

TRACTATENBLAD

VAN HET

KONINKRIJK DER NEDERLANDEN

JAARGANG 2002 Nr. 102

A. TITEL

Verdrag tussen het Koninkrijk der Nederlanden, ten behoeve van de Nederlandse Antillen, en de Verenigde Staten van Amerika inzake de uitwisseling van gegevens met betrekking tot belastingen; Washington, 17 april 2002

B. TEKST

Agreement between the Government of the Kingdom of the Netherlands in respect of the Netherlands Antilles and the Government of the United States of America 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 United States of America;

Considering that it is more important than ever not to allow the institutions in either jurisdiction to be used to further illicit financial activity of any kind and recognizing the critical importance of sharing information with one another to prevent abuse of their respective fiscal laws; and

Therefore, desiring to cooperate to prevent financial crimes and combat terrorism, including through sharing of information, and to conclude an Agreement for the exchange of information with respect to taxes (hereinafter referred to as the "Agreement");

Have agreed as follows:

Article 1

Object and scope of the Agreement

1. The Contracting States shall assist each other to assure the accurate assessment and collection of taxes, to prevent fiscal fraud and eva-

sion, and to develop improved information sources for tax matters. The Contracting States shall provide assistance through exchange of information authorized pursuant to Article 4 and such related measures as may be agreed upon by the competent authorities pursuant to Article 5.

2. Information shall be exchanged to fulfill the purpose of this Agreement without regard to whether the person to whom the information relates is, or whether the information is held by, a resident or national of a Contracting State, provided that the information is present within the territory, or in the possession or control of a person subject to the jurisdiction, of the requested State.

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

Article 2

Taxes covered by the Agreement

1. This Agreement shall apply to the following taxes imposed by or on behalf of a Contracting State:

- a) in the case of the United States of America, all federal taxes;
- b) in the case of the Netherlands Antilles, the following taxes: the income tax (inkomstenbelasting), the wages tax (loonbelasting), the profit tax (winstbelasting) and the surtaxes on the income and profit taxes (hereinafter referred to as "Netherlands Antilles taxes").

2. This Agreement shall apply also to any identical or substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. The competent authority of each Contracting State shall notify the other of changes in laws which may affect the obligations of that State pursuant to this Agreement.

3. This Agreement shall not apply to the extent that an action or proceeding concerning taxes covered by this Agreement is barred by the applicant State's statute of limitations.

4. This Agreement shall not apply to taxes imposed by states, municipalities or other political subdivisions, or possessions of a Contracting State.

Article 3

Definitions

1. In this Agreement, unless otherwise defined:

- a) The term "competent authority" means:
 - (i) in the case of the United States of America, the Secretary of the Treasury or his delegate; and

- (ii) in the case of the Netherlands Antilles, the Minister of Finance or his authorized representative;
- b) The term “Contracting State” means the United States or the Kingdom of the Netherlands in respect of the Netherlands Antilles as the context requires;
- c) The term “national” means:
 - (i) in the case of the United States, any United States citizen and any legal person, partnership, corporation, trust, estate, association, or other entity deriving its status as such from the laws in force in the United States; and
 - (ii) in the case of the Netherlands Antilles, an individual who has Dutch nationality and who would be eligible to vote in the Netherlands Antilles if he were of age and present in the Netherlands Antilles, provided however, if an individual is not present in the Netherlands Antilles, he must have either been born in the Netherlands Antilles or have been resident thereof for at least five years;
- d) The term “person” includes an individual and a partnership, corporation, trust, estate, association or other legal entity;
- e) The term “tax” means any tax to which the Agreement applies;
- f) The term “information” means any fact or statement, in any form whatever, that may be relevant or material to tax administration and enforcement, including (but not limited to):
 - (i) testimony of an individual; and
 - (ii) documents, records or tangible property of a person or Contracting State;
- g) The terms “applicant State” and “requested State” mean, respectively, the Contracting State applying for or receiving information and the Contracting State providing or requested to provide such information;
- h) For purposes of determining the geographical area within which jurisdiction to compel production of information may be exercised, the term “United States” means the United States of America, including Puerto Rico, the Virgin Islands, Guam, and any other United States possession or territory;
- i) For purposes of determining the geographical area within which jurisdiction to compel production of information may be exercised, the term “Netherlands Antilles” means that part of the Kingdom of the Netherlands that is situated in the Caribbean area and consisting of the Island Territories of Bonaire, Curaçao, Saba, St. Eustatius and St. Maarten (Dutch part).

