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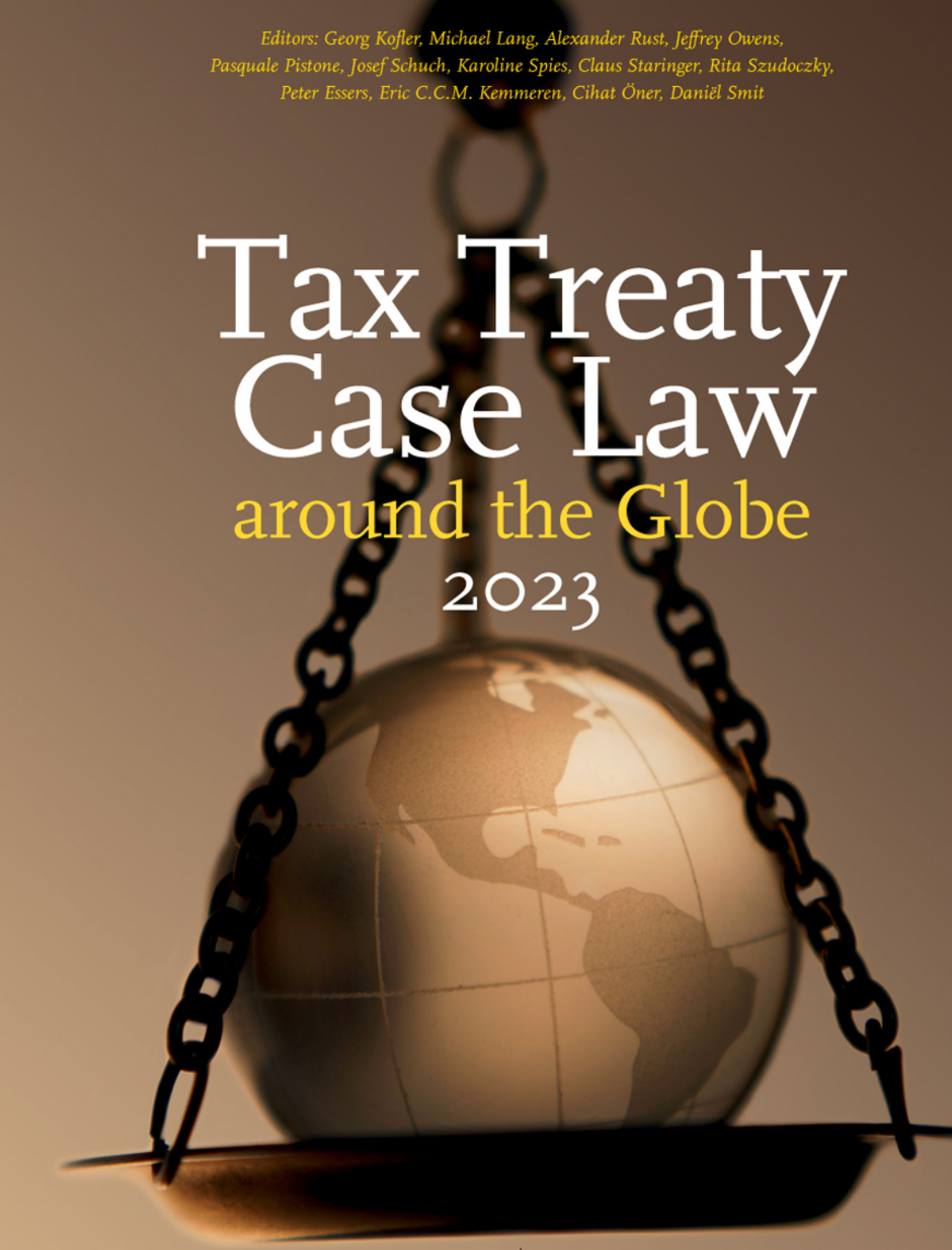
Tax Treaty Case Law around the Globe 2023



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Tax Treaty Case Law Around The Globe 2023

Why this book?
This book is a unique publication that provides a global overview of international tax disputes in respect of double tax conventions and thereby fills a gap in the area of tax treaty case law. It covers the 32 most important tax treaty cases that were decided around the world in 2022. The systematic structure of each chapter allows for the easy and efficient study and comparison of the various methods adopted for applying and interpreting tax treaties in different cases.

With the continuously increasing importance of tax treaties, Tax Treaty Case Law around the Globe 2023 is a valuable reference tool for anyone interested in tax treaty case law, including tax practitioners, multinational businesses, policymakers, tax administrators, judges and academics.

