD Model Tax Convention (OECD Model) and its Commentary. However, as many other countries, the Netherlands has its quirks which come to light as deviations from the OECD Model. This report will elaborate on these deviations by discussing those elements that the author regards as most substantive and suitable for discussion.

15.1. Tax treaty practice in the Netherlands

15.1.1. Introduction

Although the Netherlands in fact published a model treaty a long time ago, the *Nederlands Standaardverdrag* (NSV), this model cannot be regarded as a template of contemporary Dutch tax treaty policy due to its age. Published in 1987, the NSV has been outpaced by the national and international developments that shape tax treaty policy. The NSV is therefore of no significance in the Netherlands, which is also confirmed by the Dutch Memorandum on Tax Treaty Policy 2011 (MTTP). The MTTP states that the Netherlands takes the OECD Model as a basis and strives to contend with specific characteristics of potential tax treaty partners though tailor-made solutions. This approach precludes the use of a standard Dutch model tax treaty, according to the MTTP.[4]

The MTTP is an extensive memorandum describing the tax treaty policy of the Netherlands and serves as a starting point for tax treaty negotiations by the Netherlands. In combination with recent tax treaties, the MTTP adequately reflects the tax treaty policy of the Netherlands. This report will discuss the deviations from the OECD Model and Commentary in the Dutch tax treaty policy through the MTTP and recent tax treaties.

15.1.2. Residency for tax treaty purposes

Article 4(1) OECD Model provides that residency for tax treaty purposes requires liability to tax by reason of domicile, residence, place of management or any other criterion of similar nature. What qualifies as liable to tax? The OECD Model does not take a strong stance on the meaning of "liable to tax". It does, however, give two interpretations:

(i) "[L]iable to tax" requires formal or theoretical liability rather than material liability. Consequently, a subjective exemption is no obstacle to qualify as being liable to tax. This is, according to the OECD Commentary, the position that is shared by the majority of OECD member countries.[5]
(ii) A different view is taken by a minority of OECD member countries and consists of the interpretation that "liable to tax" does require material liability to tax. From that perspective, a subjective exemption prevents that the "liable to tax" criterion is fulfilled.[6]

The MTTP states that the Netherlands concurs with the majority of the OECD members. In this regard, the Netherlands stresses that tax treaties not only entail avoiding double taxation, but also more generally divide taxing rights between the contracting states. Therefore, except in case of abuse, there is no reason why a tax exemption granted by the residence state should lead to increased taxing rights of the source state.[7]

Contrary to the view of the Deputy-Minister of Finance, the Supreme Court of the Netherlands embraced interpretation (ii) above. The so-called "*Inwonerschap vereniging-arrest*" or "Residency association case" dealt with residency of an association under the Netherlands-United States treaty. Under Dutch domestic

law, an association is only taxable for corporate income tax purposes in case, and to the extent that, it operates an enterprise.[8] The association that was the protagonist in the "Residency association case" did not operate an enterprise and was therefore not taxable under the Dutch Corporate Income Tax Act.

The association was managed by an American director, who qualified as a resident of the United States. The Supreme Court had to determine whether the association qualified as "resident" under article 17 of the Netherlands-United States treaty. Through its interpretation of "resident", the Supreme Court would answer the question whether the Netherlands (as source state) or the United States (as residence state) would have taxing rights in respect of the director's remuneration.[9]

Article 4(1) of the concerned treaty provided that the term "resident of one of the States"

> means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature, or that is an exempt pension trust, as dealt with in Article 35 (Exempt Pension Trust) and that is a resident of that State according to the laws of that State, or an exempt organization, as dealt with in Article 36 (Exempt Organizations) and that is a resident of that State according to the laws of that State….

The Supreme Court judged that in case the residence article of a certain tax treaty explicitly identifies treaty-exempt bodies as treaty resident, other exempt entities that have not been explicitly mentioned do not qualify as treaty resident. Due to the fact that the association did not operate an enterprise that gave rise to subjective taxation under the Dutch Corporate Income Tax Act, in combination with the absence of a reference in article 4 of the treaty to this type of association, the Supreme Court ruled that the association did not qualify as resident under the Netherlands-United States treaty.[10]'[11]

This ruling was in accordance with previous case law which indicates that the Supreme Court regards "liable to tax" as a requirement for a material tax liability. In the 2001 *Drielandenpunt* case, the Supreme Court had to determine residency of a dual resident company for the application of the tax treaty with a third state. It concerned a company incorporated under Dutch law whose actual management was located in the Netherlands Antilles. Thus, it concerned a dual resident company. This company qualified as resident in the Antilles under the Netherlands Tax Treaty (NTT) between the Netherlands and the Antilles. Therefore, the company was not fully subject to taxation in the Netherlands, but only for the income that was allocated to the Netherlands under the NTT. This resulted in a limited tax liability in the Netherlands. The Supreme Court ruled that due to this limited tax liability, the company was not subject to "full tax liability". Hence, the company did not qualify as resident of the Netherlands under the old Netherlands-Belgium tax treaty (1970).[12]

Although the Residency association case was decided under a treaty that included a residency provision that deviated from the OECD Model, given the reference to certain exempt entities, it remains unclear what the reasoning of the Supreme Court would be under a OECD Model-compliant residency provision, which would not be suitable for the *argumentum a contrario* of the Supreme Court as demonstrated in the Residency association case, according to the MTTP.[13] However, it has been argued in the literature that the outcome of the *Drielandenpunt* case already provides that the Supreme Court regards "liable to tax" as a requirement for material tax liability.[14]

The Netherlands exempts pension funds from corporate income tax and traditionally endeavoured to include a reference in article 4 that guarantees treaty access for these pension funds. However, as a result of the case law mentioned above, the Netherlands now also intends to provide certainty for other exempt entities by including them in article 4. In that case, these entities remain outside the scope of the case law mentioned above and are ensured of treaty access. For the Netherlands, this would not only concern pension funds, but also non-profit organizations and associations or foundations that do not operate an enterprise.

This intention is realized, for example, in the residency article of the Netherlands-Japan treaty. Article 4(2) provides that "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."[15]

Furthermore, the Netherlands also intends to include exempt collective investment vehicles in article 4, but is willing to limit treaty rights with regard to these entities.[16]

15.1.3. The so-called KLM provision

In the 17th century, the Dutch skipper Barend Fockesz, who transported spices from Indonesia to the Netherlands, was supposed to have made a pact with the Devil. The latter ensured him of sufficient wind during his journeys, thereby significantly shortening his journey from Batavia (currently known as Jakarta) to the Netherlands. In return, Fockesz was to sail his ship for eternity. The ship was then known as "The

Flying Dutchman".[17] It took some 200 years more before the Dutch actually flew to Batavia. On 1 October 1924, the *Koninklijke Luchtvaart Maatschappij voor Nederland en Koloniën* (The Royal Airline for the Netherlands and Colonies) flew to Indonesia.[18] This airline is currently known as KLM, which merged in 2004 with Air France in order to become Air-France KLM. The top holding is established under French law and located in Paris. However, KLM still operates with a high level of independence from the Netherlands.

