

TRACTATENBLAD

VAN HET

KONINKRIJK DER NEDERLANDEN

JAARGANG 2009 Nr. 188

A. TITEL

*Verdrag tussen het Koninkrijk der Nederlanden, ten behoeve van de
Nederlandse Antillen, en de Britse Maagdeneilanden inzake de
uitwisseling van informatie betreffende belastingen;
(met Protocol)
's-Gravenhage, 11 september 2009*

B. TEKST

**Agreement between the Kingdom of the Netherlands, in respect of
the Netherlands Antilles, and the British Virgin Islands for the
exchange of information with respect to taxes**

The Government of the Kingdom of the Netherlands, in respect of the
Netherlands Antilles,

and

the Government of the British Virgin Islands,

Whereas the Contracting Parties recognise that present legislation
already provides for cooperation and the exchange of information in tax
matters;

Whereas the Contracting Parties have long been active in international
efforts in the fight against financial and other crimes, including the tar-
geting of terrorist financing;

Whereas it is acknowledged that the Contracting Parties are compe-
tent to negotiate and conclude a tax information exchange agreement;

Whereas the Netherlands Antilles on the 30th of November 2000 and the British Virgin Islands on the 2nd April 2002 entered into a formal written commitment to the Organisation for Economic Co-operation and Development's (OECD) principles of transparency and exchange of information and subsequently have participated actively in the OECD Global Forum on Taxation;

Whereas the Contracting Parties wish to enhance and facilitate the implementation of the terms and conditions governing the exchange of information relating to taxes;

Now, therefore, the Contracting Parties have agreed to conclude the following Agreement which contains obligations on the part of the Contracting Parties only:

Article 1

Scope of the Agreement

1. The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning the taxes and the tax matters covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment, verification, enforcement, recovery or collection of tax claims or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8.

2. As regards the Kingdom of the Netherlands, this Agreement shall apply only to the Netherlands Antilles.

Article 2

Jurisdiction

To enable the appropriate implementation of this Agreement, information shall be provided in accordance with this Agreement by the competent authority of the Requested Party:

a) without regard to whether the person to whom the information relates is a resident, national or citizen of a Contracting Party, or whether the person by whom the information is held is a resident, national or citizen of a Contracting Party; and

b) provided that the information is present within the territory, or in the possession or control of a person present in the jurisdiction of the Requested Party.

Article 3

Taxes Covered

1. The taxes which are the subject of this Agreement are:
 - a) in the Netherlands Antilles,
 - (i) the income tax (inkomstenbelasting¹⁾);
 - (ii) the wages tax (loonbelasting)
 - (iii) the profit tax (winstbelasting); and
 - (iv) the surtaxes on the income and profit tax (opcenten op de inkomsten- en winstbelasting);
 - b) in the British Virgin Islands,
 - (i) the income tax;
 - (ii) the payroll tax; and
 - (iii) the property tax.

2. This Agreement shall also apply to any identical or substantially similar taxes imposed by either Contracting Party after the date of signature of the Agreement in addition to, or in place of, the existing taxes listed in sub-paragraph 1. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other through the exchange of letters of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

Article 4

Definitions

1. In this Agreement:
 - a) the term "British Virgin Islands" means the territory of the British Virgin Islands as referred to in the Virgin Islands Constitution Order 2007;
 - b) the term "the Netherlands Antilles" means that part of the Kingdom of the Netherlands that is situated in the Caribbean Sea and consisting of the Island Territories of Bonaire, Curaçao, Saba, St. Eustatius and St. Maarten (Dutch part), including the territorial waters thereof and the part of the seabed and its subsoil under the Caribbean Sea over which the Kingdom of the Netherlands has sovereign rights in accordance with international law but excluding the part thereof relating to Aruba;
 - c) the term "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form;

¹⁾ Noot redactie: hier wordt kennelijk bedoeld „inkomstenbelasting”.