2. Any term not defined in this Agreement, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 5, shall have the meaning which it has under the laws of the Contracting State relating to the taxes which are the subject of this Agreement.

Article 4

Exchange of information

1. The competent authorities of the Contracting States shall exchange information to administer and enforce the domestic laws of the Contracting States concerning taxes covered by this Agreement, including information to effect the determination, assessment, and collection of tax, the recovery and enforcement of tax claims, or the investigation or prosecution of tax crimes or crimes involving the contravention of tax administration.

2. The competent authority of the requested State shall provide information upon request by the competent authority of the applicant State for the purposes referred to in paragraph 1. If the information available in the tax files of the requested State is not sufficient to enable compliance with the request, that State shall take all relevant measures, including compulsory measures, to provide the applicant State with the information requested.

a) The requested State shall have the authority to:

(i) examine any books, papers, records, or other tangible property which may be relevant or material to such inquiry;

(ii) question any person having knowledge or in possession, custody or control of information which may be relevant or material to such inquiry;

(iii) compel any person having knowledge or in possession, custody or control of information which may be relevant or material to such inquiry to appear at a stated time and place and testify under oath and produce books, papers, records, or other tangible property;

(iv) take such testimony of any individual under oath.

b) Privileges under the laws or practices of the applicant State shall not apply in the execution of a request but shall be preserved for resolution by the applicant State.

3. The requested State shall provide information requested pursuant to the provisions of this Article regardless of whether the requested State needs such information for purposes of its own tax. Moreover, if specifically requested by the competent authority of the applicant State, the requested State shall:

a) specify the time and place for the taking of testimony or the production of books, papers, records, and other tangible property;

b) place the individual giving testimony or producing books, papers, records and other tangible property under oath;

c) permit the presence of individuals designated by the competent authority of the applicant State as being involved in or affected by execution of the request, including an accused, counsel for the accused, individuals charged with the administration and enforcement of dom-

estic laws of the applicant State covered by this Agreement, and a commissioner or magistrate present for the purpose of rendering evidentiary rulings or determining issues of privilege under the laws of the applicant State;

d) provide individuals permitted to be present with an opportunity to question, directly or through the executing authority, the individual giving testimony or producing books, papers, records and other tangible property;

e) secure original and unedited books, papers, and records, and other tangible property;

f) secure or produce true and correct copies of original and unedited books, papers and records;

g) determine the authenticity of books, papers, records and other tangible property produced;

h) examine the individual producing books, papers, records and other tangible property regarding the purpose for which and the manner in which the item produced is or was maintained;

i) permit the competent authority of the applicant State to provide written questions to which the individual producing books, papers, records and other tangible property is to respond regarding the item produced;

j) perform any other act not in violation of the laws or at variance with the administrative practice of the requested State;

k) certify either that procedures requested by the competent authority of the applicant State were followed or that the procedures requested could not be followed, with an explanation of the deviation and the reason therefore.