This merger had an impact on Dutch tax treaties, in the first place with the France-Netherlands treaty. The Netherlands feared that it could lose taxing rights on the profits derived by KLM in case the merger would result in KLM's place of effective management being shifted from the Netherlands to France. Consequently, the 1973 France-Netherlands tax treaty was amended through a protocol in 2004 as follows:

> 1. Notwithstanding the provisions of Articles 4, 8, 13 and 23 of the Convention, it is understood that the Netherlands shall have the exclusive right to tax:
>
> (a) the profits derived by the existing Koninklijke Luchtvaartmaatschappij N.V. from the operation of aircraft in international traffic;
> (b) the gains derived by the existing Koninklijke Luchtvaartmaatschappij N.V. from the alienation of aircraft operated in international traffic, as well as from the alienation of movable property used for the operation of such aircraft, and
> (c) aircraft operated in international traffic by the existing Koninklijke Luchtvaartmaatschappij N.V., as well as movable property used for the operation of such aircraft,
>
> provided that the aforementioned profits and gains, aircraft and movable property, insofar as the domestic law of the Netherlands allows the Netherlands to tax, are effectively subject to tax in the Netherlands.
>
> 2. Notwithstanding the provisions of Articles 4, 8, 13 and 23 of the Convention, it is understood that, in any situation in which the operation of aircraft of the existing Koninklijke Luchtvaartmaatschappij N.V. were to be entirely or substantially carried out by another person, the Netherlands would have the exclusive right to tax the profits, capital gains, aircraft and movable property pertaining to these activities, provided that the aforementioned profits and gains, aircraft and movable property are effectively subject to tax in the Netherlands insofar as the domestic law of the Netherlands allows the Netherlands to subject them to tax.
>
> 3. The Contracting States shall, where necessary, consult each other regarding the mode of the application of the second paragraph by way of letters or otherwise.

The OECD Model provides that profits from the operation of ships or aircraft in international traffic are taxable only in the state in which the effective management of the enterprise operating these ships or aircrafts is located.[19]

The Netherlands generally follows this approach. However, in case the Air France-KLM structure were to change, that could result in a shift of the effective management of KLM from the Netherlands to France. Consequently, the Netherlands would lose taxing right with regard to profits derived by KLM through activities in the treaty partner. The allocation of KLM profits was a politically sensitive issue.[20] Therefore, the Netherlands intends to include a provision in the Protocol that determines that the place of effective management of KLM is deemed to be located in the Netherlands.

Such a provision in the Protocol has been included in recent treaties.[21] For example, article IX of the Protocol to the Ethiopia-Netherlands treaty provides that:

> 1. For the purposes of Articles 8, 13, 15 and 21, the place of effective management of the enterprise of Koninklijke Luchtvaartmaatschappij N.V. (KLM N.V.) shall be deemed to be situated in the Netherlands, as long as the Netherlands has an exclusive taxing right with respect to the enterprise of KLM N.V. under the tax convention concluded between the Netherlands and France.
>
> 2. The provision of paragraph 1 shall also apply in any situation where the air transport activities of the existing KLM N.V. would be continued fully or substantially by another person. This person shall be considered to be a resident of the Netherlands for the purposes of this Convention.

15.1.4. Taxation of offshore activities

In the late 1950s, the first gas was extracted from Dutch soil. In 2009, the total income (during the period 1959-2009) for the Dutch government from the extraction of gas amounted to EUR 211 billion, as was calculated by a Dutch newspaper.[22] This windfall, unfortunately, gave rise to a phenomenon called the "Dutch disease".[23] The Dutch-disease theory provides that an increase in exploitation of natural resources leads to a decline in the manufacturing sector. Subsequently, the revenues were "cheered away" through consumptive spending. For example, a quarter of the EUR 211 billion mentioned above

has been spent on social benefits.[24]

The natural resources windfall did not only give rise to the Dutch disease, but, luckily for this report, also to a specific provision in Dutch tax treaties.

Since 1990, Dutch domestic law offers the possibility to tax income from exploration and extraction of natural resources on the continental shelf when these activities have been performed for at least 30 days in a year. Dutch tax law provides in that regard that "the Netherlands" also includes the seabed and its subsoil located outside its territorial waters in the North Sea, to the extent that the Kingdom of the Netherlands is allowed by international law to exercise sovereign rights with regard to exploration and extraction of natural resources.[25] The 30-day threshold constitutes a divergence from the permanence criterion that would normally be applicable to determine whether a permanent establishment (PE) exists.[26] The incorporation of the 30-day threshold was driven by the intention to extend the reach of the PE concept in the context of income from natural resources derived offshore.[27]

In its tax treaty policy, the Netherlands proposes to include a provision in tax treaties that allows the Netherlands to effectuate its extended taxing rights with regard to the offshore activities mentioned above. This provision consists of an extension of the concept of permanent establishment through which the Netherlands can exercise taxing rights on profits earned from offshore activities related to the exploration and production of natural resources, in case these activities have been performed for at least 30 days, as in accordance with Dutch domestic law.[28]'[29]

Not all treaty partners of the Netherlands are prepared to include an offshore provision. This mainly depends on whether the treaty partner has a continental shelf containing exploitable natural resources. The Dutch position heavily depends on the question whether companies of the treaty partner are involved in offshore activities on the continental shelf.[30]

The offshore provision can appear in two forms, either included in article 5 or as an independent provision. The Netherlands-United Kingdom tax treaty includes an extensive offshore provision, which does not raise much surprise since it has great practical importance due to geographical reasons. Article 23(3) provides that:

> An enterprise of a Contracting State which carries on offshore activities in the other Contracting State shall, subject to paragraph (4) of this Article, be deemed to carry on, in respect of those activities, business in that other State through a permanent establishment situated therein, unless the offshore activities in question are carried on in the other State for a period or periods not exceeding in the aggregate 30 days in any twelve month period.

Article 23 also provides that activities of associated enterprises should be taken into account in order to determine the existence of an offshore PE.

In case associated enterprises both carry on offshore activities and together exceed a period of 30 days, then each enterprise shall be deemed to be carrying on its activities for a period exceeding 30 days in any 12-month period.[31] These provisions in the Netherlands-United Kingdom treaty are similar to the provision that is included in article 5 with other treaty partners.[32]

15.1.5. Pensions

Pensions have been a hot topic in the Netherlands for some time now. To a certain extent, a battle takes place between generations. Younger generations face higher contributions that must be made during an exceeding amount of time, in order to save for shrinking entitlements. On the other hand, older generations face cuts in their entitlements. This even gave rise to a political party whose most prominent, if not only, goal is to conserve pension entitlements for the elderly. This party saw its potential electorate soar in the polls, but collapsed due to the parting of its charismatic party leader. He felt he could do nothing but resign after a newspaper published that during his entrepreneurial years in which he managed a gay magazine, he did not transfer pension contributions of his employees to the pension fund. Instead, he used the pension contributions to plug the holes in his company's balance sheet.[33]

However, despite the heated public debate, the Dutch pension system is still rated as second best in the world.[34] The Netherlands uses an EET system (exempt, exempt, taxed). Under such a system, premiums are deductible and accrued pensions are exempt until they are distributed. Article 18 of the OECD Model grants taxing rights with regard to pension payments to the resident state, since the recipient of those payments uses the collective resources in that state. Consequently, the Netherlands would not be able to tax pensions that originated in the Netherlands and are paid to a retiree that emigrated from the Netherlands, in case a treaty with an article 18 conforming to the OECD Model is applicable.

