

# Stand-By Fee Taxable in Residence State under Art. 15 of the OECD Model

## Decision of the Netherlands Supreme Court of 22 December 2006, BNB 2007/97

### Introduction

This article considers the decision of the Netherlands Supreme Court of 22 December 2006.<sup>1</sup> The Netherlands Supreme Court held that the employee's Residence State has the exclusive authority to tax a stand-by fee under Art. 15 of the Netherlands tax treaties that are based on the OECD Model Convention (hereinafter: the OECD Model), provided that the employee is physically present in that State whilst he is on stand-by.

### Art. 15 of the OECD Model

Art. 15 of the OECD Model divides the taxation right on the salary of a cross-border employee between the Residence State and the Work State. In particular, Art. 15 of the OECD Model distinguishes three rules in this respect, i.e.:

- (1) The employee's Residence State has the exclusive right to tax the employee's salary (Art. 15(1), first part of the first sentence of the OECD Model). This first rule applies if the employee exercises his employment in his Residence State or in a third State.
- (2) The Work State may tax the employee's salary if and insofar as it is attributable to an employment that is exercised in that State (Art. 15(1), end of the first sentence and the second sentence of the OECD Model). The Residence State must grant relief from double taxation in respect of the salary that is taxable in the Work State (Art. 23A or Art. 23B of the OECD Model). This second rule reflects the general rule of Art. 15 of the OECD Model, i.e. the Work State is entitled to tax the salary.<sup>2</sup>
- (3) If the following three requirements are all fulfilled the first rule revives, which results in the assignment of an exclusive taxation right to the employee's Residence State (Art. 15(2) of the OECD Model):
  - (a) the employee is present in the Work State for a period or periods not exceeding in aggregate 183 days in any 12-month period commencing or ending in the fiscal year concerned;
  - (b) the remuneration is paid by, or on behalf of, an employer who is not a resident in the Work State; and
  - (c) the remuneration is not borne by a permanent establishment (PE) of the employer in the Work State.

If any of these three conditions are not fulfilled, the State in which the employment is exercised may tax the salary derived from that employment under the second rule of Art. 15 of the OECD Model if and insofar as the salary can be allocated to the services provided in the Work State.

### The Case

#### The facts

The taxpayer in question (X) resided in the Netherlands until 1 November 1998. On that date, she emigrated from the Netherlands to Mexico. In the tax year in question (2000), the taxpayer resided in Mexico. The taxpayer was the director and sole shareholder of a Netherlands private limited liability company (BV), in respect of which the place of actual management also moved to Mexico on 1 November 1998. The BV entered into an agreement of assignment (*overeenkomst van opdracht*) with a Netherlands resident TV producer for a period of three years with the option to extend this cooperation. The agreement stated that the BV was obliged to put X at the TV producer's disposal to perform editorial and presentation activities on behalf of a number of TV programmes (a maximum of 143 episodes per contractual year) for five days a week. A contractual year consisted of nine months (September to May). A fixed fee was paid in nine instalments. The contractual relationship between the BV and the TV producer was not recognized for tax purposes, but, instead, a direct employment relationship was assumed between X and the TV producer.

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1. BNB 2007/97. For a discussion of this decision in the Netherlands, see F. Pötgens, "Volgens de Hoge Raad is een stand-by fee onder artikel 15 OESO-Modelverdrag belastbaar in de woonstaat", *NTRF Beschouwingen*, 2007/24, pp. 20-24.

2. Compare also Para. 1 of the Commentary on Art. 15 of the OECD Model, i.e. "Paragraph 1 [of Art. 15] establishes the general rule as to taxation of income from employment (other than pensions), namely that such income is taxable in the State where the employment is actually exercised" (emphasis added). This extract from the Commentary does not further distinguish between the first and second rule of Art. 15. In this respect, the Commentary appears to regard the entire Art. 15(1) as one rule, in the context of which attention is given only to the general rule, i.e. taxation in the State where the services are rendered. Compare also F. Pötgens, *Income from International Private Employment: An Analysis of Article 15 of the OECD Model*, Doctoral Series, No. 12, (Amsterdam: IBFD, 2006), p. 114.

In 1999, X presented six episodes of a TV show, the episodes of which were recorded in the Netherlands. X actually and physically provided services consisting of the recording of these episodes in the Netherlands for nine days in 1999. The preparation for these activities took place in Mexico.