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Preface

Both the OECD Model Tax Convention on Income and Capital (OECD Model) and the United Nations Model Double Taxation Convention (UN Model) often serve as a basis for tax treaty negotiations between different jurisdictions around the world, being a designed tool to facilitate legislative harmonization. At the same time, however, the interpretation of a particular tax treaty provision may still differ from country to country due to various reasons. Therefore, the risk of double or even multiple (non-)taxation is not entirely eliminated which adversely affects the international trade in goods and services and the movement of capital and people. In order to promote a uniform interpretation of tax treaties worldwide and hence reduce the risk of double or multiple (non-)taxation, basic knowledge on how various tax treaty issues are dealt with by different jurisdictions is necessary.

It is widely known that a unified approach to interpreting and applying international tax treaty rules can benefit not only the countries that are parties to a particular tax treaty but also their taxpayers as well as international trade and investment in general. Consequently, this topic is of ongoing concern to many tax scholars, practitioners, public officers, and representatives of international organizations.

On 26–28 April 2023, the "Tax Treaty Case Law around the Globe" conference was at the WU (Vienna University of Economics and Business). This international conference took place for the twelfth time and was jointly organized by the Institute for Austrian and International Tax Law of the WU and the European Tax College of Tilburg University. The conference was dedicated to the analysis of the most important international tax treaty law cases decided all over the world in 2022. Thirty-two cases were presented by outstanding tax experts from 22 different tax jurisdictions. Each presentation was followed by an in-depth and fruitful discussion. Conference participants compared interpretation approaches existing in both the OECD and non-OECD Member countries and presented comprehensive conclusions and suggestions. The main scientific results of the conference are presented in this book.

Each report in this book is devoted to a court case or a series of cases on a particular article of the tax treaty at issue (often based on the OECD or UN Model) decided in a certain jurisdiction in 2022. Every report is structured in a similar way, presenting the facts of the case, the decision and reasoning of the court, and the authors' observations and conclusions, including the possible impact of the decision on the development of international tax law in the respective country and in other jurisdictions. This clear and concise structure provides a solid and accessible overview of the case law on tax treaty application around the world in 2022. The systematic structure of each report allows different tax treaty case law to be studied and compared in a simple and efficient manner.

The editors believe that the reports presented in this book are of high value and will therefore be of particular interest for academics, tax consultants, judges, public officers, and all who are interested in international tax law. The fact that many domestic decisions are otherwise available only in the respective national languages makes the materials contained in this book even more valuable.

The editors would like to express their sincere gratitude to the Linde Publishing House for their cooperation and swift realization of this publishing project. Ms. Jenny Hill contributed greatly to the completion of this book by editing and polishing the texts for authors for whom English is – for the most part – a foreign language. Furthermore, we are most grateful to Michael Hubmann and Monique Malan who helped with the preparation and realization of the conference and assisted in editing the book. Finally, special thanks go to Matthias Bauer, Nina Nimmerrichter and Caroline Ristic and who were responsible for the organization of the conference in Vienna and who also worked on the publication of this book.

Vienna, February 2024

The Editors

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List of Abbreviations

AN	Audiencia Nacional (Spanish National Court)
AUD	Australian Dollar
BEPS	Base erosion and profit shifting
CAD	Canadian Dollar
CRA	Canada Revenue Agency
CVI	Centre of vital interests
DST	Digital services tax
DTA	Double Taxation Agreement
DTC	Double Taxation Convention
DTT	Double Tax Treaty
EU	European Union
EUR	Euro
FAR	Functions, assets and risks
FTT	United Kingdom's First-Tier Tribunal
HMRC	Her Majesty's Revenue and Customs
IER	Information Exchange Request
ILS	Israeli Shekel
IP	Intellectual property
ITA	Israeli Tax Authorities
ITAC	Income Tax Act (Canada)
MAP	Mutual Agreement Procedure
MC	Model Convention
NHR	Non-Habitual Resident
OECD	Organisation for Economic Cooperation and Development
PE	Permanent establishment
PIT	Personal Income Tax
PPT	Principal Purpose Test
PTA	Portuguese Tax Authorities
RSA	Republic of South Africa
STA	Spanish Tax Authorities
TS	Tribunal Supremo (Spanish Supreme Court)
UCITS	Undertakings for Collective Investments in Transferable Securities

UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
USD	United States Dollar
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
WHT	Withholding tax

