

The Dutch Supreme Court Reaffirms and Clarifies 'de facto employer' under Article 15 of the OECD Model

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1. Introduction

This article discusses six decisions of the Dutch Supreme Court of 1 December 2006, *BNB 2007/75-79* and *V-N 2006/65.9*.¹ In these decisions the Supreme Court confirmed that the expression 'employer' should be given a substantive meaning and further, clarified the scope of this meaning for the purposes of Dutch tax treaties patterned on Art. 15 of the OECD Model. 'Employer' is one of the elements of Art. 15(2)(b) relevant in determining whether the work state may tax the salary attributable to the employment exercised in that state; the taxation right is allocated to the work state if the salary is paid by, or on behalf of an employer residing in the work state. As a result, the explanation and interpretation of 'employer' (Art. 15(2)(b) of the OECD Model) are important for cross-border secondments of employees. The Supreme Court followed a substantive approach of 'employer', having as a consequence that the receiving company is regarded as employer in more situations, at least compared with the formal interpretation of employer previously used by the Dutch tax authorities.

2. Facts

The facts of the cases were clear-cut. The employees were residing in the Netherlands. They had a formal employment contract with a Dutch resident company (formal employer) assigning them to perform activities on behalf of group companies (affiliated companies) established in various 'work states': namely Denmark, Belgium, and Germany. The employees' presence in the work states did not exceed 183 days during the relevant reference periods mentioned in Art. 15(2)(a) of the former 1970 Belgium-Netherlands Tax Treaty, Art. 10(2)(1) of the 1959 Germany-Netherlands Tax Treaty and Art. 14(a) of the former 1957 Denmark-Netherlands Tax Treaty.

The salary costs of the seconded employees were borne by the receiving group companies residing in the various work states. However, the manner of recharging these salary costs differed per case: the Dutch

company recharged upfront agreed fixed amounts per assignment day to the Danish companies, i.e. the average salary costs were calculated per day as they were also invoiced to external clients hiring-in labour (*BNB 2007/75* and *BNB 2007/76*); the Belgian company paid the salary to the seconded employee via the assigning Dutch company (*BNB 2007/77*); in two cases the assigning Dutch companies paid the salaries to the seconded employees referring to their services rendered in Germany but the Dutch companies recharged the salary costs to the receiving German companies in proportion to the hours these employees worked on the projects of the German companies in Germany (*BNB 2007/78* and *V-N 2006/65.9*); in another case the Dutch assigning company invoiced the Germany company for the costs calculated on the basis of upfront agreed fixed amounts. The amounts were composed of the average salary costs calculated per day and, depending on the category to which the employee in question belonged, that were also invoiced to third parties (*BNB 2007/79*).

However, the case involving the secondment to Belgium (*BNB 2007/77*) contained an additional element not present in the other cases: the seconded employee was also a director of the Belgian company. He did not receive a fee as consideration for the duties he performed as a director on behalf of the Belgian company.

3. Disputes

The employees in question argued that they were entitled to relief for double taxation pursuant to the relevant tax treaties regarding salary attributable to services rendered in the work states. The receiving companies were to be regarded as de facto employers – in addition to the formal Dutch employers – within the meaning of the income from employment provisions of the tax treaties at issue, in which connection the salary was deemed to be paid on behalf of these receiving companies. As a result, the conditions comparable or similar to Art. 15(2)(b) of the OECD Model included in the tax treaties in question, were not satisfied and the taxation right on the proportionate part of the

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¹ The author previously discussed these decisions in the Dutch language: 'Hoge Raad bevestigt en verduidelijkt het materiële werkgeverschap onder de belastingverdragen', *WFR* 2007, pp. 375–383.

employees' salaries was assigned to the work states. The Netherlands was to provide relief from double taxation by way of the exemption method for these salaries.

The Dutch tax authorities disagreed with the employees' point of view. They were of the opinion that the formal employer is decisive for the purposes of Art. 15(2)(b) of the OECD Model, rather than the de facto employer (compare also the resolution of the Dutch State Secretary of Finance of 10 March 2004, *BNB 2004/235*²). In response to the decision of the Dutch Supreme Court of 28 February 2003 (*BNB 2004/138*, also see below) a substantive interpretation of employer was only accepted under Dutch tax treaties in rather traditional situations of international hiring-out of labour, i.e. agency (state A) puts an employee, also residing in state A, at the disposal of a user residing in the Netherlands. *BNB 2004/235* distinguished the international hiring-out of labour from cross-border secondments within a group of companies. The State Secretary continued to apply a formal explanation of employer to intra-group secondments, which was also the case in the Court's decisions of 1 December 2006. Consequently, the tax authorities argued that the receiving group companies residing in the work states were not to be seen as employers resulting in the fulfilment of Art. 15(2)(b) of the tax treaties that were patterned on the OECD Model. This view of the tax authorities resulted in the Netherlands having the exclusive right to tax the entire salaries in which context the tax authorities refused to provide relief for the elimination of double taxation.

