

TRACTATENBLAD

VAN HET

KONINKRIJK DER NEDERLANDEN

JAARGANG 2009 Nr. 200

A. TITEL

*Verdrag tussen het Koninkrijk der Nederlanden, ten behoeve van de Nederlandse Antillen, en Bermuda (zoals gemachtigd door de Regering van het Verenigd Koninkrijk van Groot-Brittannië en Noord-Ierland) inzake de uitwisseling van informatie betreffende belastingen;
(met Protocol)
Hamilton, 28 september 2009*

B. TEKST

Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and Bermuda (as authorised by the Government of the United Kingdom of Great Britain and Northern Ireland) 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 Bermuda (as authorised by the Government of the United Kingdom of Great Britain and Northern Ireland),

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

Have agreed as follows:

Article 1

Object and scope of the Agreement

1. The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement.

Such information shall include information that is relevant to the determination, assessment and collection of such taxes, the recovery and enforcement 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.

The rights and safeguards secured to persons by the laws or administrative practices of the requested Party remain applicable.

The rights and safeguards shall not be applied by the requested Party in a manner that unduly prevents or delays effective exchange of information.

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

Article 2

Jurisdiction

A requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

Article 3

Taxes covered

1. This Agreement shall apply to the following taxes imposed by the Contracting Parties:

- a) in the case of the Netherlands Antilles:
 - (i) Income tax (Inkomstenbelasting);
 - (ii) Wages tax (Loonbelasting);
 - (iii) Profit tax (winstbelasting);
 - (iv) Surtaxes on the income and profit tax (opcenten op de inkomsten- en winstbelasting);
- b) in the case of Bermuda:

The existing taxes which are the subject of this Agreement are direct taxes of every kind and description.

2. This Agreement shall also apply 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 authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by this Agreement. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of exchange of letters.

Article 4

Definitions

1. For the purposes of this Agreement, unless otherwise defined:

a) the term “Contracting Party” means the Kingdom of the Netherlands, in respect of the Netherlands Antilles, or Bermuda as the context requires;

b) the term “Bermuda” means the Islands of Bermuda including the territorial sea adjacent to those islands, in accordance with international law;

c) 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 its territorial waters 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 relating to Aruba;

d) the term “collective investment fund or scheme” means any pooled investment vehicle, irrespective of legal form. 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. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed “by the public” if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

e) the term “company” means any body corporate or any entity that is treated as a body corporate for tax purposes;

f) the term “competent authority” means:

(i) in the case of the Netherlands Antilles, the Minister of Finance or his authorised representative; and

(ii) in the case of Bermuda, the Minister of Finance or an authorised representative of the Minister;

g) the term “criminal tax matters” means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party with the inclusion of administrative fines;

h) 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;

i) the term “information” means any fact, statement 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 requested information;

k) the term “national” means:

(i) in the case of 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; and

(ii) in the case of Bermuda, any individual, legal person, partnership, company, state, association or other entity deriving its status as such from the laws in force in Bermuda;

l) the term “person” includes an individual, a company and any other body of persons;

m) the term “principal class of shares” means the class or classes of shares representing a majority of the voting power and value of the company;

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. Shares can be purchased or sold “by the public” if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;

o) the term “recognised stock exchange” means any stock exchange agreed upon by the competent authorities of the Contracting Parties;

p) the term “applicant Party” means the Contracting Party requesting information;

q) the term “requested Party” means the Contracting Party requested to provide information;

r) the term “tax” means any tax to which the Agreement applies.

2. The term “relevant” wherever used in the Agreement with respect to information, shall be interpreted in a manner that ensures that information will be considered relevant notwithstanding that a definite assessment of the pertinence of the information to an on-going investigation could only be made following the receipt of the information.

3. 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 Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

4. The Commentary to the Organisation for Economic Co-operation and Development (OECD) Model Agreement on Exchange of Information on Tax Matters shall apply to the interpretation of this Agreement where this Agreement is in conformity with the OECD Model Agreement on Exchange of Information on Tax Matters.

Article 5

Exchange of information upon request

1. The competent authority of the requested Party shall provide upon request 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 such conduct occurred in 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 applicant 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 applicant 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, foundations, "Anstalten" and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees, beneficiaries and the position in an ownership chain; in the case of foundations, information on founders, members of the foundation council and beneficiaries.

5. This Agreement does not create an obligation on the Contracting Parties to obtain or provide:

- (i) 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;
- (ii) information relating to a period more than six years prior to the tax period under consideration;
- (iii) information, unless the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties;
- (iv) information in the possession or control of a person other than the taxpayer that does not directly relate to the taxpayer.

