

Toepassing artikel 35 Verdrag met de Verenigde Staten van Amerika tot het vermijden van dubbele belasting

Directoraat-generaal voor Fiscale Zaken
Directie Internationale Fiscale Zaken

6 augustus 2007; IFZ 2007/537M, Stcrt. nr. 154

De directeur-generaal voor Fiscale Zaken deelt namens de Staatssecretaris van Financiën de uitkomst van een overleg met de bevoegde autoriteiten van de Verenigde Staten met Amerika mede.

De staatssecretaris van Financiën,
namens deze:
de directeur-generaal Fiscale Zaken,
mr. M. Brabers

COMPETENT AUTHORITY AGREEMENT

The Competent Authorities of the Netherlands and the United States hereby amend and restate the agreement that they entered into on March 23, 2000¹, with respect to the qualification of certain tax-exempt trusts, companies, or other organizations for benefits under Article 35 of the Convention between the Kingdom of the Netherlands and the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed on December 18, 1992, and amended by Protocols signed on October 13, 1993 and March 8, 2004 (the "Treaty"). The agreement specifies the procedures for claiming treaty benefits in each country and the methods each country will use to grant treaty benefits.

This agreement constitutes a Mutual Agreement in accordance with Article 29 of the Treaty.

Chapter I

Qualification for treaty benefits under Article 35 of the 1992 Netherlands-US income tax treaty

Paragraph 1 of Article 35 of the Treaty provides that dividends or interest derived by a trust, company, or other organization constituted and operated exclusively to administer or provide benefits under one or more funds or plans established to provide pension,

¹ Dutch Form IB 96 USA uses the date March 27, 2000, which was the date the original agreement was published in the Staatscourant, but the competent authorities here refer to the same original mutual agreement as is referred to in Form IB-96-USA.

retirement, or other employee benefits shall be exempt from tax in one Contracting State if it is a resident of the other Contracting State according to the laws of that other State and its income is generally exempt from tax in that other State. Paragraph 2 provides that the provisions of paragraph 1 do not apply with respect to the income of a trust, company, or other organization from carrying on a trade or business or from a related person other than a person referred to in paragraph 1.

Questions have been raised regarding the types of trusts, companies, or other organizations that qualify for benefits under Article 35 of the Treaty. In practice, there are many different types of funds or plans established to provide pension, retirement, or other employee benefits and it is not always clear which of these funds or plans fulfill the requirements of Article 35. In view of this uncertainty, the competent authorities of the Netherlands and the United States agree that the types of trusts, companies, or other organizations mentioned in chapters II and IV of this agreement are considered to fall within the scope of Article 35.

It is understood that for the purpose of this agreement the term "Code section" refers to a section of the U.S. Internal Revenue Code of 1986, as amended, and that the term "trust" includes a custodial account treated as a trust for U.S. federal income tax purposes.

Chapter II

U.S. resident tax-exempt trusts, companies, or other organizations

Subject to the conditions of Article 26, paragraph 2 of Article 35, and paragraph 4 of Article 34 of the Treaty, the following types of U.S. resident trusts, companies, or other organizations are treated as the beneficial owners of dividends and interest derived from the Netherlands and are considered to qualify for benefits under Article 35 of the Treaty:

1. a U.S. resident tax-exempt trust providing pension or retirement benefits under a Code section 401(a) qualified pension plan, profit sharing plan or stock bonus plan (including Code section 401(k) arrangements);
2. a U.S. resident tax-exempt trust described in Code section 457(g) providing pension or retirement benefits under a Code section 457(b) plan;
3. a U.S. resident tax-exempt trust providing pension or retirement benefits under a Code section 403(b) plan;
4. a U.S. resident tax-exempt trust that is an individual retirement account (Code section 408), a Roth individual retirement account (Code section 408A), or a simple retirement account, or a U.S. resident tax-exempt trust that is providing pension or retirement benefits under a simplified employee pension plan;

5. a group trust described in IRS Revenue Ruling 81-100 and meeting the conditions of IRS Revenue Ruling 2004-67;
6. a U.S. resident common trust fund (Code section 584) to the extent that the participants are trusts mentioned under points 1) through 5) above;
7. the Thrift Savings Fund (Code section 7701(j)); and
8. a voluntary employees' beneficiary association (Code section 501(c)(9)).