In *BNB 2007/77* the taxpayer argued that the salary costs that were borne by the Belgian company were taxable in Belgium because these costs should be classified entirely under Art. 16 of the former 1970 Belgium-Netherlands Tax Treaty designed on Art. 16 of the OECD Model (directors' fees). This point of view was based upon using the 'attraction principle', as it existed under Belgian law, at a tax treaty level (see also 8 below). This 'attraction principle' provides that all remuneration a director receives from a company resident in Belgium must be regarded as directors' fees despite the fact that the director performed activities on behalf of that company in his capacity as an employee. The Dutch tax authorities reversed this point of view.

4. Decisions

The Supreme Court held in all six cases that the receiving company could be regarded as an employer in addition to the assigning company (formal employer), provided that the following elements can be imposed on the receiving company:

- (a) a relationship of subordination, implying that the receiving company has an authority to instruct the seconded employee in rendering his services, in which connection the employee is obliged to follow these instructions and to carry out the assignments given by that company;
- (b) the receiving company bears the costs of the services rendered by the seconded employee and the advantages of activities performed by the employee and the disadvantages and risks resulting from these activities are for the account of the receiving company;
- (c) the receiving company bears the responsibility for the results of the services rendered by the seconded employee; and
- (d) the assigning Dutch company recharges the salary of the seconded employee to the receiving company in an individually identifiable manner.

If the receiving company meets these requirements, that company is considered an employer, resulting in the work state having the authority to tax the part of the salary that is attributable to the activities performed in that state.

5. An analysis of the decisions of the Supreme Court

A. The master/servant relationship – *BNB 2004/138*

The Supreme Court referred in *BNB 2007/75-79* and in *V-N 2006/65.9* to its decisions of 28 February 2003, *BNB 2004/138* and of 12 October 2001, *BNB 2002/65*. In *BNB 2004/138* and *BNB 2002/65* the Supreme Court cited a substantive interpretation of employer under Art. 15 of the Dutch tax treaties patterned on the OECD Model. *BNB 2004/138* indicated that an employer is a person under whose authority the employee performs his activities. The Court did not give a more detailed explanation of the elements that were deemed to be decisive in determining whether the company to which the employee was seconded (residing in the work state) could be seen as an employer in addition to the Dutch company with whom he entered into a formal (i.e. written) employment agreement.

The author believes that the relationship of subordination – including the authority to instruct – can indeed be seen as a decisive element for the question of who is 'an employer'. Giving decisive weight to this element of subordination could result in the existence of several employers for purposes of the Dutch tax treaties patterned on Art. 15 of the OECD

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² See for a discussion of this resolution, F. Pötgens, *Income from International Private Employment*, Doctoral Series, no. 12 (IBFD, Amsterdam, 2006), pp. 617–622 and F.E. Dekker, 'De verdragswerkgever van de internationale uitzendkracht', *MBB* 2005, no. 1, p. 22.

Model. This conclusion is in conformity with the wording of Art. 15(2)(b) of the OECD Model that explicitly refers to 'an employer'. In addition, the importance of this element for the interpretation of 'employer' under tax treaties seems to be increasingly subscribed to in the literature,³ case law and/or the policy of the tax authorities in various jurisdictions operating as work states in this respect.⁴

B. BNB 2002/65 – for whose account and risk are the activities?

The Supreme Court views the fact that the relevant performed activities are for the account and risk of the receiving company, as another key requirement to regard that company as an employer for the purposes of the tax treaties in question. This requirement encompasses that a *pro rata* part of the salary costs are borne by that company and that the advantages and disadvantages stemming from an employee's services are for that company's account. The Supreme Court referred in this respect to its decision of 12 October 2001, *BNB 2002/265*. This decision involved the explanation of the condition of Art. 6(2) of the 1951 Netherlands-Switzerland Tax Treaty, that the taxpayer must exercise his employment for the account of an employer not having its residence in the work state.⁵ The Court held in *BNB 2002/65* that for the application of this condition it is not only relevant for whose account the salary costs were, but additionally, for whom the benefits of these activities were and who

bore the disadvantages and risks connected with these benefits.⁶ *BNB 2007/75-79* and *V-N 2006/65.9* repeated this reference to *BNB 2002/65*.

At first sight, it is striking that the Supreme Court included a reference to *BNB 2002/65* and adopted the above-mentioned elements as characteristics for interpreting 'an employer'. It seemed that *BNB 2002/65* in particular considered the expression '... benefit-directed activity exercises for the account of ...'⁷ ('... zijn op voordeel gerichte werkzaamheid uitoefent voor rekening van/exerce son activité à but lucrative pour le compte de ...') that Art. 6(2) used in addition to the term 'an employer'. Nevertheless, account should be taken of the circumstance that there is a certain overlap and resemblance between 'an employer' and 'benefit-directed activity exercises for the account of'. Therefore, the explanation of the latter term is similarly relevant for the interpretation of 'an employer'. From that perspective, it is understandable that the Supreme Court in its decisions of 1 December 2006 referred to the characteristics developed in *BNB 2002/65* when interpreting 'an employer'.

C. The remuneration is recharged in an individually identifiable manner

Based upon *BNB 2002/65*, the Dutch Supreme Court held that an element of a de facto employer at a tax treaty level is whether the salary costs are recharged to the receiving company in an individually identifiable manner. Even though bearing the costs of the

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³ L. De Broe *et al.*, 'Interpretation of Article 15(2)(b) of the OECD Model Convention: "Remuneration Paid By, or on Behalf of, an Employer who is not a Resident of the Other State"', *Bulletin for International Fiscal Documentation* 2000, no. 10, pp. 505–506.