Part I:
Treaty Interpretation, Application, and Status of OECD Commentaries

Netherlands: The Relevance of (Amended) OECD Models and Commentaries and the Interpretation of the Term "Employer"

Eric Kemmeren

1. Introduction[1]

The relevance of (amended) OECD Models and Commentaries in respect of the interpretation of actual tax treaty provisions has been a subject of debate for maybe as long as these models and commentaries have existed.[2] This is also the topic of this contribution. More specifically, the research questions of this chapter are:

1. What is the relevance of the (amended) OECD Models and Commentaries in respect of the interpretation of actual tax treaty provisions in the Netherlands, and what should this relevance be considering the developed benchmarks?
2. What is the relevance of the (amended) OECD Models and Commentaries in the Netherlands in respect of the interpretation of the term "employer" in the employment income provision under the Netherlands-Germany tax treaty (1959)?[3]
3. Should the answers to the first two questions also be considered by other states when interpreting actual tax treaty provisions?

The answers to the questions will be prompted by the mentioned 2022 ruling by the Dutch Supreme Court (in Dutch: *Hoge Raad* [HR]).

In many countries, the OECD Models and their Commentaries play a role in the interpretation process of actual treaties. Therefore, the answer provided by the Dutch Supreme Court may, both from an academic and practical point of view, contribute to the learning processes in other states. In this context, this chapter will discuss the 2022 ruling. The most important question in this case is: What is the relevance in the interpretation process of tax treaties of the OECD Commentaries published at the time that the actual tax treaty (in this case, the Netherlands-Germany tax treaty [1959]) was concluded ("treaty *antecedent* commentary") and of the OECD Commentaries published after the actual tax treaty was concluded ("treaty *posterior* commentary")?

1 NL: HR 14 October 2022, no. 21/00747, ECLI:NL:HR:2022:1436, Beslissingen in belastingzaken Nederlandse Belastingrechtspraak (BNB) 2023/33, IBFD Tax Treaty Case Law.

2 See, e.g. F. Engelen, *Interpretation of Tax Treaties under International Law*, Amsterdam: IBFD 2004; D.A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model,* (2005); G. Maisto, *The Interpretation of Income Tax Treaties*, Amsterdam: IBFD 2005; W. Haslehner, *Introduction*, in: E. Reimer and A. Rust (eds), *Klaus Vogel on Double Taxation Conventions*, Alphen aan de Rijn: Wolters Kluwer 2022, paras. 87–134; T.M. Vergouwen and F.P.G. Pötgens, *De status van het OESO-Commentaar volgens de jurisprudentie van de Hoge Raad, deel 1* Weekblad Fiscaal Recht (WFR) 2022/72 and *De status van het OESO-Commentaar volgens de jurisprudentie van de Hoge Raad, deel 2* WFR 2022/75; and Advocate General R.E.C.M. Niessen in paras. 4.5 and following of his opinion of 16 March 2022 in the present case 21/00747.

3 See *Convention between the Kingdom of the Netherlands and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and Various other Taxes and for the Regulation of other Questions Relating to Taxation* (16 June 1959), effective as of 1 Jan 1959, as amended in 1980, 1991 and 2004, and terminated as of 1 Jan 2016. Treaties IBFD [*Netherlands-Germany tax treaty (1959)*].

To answer the research questions, this chapter adheres to the traditional doctrinal legal methodology.[4] Doctrinal legal research covers positive law as contained in written and unwritten international, European, and national rules, treaties, court decisions, policies, principles, concepts, doctrines, and articles in the commentary literature. This methodology makes it possible to acquire a more complete understanding of the possible impact of the OECD Commentaries on the interpretation process of actual tax treaties. It also enables assessing, based on the developed benchmarks, whether positive law should be improved and, if so, how this should be done. Therefore, the author thinks that the application of the doctrinal legal methodology is appropriate to discuss the potential impact of the OECD Commentaries on the interpretation process of actual tax treaties.

First, the facts of the case will briefly be described. Second, the decision of the Dutch Supreme Court will be presented. Subsequently, the decision will be analysed. The author will develop benchmarks in order to assess the Supreme Court's decision and to come up with suggestions for improvement if necessary.[5] The benchmarks consist of three main components. The author will explain that the interpretation process of an actual tax treaty should contribute to the protection of the rule of law and the enhancement of legal certainty. Furthermore, this process should also be consistent with good faith. In this context, the author will also address what impact the decision may have on the tax treaty interpretation process of actual tax treaties if a contracting state wants to give effect under tax treaties to the OECD Commentaries. This chapter ends with the answers to the research questions including some main conclusions.