In order to conserve taxing rights for the Netherlands as country that facilitated pension accrual through tax exemptions, the Netherlands intends to include a provision in its treaties that allows for source-state

taxation with regard to pensions.[35]

The Netherlands, however, did not include an observation or reservation in this regard in the OECD Commentary. In the MTTP 1998, the Netherlands stated that it intends to maintain taxing rights over pensions that were facilitated in the Netherlands. However, this would be achieved by following the main rule of the OECD Model, flanked with exemption for pensions that were fiscally facilitated in the Netherlands and with an exemption that allows for source-state taxation in case the pension is not sufficiently taxed in the residence state.

The MTTP 2011 takes a stronger position and indicates that the Netherlands intends to include source-state taxation as general rule.[36] During the parliamentary discussions on the MTTP, the parliament forced the Deputy-Minister of Finance to take an even stronger stance regarding source-state taxation in tax treaties. A resolution, which was adopted by the parliament, stated that the Netherlands should only conclude tax treaties with source-state taxation for pensions.[37] The deputy-minister replied that this is indeed Dutch tax treaty policy, but a final compromise could mitigate these source-state intentions.

The Netherlands concluded tax treaties with a variety of provisions that (partly) effectuate source-state taxation for pensions. For example, the 2012 Germany-Netherlands treaty only allows for partial source-state taxation. Taxation is possible for pension payments that exceed an annual aggregate of EUR 15,000.[38] This limited source-state taxation only applies to pension that originate in the source state. Article 17(5) of the treaty subsequently provides that a pension (or similar remuneration) is deemed to arise in a contracting state as far as the pension or other similar remuneration or annuity contributions or associated payments, or entitlement to this pension or other similar remuneration or annuity, have been eligible for tax facilitation in that country.

Recent treaties concluded by the Netherlands with Japan and the United Kingdom include a similar provision; however, the UK treaty includes a higher threshold of EUR 25,000.[39]

15.1.6. Readmission clause immigrants

The MTTP also refers to a provision that seems rather out of place in the context of international taxation, but still plays a (minor) role in the Netherlands tax treaty policy: the readmission clause.[40] Such clause obliges the treaty partner to readmit immigrants that have immigrated to the Netherlands and exhausted legal procedures in the Netherlands but have not been awarded right to stay.

The MTTP states that the Netherlands seeks inclusion of a readmission clause in a tax treaty in case such a provision has not yet been agreed in a different context. This caused a certain uproar, however, within the Dutch tax advisors' lobby. The deputy-minister responded that the impact of the readmission clause on tax policy will be limited to nil, as the Netherlands has already successfully negotiated with more than 100 countries on such arrangements, outside tax treaty context.[41] This is confirmed by the fact that the readmission clause has not yet been included in a single tax treaty.

15.2. Observations, reservations and positions recorded in OECD Commentaries

15.2.1. Relevance of observations, reservations and positions recorded in OECD Commentaries for the purpose of applying tax treaties

15.2.1.1. Introduction

Before establishing the significance and legal nature of reservations and observations made by a country on the OECD Commentary, one must, in the author's opinion, consider the same for the OECD Model and its Commentary in that same country. After all, the OECD Model and Commentary are the legal premise of these observations. Findings brought to light by research on observations will therefore remain void when the legal status of the OECD Model and Commentary remains unexamined. However – and unfortunately – academic discussions on the legal status of the OECD Model seem to be a *perpetuum mobile* in international taxation, as these discussions have not yet ended in a definite answer on the question of what the legal nature of the OECD Model and Commentary actually is.[42]

These discussions on the legal status of the OECD Model and Commentary bear significant potentially practical impact in the Netherlands given the frequency Dutch courts refer to the OECD Model and Commentary. Peculiarly, despite this importance, Dutch courts have refrained from a legal analysis towards the legal status of the OECD Model. They have embraced the practical use of the OECD Model and Commentary without expressing their view on the legal nature of these instruments. The current consensus in Dutch case law consists of the OECD Model and Commentary being of "great significance". [43]

15.2.1.2. Observations vs reservations

A reservation indicates that an OECD member country does not agree with a certain provision in the

OECD Model and reserves the right not to include the concerned article in its tax treaties. For example, paragraph 51 of the Commentary on Article 13 of the OECD Model states that, "Belgium, Luxembourg, the Netherlands and Switzerland reserve the right not to include paragraph 4 in their conventions." However, such reservation is not absolute, as a final compromise in treaty negotiation may demand to include this provision.[44]

An observation indicates that a member country does agree with the OECD Model, but does not agree with the interpretation given in the OECD Commentary on a certain provision.[45] An observation therefore states how a treaty provision should be interpreted according to certain countries, whereas a reservation indicates how a state intends to draft its treaties. An observation therefore constitutes a unilateral interpretative statement by the state making the observation. The observation is thus of significance for tax treaty interpretation.

Such interpretative value cannot be granted to reservations. After all, in case a state indicates through a reservation that it intends not to include a certain provision, but does so in a specific treaty, then the reservation will lose its value other than that it only substantiates that the concerned state reluctantly incorporated that provision. Therefore, in the following, this report will only examine the interpretative value of observations.

Observations share the faith of the OECD Model and Commentary when it comes to their legal nature: it remains opaque. Observations, however, have proven to be of practical relevance in case law in the Netherlands. Take for example a case that dealt with the definition of "employer" in the (old) treaty between Germany and the Netherlands. In that case, the Court of Appeal judged that the Netherlands had refrained from making an observation at the relevant paragraphs of the OECD Commentary and therefore deemed the OECD Commentary applicable to this treaty. Consequently, the court interpreted the treaty definition of "employer" through the OECD Commentary. This judgment was later confirmed by the Supreme Court of the Netherlands.[46] Though an *argumentum a contrario* is generally not the strongest reasoning, this author would assume that the Supreme Court would have taken into account the observation by following its reasoning, in case the Netherlands would have made an observation with regard to the OECD Commentary.

15.2.1.3. Observations determinative for legal nature of OECD Commentary

It has been argued in literature that an observation can function as a characteristic to establish the legal nature from an international public law perspective of the OECD Commentary in specific cases. For example, Van Raad considered that the Commentary is agreed by OECD member countries, which have the opportunity of making an observation on its content.[47] It therefore seems reasonable that the OECD Commentary qualifies under article 31(2)(b) of the Vienna Convention on the Law of Treaties (VCLT). Article 31(2)(b) provides that "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" is considered as treaty context and, as such, should be taken into account as a legally binding instrument for treaty interpretation purposes, in case the concerned country is an OECD member country and did not make an observation.