However, a U.S. resident tax-exempt trust mentioned under points 2), 3), or 4) above will not be considered to qualify for treaty benefits under Article 35 of the Treaty in any taxable year if less than 70% of the total amount of the withdrawals from such U.S. trust during that year is used to provide pension, retirement or other employee benefits as meant in Article 35 of the Treaty.

Any type of U.S. resident tax-exempt trust, company, or other organization not mentioned above, that considers itself to qualify for benefits under Article 35 of the Treaty, may present its case to the Netherlands tax unit Belastingdienst Limburg / kantoor Buitenland (address: P.O. Box 2865, 6401 DJ HEERLEN, The Netherlands), or to the U.S. competent authority (see Rev. Proc. 2006-54, 2006-49 I.R.B. 1035) requesting competent authority consideration under Article 29 of the Treaty.

Chapter III

Appropriate procedures for filing a request for an application of treaty benefits in the Netherlands

A trust, company, or other organization that qualifies for benefits under Article 35 of the Treaty may claim benefits with respect to income derived from the Netherlands referred to in Article 10 (Dividends). The Netherlands does not apply a withholding tax on outgoing interest payments as meant in Article 12 of the Treaty.

The Netherlands has two methods for granting benefits for Dutch source dividend income: the so-called exemption method (in which case the treaty rate is applied at source) and the so-called refund method.

As a general rule, the Netherlands applies the exemption method when granting treaty benefits in the case of Dutch source dividend income received by a resident of the United States, which means that treaty benefits will be granted by means of an exemption from Netherlands withholding tax at source. In view of the Netherlands competent authority's preference for a closer monitoring of all requests filed for an application of benefits under Article 35 of the Treaty, a U.S. resident tax-exempt trust (including a U.S. common trust fund or group trust) mentioned in point 1) through 8) of chapter II of this agreement shall - as a general rule - be required to use the refund method when filing its request for an application of benefits under Article 35 of the Treaty. Only if the conditions listed below are

fulfilled, may such a U.S. resident tax-exempt trust use the exemption method when filing its request for an application of benefits under Article 35 of the Treaty.

The Netherlands 2007 regulations for the implementation of the Treaty give a detailed description of the procedures to be applied in the case of both the exemption method and the refund method.

The exemption method may be used if the U.S. resident tax-exempt trust, company, or other organization requesting benefits under Article 35 of the Treaty:

- * provides to the appropriate Dutch withholding agent or payor, Form 6166, a U.S. residency certification letter issued by the U.S. Internal Revenue Service for the applicable taxable year(s) (Form 6166 may be obtained by filing Form 8802 (Application for United States Residency Certification) in accordance with the instructions for Form 8802) stating that the entity in question is a trust forming part of a pension, profit sharing, or stock bonus plan qualified under Code section 401(a) of the Internal Revenue Code (an example of Form 6166 is attached); or

- * provides to the appropriate Dutch withholding agent or payor, a so-called "qualification" certification issued by the competent Netherlands tax authorities, stating that the entity in question is a U.S. resident tax-exempt trust, company, or other organization described in paragraph 1 of Article 35 of the Treaty.

Requests for a "qualification" certification may be filed with the tax unit Belastingdienst Limburg / kantoor Buitenland (address: P.O. Box 2865, 6401 DJ HEERLEN, The Netherlands).

A "qualification" certification, issued by the competent Netherlands tax authorities, is in principle valid indefinitely. However, a "qualification" certification will no longer be valid in the event:

- *there is a material change in facts or circumstances; or

- *It is determined that the "qualification" certification was issued erroneously; or

- *the U.S. resident tax-exempt entity in question has not claimed an application of benefits under Article 35 of the Treaty for five consecutive calendar years. Since Form 6166 issued by the U.S. Internal Revenue Service is not valid indefinitely, a U.S. resident tax-exempt entity that has been issued a Form 6166 by the U.S. Internal Revenue Service may also file a request for a "qualification" certification with the competent Netherlands tax authorities.