2. Facts of the Case

The taxpayer is a resident of the Netherlands and is employed by a company resident in the United Kingdom (UK Limited). UK Limited is a subsidiary of a company resident in the United States (US LLC). US LLC also has a German resident subsidiary company (GER GmbH). On the basis of his employment contract with UK Limited, the taxpayer performs an international management function in which he is responsible for the activities in the Europe, Middle East, and Africa

4 See, e.g. J.B.M. Vranken, *Wij weten wel wat wij doen – Over juridisch-dogmatisch onderzoek in het privaatrecht, maar wel een slag anders*, Nederlands Juristenblad (NJB) 2014, p. 8; and G. Van Dijck, M. Snel & T. Van Golen, *Methoden van rechtswetenschappelijk onderzoek*, Boom juridisch 2018, p. 84.

5 The benchmarks have partly been developed on the basis of, e.g. E.C.C.M. Kemmeren, *De rol van het OESO-Commentaar bij de uitleg van belastingverdragen en het Europese recht: trias politica onder toenemende druk?*, in: J.L.M. Gribnau (ed.), *Principieel belastingrecht, Liber Amicorum, Richard Happé* (Nijmegen: Wolf Legal Publishers 2011), pp. 95–108; E.C.C.M. Kemmeren, *Netherlands: The Impact on Tax Treaties of a Legal Fiction included in National Tax Law (the "customary wage rule")* in: Michael Lang et al. (eds), *Tax Treaty Case Law around the Globe 2017* (Vienna: Linde/Amsterdam: IBFD 2018), pp. 302–311; and E.C.C.M. Kemmeren, *Netherlands: Place Where a Company Is Managed and Controlled in Order to Determine the Tax Treaty Residence*, in: Michael Lang et al. (eds), *Tax Treaty Case Law around the Globe 2019*, (Vienna: Linde/Amsterdam: IBFD 2020), pp. 59–87.

region of the group of companies of which US LLC is the top shareholder. In this capacity, the taxpayer performs work for both UK Limited and GER GmbH. This work is performed in, among others, Germany, the Netherlands, and the United Kingdom. The taxpayer is accountable to the CEO of US LLC for these activities.

An agreement was entered into between UK Limited and GER GmbH. Pursuant to this agreement, UK Limited provides certain management services to GER GmbH. To this end, a number of persons, including the taxpayer, are made available by UK Limited to GER GmbH. As remuneration for this, GER GmbH pays UK Limited a so-called "service fee" based on a percentage of UK Limited's costs allocated to it plus a profit mark-up. The "service fee" constitutes compensation for the "CEO, CFO and marketing services" performed by UK Limited. The taxpayer serves as the CEO of GER GmbH.

The German tax authorities have taken the position that the taxpayer is liable to tax in Germany in respect of wages earned by him that are attributable to the days he works in Germany.

The taxpayer claimed a deduction for double taxation in his income tax/national insurance contributions return for the year *2014* for employment income attributable to work performed for UK Limited and GER GmbH. The tax inspector granted double tax relief for the earned income attributable to the work performed for UK Limited. For the portion of the employment income attributable to work performed for GER GmbH, the tax inspector denied double tax relief.

3. National laws and (Tax) Treaty Law

The manager is a resident of the Netherlands. Therefore, he is a resident taxpayer and *can* be taxed on his worldwide income, including his income from employment.[6]

The subsequent question is whether he *may* be taxed in the Netherlands on his income that he earns as a manager. The relevant tax treaty in this case is the Netherlands-Germany tax treaty (1959). This treaty does not include a director's fees provision similar to Article 16 OECD Model 2017.[7] Therefore, the general provision on income from employment is relevant for resolving the case. As far as it is relevant, Article 10 of this treaty reads as follows [unofficial translation; italics added]:

6 See NL: Arts. 2.1, 2.3–2.4, 3.1, 3.81–3.87 *Wet inkomstenbelasting 2001* (Personal Income Tax Act (PITA) 2001).

7 Which reads as follows:
"Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State."

(1) Where an individual resident in one of the States derives income from dependent personal services, the other State shall have the right to tax such income if the services are performed in the other State.
(2) Notwithstanding paragraph 1, income from dependent personal services may be taxed only in the State in which the employee is resident *if such employee*
    1. is temporarily present in the other State for not more than a total of 183 days during a calendar year,
    2. receives consideration for his activities performed during that time *from* an *employer* not domiciled in the other State and
    3. does not receive consideration for his activities from a permanent establishment or a permanent establishment of the employer situated in the other State.[8]

The dispute is on the interpretation and application of the introductory sentence of paragraph 2 and subparagraph 2: *May* Germany tax as income from employment the salary attributable to the German CEO activities of the Dutch resident CEO of GER GmbH (the German CEO salary)?