The cooperation between the TV producer and X terminated on 1 September 2000. As consideration for the termination, X received a severance payment. The TV producer and X also agreed that X would perform presentation and editorial activities on behalf of another company (C). The remuneration that X would receive from company C would reduce the severance payment, in connection with which a certain maximum applied.

The agreement between company C and X stated that the employment relationship between X and the TV producer would be continued until the contractually agreed period of three years lapsed (September 2000). X would be available to perform activities on behalf of company C until the termination of this employment agreement. In this respect, X actually and physically provided services on behalf of company C in the Netherlands for four days (in July and August 2000).

It is crucial that the Amsterdam Court of Appeal understood the facts such that the fee was for the major part characterized as a stand-by fee, which X received for being available when her employer called on her to provide services. According to the Amsterdam Court of Appeal, it appeared from the contractual relationship that an obligation was imposed on X to be on stand-by. This determination and understanding of the facts could not be reversed in the appeal before the Netherlands Supreme Court.

### The dispute

The tax year in question was 2000. As a result of the facts that were determined by the Amsterdam Court of Appeal, the dispute involved the question as to whether, under Art. 15 of the 1993 Mexico–Netherlands tax treaty, the regular remuneration had to be allocated entirely to the small number of days (four days in 2000) in which X was physically present in the Netherlands performing presentation and editorial activities (the tax inspector's view) or whether similar account had to be taken of the remaining inactivity for which X was paid and which was physically exercised in Mexico (X's view). In X's view, the regular remuneration could only be taxed in the Netherlands in proportion to the days that she was physically present in the Netherlands to provide editorial and presentation activities.

The tax inspector and X applied similar principles to the severance payment.

### The Netherlands Supreme Court's decision

Given the facts as determined by the Amsterdam Court of Appeal, the Netherlands Supreme Court held that the stand-by services had to be regarded as exercising an employment within the meaning of Art. 15(1) of the

1993 Mexico–Netherlands tax treaty. This employment was exercised at the place where X was physically present on stand-by. The regular remuneration had to be allocated to the editorial and presentation activities provided in the Netherlands during the four days and to the stand-by services provided in Mexico on a time-proportionate basis.

The Netherlands Supreme Court, therefore, reversed the decision of the Amsterdam Court of Appeal regarding the severance payment. In this respect, the Netherlands Supreme Court developed specific rules to allocate severance payments (see below). When the Amsterdam Court of Appeal gave its decision, that Court was unable to take account of these specific rules. Accordingly, the Netherlands Supreme Court remanded the case to a different Court of Appeal to take note of these allocation rules.

### Comment

#### Art. 17 prevails over Art. 15 of the OECD Model

First, it is necessary to determine whether or not the stand-by fee can be regarded as “salaries, wages and other similar remuneration” resulting in the stand-by fee being classified under Art. 15 et seq. of the OECD Model.<sup>3</sup> A stand-by fee must be characterized under Art. 15 of the OECD Model if the employer attributes the fee and the employee is obliged to be ready to perform activities that may or may not be used by the employer depending on future events. In these circumstances, and from a Netherlands tax perspective, the stand-by fee is considered to be enjoyed from an employment within the meaning of Art. 10(1) of the Wage Tax Withholding Act 1964 (*Wet op de loonbelasting* 1964, LB). This may also have repercussions for Netherlands tax treaties, as Art. 3(2) of the OECD Model refers, with regard to the meaning of undefined treaty terms such as “salaries, wages and other similar remuneration”, to the meaning that these have under the domestic law of the Contracting States applying the tax treaty, unless the context requires another meaning. Only in exceptional circumstances does the context require a meaning deviating from the meaning under the domestic law.<sup>4</sup>

Subsequently, it is necessary to consider whether or not the income realized by X as a TV presenter could fall under Art. 17 of the OECD Model (sportsmen and artistes). Art. 17 of the OECD Model prevails as a *lex specialis* over the *lex generalis* of Art. 15, in connection with

3. The characterization of a stand-by fee as income from employment for the purposes of Art. 15 of the OECD Model is explicitly followed in other jurisdictions. For instance, see the decision of the German Federal Tax Court of 9 September 1970, BStBl. II 1970, p. 867 and US IRS Treas. Reg. Section 1.861-(4)(b)(2)(ii)(G).