⁴ Although the German Federal Tax Court attached primary relevance to the person who economically bore the employee's remuneration in determining 'an employer' under the German tax treaties, it also made an allusion to this authority element; compare the decision of the Federal Tax Court of 21 August 1985, *BSfBl* 1985, p. 4. The Federal Tax Court was even more explicit on this point in its decision of 23 February 2005, *BB* 2005, no. 27, p. 1482 (see for an overview of this case law, Pötgens, n. 2 above, pp. 592–596). The German Federal Ministry of Finance in its Letter of 14 September 2006, no. IV B 6 – S 1300 – 367/06 (*Steuerliche Behandlung des Arbeitslohns nach den Doppelbesteuerungsabkommen*), point 66 *et seq.* also lent a certain weight to the relationship of subordination.

The great majority of decisions of the Belgian Courts of Appeal followed a formal approach in interpreting 'employer' at a tax treaty level. This case law is being re-examined by some legal scholars who state that a substantive interpretation of employer should be adopted given the decision of the Belgian Supreme Court of 18 March 1994, *FJF 94/77*; in this decision the Supreme Court gave a substantive meaning to the expression 'employment' under Art. 15 of the former 1970 Belgium-Netherlands Tax Treaty. According to these authors the same explanation has to be given to 'employer'; compare J. Baeten, 'Politiques de mobilité: la notion d'employeur en cas de détachement international', *RGF* 2001, no. 5, p. 169. The Belgian tax authorities in their Circular of 25 May 2005, no. AFZ 2005/0652 (AFZ 08/2005) shared a similar view imposing special emphasis on the authority element; see for a discussion of this Circular, Pötgens, n. 2 above, pp. 592 and 623 and, in more detail, J. Baeten, 'Mobilité internationale; nouveau commentaire belge de l'article 15 des conventions préventives de double imposition', *RGF* 2006, no. 11, p. 3 and B. Peeters, 'Artikel 15 OESO-Modelverdrag: Inkomsten uit niet-zelfstandige arbeid – De nieuwe administratieve circulaire d.d. 25 mei 2005 en de niet-gedefinieerde begrippen', *TRV* 2006, p. 203.

The majority of the Danish Supreme Court (*Højesteret*) in its decision of 4 February 2003, 'Tidsskrift for Skatteret', *Fiscal Law Journal* 2003, p. 222, *Haliburton Company Germany* also followed a substantive interpretation of the term 'employer' under the former 1955 Canada-Denmark Tax Treaty and the former 1948 Denmark-US Tax Treaty. An unofficial translation of this decision is included in *International Tax Law Reports* 2003, no. 5, p. 802 and it is discussed by J. Qvist, 'Interpretation of Tax Treaties – a Recent Supreme Court Decision', *ET* 2003, no. 7/8, p. 275 and Pötgens, n. 2 above, pp. 627–630.

⁵ Although the wording of Art. 6 of the 1951 Netherlands-Switzerland Tax Treaty deviated from Art. 15 of the OECD Model, the scope and set-up of that provision are in conformity with Art. 15 of the OECD Model. Like Art. 15(2) of the OECD Model, Art. 6(2) of the 1951 Netherlands-Switzerland Tax Treaty has as objective and purpose the avoidance of complicating short-term employments to the extent that they are exercised outside the employee's residence state (the reference to short-term employment is in the current version of the Commentary on Art. 15 of the OECD Model included in para. 6.2). Article 6(2) of the 1951 Netherlands-Switzerland Tax Treaty prohibits the work state from taxing the salary income if certain conditions are fulfilled. When the conditions of Art. 6(2) are cumulatively fulfilled the exemption from taxation in the work state applies; the non-fulfilment of one of these conditions leads to taxation in the work state. Compare also the decision of the Dutch Supreme Court of 12 October 2001, *BNB 2002/65*.

⁶ Compare from a different angle, para. 8 of the Commentary on Art. 15 of the OECD Model ('person having rights on the work produced and bearing the relative responsibilities and risks'). The OECD Public Discussion Draft entitled 'Revised Draft Changes to the Commentary on Paragraph 2 of Article 15' of 12 March 2007 proposed a new para. 8.13 of the Commentary on Art. 15 of the OECD Model stating that for the question into whose enterprise the activities of the employee are integrated, it is of relevance which enterprise 'bears the responsibility or risk for the results produced by the individual's work'. See for a discussion of this Discussion Draft, F.P.G. Pötgens, 'Proposed Changes to the Commentary on Art. 15(2) of the OECD Model and their Effect on the Interpretation of "Employer" for Treaty Purposes', *Bulletin for International Taxation* 2007, no. 11, pp. 476–488.