Engelen found that international public law requires that when a state incorporates provisions of the OECD Model in a tax treaty but intends to deviate from their interpretations provided by the OECD Commentary, that state should express this through an observation on the OECD Commentary. In case that state refrains from such an observation, the OECD Commentary qualifies as "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and therefore as part of the treaty context under article 31(2)(a) of the VCLT.[48]

Wattel took the position that the OECD Commentary can qualify as part of the treaty context under article 31 of the VCLT, provided it concerns a tax treaty concluded by OECD member countries or non-members that took a "position", and which refrained from making an observation or reservation.[49]

A different view was taken by Ward, who found that the OECD Commentary does not qualify as a legally binding part of a treaty context as provided by article 31 of the VCLT, even when the concerned tax treaty is based on the OECD Model.[50] From that viewpoint, an observation has no impact on the legal nature of the OECD Commentary.

15.2.1.4. Treaty policy regarding observations and reservations in the Netherlands

The MTTP stresses the importance of the OECD Commentary for Dutch treaties based on the OECD Model, even when the treaty partner is not a member of the OECD.[51] For that purpose, the Memorandum refers to the aforementioned case of the Dutch Supreme Court in which the OECD Commentary was considered to be of "great significance" for the interpretation of tax treaties.[52] The MTTP notes that OECD member countries have the possibility to make observations and reservations to the OECD Model and Commentary. The Dutch policy consists of a reticent approach towards

observations and reservations, as the Netherlands believes that the strength of the OECD Model and Commentary is best preserved by limiting the amount of observations and reservations.[53]

15.2.1.5. Dynamic application of the Commentary and inter-temporal application of observations

The MTTP refers to the introduction of the Commentary on the OECD Model with regard to the dynamic application of the Commentary. In case the Commentary is amended, then tax treaties predating that amendment should be interpreted in accordance with the amended Commentary, i.e. the Commentary should be applied dynamically.[54] Dutch tax treaties can include a provision in the protocol that confirms this dynamic application of the OECD Model. This is also the case for treaties concluded with non-OECD members.[55]

In case such a provision is not included in the protocol, reference can be made to the MTTP in order to establish the Dutch position. With regard to the dynamic application of the OECD Model and Commentary, the MTTP distinguishes between three situations: (i) the amended Commentary clarifies the meaning of the OECD Model; (ii) the amended Commentary interprets the OECD Model differently than previous Commentaries and (iii) the Commentary is amended as a result of amendments in the OECD Model. With regard to (i), the deputy-minister confirmed the dynamic application of the OECD Commentary. This applies also in case the treaty partner is a non-member, to the extent that the treaty partner refrained from taking a position on the amended Commentary.[56] In case of situation (ii), it should be assessed on a case-by-case basis whether it is reasonable to apply the Commentary dynamically. Finally, with regard to (iii), the Netherlands' perspective is that the Commentary cannot be applied dynamically.

Therefore, according to the deputy-minister, the Commentary may only be unconditionally applied in a dynamic manner when the amended Commentary concerns a clarification. The Memorandum substantiates this point of view by referring to case law.[57] This reference, however, raised criticism as the Supreme Court in the referred case seems to attach less value to the amended Commentary than indicated in the Memorandum, since the Court regarded the Commentary merely as a supplementary means of interpretation under article 32 of the VCLT rather than as part of the treaty context under article 31 of the VCLT, as the Memorandum implicates.[58]'[59]

This discussion can even be of relevance for treaties that include a protocol indicating that the concerned treaty "shall be interpreted according to the OECD Commentary on these provisions at the moment of signing the Convention and to subsequent clarifying modifications of the OECD Commentary on these provisions." The wording of the protocol is clear: the treaty partners intend that the treaty is interpreted analogously to the OECD Commentary, in a limited dynamic way. However, such a protocol remains ambiguous with regard to the question whether the Commentary should be regarded as part of the treaty context or related content under article 31 of the VCLT, or as a supplementary means of interpretation under article 32, since the protocol does not expressively refer to these provisions. In the author's opinion, the wording of such a protocol indicates that the treaty partners had a more prominent position for the OECD Commentary in mind than as a supplementary means of interpretation. Article 31(4) of the VCLT provides that, "A special meaning shall be given to a term if it is established that the parties so intended." It can therefore be argued that the reference to the OECD Commentary qualifies as such a special meaning. However, a more thorough research in this matter is beyond the scope of this report.

The nature of the OECD Commentary with respect to its dynamic or static application is of equal importance to determine the inter-temporal nature of observations, meaning whether observations have impact for treaties predating that observation (or its elimination). In this respect, four situations relevant for tax treaty interpretation can be distinguished: (i) an observation is made in respect of a part of the Commentary at the same time that part is included in the Commentary; (ii) an observation is made in respect of a part of the Commentary that already existed; (iii) an observation is dropped while the part of the Commentary in respect of which the observation was made is still included in the OECD Commentary and (iv) both the observation and its relating part of the Commentary have been eliminated from the Commentary. All the observations made by the Netherlands qualify under (i) and the author has not encountered any observations qualifying under (iii) and (iv).

As observations are included in the Commentary, the assessment that should be made whether the (eliminated) observation has inter-temporal effect requires the same assessment that should be made for determining the dynamic application of the Commentary. This would mean that according to the Deputy-Minister of Finance, an observation insofar as it concerns a clarification will have inter-temporal effect. However, since all observations of the Netherlands were made synchronously with the amendments in the Commentary that they target, this discussion has no practical relevance. After all, these observations merely intend to eliminate amendments in the Commentary and therefore conserve the Commentary as it was before the amendments.

15.2.2. Observations and reservations made by the Netherlands

15.2.2.1. Articles 1 and 23A/B: Application of the OECD Partnership Report

In 1999, the OECD released a report titled *The Application of the OECD Model Tax Convention to Partnerships* (Partnership Report). The Partnership Report deals with the qualification of partnerships for treaty purposes and allocation of income and qualification conflicts.[60] A qualification conflict arises if the source and residence states apply different treaty provisions as a result of the reference to domestic law in article 3(2) of the OECD Model.[61]

The Partnership Report found that without further guidance, the issues identified above could give rise to both double taxation and double non-taxation. The OECD provided the guidance it deemed necessary through two principles, which are roughly the following: (i) the decisive qualification of a partnership is that of the state from which the treaty is invoked and (ii) in case of a qualification conflict, the qualification of the source state is decisive. These principles were subsequently incorporated in the OECD Commentary, the first in paragraph 2 et seq. of the Commentary on Article 1 and the latter in paragraph 32.1 et seq. of the Commentary on Article 23A/B of the OECD Model (2010).

The Netherlands made an observation on both paragraphs in the Commentary. The observation on article 1 provides that the Netherlands will adhere to the conclusions of the Partnership Report that have been incorporated in the Commentary on Article 1 only and to the extent that, (i) it is explicitly implemented in a tax treaty, (ii) it results from a mutual agreement procedure or (iii) it is laid down in a domestic policy statement.