- d) the term “company” means any body corporate or any entity that is treated as a body corporate for tax purposes;
- e) the term “competent authority” means
 - (i) in the case of the Netherlands Antilles, the Minister of Finance or his authorized representative;
 - (ii) and in the case of the British Virgin Islands, the Financial Secretary or a person or authority designated by him in writing;
- f) the term “Contracting Party” means the Kingdom of the Netherlands, in respect of the Netherlands Antilles, or the British Virgin Islands as the context requires;
- g) the term “criminal laws” means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes;
- h) the term “criminal tax matters” means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the Requesting Party with the inclusion of administrative fines;
- i) the term “information” means any fact, statement, document or record in any form whatever;
- j) the term “information gathering measures” means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the information requested;
- k) the term “national” means
 - (i) In relation to the Netherlands Antilles, an individual who has the Dutch nationality and who is registered as a resident in one of the Island territories of the Netherlands Antilles, provided however that, if an individual is not present in the Netherlands Antilles, he must have been born in the Netherlands Antilles, and any legal person, partnership or association deriving its status as such from the laws in force in the Netherlands Antilles;
 - (ii) in relation to the British Virgin Islands, any person who belongs to the British Virgin Islands by virtue of the Virgin Islands Constitution Order 2007 (Statutory Instrument 2007 No.1678) or has a certificate of residence of the British Virgin Islands by virtue of the Immigration and Passport Ordinance (Cap.130); and any legal person, partnership, association or other entity deriving its status as such from the laws in force in the British Virgin Islands;
- l) the term “person” includes an individual (“natural person”), a company and any other body or group of persons;
- m) the term “public collective investment fund or scheme” means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public;
- n) the term “publicly traded company” means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public and for the purposes of this definition the term:

- (i) “principal class of shares” means the class or classes of shares representing a majority of the voting power and value of the company;
- (ii) “Shares can be purchased or sold by the public” means the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;
- (iii) “recognised stock exchange” means any stock exchange agreed upon by the competent authorities of the Contracting Parties;
- o) the term “Requested Party” means the Contracting Party which is requested to provide or has provided information in response to a request;
- p) the term “Requesting Party” means the Contracting Party submitting a request for or having received information from the Requested Party;
- q) the term “tax” means any tax which is subject of this Agreement.

2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Contracting Party, any meaning under the applicable tax laws of that Contracting Party prevailing over a meaning given to the term under other laws of that Contracting Party.

Article 5

Exchange of Information Upon Request

1. The competent authority of a Requested Party shall provide upon request in writing by the Requesting Party information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the Requested Party if it occurred in the jurisdiction of the Requested Party.

2. If the information in the possession of the competent authority of the Requested Party is not sufficient to enable it to comply with the request for information, the Requested Party shall use all relevant information gathering measures to provide the Requesting Party with the information requested, notwithstanding that the Requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of the Requesting Party, the competent authority of the Requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authority, for the purposes of this Agreement, has the authority to obtain and provide upon request:

a) information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;

b) information regarding the legal and beneficial ownership of companies, partnerships and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; and in the case of trusts, information on settlors, trustees, beneficiaries and protectors; and in the case of foundations, information on founders, members of the foundation council and beneficiaries and equivalent information in the case of entities that are neither trusts nor foundations.

5. Notwithstanding the preceding paragraphs, this Agreement does not create an obligation on the Contracting Parties to obtain or provide:

a) ownership information with respect to publicly traded companies or public collective investment funds or schemes, unless such information can be obtained without giving rise to disproportionate difficulties;

b) information relating to a period more than six years prior to the tax period under consideration;

c) information in the possession or control of a person other than the taxpayer that does not directly relate to the taxpayer.