Based on Article 10(1) Netherlands-Germany tax treaty (1959), the state where the services are provided may tax income from employment. However, Article 10(2) also includes a 183-day rule. The Netherlands, as the manager's state of residence, is exclusively entitled to tax the German CEO salary if all conditions of paragraph 2 are satisfied, including that:

> *such employee* […] receives consideration for his activities performed during that time *from* an *employer* not domiciled in the other State [Germany].

8 In Dutch [italics added]:
"(1) Indien een natuurlijk persoon met woonplaats in een van de Staten inkomsten verkrijgt uit niet-zelfstandige arbeid, heeft de andere Staat het recht tot belastingheffing voor deze inkomsten, indien de arbeid in de andere Staat wordt uitgeoefend.
(2) In afwijking van het eerste lid kunnen inkomsten uit niet-zelfstandige arbeid slechts in de Staat worden belast, waar de werknemer zijn woonplaats heeft, *indien deze werknemer*
    1. tijdelijk in totaal niet meer dan 183 dagen gedurende een kalenderjaar, in de andere Staat verblijft,
    2. voor zijn gedurende deze tijd uitgeoefende werkzaamheden vergoeding ontvangt *van* een *werkgever*, die zijn woonplaats niet in de andere Staat heeft en
    3. voor zijn werkzaamheden niet ten laste van een zich in de andere Staat bevindende vaste inrichting of duurzame inrichting van de werkgever vergoeding ontvangt."

In German [italics added]:
"(1) Bezieht eine natürliche Person mit Wohnsitz in einem der Vertragstaaten Einkünfte aus nichtselbständiger Arbeit, so hat der andere Staat das Besteuerungsrecht für diese Einkünfte, wenn die Arbeit in dem anderen Staat ausgeübt wird.
(2) Abweichend von Absatz 1 können Einkünfte aus nichtselbständiger Arbeit nur in dem Vertragstaate besteuert werden, in dem der Arbeitnehmer seinen Wohnsitz hat, *wenn dieser Arbeitnehmer*
    1. sich vorübergehend, zusammen nicht mehr als 183 Tage im Lauf eines Kalenderjahres, in dem anderen Staat aufhält,
    2. für seine während dieser Zeit ausgeübte Tätigkeit *von* einem *Arbeitgeber* entlohnt wird, der seinen Wohnsitz nicht in dem anderen Staat hat, und
    3. für seine Tätigkeit nicht zu Lasten einer in dem anderen Staate befindlichen Betriebstätte oder ständigen Einrichtung des Arbeitgebers entlohnt wird."

According to the Netherlands-Germany tax treaty (1959), both texts are equally authentic.

The dispute focused on two questions:

1. Does a *relationship of authority* exist between GER GmbH as the employer and the taxpayer as the employee?
2. Is the remuneration received by the taxpayer for their work on behalf of GER GmbH *from GER GmbH*?

If GER GmbH qualifies as the taxpayer's employer and if the remuneration that they receive for their services provided to GER GmbH is to be considered to be received from GER GmbH, Germany may tax the German CEO salary. Consequently, they would be entitled to a tax reduction on the basis of Article 20(1)+(3) of the Netherlands-Germany tax treaty (1959) which, as far as is relevant, reads as follows [unofficial translation; italics added]:

> (1) Without prejudice to the provisions of paragraph 2 of Article 13 and the second sentence of paragraph 3 of Article 14, where the State of residence has the right to tax income or assets under the preceding Articles, the other State *may not tax such income* or assets. […]
> (3) If the *Netherlands* is the State of residence, it shall have the power also to include in the basis, upon which taxes are imposed, those items of income and capital on which the Federal Republic of Germany has a right to tax under the preceding Articles; However, the Netherlands shall, subject to its domestic rules for the avoidance of double taxation in respect of the compensation of losses, deduct from the computed tax that part of the tax which belongs to *the income* or capital items for which under Articles 4, 5, 6, 7, 8, paragraph 2, Articles 9, *10, paragraph 1*, Articles 11, 12, paragraphs 2 and 3, Article 13, paragraph 5, Article 14, paragraph 2, Article 15, paragraph 4, and Article 19, paragraph 1, the Federal Republic of Germany has the right to tax. The tax to be deducted shall be calculated in the proportion in which the items of income or the part of the property, in respect of which the Federal Republic of Germany has the right to tax pursuant to the articles mentioned in the preceding sentence, stand to all the items of income or the whole of the property.[9]