6. Where the applicant Party requests information in accordance with this Agreement, a senior official of the competent authority of the applicant Party shall certify that the request is relevant to, and necessary for, the determination of the tax liability of the taxpayer under the laws of the applicant Party.

7. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under this Agreement to demonstrate the relevance of the information sought to the request:

- a) the identity of the taxpayer under examination or investigation;
- b) grounds for believing that the information requested is in the possession or control of a person subject to the jurisdiction of the requested Party;
- c) to the extent known, the name and address of any person believed to be in possession or control of the information requested;
- d) a statement that the request conforms to the law and administrative practice of the applicant Party and would be obtainable by the applicant Party under its laws in similar circumstances, both for its own tax purposes and in response to a valid request from the requested Party under this Agreement;
- e) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties;
and, to the fullest extent possible:
- f) the nature and type of the information requested, including a description of the specific evidence, information or other assistance sought and the form, in which the applicant Party prefers to receive the information;
- g) the tax purposes for which the information is sought and why it is relevant to the determination of the tax liability of a taxpayer under the laws of the applicant Party;

h) the period of time with respect to which the information is required for the tax purposes.

8. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant 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 applicant Party and shall notify the competent authority of the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request;

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, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.

Article 6

Tax examinations abroad

1. The requested Party may allow, to the extent permitted under its domestic law, representatives of the competent authority of the applicant Party to enter the territory of the applicant Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the applicant Party shall notify the competent authority of the requested Party of the time and place of the meeting with the individuals concerned.

2. At the request of the competent authority of the applicant Party, the competent authority of the requested Party may allow representatives of the competent authority of the applicant 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 applicant 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 tax examination shall be made by the requested Party conducting the examination.

Article 7

Possibility of declining a request

1. The competent authority of the requested Party may decline to assist where:
 - a) the request is not made in conformity with this Agreement;
 - b) the applicant Party would not be able to obtain the information
 - (i) under its own laws for purposes of administration or enforcement of its own tax laws; or
 - (ii) in response to a valid request from the requested Party under this Agreement.
2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply 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 paragraph 4 of Article 5 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.
3. 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 an attorney, solicitor or other admitted legal representative where such communications are subject to legal professional privilege under the laws in force in the requested Party.
4. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).
5. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.
6. The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

Article 8

Confidentiality

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to per-

sons 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. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.

Article 9

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 competent authorities of the Contracting Parties.

Article 10

Implementation legislation

The Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the Agreement.

Article 11

Language

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

Article 12

Mutual agreement procedure

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of the Convention, the competent authorities shall endeavour to resolve the matter by mutual agreement.

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

3. The Contracting Parties shall agree on other forms of dispute resolution should this become necessary.

Article 13

Entry into force

This Agreement shall enter into force on the later of the dates on which each of the Contracting Parties has notified the other in writing that the formalities constitutionally or otherwise required in their respective Party have been complied with. Upon the date of entry into force, it shall have effect:

- a) for criminal tax matters on that date; and
- b) for all other matters covered in Article 1 on that date; however, no earlier than the date of entry into force, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date.

Article 14

Termination

1. This Agreement shall remain in force until terminated by one of the Contracting Parties. Either Contracting Party may, after the expiration of three years from the date of its entry into force, terminate the Agreement, through diplomatic channels, by giving notice of termination to the other Contracting Party.

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 notice of termination by the other Contracting Party. Nevertheless, all requests received before the effective date of termination shall be dealt with in accordance with this Agreement.

3. In the event of termination, both Contracting Parties shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

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

DONE at Willemstad, this 21st day of September 2009, and Hamilton, this 28th day of September 2009, in duplicate, in the English language.

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

ERSILIA DE LANNOOY

For Bermuda:

PAULA A. FOX

Protocol between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and Bermuda (as authorised by the Government of the United Kingdom of Great Britain and Northern Ireland) concerning the interpretation and application of the Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and Bermuda (as authorised by the United Kingdom of Great Britain and Northern Ireland) 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 Bermuda (as authorised by the Government of the United Kingdom of Great Britain and Northern Ireland)

(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(7)(e))

With respect to subparagraph e) of paragraph 7 of Article 5 it is understood that the term “pursued all means available in its own territory” includes the requesting Contracting Party using exchange of information mechanisms it has in force with any third country in which the information is located.