6. The competent authority of the Requesting Party shall provide the following information to the competent authority of the Requested Party when making a request for information under the Agreement in order to demonstrate the foreseeable relevance of the information to the request:

a) the identity of the person under examination or investigation;

b) the period for which the information is requested;

c) the nature and type of the information requested, including a description of any specific evidence sought and the form in which the Requesting Party would prefer to receive the information;

d) the tax purpose for which the information is sought and the reasons for believing that the information requested is foreseeably relevant to the administration or enforcement of the domestic laws of the Requesting Party;

e) grounds for believing that the information requested is present in the jurisdiction of the Requested Party or is in the possession or control of a person subject to the jurisdiction of the Requested Party;

f) to the extent known, the name and address of any person believed to be in possession or control of the information requested;

g) a statement that the request is in conformity with this Agreement and the law and administrative practices of the Requesting Party and that if the requested information were within the jurisdiction of the Requesting Party then the competent authority of the Requesting Party would be

able to obtain the information under the laws of the Requesting Party or in the normal course of administrative practice;

h) a statement that the Requesting Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

7. The competent authority of the Requested Party shall forward the requested information as promptly as possible to the competent authority of the Requesting Party. To ensure a prompt response, the competent authority of the Requested Party shall:

a) confirm receipt of a request in writing to the competent authority of the Requesting Party and shall notify the competent authority of the Requesting Party of any deficiencies in the request within 60 days of the receipt of the request; and

b) if the competent authority of the Requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, if obstacles are encountered in furnishing the information or if the competent authority of the Requested party refuses to provide the information, it shall immediately inform the Requesting Party, in writing explaining the reason for its inability to obtain and provide the information or the reasons for its refusal.

8. For the purposes of this Agreement, the Contracting Parties may enter into a Memorandum of Understanding to deal with any procedural matters they consider necessary for the processing of requests for the provision under this Agreement of information on tax matters and any other matters connected therewith.

Article 6

Tax Examinations Abroad

1. The Requested Party may, to the extent permitted under its domestic laws following reasonable notice from the Requesting Party, allow representatives of the competent authority of the Requesting Party to enter the jurisdiction of the Requested Party with a request to interview persons and examine records with the written consent of the persons concerned. The competent authority of the Requesting Party shall notify the competent authority of the Requested Party of the time and place of the intended meeting with the persons concerned.

2. At the request of the competent authority of the Requesting Party, the competent authority of the Requesting Party may, in accordance with its domestic laws, permit representatives of the competent authority of the Requesting Party to be present at the appropriate part of a tax examination in the Requested Party.

3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Requested Party conducting the examination shall, as soon as possible, notify the competent authority of the Requesting Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the Requested Party for the conduct of the examination. All decisions with respect to the conduct of the examination shall be made by the Requested Party conducting the examination in accordance with its domestic laws.

Article 7

Possibility of Declining a Request

1. The competent authority of the Requested Party may decline to assist:

- a) where the request is not made in conformity with this Agreement;
- b) where the Requesting Party has not pursued all means available in its own territory to obtain the information, except where recourse to such means would give rise to disproportionate difficulty; or
- c) where the disclosure of the information requested would be contrary to the public policy (ordre public) of the Requested Party.

2. This Agreement shall not impose on a Contracting Party the obligation to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4, shall not by reason of that fact alone constitute such a secret or process.

3. a) The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and a legal practitioner or other admitted legal representative where such communications are:

- (i) produced for the purposes of seeking or providing legal advice;
or
- (ii) produced for the purposes of use in existing or contemplated legal proceedings.

b) Information held with the intention of furthering a criminal purpose is not subject to legal privilege, and nothing in this Article shall prevent a legal practitioner or other admitted legal representative from providing the name and address of a client where doing so would not constitute a breach of legal privilege.

4. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.

5. The Requested Party may decline a request for information if the information is requested by the Requesting Party to administer or enforce a provision of the tax law of the Requesting Party, or any requirement connected therewith, which discriminates against a resident or national of the Requested Party as compared with a resident or national of the Requesting Party in the same circumstances.

Article 8

Confidentiality

1. Any information provided and received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes.

2. The information may not be disclosed to any person, entity or authority, or any other jurisdiction which has a tax information exchange agreement with the Requested Party, without the express written consent of the competent authority of the Requested Party.

3. Save as otherwise provided in paragraph 2, no information shall be provided to any other person, entity, authority or jurisdiction.