4. The provisions of the preceding paragraphs shall not be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that State or of the other Contracting State;

b) to supply particular items of information which are not obtainable under the laws or in the normal course of the administration of that State or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process;

d) to supply information, the disclosure of which would be contrary to public policy;

e) to supply information requested by the applicant State to administer or enforce a provision of the tax law of the applicant State, or any requirement connected therewith, which discriminates against a national of the requested State. A provision of tax law, or connected requirement, will be considered to be discriminatory against a national of the requested State if it is more burdensome with respect to a national of the requested State than with respect to a national of the applicant State in the same circumstances. For purposes of the preceding sentence, a

national of the applicant State who is subject to tax on worldwide income is not in the same circumstances as a national of the requested State who is not subject to tax on worldwide income. The provisions of this subparagraph shall not be construed so as to prevent the exchange of information with respect to the taxes imposed by the United States on branch profits or on the premium income of nonresident insurers or foreign insurance companies or on any similar such taxes imposed by the Netherlands Antilles in the future;

f) notwithstanding subparagraphs a) through e) of this paragraph, the requested State shall have the authority to obtain and provide, through its competent authority, information held by financial institutions, nominees, or persons acting in agency or fiduciary capacity (not including information that would reveal confidential communications between a client and an attorney, solicitor or other legal representative where the client seeks legal advice), or information respecting ownership interests in a person.

5. Except as provided in paragraph 4, the provisions of the preceding paragraphs shall be construed so as to impose on a Contracting State the obligation to use all legal means and its best efforts to execute a request. A Contracting State may, in its discretion, take measures to obtain and transmit to the other State information which, pursuant to paragraph 4, it has no obligation to transmit.

6. The competent authority of the requested State shall allow representatives of the applicant State to enter the requested State to interview individuals and examine books and records with the consent of the individuals contacted.

7. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to individuals or authorities (including judicial and administrative bodies) involved in the determination, assessment, collection, and administration of, the recovery and collection of claims derived from, the enforcement or prosecution in respect of, or the determination of appeals in respect of, the taxes which are the subject of this Agreement, or the oversight of the above. Such individuals or authorities shall use the information only for such purposes. These individuals or authorities may disclose the information in public court proceedings or in judicial decisions.

Article 5

Mutual agreement procedure

1. The competent authorities of the Contracting States shall agree to implement a program to carry out the purposes of this Agreement. This program may include, in addition to exchanges specified in Article 4, other measures to improve tax compliance, such as exchanges of tech-

nical know-how, development of new audit techniques, identification of new areas of non-compliance, and joint studies of non-compliance areas.

2. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. In particular, the competent authorities may agree to a common meaning of a term, and may determine when costs are extraordinary for purposes of Article 6.

3. The competent authorities of the Contracting States may communicate with each other directly for the purposes of reaching an agreement under this Article.

Article 6

Costs

Unless the competent authorities of the Contracting States otherwise agree, ordinary costs incurred in providing assistance shall be borne by the requested State and extraordinary costs incurred in providing assistance shall be borne by the applicant State.

Article 7

Implementation

A Contracting State shall enact such legislation as may be necessary to effectuate this Agreement.

Article 8

Entry into force

This Agreement shall enter into force upon an exchange of notes between the Contracting States, confirming that each has completed the necessary internal domestic procedures to bring the Agreement into force; provided, however, that this Agreement shall not enter into force before January 1, 2004.

Article 9

Termination

This Agreement shall remain in force until terminated by one of the Contracting States. Either Contracting State may terminate the Agreement at any time after the Agreement enters into force provided that at least three months prior notice of termination has been given through diplomatic channels.

DONE at Washington in duplicate, this 17th day of April, 2002.

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

(sd.) M. A. POURIER

For the Government of the United States of America:

(sd.) P. O'NEILL

D. PARLEMENT

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

G. INWERKINGTREDING

De bepalingen van het Verdrag zullen ingevolge artikel 8 van het Verdrag in werking treden na de uitwisseling tussen de Verdragsluitende Partijen van de nota's die bevestigen dat elke Partij de nationale procedures heeft voltooid die nodig zijn voor de inwerkingtreding van het Verdrag, op voorwaarde dat het Verdrag niet voor 1 januari 2004 in werking treedt.

Uitgegeven de *dertigste* mei 2002.

De Minister van Buitenlandse Zaken,

J. J. VAN AARTSEN