⁷ This is an unofficial translation by the author.

remuneration can be regarded as a characteristic of an employer,⁸ it is remarkable that the Court devoted attention to the individually identifiable recharge of the salary costs in determining who is a de facto employer for the purposes of the tax treaties. The Court held that if the remuneration for the services rendered in the work state is paid by an employer residing in the employee's residence state, the remuneration can only be considered to be borne by an employer residing in the work state, if the employer residing in the residence state recharged the salary costs to the employer residing in the work state in an individually identifiable manner. Apparently, the Supreme Court did not deem it necessary to examine whether the 'paid by, or on behalf of' criterion of Art. 15(2)(b) of the OECD Model, was satisfied.⁹

These legal considerations seem to imply that the Dutch Supreme Court follows to a certain extent the same path as the German Federal Tax Court. According to this Federal Tax Court economically bearing (*wirtschaftlich trägt*) the employee's remuneration is the decisive factor in typifying a person as an employer for tax treaty purposes.¹⁰ This point of view of the Federal Tax Court includes that 'paid by, or on behalf of' does not have an independent meaning in addition to 'an employer' in Art. 15(2)(b) of the OECD Model.

Similar consideration can be given with respect to the relevant legal considerations of the Dutch Supreme Court in its decisions of 1 December 2006. Given the structure and purport of Art. 15(2)(b) of the OECD Model, it does not seem useful to put such strong emphasis on who bore the salary costs when determining who is to be regarded as 'an employer'. This is even more so due to the fact that the previous decisions of

the Dutch Supreme Court showed that the element of bearing the salary costs was examined in interpreting 'paid by, or on behalf of'.¹¹ In this connection, the decision of the Dutch Supreme Court disregarded the question whether the receiving Spanish and UK companies could be viewed as employers pursuant to the provisions of the tax treaties at issue (the 1971 Netherlands-Spain Tax Treaty and the 1980 Netherlands-UK Tax Treaty, respectively). The Court held that the salary the employee received from the assigning Dutch company was not paid on behalf of the receiving UK and Spanish companies because there was an insufficiently direct relationship between the services rendered by the employee of the assigning Dutch parent company to the benefit of the UK and Spanish subsidiaries and the service fee that was invoiced by the former company to the latter companies; in other words the salary costs were not recharged in an individually identifiable manner.

The difference in approach between the decisions of 1 December 2006 and *BNB 1996/369* is remarkable. The decisions of 1 December 2006 regard the recharge of the salary costs in an individually identifiable manner as an important element in determining who can be seen as an employer for the purposes of the Dutch tax treaties, whereas *BNB 1996/369* – in the author's view correctly – only considered this element in examining whether the assigning Dutch company paid the salary on behalf of the receiving companies residing in the UK and Spain. However, contrary to the decisions of 1 December 2006, *BNB 1996/369* disregarded the question of whether the receiving companies in the UK and Spain could be seen as employers.¹²

The author would have preferred the Supreme

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- ⁸ Compare in this respect para. 8 of the Commentary on Art. 15 of the OECD Model ('the remuneration to the hirer is calculated on the basis of time utilised or there is in other ways a connection between this remuneration and wages received by the employee') and para. 8.14 of the Commentary on Art. 15 of the OECD Model that was newly proposed by the 2007 revised Discussion Draft, see n. 6 above ('the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided').
- ⁹ This is not only demonstrated by the legal considerations of the Dutch Supreme Court in its decisions of 1 December 2006, but it is mainly shown by *BNB 2007/77* involving Art. 15(2)(b) of the former 1970 Belgium-Netherlands Tax Treaty that included the expression 'paid by, or on behalf of'. The Court did not devote any attention to this expression. From the assignments to the Court of Appeal to which the Supreme Court remanded this case, it followed that the Court of Appeal had to examine whether the receiving Belgian SA had to be considered an employer. To regard the SA as an employer it is of importance that the salary costs of the seconded employee are recharged to the SA in an individually identifiable manner. This conclusion is not altered by the fact that the Supreme Court's legal considerations in *BNB 2007/78*, *BNB 2007/79* and *V-N 2006/65.7* reproduced the decisions of the Courts of Appeal and that the Supreme Court held that these decisions of the Courts of Appeals were not legally inaccurate or incomprehensible. The Courts of Appeal examined whether the seconded employee received a remuneration within the meaning of Art. 10(2)(2) of the 1959 Germany-Netherlands Tax Treaty. See for the meaning of 'received from', point 10.5 of the annex to the Advisory Opinions of Advocate-General Wattel; P.E. Roeloffs, 'De grensoverschrijdende dienstbetrekking in het verdrag Nederland-Duitsland', *WFR 1996*, p. 340 and A.G. Goedkoop and M.A. Kuijlaars, '(H)oeso door of namens een werkgever?', *WFR 1996*, p. 1228, Art. 14(b) of the former 1957 Denmark-Netherlands Tax Treaty contained a language that was comparable to Art. 6(2) of the 1951 Netherlands-Switzerland Tax Treaty even though the first provision lacked the expression 'an employer'. Article 14(b) of the former 1957 Denmark-Netherlands Tax Treaty required that 'the labour or the services are performed for, or on behalf of an individual or an entity not residing in the [work] state' (unofficial translation by the author) ('*de arbeid of die diensten worden verricht voor of ten behoeve van een natuurlijk persoon of lichaam niet zijnde een inwoner van de [werk]staat*'). Despite the fact that Art. 14(b) lacked the term 'an employer' the Supreme Court deemed it reasonable regarding 'an individual or an entity' as 'an employer'. One should be reluctant in equating the ordinary meaning of 'an individual or an entity' with 'an employer'. The author would have welcomed it if the Supreme Court had given some additional arguments for this equation instead of only mentioning that it is reasonable. A similar issue arose with respect Art. 14(2)(b) of the 1977 Belgium-Korea Tax Treaty using 'a person' instead of 'an employer'. See with respect to the last treaty L. Hinnekens, 'The salary split and the 183-day exception in the OECD Model and the Belgian tax treaties', *Intertax 1988*, no. 10, p. 331 and Pötgens, see n. 2 above, pp. 668 and 669 (footnote 1926).
- ¹⁰ Compare the decisions of the German Federal Tax Court of 21 August 1985, *BStBl. 1986*, p. 4; 29 January 1986, *BStBl. 1986*, p. 442; 29 January 1986, *BStBl. 1986*, p. 513; 27 April 2000, *ISr 2000*, p. 569; 5 September 2001, *ISr 2002*, p. 164; 15 March 2000, *ISr 2000*, p. 408 and 25 February 2005, *BB 2005*, no. 27, p. 1482 (see also Pötgens, n. 2 above, p. 595).
- ¹¹ The Dutch Supreme Court is of the opinion that the allocation of the salary costs pursuant to Art. 9 of the OECD Model does not suffice in this respect; compare the decision of the Dutch Supreme Court of 23 June 2006, *BNB 2006/295* (see also P. Kavelaars' annotation under *BNB 2006/295*, point 1 and P. Kavelaars, 'De Hoge Raad geeft handen en voeten aan verdrags-werkgeverschap', *NTER Beschouwingen 2007*, no. 4, p. 20).
- ¹² The approach of the Supreme Court in *BNB 1996/369* was also dictated by the underlying judgment of the Amsterdam Court of Appeal.