9 In Dutch [italics added]:
"(1) Indien de woonstaat ingevolge de voorgaande artikelen het recht tot belastingheffing voor inkomsten of vermogensbestanddelen heeft, mag, onverminderd het bepaalde in artikel 13, tweede lid, en artikel 14, derde lid, tweede zin, de andere Staat *deze inkomsten* of vermogensbestanddelen *niet belasten*. […]
(3) Indien *Nederland* de woonstaat is, is het bevoegd, ook die inkomsten en vermogensbestanddelen in de grondslag, waarnaar de belastingen worden geheven, te begrijpen, waarvoor de Bondsrepubliek Duitsland ingevolge de voorgaande artikelen een recht tot belastingheffing heeft; Nederland zal evenwel, onder voorbehoud van zijn nationale voorschriften voor de vermijding van dubbele belasting betreffende de verliescompensatie, op de berekende belasting dat deel van de belasting in mindering brengen, dat behoort bij *de inkomsten* of vermogensbestanddelen, waarvoor ingevolge de artikelen 4, 5, 6, 7, 8, tweede lid, de artikelen 9, *10, eerste lid*, de artikelen 11, 12, tweede en derde lid, artikel 13, vijfde lid, artikel 14, tweede lid, artikel 15, vierde lid, en artikel 19, eerste lid, de Bondsrepubliek Duitsland het recht tot belastingheffing heeft. De in mindering te brengen belasting wordt berekend naar de verhouding, waarin de inkomensbestanddelen of het gedeelte van het vermogen, waarvoor ingevolge de in de vorige zin genoemde artikelen de Bondsrepubliek Duitsland het recht tot belastingheffing heeft, staan tot alle inkomensbestanddelen of het gehele vermogen."

The Court of Appeals answered the two questions in the negative and, therefore, it also denied a tax reduction.

4. The Court's Decision

The Supreme Court focuses its decision on the interpretation and application of Article 10 Netherlands-Germany tax treaty (1959) and the relevance of various OECD Commentaries regarding the interpretation of this provision, more specifically concerning the term "employer" and whether remuneration is received "from" an employer in the working state. First, the Supreme Court gives its general view on the significance of OECD Commentaries for interpretation of actual tax treaty provisions (section 4.1. below). Subsequently, it decides on the significance of a qualification by the working state for the qualification in the state of residence (section 4.2. below). Finally, it makes a decision on whether the German CEO salary is received from a German resident employer (GER GmbH) (section 4.3. below).

4.1. Significance of OECD Commentaries for interpretation of actual tax treaty provisions in general

The Supreme Court starts its decision by setting out its views on the relevance of OECD Models and Commentaries for the interpretation of actual tax treaties in general.

The court holds that, if the *text* of a provision in a tax treaty is aligned as much as possible with the OECD Model, as is the case with Article 10 Netherlands-Germany tax treaty (1959),[10] the OECD Commentary on the corresponding provision in the OECD Model, as that commentary read at the time the treaty in question was

In German [italics added]:

"(1) Wenn der Wohnsitzstaat nach den vorhergehenden Artikeln für Einkünfte oder Vermögensteile das Besteuerungsrecht hat, so darf der andere Staat *diese Einkünfte* oder Vermögensteile *nicht besteuern*. Artikel 13 Abs. 2 und Artikel 14 Abs. 3 Satz 2 bleiben unberührt. […]