4. In this connection, reference should be made to the decision of the Netherlands Supreme Court of 9 February 2007, BNB 2007/143, involving the base salary of a professional soccer player that also encompassed stand-by services (being on reserve for a soccer match). The latter element did not alter the fact that Art. 10(1) of the LB, in connection with Art. 3.80 and Art. 3.81 of the Personal Income Tax Act 2001 (*Wet inkomstenbelasting* 2001), applied. These provisions relate to the income from employment provisions in respect of wage withholding tax and personal income tax.

which these provisions, together with the other articles relating to income for employment and, according to existing case law of the Netherlands Supreme Court, form a closed system. Art. 15 of the OECD Model fulfils the role of a catch-all provision within this closed system.<sup>5</sup>

The Netherlands Advocate General, Van Ballegooijen, in his Advisory Opinion accompanying the case in question devoted extensive attention to the possible application of Art. 17 of the OECD Model. According to the Advocate General, the TV presenter in question should be regarded as an artist within the meaning of Art. 17 of the OECD Model, provided that, and to the extent that, she performed for an audience. It should also be demonstrated that this public performance is primarily of an entertaining nature. The Advocate General in his Advisory Opinion assumed that X's performance as a TV presenter bore such an entertaining character, but it was not factually determined that X's performance as a TV presenter had a predominantly entertaining character nor that the public performance predominated in her activities.<sup>6</sup> The Advocate General's assumption was, inter alia, based on the fact that her employer, the TV producer, was a commercially operating broadcasting corporation.

The Netherlands Supreme Court and the Amsterdam Court of Appeal were of the opinion that it could be established with sufficient certainty that Art. 17 of the OECD Model did not apply to the services that X provided as a TV presenter. The rationale behind this view is that a TV presenter does not perform as an entertaining artist.<sup>7</sup> As a result, the Netherlands Supreme Court and the Amsterdam Court of Appeal classified the stand-by fee as falling within Art. 15 of the OECD Model.<sup>8</sup>

### Stand-by fees

The following questions arise in respect of income from inactivity, such as stand-by fees, with regard to the second rule of Art. 15 of the OECD Model (see above):<sup>9</sup>

- (1) Does the inactivity, i.e. being on stand-by, constitute the exercise of an employment?
- (2) In which place is the employment exercised (the geographical element)?
- (3) To which place of exercise of the employment does the income need to be allocated when more than one place can be recognized ("such remuneration as is derived therefrom")?

In the author's opinion, the Netherlands Supreme Court was correct in following the conclusion of the Amsterdam Court of Appeal in implying that being on stand-by should be regarded as the exercise of an employment. Consequently, being on stand-by should be treated in the same way as the actual presentation and editorial activities.<sup>10</sup> The exercise of the employment occurs at the place where the employee is physically present when performing the activities for which he or she is remunerated.<sup>11</sup> The Netherlands Supreme Court, however, emphasized that the stand-by services in question differed from the on-call services and readiness for work services of, for instance, firemen, and security and medical personnel.<sup>12</sup>

The conclusion of the Netherlands Supreme Court in the case in question appears to be supported by Netherlands civil law (in this connection fiscal law follows civil law, which regards stand-by services as the performance of employment activities),<sup>13</sup> the decisions of the European Court of Justice (ECJ)<sup>14</sup> and standpoints that have been developed by some other jurisdictions (see below). The Netherlands Supreme Court had also already alluded to the fact that stand-by services must be regarded as providing services as a sportsman within the framework of Art. 17 of the OECD Model. Specifically, the Netherlands Supreme Court, in its decision of 9 February 2007,<sup>15</sup> held that a professional soccer player who was on stand-by if he was, for example, a reserve for a soccer match still performed activities in his capacity as a sportsman within the meaning of Art. 17 of the OECD Model.

In this respect, German labour law regards stand-by services on behalf of an employer without the employee being obliged to remain waiting in a place designated by the employer (*Rufbereitschaft*) as performing his professional tasks.<sup>16</sup> From a tax perspective, this was endorsed by the German Federal Tax Court in its decision of 27 August 2002.<sup>17</sup> Considered from a German tax perspective, the activities performed by the TV presenter would have to be regarded as *Rufbereitschaft*.<sup>18</sup>

5. See the decisions of the Netherlands Supreme Court of 3 May 2000, BNB 2000/296; 20 December 2000, BNB 2001/124; 10 August 2001, BNB 2001/353; and 5 September 2003, BNB 2003/380.