Court to have adopted a consistent approach in this respect. Arguably, such an approach should entail that the individually identifiable recharge of the salary costs is examined and weighted in the framework of the question: on whose behalf the salary is paid and in which connection the remaining elements (mentioned under 4) have to be considered in determining who is an employer. This approach would not have led to results deviating from the decisions of 1 December 2006 and *BNB* 1996/369.

6. Commentaries on the OECD Model

It is remarkable that the Supreme Court did not make any reference to para. 8 of the Commentary on Art. 15 of the OECD Model. Under certain circumstances, para. 8 of the Commentary also follows a substantive interpretation of employer for the purposes of Art. 15 of the OECD Model. However, para. 8 contains some ambiguities and obscurities.¹³

- (a) It seems that para. 8 only covers cases of abuse (known as 'international hiring-out of labour'). In this connection it is unclear which legal principle allows explaining the term 'employer' differently depending on whether the case is deemed to be abusive or *bona fide* and what para. 8 exactly means by abuse in this context.¹⁴
- (b) Paragraph 8 seems to proceed from the theory that there can only be one employer, whereas Art. 15(2)(b) of the OECD Model refers to 'an employer' clearly suggesting that an employee may have more than one employer.¹⁵
- (c) The structure of para. 8 is unclear because it suggests that, for the purposes of the OECD Model,

the employer is the person who has the right to the work produced and who bears the responsibility risks; this does not offer a complete definition of an employer, even though the elements on which the competent authorities may mutually agree pursuant to para. 8 reflect two important characteristics of an employment relationship, i.e. control and integration in the master's business.

These ambiguities and obscurities may explain why the Supreme Court, contrary to The Hague Court of Appeal in its decision of 29 April 2003 (included in *V-N* 2006/65.9), did not make reference to para. 8 of the Commentary on Art. 15 of the OECD Model. As a result, it became unclear how to apply para. 8 to the secondments at issue. Another possible explanation for not referring to para. 8 is that the tax treaties in question either predate the implementation of para. 8 into the OECD Commentary in 1992, e.g. the former 1970 Belgium-Netherlands Tax Treaty, or are not based upon the OECD Model, which is the case for the previous 1957 Denmark-Netherlands Tax Treaty using language that entirely differed from the OECD Model. One could argue that the 1959 Germany-Netherlands Tax Treaty also belonged to the last category, especially because Art. 10 of that Treaty (income from dependent personal services) seems to be based on the former 1954 Austria-Germany Tax Treaty¹⁶ and to be developed by tax treaty practice.¹⁷ A third possible explanation why the Supreme Court did not mention para. 8 is that the Court was not willing to apply that Commentary dynamically. This dynamic application is propagated by paras. 33–35 of the Introduction to the OECD Commentaries, but the Supreme Court did not yet clearly indicate in its case law whether it accepted such a dynamic application.¹⁸

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¹³ De Broe *et al.*, see n. 3 above, pp. 507–509 and Pötgens, n. 2 above, pp. 635–640.

¹⁴ The 2007 revised public Discussion Draft, n. 6 above, does not distinguish between abusive and *bona fide* secondments. The explanation given to 'employer' in the newly proposed 8-8.28 of the Commentary on Art. 15 of the OECD Model will be applicable irrespective of the nature of the secondments.

¹⁵ The 2007 revised public Discussion Draft, see n. 6 above, still seems to take the view that an employee can have only one employer at a tax treaty level.