The observation on article 23 states that the Netherlands is in principle in favour of resolving situations of both double taxation and double non-taxation due to conflicts of qualification between contracting states, as these situations are contrary to the object and purpose of a tax treaty. However, the Netherlands does not agree with the interpretation given in paragraphs 32.4 and 32.6 of the Commentary on Articles 23A and 23B to the phrase “in accordance with the provisions of this Convention” in article 23. The Netherlands finds that the OECD’s interpretation overstretches the wording of article 23. Therefore, the Netherlands will adhere to the OECD interpretation only and to the extent that, (i) it is explicitly implemented in a tax treaty, (ii) it results from mutual agreement procedure or (iii) it is laid down in a domestic policy statement.[62]

Currently, there are no treaties in which the Netherlands has implemented the OECD’s interpretation on article 23; neither does there exist a domestic policy statement. The approach with regard to the treatment in partnerships is followed in recent treaties.[63] The parliamentary report on the amending protocol of the treaty with the United States (8 March 2004) seems to moderate the observation, by stating that the Netherlands does in fact support the findings of the Partnership Report. However, according to the Deputy-Minister of Finance, Dutch case law does not allow for fundamental changes to the OECD Commentary.[64] However, in the MTTP, the observation and its rationale were again reaffirmed.[65]

These observations have raised academic discussion. It can be argued that the OECD’s interpretation of the phrase “which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State” in article 23 is in line with the international public law effectiveness principle, which is included in article 31 of the VCLT.[66] The effectiveness principle provides that in case a treaty provision is open to two different interpretations whereby the first allows for effective application of the treaty’s object and purpose and the second does not make such effective application possible, then the first interpretation should be followed.[67]

In case the Netherlands would persist in its interpretation of article 23, then double taxation could arise that otherwise would have been avoided if the OECD’s interpretation was followed. Given the fact that the object and purpose of a tax treaty consists of avoiding double (non-)taxation,[68] the Netherlands’ observation would lead to a result contrary to that object and purpose. Therefore, the principle of effectiveness demands that the OECD’s interpretation is given precedence.[69]

The Supreme Court has followed the line of the Dutch observation in its judgment of 1 March 2002, meaning that the Netherlands, as residence state, refrains from following the qualification of the source state, although the Court did not in fact refer to the Dutch observation.[70] The case concerned a fisherman, resident of the Netherlands, who worked on a ship under Belgian flag. The Dutch tax authorities qualified its income as business profit, taxable in the Netherlands due to the absence of a PE. The Belgian tax authorities, however, deemed the income to constitute employment income; such income would be taxable in Belgium under article 17 of the treaty.[71]

The Supreme Court considered that the treaty did not define “employment” and therefore should be given its meaning under Netherlands domestic law, independent from its meaning under the law of the source state (Belgium). Subsequently, the Court considered the facts and circumstances in the light of Dutch law

and found that the relationship between the fisherman and the company owning the ship did not qualify as an employment contract. The Court confirmed the assumption of the Dutch tax authorities and considered the fisherman's income as business profits, taxable in the Netherlands. This finding was contrary to the finding of Belgium and double taxation arose. This double taxation would have been eliminated in case the OECD's interpretation of article 23 was followed, rather than the line of the Dutch observation.[72]

15.2.2.2. Article 1: Domestic anti-avoidance rules

Paragraph 7 et seq. of the Commentary on Article 1 deals with treaty abuse. More specifically, paragraph 22 et seq. concerns the application of domestic anti-abuse provisions. The Commentary considers that domestic anti-abuse provisions do not conflict with the provisions of tax treaties.

The Netherlands has made an observation with regard to these paragraphs:

> 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. The compatibility of such rules and provisions with tax treaties is, among other things, dependent on the nature and wording of the specific provisions, the wording and purpose of the relevant treaty provision and the relationship between domestic and international law in a country. 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 unintended use. In such situations the application of domestic measures has to respect the principle of proportionality and should not go beyond what is necessary to prevent the abuse or the clearly unintended use.[73]

The observation is effectively applied by the Netherlands in treaty negotiations. In that respect, reference can be made to the treaty with Germany. While a final compromise was reached by including a mitigated reference to German anti-abuse legislation, the Netherlands endeavoured to maintain its observation. According to the explanatory note on the treaty, the Netherlands opposed the desired inclusion of an anti-abuse provision by Germany with a general reference to German domestic law. The Netherlands had indicated to agree that treaty abuse must be prevented, but had concerns regarding the scope of such a general provision. After all, a general anti-avoidance clause bears the risk of overkill. In that respect the Netherlands referred to its observation on article 1.[74]

15.2.2.3. Article 13: Capital gains on real estate investment entities

Since 2003, the current paragraph 4 has been included in article 13 of the OECD Model. This provision grants right to tax to the source state, in respect of capital gains from the alienation of shares that directly or indirectly derive more than 50% of their value from immovable property situated in the source state. Paragraph 4 entails to align the tax treatment of shares in legal entities whose assets predominantly consist of real estate with the tax treatment of actual real estate under article 13(1) of the OECD Model.

The Netherlands has made a reservation to this paragraph 4.[75] The Netherlands wants to retain as much as possible to the general rule that the right to levy capital gains tax from the alienation of shares is assigned to the residence state, regardless of the nature of the assets of the company.[76] This reservation, however, is not absolute. This is demonstrated by the tax treaties that the Netherlands has concluded with the United Kingdom (2008), Switzerland (2010), Hong Kong (2010), Japan (2010), Panama (2010) and Germany (2012).

Such is also confirmed by the MTTP, according to which, the Netherlands is willing to consider including paragraph 4 in the context of a final compromise. However, in that case, the effect of paragraph 4 should be mitigated by including, for example, a higher percentage than 50%. Furthermore, the Netherlands aims to incorporate an exemption for shares in listed companies, portfolio shareholdings, industrial property interests held by pension funds and capital gains realized as a result of group restructuring.

The Dutch observation received agreement in academic discussions,[77] though this does not necessarily relate to its justification, i.e. the intention to retain the general rule. Albert found that article 13(4) raises interpretative issues that may give rise to double non-taxation; especially the inclusion of indirectly held real estate may cause such interpretative issues. Treaty partners may have different interpretations on this indirect real estate, since the OECD Commentary does not provide guidance in this matter.[78]

15.2.2.4. Article 19: Apportionment of pension payments

Article 18 of the OECD Model allocates taxing right with regard to pensions to the residence state. Notwithstanding this allocation under article 18, taxing rights over pension benefits accrued in government service are allocated under article 19 to the state which pays the pension.

Practical difficulties may arise in case the employee worked both in private and public sectors. Such a situation may exist in case (i) pension rights are transferred from a public scheme to a private scheme and

(ii) vice versa. As of 2005, the OECD Commentary addresses these situations. Paragraph 5.4 provides that in case of scenario (i), the pension payments are taxable only under article 18 of the OECD Model. In situation (ii), practical difficulties may arise, according to paragraph 5.5. Some countries may intend to tax the pension payments under article 19, although other countries may allocate the pension payments to both article 18 and 19, based on the source of the pension entitlements.