Article 9

Safeguards

Nothing in this Agreement shall affect the rights and safeguards secured to persons by the laws or administrative practice of the Requested Party. The rights and safeguards may not be applied by the Requested Party in a manner that unduly prevents or delays effective exchange of information.

Article 10

Costs

Incidence of costs incurred in providing assistance (including reasonable costs of third parties and external advisors in connection with litigation or otherwise) shall be agreed by the Contracting Parties in accordance with a Memorandum of Understanding.

Article 11

Implementation Legislation

The Contracting Parties shall (where they have not already done so) enact any legislation necessary to comply with, and give effect to, the terms of this Agreement.

Article 12

Language

Requests for assistance and answers thereto shall be drawn up in English.

Article 13

Mutual Agreement Procedure

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of this Agreement, the competent authorities shall use their best efforts to resolve the matter by mutual agreement, including utilising the Commentary in Part III of the OECD Model Agreement on Exchange of Information on Tax Matters where the provisions of the OECD Model Agreement are identical or substantially identical to the provisions of this Agreement.

2. In addition to the endeavours referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually determine the procedures to be used under Articles 5 and 6.

3. The competent authorities of the Contracting Parties may communicate with each other directly for purposes of this Agreement.

4. The Contracting Parties may also agree on other forms of dispute resolution, including mediation and arbitration.

Article 14

Entry into Force

This Agreement shall enter into force on the first day of the third month after the latter of the respective Contracting Parties have notified each other in writing that the formalities required in their respective jurisdiction have been complied with, and its provisions shall have effect with respect to the exchange of information for criminal tax matters on or after that date, and, with respect to all other matters for taxable peri-

ods beginning on or after that date, or where there is no taxable period, for all charges to tax arising on or after that date.

Article 15

Termination

1. This Agreement shall remain in force until terminated by one of the Contracting Parties. Either Contracting Party may terminate the Agreement by giving at least six months notice to the other Contracting Party after the expiration of a period of three years from the date of its entry into force. In such event the Agreement shall cease to have effect for taxable years and periods beginning after the end of the year in which the notice of termination has been given.

2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notice of termination by the other Contracting Party.

3. In the event of termination, the Contracting Parties shall remain bound by the provisions of Article 8 with respect to any information obtained under this Agreement. All requests received up to the effective date of termination shall be dealt with in accordance with the terms of this Agreement.

IN WITNESS WHEREOF, the undersigned being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE at The Hague this 11th day of September 2009, in duplicate, in the English language.

For the Kingdom of the Netherlands, in respect of the Netherlands Antilles:

E. DE LANNOOY
Minister of Finance

For the British Virgin Islands:

RALPH T. O'NEIL
Prime Minister and Minister of Finance

Protocol between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the British Virgin Islands concerning the interpretation and implementation of the Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the British Virgin Islands for the exchange of information with respect to taxes

The Government of the Kingdom of the Netherlands, in respect of the Netherlands Antilles,

and

the Government of the British Virgin Islands

(hereinafter referred to as “the Contracting Parties”),

desiring to facilitate the exchange of information with respect to taxes,

have further agreed as follows:

Article 1

(Article 5 – Notification on Request)

For the purpose of facilitating the exchange of information under the Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the British Virgin Islands for the Exchange of Information with Respect to Taxes (herein after referred to as “the Agreement”), where information received by the competent authority of the Requesting Party is not sufficient to enable it to comply with the request, it shall advise the competent authority of the Requesting Party of that fact and request such additional information as may be required to enable the effective processing of the request.

Article 2

(Modifications to the Agreement)

At any time after the entry into force of this Protocol, a Contracting Party may propose modifications, for the purpose of bringing the Agreement into conformity with the internationally agreed standards on exchange of information for tax purposes. Upon receipt of such a proposal, the other Contracting Party shall enter into good faith negotiations concerning the proposal.