6. See, in this connection, the OECD Report, "The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities", (OECD, 1987) that is also included in point 4.6 of the Advisory Opinion of Advocate General van Ballegooijen.

7. Compare C.W.M. van Ballegooijen and D.V.E.M. van der Wiel-Rammeloo, *Loonheffingen* (Deventer: Kluwer, 2007), p. 311 and D. Molenaar, *Taxation of International Performing Artists: The Problems with Article 17 OECD and How to Correct Them*, Doctoral Series, No. 10 (Amsterdam: IBFD, 2005), pp. 91-92.

8. The same conclusion is reached by P. Kavelaars, *Annotation*, BNB 2007/97, point 5. For a different view, see R.A.V. Boxem, *Annotation*, *FED* 2007/14, point 3.

9. Pötgens, note 2, p. 413.

10. See in the same sense P. Kavelaars, *Annotation*, BNB 2007/97, point 2.

11. Para. 1 of the Commentary on Art. 15 of the OECD Model.

12. Compare the decisions of the Central Appeals Tribunal, i.e. the Netherlands Supreme Court competent for employee social security and for public services, of 4 February 1992, RSV 1992/215 (an ambulance nurse) and The Hague Court of Appeal, 27 February 2007, TAR 2007/77 (a fireman).

13. Compare Asser de Leede, *Bijzondere overeenkomsten III* (Deventer: Kluwer) (database), Chapter VII, Para. 2, No. 278.

14. See ECJ, 9 September 2003, Case C-151/02, *Landeshauptstadt Kiel v. Norbert Jaeger* (a doctor) and ECJ, 5 October 2004, Joined Cases C-397/01 to C-403/01, *Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus Nestvogel, Roswitha Zeller, Matthias Döbele v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (social workers manning ambulances within the framework of a service for medical emergency assistance founded by the German Red Cross).

15. BNB 2007/143. The tax inspector stated that Art. 17 of the OECD Model could only be relevant if the soccer player actually performed physical activities during a match, whereas Art. 17 would not apply if he was placed on the bench during that match. The latter could also be considered a form of on-call services.

16. German Federal Labour Court (*Bundesarbeitsgericht*), decision of 20 October 2000, BStBl. II 2000, p. 735.

17. BStBl. II 2002, p. 883. German labour law further distinguishes *Arbeitsbereitschaft* and *Bereitschaftsdienst*, which are characterized by the fact that the employee is obliged to make himself available at the place of employment or at a place determined by the employer. Under the latter category, the employee is allowed to rest.

18. According to the US IRS Treas. Reg. Section 1.861-4, on-call services must be regarded as the performance of activities.

As it was established that the stand-by services of the employee in question could be regarded as the exercise of an employment, it was rather easy to determine the place where the employment was exercised. The exercise of the employment occurs at the place where the employee is physically present in providing his or her stand-by services. In the Netherlands Supreme Court's decision in the case in question, Mexico (the Residence State) was the place where the employee was physically present when performing these stand-by services. Subsequently, the remuneration had to be allocated to the presentation and editorial activities performed in the Work State on a time-proportionate basis.<sup>19</sup> The part of the remuneration involving the stand-by services and the preparatory activities that were provided in the Residence State did not fall within the second rule, but, rather, the first rule of Art. 15 of the OECD Model, which resulted in the Residence State having the exclusive authority to tax that part of the remuneration. The Netherlands Supreme Court took a nine-month period as point of departure in allocating the remuneration, as it was contractually agreed that the employee would be remunerated during this period. The nine-month period, therefore, constituted the basis for determining the denominator of the days-based fraction that is used to allocate the remuneration to the employment exercised in the Work State. In the author's view, the Netherlands Supreme Court correctly differed from its earlier decision of 23 September 2005,<sup>20</sup> using the calendar year when allocating the salary to the employment exercised in the Work State on a time-proportionate basis, as the activities were both factually and contractually agreed and performed during the entire calendar year.