As already discussed in section 15.2.1., the Netherlands intends to incorporate source-state taxation for pension payments in article 19 as part of its general tax treaty policy. From that perspective, apportioning pension payments between articles 18 and 19 would be of little practical use, as both articles provide for source-state taxation. However, as part of a final compromise, it may occur that intended source-state taxation under article 18 may not be realized in a specific treaty or only in a limited way.[79] With regard to these treaties, the Netherlands made an observation on paragraphs 5.4 and 5.5 of the Commentary on Article 19.[80]

This observation states that the Netherlands does not adhere to the statements in paragraphs 5.4 and 5.5. According to the Netherlands, apportionment of pension payments on the basis of the relative source of the pension entitlements, private or government employment, is also possible if pension rights are transformed from a public pension scheme to a private scheme.[81]

This observation can be explained by Dutch case law, more specifically the famous *PTT* case.[82] The *PTT* case dealt with lump-sum pension payments made by a Dutch telecom provider, PTT (currently KPN) in 1991 to two German residents. PTT was a government enterprise until its privatization in 1989. Therefore, the lump-sum payments accrued during both private-sector and government service. The Supreme Court dealt with the question whether article 12(1) (comparable to article 18 of the OECD Model) or article 12(2) (comparable to article 19 of the OECD Model) of the former German-Netherlands treaty was applicable. Consequently, the Court had to interpret the phrase “paid by a Contracting State”.

Its interpretation was the following. Applicability of article 12(2) of the Convention requires that the state or a public corporation or institution “pays” the pension. That requirement is fulfilled to the extent that pensions accrued at PTT. Usually, a government pension will also be paid by a government body, but if that is not the case – as here – it comes down to where the pension entitlements accrued. The Supreme Court therefore interpreted “paid by” as a reference to the accrual phase of the pension entitlements. In that way, the Supreme Court overruled the Court of Appeal, which regarded the time of payment determinative and not the accrual phase. The *PTT* case is confirmed by later case law.[83]

In the MTTP and a recent letter to the Dutch parliament, the Deputy-Minister of Finance confirmed that the line of the Supreme Court described above is applicable on the distinction that should be made between private pensions and public pensions under Dutch tax law.[84] In that letter, the deputy-minister considered that treaty partners may adopt a different interpretation than the Netherlands, analogously to paragraphs 5.4 and 5.5 of the Commentary. Therefore, the Netherlands aims to address this matter in a treaty, often as part of the treaty protocol. Such a provision confirms that in case of pension entitlements that accrued partly during private employment and partly during government service, these should be divided in proportion to the number of years during which the total pension entitlement in the public respectively private employment is accrued.[85] For example, the treaties with Albania, Georgia, the new treaty with Germany, Portugal and Poland contain such a provision.

15.3. Impact of EU law on Dutch tax treaties

15.3.1. Introduction

According to case law of the European Court of Justice (ECJ), EU Member States have the exclusive authority to conclude tax treaties.[86] Consequently, EU Member States are free to determine the factors for the allocation of taxing rights in tax treaties. However, in exercising this authority, Member States must take EU law into account.[87] Thus, tax treaties concluded by EU Member States must be in accordance with EU law.[88] Consequently, elements in tax treaties that violate EU law are non-applicable.[89] This particularly concerns discriminatory treatment between residents of a contracting state that is also an EU Member State and those of an EU Member State that is not a contracting state to the treaty.

It may be difficult to establish a discriminatory treatment under a tax treaty. A certain measure in a tax treaty may prima facie appear to have discriminatory impact. This, however, does not necessarily imply that the concerned measure is in fact a discrimination prohibited under the EU Treaty. Reference can be made to the *D* case (Case C-376/03) and the *Test Claimants in Class IV of the ACT Group Litigation* case (Case C-374/04). In the latter, the ECJ considered that:

> The fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows, as regards the taxation of dividends paid by a company resident in the United Kingdom, that a company resident in a Member State which has concluded a DTC with

the United Kingdom which does not provide for such a tax credit is not in the same situation as a company resident in a Member State which has concluded a DTC which does provide for one.

Given the fact that EU Member States are authorized to conclude tax treaties and that difficulties may arise when establishing a violation of EU law under a tax treaty, the direct impact of EU law on tax treaties seems limited. This is also expressed by the Deputy-Minister of Finance in the MTTP.[90] Yet, EU law cannot be denied any practical relevance, as is discussed below.

15.3.2. Triangular cases

In *Saint-Gobain* (Case C-307/97), the ECJ ruled that an EU Member State must grant a PE of a national of another Member State the same treatment as it grants to resident companies, provided that both are objectively comparable, the so-called right of secondary establishment; e. g. the case where interest, dividends or royalties arising in a non-EU Member State are attributable to a Dutch PE of another EU Member State. This has impact on tax treaties that EU Member States conclude with third countries, as an EU Member State must grant treaty access to the PEs of a company that is resident in another EU Member State.[91]

The Deputy-Minister of Finance acknowledged that these triangular cases can lead to uncertainties. Therefore, the Netherlands endeavours to include a provision in the protocol in its tax treaties that clarifies the application of the tax treaty in such a triangular case.[92]

15.3.3. Withholding taxes

The EU Parent-Subsidiary Directive and the Interest and Royalties Directive aim to abolish withholding taxes on qualifying capital payments between EU Member States. These provisions are generally more favourable than tax treaties provide for. This particularly concerns tax treaties between EU Member States that are concluded before these directives or before the amendments in the Parent-Subsidiary Directive. This means that the concerned treaty provisions generally lack practical relevance, as taxpayers will invoke the more favourable EU directives.

Furthermore, the ECJ determined that that a source state should ensure that taxation of capital payments paid to non-residents, who may rely on the EU Treaty, should not be higher than the taxation which residents of that source state are confronted with.[93] For example, in case a domestic shareholder is rewarded an exemption with regard to payments on his shares, this exemption must also apply to a shareholder that is resident in a different EU Member State and that finds himself in comparable circumstances.[94] Consequently, the Netherlands is restricted in the execution of taxing rights that may have been awarded under a tax treaty.[95]

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1. International Tax Policy Advisor, Ministry of Finance, the Netherlands; PhD Fellow, VU University Amsterdam, research thesis, *Tax Aspects of Bilateral Investment Treaties*. This report was written under a personal title.
2. *See* http://www.volkskrant.nl/vk/nl/2680/Economie/article/detail/3130161/2012/01/20/Nederland-grootste-exporteur-agrarische-producten-na-de-VS.dhtml.
3. CBS, infographic “Nederland Handelsland” (2 Nov. 2012).
4. Ministry of Finance, Memorandum on Dutch Tax Treaty Policy 2011, Summary, p. 1.
5. *OECD Income and Capital Model Convention and Commentary (2010)*: *Commentary on Article 4* para. 8.6 (22 July 2010), Models IBFD.
6. Para. 8.7 *OECD Model: Commentary on Article 4* (2010). *See also* F.P.G. Pötgens, *Verdragstoegang en inwonerschap in de Notitie Fiscaal Verdragsbeleid 2011*, Weekblad voor Fiscaal Recht, 2011/532 and Ministry of Finance, *supra* n. 4, at 31.
7. Ministry of Finance, id., at 32.
8. NL: Corporate Income Tax Act 1969, art. 2(1)(e).
9. A.C.G.A.C. de Graaf and F.P.G. Pötgens, *Verontrustende Hoge Raaduitleg verdragsbegrip “inwoner”*, Weekblad voor Fiscaal Recht, 2010/266.
10. NL: HR (Supreme Court), 4 Dec. 2009, 07/10383, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak* 2010/177, annotated by S. van Weeghel, Tax Treaty Case Law IBFD.
11. Noteworthy is that the US interpretation of article 4 seems to grant less importance to the reference to the exempt entities than the Dutch Supreme Court. The Technical Explanation of the