(3) Sind die *Niederlande* der Wohnsitzstaat, so sind sie berechtigt, auch die Einkünfte und Vermögensteile in die Bemessungsgrundlage einzubeziehen, für die die Bundesrepublik Deutschland nach den vorhergehenden Artikeln ein Besteuerungsrecht hat; jedoch werden die Niederlande, unbeschadet ihrer innerstaatlichen Vorschriften über die Vermeidung der Doppelbesteuerung bezüglich des Verlustausleiches, von der errechneten Steuer den Teil der Steuer in Abzug bringen, der auf *die Einkünfte* oder Vermögensteile entfällt, für die nach den Artikeln 4, 5, 6, 7, 8 Abs. 2, den Artikeln 9, *10 Abs. 1*, den Artikeln 11, 12 Abs. 2 und 3, Artikel 13 Abs. 5, Artikel 14 Abs. 2, Artikel 15 Abs. 4 und Artikel 19 Abs. 1 die Bundesrepublik Deutschland das Besteuerungsrecht hat. Die in Abzug zu bringende Steuer errechnet sich aus dem Verhältnis, in dem die Einkünfte oder Vermögensteile, für die nach den im vorigen Satz genannten Artikeln die Bundesrepublik Deutschland das Besteuerungsrecht hat, zum Gesamteinkommen oder Gesamtvermögen stehen."

10 The Supreme Court also refers to its previous case law: NL: HR 9 Dec. 1998, no. 32.709, ECLI:NL:HR:1998:AA2613, BNB 1999/267, IBFD Tax Treaty Case Law.

concluded (treaty *antecedent* commentary), *is of great importance* for the interpretation of that provision.[11]

Subsequently, the court decides that an OECD Commentary published after a tax treaty has been concluded (treaty *posterior* commentary) *may also be of importance* for the interpretation of a provision of that tax treaty if the *text* of that provision has been aligned as much as possible with the OECD Model. Such importance may accrue to the treaty-*posterior* commentary if it is a *precision or clarification* of the relevant provision of the OECD Model or a treaty-*antecedent* commentary. The *significance* of such treaty *posterior* commentary *is limited* in the sense that, when interpreting the previously concluded tax treaty, it can only be used as an additional means of interpretation within the meaning of Article 32 of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter VCLT). Therefore, a treaty *posterior* commentary cannot give rise to an interpretation of a treaty provision that differs from the interpretation arising from the primary sources of interpretation referred to in Article 31 VCLT, i.e. the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Still, according to the court, a different interpretation would mean that the determination or amendment of the *content of obligations* arising for the Netherlands from a tax treaty would be taken away from the bodies designated as competent to do so by or under the constitution.

Furthermore, the court considers that a treaty *posterior* OECD Commentary that goes beyond a precision or clarification *is not relevant* when interpreting provisions of a tax treaty even as an additional means of interpretation as referred to in Article 32 VCLT.

Finally, it decides that, what has been held regarding the significance of a treaty *posterior* OECD commentary does not apply to the extent that the relevant tax treaty contains a different rule. However, as the court explains, such a derogating rule does not apply for the purposes of the Netherlands-Germany tax treaty (1959).

4.2. Significance of qualification by the working State

The next point addressed by the Supreme Court is the relevance of a qualification by the other contracting state which, in this case, is the qualification by Germany as the working state.

The taxpayer had argued, in essence, that it follows from paragraph 8.10 of the tax treaty *posterior* 2010-OECD Commentary on Article 15 OECD Model that the

11 The Supreme Court also refers here to previous case law: NL: HR 14 July 2017, no. 16/03578, ECLI:NL:HR:2017:1326, BNB 2027/188, paragraph 3.1.2, IBFD Tax Treaty Case Law.

Netherlands should follow the qualification given by Germany as the working state both with regard to the relationship of authority between the taxpayer and GER GmbH and with regard to the remuneration obtained by the CEO from this GmbH.[12]

The Supreme Court deduces from this paragraph that, if the state of residence and the working state do not reach the same conclusion on the presence of an employer in the working state due to differences in national legislation, double taxation can be avoided by the state of residence joining the application of the tax treaty by the working state. The court holds that it may be left open whether, in this paragraph, in addition to a suggestion to the relevant authorities for resolving problems by mutual agreement, an indication on the interpretation of the relevant tax treaty can also be read. If at all, this paragraph would depart significantly from the principle set out in Article 2(2) of the Netherlands-Germany tax treaty (1959) that provisions of this tax treaty are to be interpreted by the contracting state applying the treaty, in many cases on the basis of its domestic law.[13] Therefore, it concludes that paragraph 8.10 is not a precision or a clarification of the tax treaty as discussed above. Nor does that paragraph qualify as a precision or a clarification of a treaty-*antecedent* OECD Commentary according to the court. Moreover, when interpreting the concept of employer in Article 10 Netherlands-Germany tax treaty (1959), the Netherlands does not rely on its domestic legislation as this concept does not appear in the laws in force in the Netherlands with respect to the taxes that are the subject of the tax treaty.[14] Moreover, the Netherlands has made an observation to the OECD Commentary that extends to this