Article 3

(Non Prejudicial and Restrictive Measures)

1. Neither of the Contracting Parties shall apply prejudicial or restrictive measures based on harmful tax practices to residents or nationals of either Contracting Party so long as this Agreement is in force and effective.

2. A “prejudicial or restrictive measure based on harmful tax practices” is a measure applied by one Contracting Party to residents or nationals of either Contracting Party on the basis that the other Contracting Party does not engage in effective exchange of information and/or because it lacks transparency in the operation of its laws, regulations or administrative practices, or on the basis of no or nominal taxes and one of the preceding criteria.

3. Without limiting the generality of paragraph 2, the term “prejudicial or restrictive measure” is not limited solely to taxation matters and includes the denial of a deduction, credit or exemption, the imposition of a tax, charge or levy, or special reporting requirements, but does not include any generally applicable measures, applied by either Contracting Party against, amongst others, members of the OECD generally.

Article 4

(Variation of Protocol)

In light of the experience of operating the Agreement, or to reflect changing circumstances either Contracting Party may wish to propose a variation in the terms of this Protocol. If so, it is understood that the other Contracting Party will agree to hold timely discussions with a view to revising the terms of the Agreement:

- a) The competent authority may initiate discussions should:
 - (i) the Kingdom of the Netherlands, in respect to the Netherlands Antilles, enter into an agreement with another jurisdiction which provides for other forms of exchange of information;
 - (ii) the British Virgin Islands enter into an agreement with another jurisdiction which provides for other forms of exchange of information;
 - (iii) either Contracting Party introduce new legislation which enables other forms of exchange of information;
- b) If the Netherlands Antilles enters into arrangements with another jurisdiction for the provision of information with respect to taxes that are less burdensome in any material respect than the provisions of the

Agreement, the British Virgin Islands may initiate discussions with the Netherlands Antilles with a view to modifying the Agreement to have similar arrangements;

c) If the British Virgin Islands enters into arrangements with another jurisdiction for the provision of information with respect to taxes that are less burdensome in any material respect than the provisions of the Agreement, the Netherlands Antilles may initiate discussions with the British Virgin Islands with a view to modifying the Agreement to have similar arrangements.

Article 5

This Protocol shall form an integral part of the Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the British Virgin Islands for the Exchange of Information with Respect to Taxes, and shall enter into force on the same date as the Agreement.

Article 6

The Contracting Parties may, by mutual arrangement, amend this Protocol at any time in writing. Such amendment shall enter into force on the first day of the second month after the Contracting Parties have notified each other in writing that the constitutional or internal requirements for the entry into force of the amendment have been complied with.

IN WITNESS WHEREOF, the undersigned being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE at The Hague this 11th day of September 2009, in duplicate, in the English language.

For the Kingdom of the Netherlands, in respect of the Netherlands Antilles:

E. DE LANNOOY
Minister of Finance

For the British Virgin Islands:

RALPH T. O'NEIL
Prime Minister and Minister of Finance

D. PARLEMENT

Het Verdrag, met Protocol, behoeft ingevolge artikel 91 van de Grondwet de goedkeuring van de Staten-Generaal, alvorens het Koninkrijk aan het Verdrag, met Protocol, kan worden gebonden.

G. INWERKINGTREDING

De bepalingen van het Verdrag, met Protocol, zullen ingevolge artikel 14 van het Verdrag juncto artikel 5 van het Protocol in werking treden op de eerste dag van de derde maand nadat beide Verdragsluitende partijen elkaar er schriftelijk van in kennis hebben gesteld dat is voldaan aan de binnen hun rechtsgebied vereiste formaliteiten.

J. VERWIJZINGEN

- Titel : Verdrag nopens de Organisatie voor Economische Samenwerking en Ontwikkeling; Parijs, 14 december 1960
- Tekst : *Trb.* 1961, 42 (Frans en Engels)
Trb. 1961, 60 (vertaling)
- Laatste *Trb.* : *Trb.* 1994, 193

Uitgegeven de *vierde* november 2009.

De Minister van Buitenlandse Zaken,

M. J. M. VERHAGEN