US Treasury Department provides that: "Paragraph 1 clarifies that certain non-taxable entities, even though not liable to tax in a State, are nevertheless to be treated as residents of a State if so treated under the laws of that State. The entities referred to are exempt pension trusts dealt with in Article 35 (Exempt pension trusts), and exempt organizations dealt with in Article 36 (Exempt organizations). Even in the absence of this explicit reference, such organizations should be considered residents of their State of organization under the general rule because they are subject to the taxation laws of that State. It was deemed useful, however, to include this clarification due to the fact that these entities generally do not incur liability to pay taxes. This list is not exhaustive: additional entities that qualify as residents of a State under the tax laws of that State and that are exempt from tax in that State (e.g., by virtue of being government-owned or operated for public purposes) also may be considered residents under Article 4 despite the fact that they are not described in Articles 35 or 36." *See also* the annotation of Van Weeghel, *supra* n. 10.

12. NL: HR, 28 Feb. 2001, 35 557, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak* 2001/295; C. van Raad, T. Bender & S.C.W. Douma, *De Hoge Raad* op een *drielandenpunt*, Weekblad Fiscaal Recht, 2001/535; De Graaf & Pötgens, *supra* n. 9.

13. Ministry of Finance, *supra* n. 4, at 31.

14. M.J. Ellis, *Nieuwe dimensies in verdragstoepassing?*, Nederlands Tijdschrift voor Fiscaal Recht, 2002/434; De Graaf & Pötgens, *supra* n. 9 and H. Pijl, *Art. 2.6 Wet IB 2001 en inwonerschap voor verdragen*, Weekblad Fiscaal Recht 2003/317.

15. *See also* H. Pijl, *Inwonerschap, de KLM en het Verdrag Nederland-Duitsland (2012)*, Nederlands Tijdschrift voor Fiscaal Recht, 2002/1474.

16. Ministry of Finance, *supra* n. 4, at 32.

17. J.R.W. Sinninghe, *Spokerijen in Amsterdam en Amstelland* pp. 8-11 (Zaltbommel 1975).

18. *See* http://www.geschiedenis24.nl/nieuws/2010/juli/Twintig-jaar-luchtvaart-in-Nederland.html.

19. Art. 8(1) *OECD Model* (2010).

20. The merger depended on the protocol to the *France-Netherlands Treaty* mentioned above.

21. E.g. *Netherlands-Ethiopia Treaty*, *Netherlands-Germany Treaty* and *Netherlands-Qatar Treaty*.

22. *See* http://vorige.nrc.nl/economie/article2270586.ece/Gasbaten_Slochteren_uitgegeven_aan_sociale_zorg.

23. The term "Dutch disease" was coined by *The Economist* in 1977: *see* "The Dutch Disease", *The Economist*, pp. 82-83 (26 Nov. 1977).

24. *See* http://vorige.nrc.nl/economie/article2270586.ece/Gasbaten_Slochteren_uitgegeven_aan_sociale_zorg.

25. Art. 2(3)(d)(2), *Algemene Wet inzake Rijksbelastingen 1969*. *See also* H. Pijl, *De fictieve vaste inrichting buitengaats*, Weekblad Fiscaal Recht, 2002/1471; L.N.J. van der Loo, *Nadere omschrijving van het begrip vaste inrichting*, Weekblad Fiscaal Recht, 1990/551 and Ministry of Finance, *supra* n. 4, at 40.

26. Art. 7.4, *Wet op de inkomstenbelasting* and art. 17a, *Wet op de vennootschapsbelasting 1969*.

27. Pijl, *supra* n. 25.

28. Ministry of Finance, *supra* n. 4, at 41.

29. Income from offshore activities that are not related to the extraction and exploration of natural resources are taxed under the general PE rules.

30. Ministry of Finance, *supra* n. 4, at 41.

31. Art. 23(3) *Netherlands-UK Treaty*.

32. Art. 5(4) and (6) *Germany-Netherlands Treaty*.

33. *See* http://www.volkskrant.nl/vk/nl/2664/Nieuws/article/detail/3521243/2013/10/04/Henk-Krol-stapt-op-mijn-vijanden-hebben-gewonnen.dhtml.

34. *See* http://www.mercer.nl/articles/global-pension-index-2013-van-mercer.

35. Ministry of Finance, *supra* n. 4, at 54.

36. Id.

37. Parliamentary notes, II 2010/11, 25 087, no. 17 (Groot, PvdA).

38. Art. 17(2) *Germany-Netherlands Treaty*.

39. Art. 17(2) *Netherlands-UK Treaty*.

40. The policy of including readmission clauses originated in 2003; *see* parliamentary notes II 2003/04, 29 344, no. 20.

41. Vakstudie Nieuws Vandaag, *Reactie op vragen en commentaar NOB over Notitie Fiscaal Verdragsbeleid 2011*, 2011/1725.

42. F. Engelen, *Interpretation of Tax Treaties under International Law* sec. 10.9., Online Books IBFD; P. Wattel & O. Marres, *The Legal Status of the OECD Commentary and the Question of Static or Ambulatory Interpretation of Tax Treaties*, 43 Eur. Taxn. 7, p. 224 (2003), Journals IBFD; O. Marres, *Statische of dynamische interpretatie van belastingverdragen?*, in *WB der Nederlanden; 25 jaar wetenschappelijk bureau van de Hoge Raad* pp. 259-260 (Wolf Legal Publishers (WLP) 2003); L.J. de Heer, *Verdragsinterpretatie*, *NDFR fiscal encyclopedia*.

43. NL: HR, 2 Sept. 1992, 27.252, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak*, 1992/379.

44. E.g. the *Netherlands-UK Treaty* contains a provision as art. 13(4) *OECD Model*.

45. M. Lang & F. Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, 23 Australian Tax Forum, p. 95 et seq. (2008) and para. 30, Introduction, *OECD Model* (2010).

46. NL: HR, 1 Dec. 2006, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak* 2007/78. *See also* NL: Court of Appeal of The Hague, 27 Mar. 2001, FED 2001/472.

47. C. van Raad, *Interpretatie van belastingverdragen*, Maandblad Belastingbeschouwingen, 1978/49.

48. F. Engelen, *Fiscaal verdragsbeleid en het OESO-modelverdrag*, Weekblad Fiscaal Recht, 2011/548; F.A. Engelen, *Over waarden en normen. Het beginsel van de goede trouw in het (fiscale) verdragenrecht* p. 39 et seq. (Deventer, Kluwer 2006).

49. Opinion of Advocate-General Wattel, 11 Dec. 2002, no. 37024, *Vakstudie Nieuws*, 2003/5.6.

50. D.A. Ward, *Is There an Obligation in International Law of OECD Member Countries to Follow the Commentaries on the Model?*, in S. Douma et al., *The Legal Status of the OECD Commentaries* (S. Douma et al. eds., IBFD 2008), Online Books IBFD.

51. Ministry of Finance, *supra* n. 4, at 23.

52. *Supra* n. 43.