12 Para. 8.10 of the 2010-OECD Commentary on Article 15 OECD reads as follows:
"The approach described in the previous paragraphs therefore allows the State in which the activities are exercised to reject the application of paragraph 2 in abusive cases and in cases where, under that State's domestic law concept of employment, services rendered to a local enterprise by an individual who is formally employed by a non-resident are rendered in an employment relationship (contract of service) with that local enterprise. This approach ensures that relief of double taxation will be provided in the State of residence of the individual even if that State does not, under its own domestic law, consider that there is an employment relationship between the individual and the enterprise to which the services are provided. Indeed, as long as the State of residence acknowledges that the concept of employment in the domestic tax law of the State of source or the existence of arrangements that constitute an abuse of the Convention allows that State to tax the employment income of an individual in accordance with the Convention, it must grant relief for double taxation pursuant to the obligations incorporated in Articles 23 A and 23 B (see paragraphs 32.1 to 32.7 of the Commentary on these articles). The mutual agreement procedure provided by paragraph 1 of Article 25 will be available to address cases where the State of residence does not agree that the other State has correctly applied the approach described above and, therefore, does not consider that the other State has taxed the relevant income in accordance with the Convention."

13 Art. 2(2) of the Netherlands-Germany tax treaty (1959) reads as follows [unofficial translation]:
"As regards the application of this Convention by any of the States, any term not defined in this Convention shall, unless the context otherwise requires, have the meaning given to it by that term which it has under the laws in force in that State relating to taxes, which constitute the subject matter of this Convention."

14 The Supreme Court also refers to previous case law: NL: HR 28 Feb. 2003, no. 37224, ECLI:NL:HR:2003:AU5241, BNB 2004/138, para. 3.3, IBFD Tax Treaty Case Law.

point.[15] The court concludes that paragraph 8.10 of the treaty *posterior* 2010 OECD Commentary goes beyond a precision or clarification. Therefore, it decides that this paragraph *has no significance* on this point in the interpretation of Article 10(2)(2) Netherlands-Germany tax treaty (1959).

Based on the same reasoning, the Supreme Court also rejects the taxpayer's tax reduction claim on the grounds of paragraphs 32.1 to 32.7 of the 2010-OECD Commentary on Articles 23A and 23B of the OECD Model referred to in paragraph 8.10 of the 2000-OECD Commentary.

4.3. Remuneration received from a German resident employer

The following point on which the court decides is whether the CEO has received remuneration *from* a German resident employer, i.e. GER GmbH.

The taxpayer claimed that it follows from paragraphs 8.13 and 8.14 of the treaty *posterior* 2010-Commentary on Article 15 OECD Model that employer status must be assessed by reference to the so-called "nature of services test".[16] He claimed that he obtained his remuneration insofar as attributable to his work performed

15 In this context, the Supreme Court holds that para. 8.10 of the 2010-Commentary on Article 15 refers to and has the same scope as paragraphs 32.1 to 32.7 of the 2000-Commentary on Articles 23A and 23B, where the Netherlands included an observation.

16 These paragraphs read as follows [italics added]:
"8.13 The nature of the services rendered by the individual will be an important factor since it is logical to assume that an employee provides services which are an integral part of the business activities carried on by his *employer*. It will therefore be important to determine whether the services rendered by the individual constitute an integral part of the business of the enterprise to which these services are provided. For that purpose, a key consideration will be *which enterprise bears the responsibility or risk for the results produced by the individual's work*. Clearly, however, this analysis will only be relevant if the services of an individual are rendered directly to an enterprise. Where, for example, an individual provides services to a contract manufacturer or to an enterprise to which business is outsourced, the services of that individual are not rendered to enterprises that will obtain the products or services in question.
8.14 Where a comparison of the nature of the services rendered by the individual with the business activities carried on by his formal employer and by *the enterprise to which the services are provided* points to an *employment relationship* that is different from the formal contractual relationship, the *following additional factors may be relevant* to determine whether this is really the case:
- who has the authority to instruct the individual regarding the manner in which the work has to be performed;
- who controls and has responsibility for the place at which the work is performed;
- the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided (see paragraph 8.15 below);
- who puts the tools and materials necessary for the work at the individual's disposal;
- who determines the number and qualifications of the individuals performing the work;
- who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;
- who has the right to impose disciplinary sanctions related to the work of that individual;
- who determines the holidays and work schedule of that individual."

Notes

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