Article 2

(Article 5)

If personal data is exchanged under the Agreement, the following additional provisions shall apply:

a) The receiving authority may use such data only for the stated purpose and shall be subject to the conditions prescribed by the supplying authority; such use is also permitted, subject to the written consent required under Article 8, for the prevention and prosecution of serious crimes and for the purpose of addressing serious threats to public security;

b) The receiving authority shall on request inform the supplying authority about the use of the supplied data and the results achieved thereby;

c) Personal data may be supplied only to the responsible agencies. Any subsequent supply to other agencies may be effected only with the prior approval of the supplying authority;

d) The supplying authority shall be obliged to take all reasonable care to ensure that the data to be supplied are accurate and that they are necessary for and proportionate to the purpose for which they are supplied. Any bans on data supply prescribed under applicable domestic law shall be observed. If it emerges that inaccurate data or data which should not have been supplied have been supplied, the receiving authority shall be informed of this without delay. That authority shall be obliged to correct or erase such data without delay;

e) Upon application the person concerned shall be informed of the supplied data relating to him and of the use to which such data are to be put. There shall be no obligation to furnish this information if on balance it turns out that the public interest in withholding it outweighs the interest of the person concerned in receiving it. In all other respects, the right of the person concerned to be informed of the existing data relating to him shall be governed by the domestic law of the Contracting Party in whose sovereign territory the application for the information is made;

f) The receiving authority shall bear liability in accordance with its domestic laws in relation to any person suffering unlawful damage as a result of supply of data pursuant to this Agreement. In relation to the damaged person, the receiving authority may not plead in its defence that the damage had been caused by the supplying agency;

g) If the domestic law of the supplying authority provided, with respect to the personal data supplied, for erasure within a certain period of time that authority shall inform the receiving authority accordingly. Irrespective of such periods, supplied personal data shall be erased once they are no longer required for the purpose for which they were supplied;

h) The supplying and the receiving authority shall be obliged to keep official records of the supply and receipt of personal data;

i) The supplying and the receiving authority shall be obliged to take effective measures to protect the personal data supplied against unauthorised access, unauthorised alteration and unauthorised disclosure.

Article 3

(Article 12)

In the event that a Contracting Party applies prejudicial or restrictive measures based on harmful tax practices to residents or nationals of the other Contracting Party, either Contracting Party may immediately initiate Competent Authority proceedings to resolve the matter. 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 any one or more of the following applies:

- a) the other Contracting Party does not engage in effective exchange of information;
- b) because it lacks transparency in the operation of its laws, regulations or administrative practices; or,
- c) on the basis of no or nominal taxes.

Without limiting the generality of 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 measure, applied by either Contracting Party against, amongst others, members of the OECD generally.

Article 4

In the 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 Agreement. If so, it is understood the other Contracting Party will agree to hold timely discussions with a view to revising the terms of the Agreement.

- a) The competent authorities may initiate discussions in case:
 - (i) the Kingdom of the Netherlands, in respect of the Netherlands Antilles, enters into an agreement with another jurisdiction comparable to Bermuda which provides for other forms of exchange of information;
 - (ii) Bermuda enters into an agreement with another jurisdiction which provides for other forms of exchange of information;
 - (iii) Bermuda introduces new legislation which enables other forms of exchange of information;
- b) If the Kingdom of the Netherlands, in respect of the Netherlands Antilles, enters into arrangements with another jurisdiction comparable to Bermuda for the provision of information with respect to taxes that are less burdensome in any material respect than the provisions of the Agreement, Bermuda may initiate discussions with the Kingdom of the Netherlands, in respect of the Netherlands Antilles, with a view to modifying the Agreement to have similar effect.

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 Bermuda (as authorised by the Government of the United Kingdom of Great Britain and Northern Ireland) on 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 through diplomatic channels that the constitutional or internal requirements for the entry into force of this amendment have been complied with.

IN WITNESS WHEREOF the undersigned, being duly authorised in that behalf by their respective Governments, have signed this Protocol.

DONE at Willemstad, this 21st day of September 2009, and Hamilton, this 28th day of September 2009, in duplicate, in the English language.

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

ERSILIA DE LANNOOY

For Bermuda:

PAULA A. FOX

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 13 van het Verdrag juncto artikel 5 van het Protocol, in werking treden

op de laatste van de data waarop beide Verdragsluitende partijen elkaar er schriftelijk van in kennis hebben gesteld dat is voldaan aan de formaliteiten die grondwettelijk of anderszins in de respectieve partijen zijn vereist.

J. VERWIJZINGEN

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

Uitgegeven de *twaaifde* november 2009.

De Minister van Buitenlandse Zaken,

M. J. M. VERHAGEN