53. Ministry of Finance, *supra* n. 4, at 23; F. Pötgens, *Position Paper: Ronde Tafelgesprek inzake de Nota Verdragsbeleid 2011*, 1 June 2011 (*Commissie Financiën van de Tweede Kamer der Staten-Generaal*), p. 4.

54. Ministry of Finance, *supra* n. 4, at 24; Introduction, *OECD Model: Commentary* (2010); Voorstel van Wet inzake bestrijding dividendstrippen en fiscale behandeling van het toekennen van werknemersopties, Parliamentary notes, I 2001/02, 27 896 and 28 246, no. 117B.

55. For example, Annex IV of the *Bahrain-Netherlands Treaty* provides that: “It is understood that the provisions of the Convention which are the same or substantially the same as the corresponding provisions of the OECD Model Tax Convention on Income and on Capital, shall be interpreted according to the OECD Commentary on these provisions at the moment of signing the Convention and to subsequent clarifying modifications of the OECD Commentary on these provisions. The understanding in the preceding sentence shall not apply with respect to any contrary interpretation agreed to in this Protocol, to contrary interpretation agreed to by the competent authorities after the entry into force of the Convention or to reservations or observations to the OECD Model Tax Convention or OECD Commentary by either Contracting State.”

56. *See also* Engelen, *Fiscaal verdragsbeleid en het OESO-modelverdrag*, *supra* n. 48.

57. NL: HR, 21 Feb. 2003, 31.011, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak* 2003/177 & 178 c.

58. Engelen, *Fiscaal verdragsbeleid en het OESO-modelverdrag*, *supra* n. 48 and F.P.G. Pötgens &

M. Jakobsen, *Het OESO-commentaar betreffende werknemersopties: hinken op twee gedachten!*, Weekblad Fiscaal Recht 2008/6792.

59. Furthermore, the Supreme Court adopted static interpretation in previous case law: NL: HR, 2 Sept. 1992, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak* 1992/379 and NL: HR, 28 June 1995, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak* 1996/108c.

60. OECD Committee on Fiscal Affairs, *The Application of the OECD Model Tax Convention to Partnerships* – Report adopted on 20 January 1999 (OECD 1999), International Organizations' Documentation IBFD.

61. Para. 32.3 *OECD Model: Commentary on Article 23* (2010). *See* P.G. Pötgens & L.J. de Heer, *The International Public Law Effectiveness Principle and Qualification Conflicts from a Dutch Perspective*, Intertax 1, pp. 54-62 (2012); K. Vogel, *Conflicts of Qualification: The Discussion Is Not Finished*, 57 Bull. Intl. Taxn. 2, p. 41 et seq. (2003), Journals IBFD; A. Rust, *The New Approach to Qualification Conflicts Has Its Limits*, 57 Bull. Intl. Taxn. 2, p. 45 et seq. (2003), Journals IBFD; J. Sasseville, *Klaus Vogel Lecture – Tax Treaties and Schrödinger's Cat*, 63 Bull. Intl. Taxn. 2, p. 46, sec. 3 (2009), Journals IBFD.

62. Paras. 6.3 and 6.4 *OECD Model: Commentary on Article 1* (2010).

63. E.g. art. 1, protocol, *Netherlands-Switzerland Treaty*.

64. Further Additional Report, Parliamentary Documents I 2004/2005, no. 29 632(C).

65. Ministry of Finance, *supra* n. 4, at 35.

66. Pötgens & De Heer, *supra* n. 61 and L.J. de Heer, *IBO-arbitrage als muze voor vervolledigen rechtsbescherming onder Nederlandse belastingverdragen*, in *Aanbevelingen ter verbetering van het vestigingsklimaat voor ondernemingen. Tribuut aan Jaap Bellingwout* (ZIFO-reeks nr. 6) pp. 79-87 (G.F. Boulogne & L.J.A. Pieterse eds., Deventer, Kluwer 2012).

67. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, British Yearbook of International Law 26 (1949) p.48 (Oxford, Oxford University Press 1949); H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, British Yearbook of International Law 28 (1951) p. 19 (Oxford, Oxford University Press 1951); ICJ, 3 Feb. 1994, *Territorial Dispute (Libyan Arab Jamahiriyaichad v. Chad)* and Engelen, *supra* n. 42, at 505.

68. Para. 3, Introduction, *OECD Model* (2010).

69. Pötgens & De Heer, *supra* n. 61 and Engelen, *supra* n. 42, at 505.

70. NL: HR, 1 Mar. 2002, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak* 2002/153.

71. It concerned the former *Belgium-Netherlands Treaty* (1970). Article 17 of that treaty was comparable to article 15 of the *OECD Model*.

72. 2002/153 (1 Mar. 2002) and Pötgens & De Heer, *supra* n. 61.

73. Para. 27.7 *OECD Model: Commentary on Article 1* (2010).

74. Explanatory note, *Germany-Netherlands Treaty* (12 Apr. 2012), p. 4.

75. Para. 70 *OECD Model: Commentary on Article 13* (2010).

76. Ministry of Finance, *supra* n. 4, at 49.

77. R. Brandsma, *Toewijzing van heffingsrechten inzake vermogenswinsten volgens het nieuwe Nederlandse verdragsbeleid*, Maandblad Belastingbeschouwingen, p. 165 (2011).

78. P. Albert, *Verdragstoepassing van vervreemdingswinst op aandelen in een onroerendezaakvennootschap*, Weekblad Fiscaal Recht, 2013/296.

79. Ministry of Finance, *supra* n. 4, at 55.

80. Para. 7 *OECD Model: Commentary on Article 19* (2010).

81. Id.

82. NL: HR, 23 Nov. 1994, 29935, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak* 1995/117.

83. NL: HR, 5 Dec. 2008, 43 722, *Beslissingen*, in *Belastingzaken, Nederlandse Belastingrechtspraak*

2009/199; m.nt. Van Weeghel; Vakstudie Nieuws 2008/59.12.

84. Ministry of Finance, *supra* n. 4, at 55 and Letter of 14 March 2012, IFZ/2012/0153 U.

85. Letter of 14 March 2012, id.

86. FR: ECJ, 12 May 1998, Case C-336/96, *Gilly v. Directeur des services fiscaux du Bas-Rhin*, ECJ Case Law IBFD; NL: ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, ECJ Case Law IBFD; and UK: ECJ, 12 Dec. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue*, ECJ Case Law IBFD.

87. UK: ECJ, 16 July 1998, Case C-264/96, *Imperial Chemical Industries (ICI) v. Kenneth Hall Colmer*, ECJ Case Law IBFD.

88. F.P.G. Pötgens, *De kernwaarden van het het fiscale verdragsbeleid*, Maandblad Belastingbeschouwingen 2 (Feb. 2013).

89. Id.

90. Ministry of Finance, *supra* n. 4, at 28.

91. DE: ECJ, 21 Sep. 1999, Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, ECJ Case Law IBFD; Ministry of Finance, *supra* n. 4, at 28.

92. Id. Ministry of Finance.

93. *D* (C-376/03).

94. Ministry of Finance, *supra* n. 4, at 29.

95. Id. at 27.

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