¹⁶ This is certainly valid for Art. 10(2)(1) of the 1959 Germany-Netherlands Tax Treaty; compare also the decisions of the Dutch Supreme Court of 29 September 1999, *BNB* 2000/16 and *BNB* 2000/17. These decisions referred in this connection to Advocate-General Van den Berge's Advisory Opinion, which stated that Art. 10 of the 1959 Germany-Netherlands Tax Treaty originates from Art. 10 of a 1958 tax treaty between the Netherlands and Germany that was never ratified; 'Treaty of 18 August 1958', *Bulletin of Treaties (Tractatenblad)* 1959, p. 122. The tax treaty history demonstrates that the German draft of that treaty was based upon the former 1954 Austria-Germany Tax Treaty in which context Art. 10(1)(1) of the 1959 Germany-Netherlands Tax Treaty was literally similar to Art. 9(1) of the former 1954 Austria-Germany Tax Treaty; see also F.A. Engelen and F.P.G. Pötgens, 'Het begrip "tijdelijk" in art. 10 Verdrag met Duitsland heeft een beperkte zelfstandige betekenis', *WFR* 2000, p. 194.

¹⁷ This is especially the case for Art. 10(2)(2) and (3) of the 1959 Germany-Netherlands Tax Treaty; compare K.H. Nissen, 'Lohnsteuer bei Arbeitnehmerstätigkeit im Ausland', *BB* 1961, no. 10, p. 253. However, it should be noted that Art. 10(2)(2) and (3) of the 1959 Germany-Netherlands Tax Treaty also have certain similarities with Art. 15(2)(b) and (c) of the OECD Model, but a comparable comment can be made with respect to Art. 10(1)(1) of the 1959 Germany-Netherlands Tax Treaty in relation to Art. 15(2)(a) of the OECD Model. Furthermore, Art. 15(2)(b) and (c) of the OECD Model also evolve from the tax treaty practice whereas Art. 15(2)(a) of the OECD Model has its origins in the 1943 Mexico and 1946 London Model Conventions of the League of Nations (see for a general overview of the history of Art. 15 of the OECD Model, Pötgens n. 2 above, pp. 15–67). If it could be argued that there a sufficient connection exists with Art. 15(2)(b) of the OECD Model prevailing in this respect on the determinations that these provisions of the 1959 Germany-Netherlands Tax Treaty were developed by tax treaty practice, the comments made as regard the former 1970 Belgium-Netherlands Tax Treaty are *mutatis mutandis* applicable to the application of the 1959 Germany-Netherlands Tax Treaty.

¹⁸ When interpreting the 1959 Germany-Netherlands Tax Treaty, the Supreme Court in its decision of 9 December 1998, *BNB* 1999/267 not only took into consideration a preparatory 1958 report of the predecessor of the OECD, which report ultimately became part of the 1963 OECD Model and Commentary, but also expressly referred to the OECD Commentaries that were published after the Treaty was concluded. As is correctly put forward by Van Raad in his annotation, *BNB* 1999/267, p. 2116, the Supreme Court indeed made reference to the later Commentaries on the OECD Model. But, it would go too far to conclude that the Supreme Court's decision is in line with the dynamic application of the Commentary propagated by the OECD in the Introduction to the OECD Commentary. In its decision, the Supreme Court also referred, in conformity with its decision of 24 March 1976, *BNB* 1976/121, to the 1958 report and to the text of the Commentary on Art. 5 of the 1963 OECD Model, in which the report was ultimately laid down and on which Art. 2 of the 1959 Germany-Netherlands Tax Treaty is consequently based. In addition, the 1963 Commentary does not differ from the later versions of the Commentaries on the OECD Model. From this it appears that the view of the Commentary on the OECD Model, according to which changes in the Commentary also affect earlier tax treaties, cannot be deduced from the

7. Interpretation method

As in its decisions of 28 February 2001, *BNB* 2004/138 and 12 October 2001, *BNB* 2002/65, the Supreme Court again followed an autonomous interpretation when explaining the expression 'an employer' for the purposes of income from employment provisions of the tax treaties in question. As a result of this autonomous interpretation the Court did not refer to the domestic law of the states applying the tax treaties at issue because:

- (a) the relevant tax treaty did not provide for an interpretation provision analogous to Art. 3(2) of the OECD Model, e.g. the 1951 Netherlands-Switzerland Tax Treaty that was at stake in *BNB* 2002/65; and
- (b) the tax treaty at issue contained an interpretation provision comparable to Art. 3(2) of the OECD Model, but nevertheless, that provision was held inapplicable because it referred for the interpretation of undefined tax treaty terms to the meaning these terms had under the laws of the Contracting State applying the tax treaty relating to the taxes which were subject of the treaty.

Contrary to Dutch civil law, Dutch tax legislation does not provide for a definition of 'employer'.¹⁹ Tax treaties containing this type of interpretation provision are the former 1979 Netherlands-Poland Tax Treaty (*BNB* 2004/138), the former 1970 Belgium-Netherlands Tax Treaty (*BNB* 2007/77), the previous 1957 Denmark-Netherlands Tax Treaty (*BNB* 2007/75 and *BNB* 2007/76) and the 1959 Germany-Netherlands Tax Treaty (*BNB* 2007/78, *BNB* 2007/79 and *V-N* 2006/65.9).