The Netherlands Supreme Court's decision in the case in question also conforms with the decision of the German Federal Tax Court of 9 September 1970,<sup>21</sup> in which an actress, residing in Germany, signed a contract with a US movie company for the period of 1956-59.<sup>22</sup> The actress only acted in two movies in 1956, but was on stand-by on behalf of the movie company during the remaining period. The movie company did not make use of the actress' services in the remaining period. The German Federal Tax Court held that these types of stand-by services constituted the exercise of the employment. The employment was deemed to be exercised at the place where the employee was physically present whilst she was on stand-by on behalf of her US employer (the Residence State). Consequently, the entire stand-by fee fell within the first rule of Art. 15 of the OECD Model, which resulted in the Residence State having the exclusive authority to tax that fee.<sup>23</sup>

Other types of income from inactivity – sickness benefits and compensation for cancelled employment

A comparison can also be made with other types of income from inactivity. The Netherlands Supreme Court in its decision of 10 August 2001,<sup>24</sup> (compensation for the cancellation of an employment) and the decisions of the Amsterdam Court of Appeal,<sup>25</sup> the 's-Hertogenbosch Court of Appeal<sup>26</sup> and (again) the

Netherlands Supreme Court<sup>27</sup> in respect of sickness benefits (the original benefits were either based on the Netherlands Sickness Benefits Act (*Ziekwet*) or, from 1 March 1996, on Art. 7:629 of the Netherlands Civil Code (*Wet Uitbreiding Loondoorbetalingsverplichting bij Ziekte*) requiring an employer to continue paying all or part of the salary during the first two years of the employee's illness) adopted an approach differing from the Netherlands Supreme Court's decision in the case in question.

The three questions referred to previously can lead to the following results with regard to these other types of income from inactivity. Compensation for the cancellation of an employment does not result in the exercise of an employment and illness, as such, cannot be regarded as the exercise of an employment either. To allocate the income, a form of "replacement of income" approach was adopted. In particular, compensation for the cancellation of an employment replaces the income that would have been received if the promised employment had not been cancelled, but, instead, had been continued and the sickness benefits replace the regular salary that the employee would have received had he been able to perform his normal activities. The "replacement of income" approach results in determining a fictitious place of exercise of the employment and it is to this place the income should finally be allocated, i.e. the place where the employment would have been exercised if the employment had not been cancelled or if the employee had not become ill, respectively.

The Netherlands Supreme Court in its decision in the case in question correctly pointed out that these types of inactivity differed from stand-by fees. Nevertheless, the "replacement of income" approach in combination with a fictitious place of exercise of the employment can be questioned. On the one hand, there is a risk that these standpoints would not be adopted by other jurisdictions, which may result in double taxation or double non-taxation (the German Federal Tax Court in its decision of 17 October 2003<sup>28</sup> held that the exercise of the

19. Compare also the decision of the Netherlands Supreme Court of 23 September 2005, BNB 2006/52.

20. BNB 2006/52.

21. BStBl. II 1970, p. 867. See Pötgens, note 2, pp. 437-438. For a detailed discussion of this decision, see P. Hellwig, "Die bezahlte Untätigkeit im internationalen Steuerrecht", *Deutsche Steuerzeitung*, (1978) No. 5, p. 83 et seq. and E. Reimer, *Der Ort des Unterlassens* (Munich: Verlag C.H. Beck, 2004), p. 128.

22. The case involved the income from employment provision of the former 1954 Germany-US tax treaty.

23. This point of view is still followed by the German tax authorities by reference to BStBl. II 1970, p. 867. In this respect, compare the resolution of 14 September 2006, IV B 6 - S 13000 - 367/06 (*Steuerliche Behandlung des Arbeitslohns nach den Doppelbesteuerungsabkommen*), point 6.2.

24. BNB 2001/353.

25. Decision of 21 March 1986, V-N 1987, p. 299.

26. Decision of 18 January 2006, V-N 2006/34.12.

27. Decisions of 24 April 1957, BNB 1957/189 and 23 September 2005, BNB 2006/52. According to the decision of 23 September 2005, days on which the employee was unable to perform his regular activities due to illness are treated as regular working days for the purposes of the numerator in respect of the days-based fraction if it is demonstrated that these days would have been spent in the Work State had illness not prevented the employee from performing his regular activities.