8. Directorship

In *BNB* 2007/77 the taxpayer did not only have an employee relationship with the receiving Belgian company (below SA) but he was also an unremunerated director of the SA. The taxpayer argued, with reference to the Belgian attraction principle (see also 2), that the entire salary attributable to the services rendered in Belgium had to be seen as a director's fee within the meaning of Art. 16 of the former 1970 Belgium-Netherlands Tax Treaty. Consequently, the primary right to tax the director's fees had to be allocated to Belgium and the Netherlands had to provide relief from double taxation with respect to these fees. The attraction principle has its basis in Belgian domestic law (Art. 32 of the 1992 Income Taxes Code). This attraction principle was applied by the Belgian tax authorities to Art. 16 of the former 1970 Belgium-Netherlands Tax Treaty because that provision lacked the wording 'in his capacity as a member of the board of directors' so that one could argue that it was not necessary that the fees were derived in a taxpayer's capacity as a director.²⁰

In its decision of 15 July 1997, *BNB* 1997/298, the Supreme Court already mentioned and applied this 'capacity requirement' to Art. 16 of the former 1970 Belgium-Netherlands Tax Treaty. *BNB* 2007/77 reconfirmed the application of the 'capacity requirement' despite the fact that Art. 16 lacked the explicit wording 'in his capacity as a member of the board of directors'. As a result, the Supreme Court reversed the application of the attraction principle in this respect. The author endorses this line of reasoning of the Supreme Court because this attraction principle is neither in accordance with the structure and set-up of the tax treaty in question nor with the relationship between Arts. 15

Notes

cont.

Supreme Court's decision because it was not an issue in the case at hand. The above also seems to be confirmed in two later decisions of the Dutch Supreme Court of 28 February 2001, *BNB* 2001/295 and of 12 December 2003, *BNB* 2004/123. In these decisions, it referred explicitly to the 1963 version of the Commentary on the OECD Model when interpreting the former 1970 Belgium-Netherlands Tax Treaty. However, in its decisions of 5 September 2003, *BNB* 2003/379 and 381, the Supreme Court, when interpreting the former 1970 Belgium-Netherlands Tax Treaty, referred to paras. 12 and 13 of the Commentary on Art. 3 of the OECD Model that were included in that Commentary as of the 1992 amendments. In *BNB* 2003/379 and 381 the Supreme Court held that the undefined tax treaty terms should be interpreted dynamically. However, the Court reversed an unlimited dynamic interpretation by allowing certain (contextual) restrictions to such interpretation. These restrictions are described in paras. 12 and 13 of the Commentary on Art. 3 of the OECD Model (*inter alia*, the intention of the Contracting States when signing the tax treaty in question and the meaning given to a term in the legislation of the other Contracting State, i.e. the principle of reciprocity). As of 1995, Art. 3(2) of the OECD Model explicitly provides that the dynamic interpretation method must be applied. However, the Court in *BNB* 2003/379 and 381 took the view that the dynamic interpretation method should also be adopted if Art. 3(2) of a treaty that is patterned on the pre-1995 OECD Model does not include an explicit reference to this type of interpretation method. However, the application of the dynamic interpretation method may be limited by the context of the tax treaty in question. See also Advocate-General P.J. Wattel in his Advisory Opinion accompanying *BNB* 2003/379 (point 4.9) and point 2.22 of the annex to his Advisory Opinions accompanying *BNB* 2003/379 to 381. Wattel remarked that the dynamic interpretation is the standard. This standard similarly applies to tax treaties patterned on the pre-1995 OECD Model lacking a specific reference to the domestic law of the Contracting States at the time when the treaty is applied, i.e. when the tax is imposed. In that case a deviation from the standard is only permitted if the context were to require it. Paragraph 11 of the Commentary on Art. 3 of the OECD Model demonstrates that the Committee on Fiscal Affairs of the OECD observed that adopting the dynamic interpretation method was already more or less *communis opinio*. The Committee adapted the text of Art. 3(2) to make this point more explicit. This seems to be confirmed by para. 13. of the Commentary on Art. 3 of the OECD Model providing that 'at that time' was added to Art. 3(2) of the OECD Model in 1995 to conform its text more closely to the general and consistent understanding of Member States of the OECD. As a result, care should be taken in regarding these decisions as a confirmation of the dynamic application of the OECD Commentary as set out by that Commentary. In the author's view, the references to paras. 12 and 13 of the Commentary on Art. 3 of the OECD Model, which were included in the Commentary after conclusion of the tax treaty at issue, should be considered within the above-mentioned framework and against the above-mentioned background. The undefined tax treaty terms had to be interpreted dynamically, in which only the context could require another meaning than would follow from a dynamic interpretation. The context is explained further in paras. 12 and 13 of the Commentary on Art. 3 of the OECD Model to which the Supreme Court referred. This explanation given in paras. 12 and 13 of the 1992-2005 OECD Commentary on Art. 3 is also relevant for tax treaties concluded before this interpretation method was explicitly laid down in the OECD Model and such is reflected in the extracts in question from the Commentary (compare also the decision of the 's-Hertogenbosch Court of Appeal of 6 September 2001 which ultimately resulted in *BNB* 2003/379 and 381).

¹⁹ The Dutch Wage Tax Withholding Act refers to wage tax withholding agent instead of employer.

²⁰ Compare parliamentary question, Bourgeois, Questions and Answers, Chamber 1986-87, 3 March 1987, no. 42, pp. 4-5.

and 16. The decisions of the Dutch Supreme Court adopting a formal explanation of the term 'director' (decision of 22 December 1999, *BNB* 2000/94 and decision of 10 December 2004, *BNB* 2005/195) and the Commentary on the OECD Model (para. 2 of the Commentary on Art. 16 of the OECD Model and para. 2 of the Commentary on Art. 15 of the OECD Model) seem to support that a distinction must be made between the remuneration received in his capacity as director and as employee implying a reversion of the attraction principle.²¹

Following this reasoning in Advocate-General Wattels Advisory Opinion, the Supreme Court seems to accept that the directorship of a company can be unremunerated despite the fact that the same person, in addition to his director's duties, renders services in his capacity as an employee on behalf of the same company for which he receives a remuneration.

9. Conclusion

In its decisions of 1 December 2006 the Supreme Court continued the course it introduced in its decisions of 28 February 2003, *BNB* 2004/138 and of 12 October 2001, *BNB* 2002/65. It is possible to have more than one employer for the purposes of Art. 15(2)(b) of the OECD Model and the expression 'an employer' has to be interpreted substantively in this context. The Supreme Court reached this conclusion with the aid of an autonomous interpretation and without relying on para. 8 of the Commentary on Art. 15 of the OECD Model. In *BNB* 2004/138 the Court referred to the relationship of subordination for the interpretation of 'employer'. In *BNB* 2004/138 the Court failed to give a more detailed explanation of this relationship of subordination. The Court filled this gap in its decisions of 1 December 2006 by adding that the authority to instruct is decisive in determining a relationship of subordination. It is the author's view that the relationship of subordination and the authority to instruct are indeed crucial elements in determining an employer.

In addition and under reference to *BNB* 2002/65, the Supreme Court deemed important the circumstances of who bore the costs of the employee services, who had the benefits of these services and for whose account and whose risk could the disadvantages stemming from

these services be directed. A part of these circumstances is the requirement that the salary is recharged in an individually identifiable manner. In the author's opinion there is no need to put such strong emphasis on the element of bearing the costs (including a recharge in an individually identifiable manner) because this element has to be examined in interpreting the expression 'paid by, or on behalf of'; this approach was similarly adopted by the Supreme Court in *BNB* 1996/369. A consequence of the view the Supreme Court expressed in its decisions of 1 December 2006 is that the term 'paid by, or on behalf of' is not given an independent meaning in addition to 'an employer' which is not deemed to be in accordance with the structure of Art. 15(2)(b) of the OECD Model.

Even though the Supreme Court gave a correct explanation of 'an employer', the author would have preferred to include a number of relevant criteria in the Commentary on the OECD Model, in which connection one could emphasise that the relationship of subordination is the most crucial in determining employer at a tax treaty level.²² This would differ from the approach chosen by the 2007 OECD Discussion Draft according to which the integration of the activities of the employee into the enterprise of the assigning or receiving company is deemed to be the most important in determining 'employer' for the purposes of Art. 15(2)(b) of the OECD Model.

As a consequence of the Dutch Supreme Court's approach, the work states will have taxation rights in more cases, i.e. compared with the formal interpretation of employer that was followed by the Dutch tax authorities (*BNB* 2004/235). This could mean that in more inbound cases wage withholding tax has to be withheld in the Netherlands whereas the Netherlands has to provide relief from double taxation in more outbound cases. The inbound cases will suffer an increase in the administrative burden.²³ In reply to parliamentary questions the Dutch State Secretary of Finance announced a new decree that would take account of this increase.²⁴ This decree has not yet been published and the resolution published in *BNB* 2004/235 has not been withdrawn. Consequently, employers can in intra-group inbound situations rely on *BNB* 2004/235 and the formal explanation of employer included therein (based upon the principle of legitimate expectations).

Notes

²¹ The Dutch State Secretary of Finance's statement during the parliamentary discussions on the 2001 Belgium-Netherlands Tax Treaty (Explanatory Memorandum, Second Chamber, 2001-2002, 28 259, no. 6, p. 40) and the Circular of the Belgian Tax Authorities of 17 December 2002, no. AFZ/Intern.IB/2002-026 (AFZ 26/2002), point 23 rejected the application of the attraction principle at a tax treaty level. It is striking that, in the Dutch State Secretary's view, the attraction principle must be applied if the person in question is a director/majority shareholder of the relevant company; in that case his entire remuneration is classified under Art. 16 of the 2001 Belgium-Netherlands Tax Treaty (Explanatory Memorandum, Second Chamber, 2001-2002, 28 259, no. 6, p. 40). It is not clear why the remuneration of a director/majority shareholder should be treated differently from the remuneration received by directors not holding the majority of the shares in the company on whose behalf they perform their duties.

²² See for more details Potgens, n. 2 above, pp. 670-671.

²³ This effect may be increased by the decision of the Dutch Supreme Court of 29 June 2007, *V-N* 2007/32.20 in which the fictitious permanent establishment for Dutch wage tax purposes, i.e. a wage tax withholding agent, arising as consequence of non-residents hiring out labour to Dutch parties is also applicable to intra-group secondments.

²⁴ Letter of 9 May 2007, *V-N* 2007/32.9.