28. BFH/NV 2004, p.161.

employment continues during the employee's illness in connection with which the physical presence of the employee whilst being sick is decisive) and, on the other, it may be difficult determining the fictitious place of exercise of the employment, in which context the parties concerned may attempt to give a certain direction to this location by amending the employment agreement. Practical impediments and questions may also arise, such as:

- How to calculate the 183-day threshold within the meaning of Art. 15(2)(a) of the OECD Model (this calculation could become meaningless if the previously referred to fiction is applied, as it takes the employee's actual physical presence into account)?<sup>29</sup>
- What is the period that is taken into account to determine where the employment would hypothetically have been exercised?
- Will the Work State change (and has the Residence State concluded a tax treaty with the new Work State)?
- Will the employee return to the Residence State?
- Will the employee's status as an employee change to that of a director?<sup>30</sup>

Especially with regard to a compensation for the cancellation of an employment, a taxation right is assigned to the Work State under the second rule of Art. 15 of the OECD Model without the employee having performed an activity in consideration of the compensation and, moreover, the employee did not perform in the Work State.<sup>31</sup>

### Severance payments

The Netherlands Supreme Court in its decision in the case in question remanded the decision with regard to the severance payment paid in 2000. It should, however, be noted that the Amsterdam Court of Appeal was unable to take note of the decisions of the Netherlands Supreme Court of 11 June 2004.<sup>32</sup> It is interesting to see how these decisions must be applied when the employment agreement only lasted for three years. Specifically, in these cases, it was held that severance payments should be allocated on the basis of the individual's history of performing labour activities. The basis on which the Netherlands Supreme Court in these cases allocated the severance payment to the former Work State (in the case in question, the Netherlands) was the fraction derived from (1) the part of the entire salary that was taxable in the Work State by virtue of Art. 15(1) and (2) of the relevant Netherlands OECD-based tax treaties, and (2) the total salary received in that period. The percentage resulting from this fraction determines the part of the severance payment that can be allocated to the Work State and/or States. This may be expressed by way of the following fraction:

The part of the regular salary taxable in the Work State in the reference period

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Total salary during the reference period

The reference period that is taken into consideration consists of (1) that part of the year between 1 January and the date on which the employment is terminated,

and (2) the four calendar years preceding the date of 1 January in the year in which the employee is dismissed.<sup>33</sup> The author assumes that this reference period should not be applied in such a rigid manner that it remains to be applicable to a case (the case in question), in which the employment agreement only lasted for three years. It could be expected that the reference period would be amended accordingly.

### Conclusions

The author endorses the decision of the Netherlands Supreme Court in the case in question. In the author's opinion, a stand-by fee that is attributed by an employer residing in the Netherlands to an employee who resided in Mexico must be classified under Art. 15 of the 1993 Mexico–Netherlands tax treaty. The stand-by services constituted the exercise of an employment, which is deemed to be exercised at the place where the employee kept him or herself available on behalf of the employer residing in the Netherlands, i.e. the employee's Residence State (Mexico).

Doubt can, however, be cast on the earlier decisions relating to sickness benefits and compensation for the cancellation of an employment. Sickness benefits and compensation for the cancellation of an employment are classified under Art. 15 of the Netherlands tax treaties based on the OECD Model, but they are allocated to the fictitious place where the employment would have been exercised had it not been cancelled or had illness not prevented the employee from performing his regular employment activities. The approach in these decisions may not only result in practical impediments and questions, but it is also not necessarily adopted in other (neighbouring) jurisdictions, which is, for instance, the case for sickness benefits in Germany. In contrast to the Netherlands, Germany adopts the principle of the physical presence of the employee during his illness.<sup>34</sup> From this perspective, it would be advisable to pay attention to income from inactivity either in the OECD Commentary or in a specific tax treaty or protocol provision.<sup>35</sup>

29. Pötgens, note 2, p. 421.

30. Compare from a slightly different approach, P. Kavelaars, *Annotation*, BNB 2005/57, point 2 and Pötgens, note 2, p. 421.

31. See also P. Kavelaars, *Annotation*, BNB 2001/353.

32. BNB 2004/344 and BNB 2004/345.

33. Special circumstances may justify departing from these allocation rules. In any event, the Netherlands Supreme Court held that if the severance payment was not borne by an employer residing in the Work State or by a PE of the employer located in the Work State, the connection between the severance payment and the labour history in that Work State did not suffice to regard the severance payment as remuneration in respect of an employment exercised in the Work State within the meaning of the second rule of Art. 15 of the OECD Model (Art. 15(1), second part of the first sentence and the second sentence). This is remarkable because these requirements are already included in Art. 15(2)(b) and (c) of the OECD Model, so that it does not appear to be logical to impose them under Art. 15(1).

34. German Federal Tax Court, 17 October 2003, *BFH/NV* 2004, p. 161.

35. For concrete recommendations in this respect, see Pötgens, note 2, pp. 460–462, 844–847 and 864–865.