Irrespective of the above, use of the refund method is mandatory in any taxable year for a U.S. resident tax-exempt entity mentioned under point 2) or 4) of chapter II, if less than 70% of the total amount of the withdrawals from such U.S. trust during that year is used to provide pension or retirement benefits.

Where assets of the pension fund(s) or pension plan(s) are held in custodial accounts, the Dutch Form IB 96 USA requires a certification that the claim for a refund of Dutch dividend tax is filed for the benefit of the custodial accounts in question.

The status of all U.S. resident tax-exempt trusts, companies, or other organizations claiming benefits under Article 35 of the Treaty may at any time be subject to verification by the competent Netherlands tax authority. If considered necessary, use will be made of the exchange of information procedure (Article 30 of the Treaty).

Chapter IV

Netherlands resident tax-exempt trusts, companies, or other organizations

Subject to the conditions of Article 26, paragraph 2 of Article 35, and paragraph 4 of Article 34 of the Treaty, the following types of Netherlands resident trusts, companies, or other organizations are treated as beneficial owners of dividends and interest derived from the United States and are considered to qualify for benefits under Article 35 of the Treaty:

1. a Netherlands resident tax-exempt company constituted and operated exclusively to administer or provide benefits as meant in article 5, paragraph 1, under b), of the Netherlands corporation tax act (including a Netherlands resident tax-exempt company constituted and operated exclusively to administer or provide benefits under a pension plan as meant in article 3.13, paragraph 1, under b), of the Netherlands income tax act);
2. a Netherlands fund that is exempt under the Netherlands corporation tax act and constituted by a Netherlands labor union and operated exclusively to administer or provide benefits to its members in case they are on strike (stakingskassen) and of which the payments are exempt under article 3.13, paragraph 1, under f), of the Netherlands income tax act; and
3. Netherlands limited fund for mutual account (besloten fondsen voor gemene rekening) in which each participant is a Netherlands resident tax-exempt company mentioned under points 1) or 2) above.

Any type of Netherlands resident tax-exempt trust, company, or other organization not mentioned above, that considers itself to qualify for benefits under Article 35 of the Treaty, may present its case to the U.S. competent authority, or to the Netherlands competent authority requesting competent authority consideration under Article 29 of the Treaty.

Chapter V

Appropriate procedures for filing a request for an application of treaty benefits in the United States

Under U.S. tax law, a Netherlands resident taxpayer (including a Netherlands resident tax-exempt entity referred to in Article 35 of the Treaty) may file for an application of treaty benefits at source, or may claim a refund of U.S. income tax withheld according to regulations set forth under the Internal Revenue Code. The following procedures apply to a Netherlands resident tax-exempt trust, company, or other organization.

A Netherlands resident tax-exempt trust, company, or other organization described in this agreement should claim exemption from U.S. income tax withholding under Article 35 of the Treaty on dividends or interest income referred to in Articles 10 and 12, respectively, of the Treaty by providing a properly completed IRS Form W-8BEN (Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding) to the appropriate withholding agent or payer of such income before the income is paid or credited to the company. An entity filing Form W-8BEN should cite Article 35 of the Treaty on line 10 thereof, and state that it is a Netherlands resident tax-exempt trust, company, or other organization described in chapter IV of this agreement.

Alternatively, the trust, company, or other organization may seek a refund of taxes withheld on such dividend or interest income by timely filing a U.S. income tax return and claiming a refund of such taxes.

The status of all Netherlands resident tax-exempt trusts, companies, or other organizations providing pension, retirement, or other employee benefits and claiming benefits under Article 35 of the Treaty may be subject to verification by the Internal Revenue Service. If considered necessary, use will be made of the exchange of information procedure (Article 30 of the Treaty).

As amended by Article 6 of the Protocol signed on October 13, 1993, paragraph 2 of Article 35 of the Treaty provides that dividends paid by a person resident in the United States that is a Real Estate Investment Trust ("REIT") from gains realized on the disposition of real property situated in the United States are not eligible for benefits under Article 35. Such distributions are subject to U.S. tax under paragraph 1 of Article 14 of the Treaty. In addition, distributions paid by a person resident in the United States that is a Regulated Investment Company ("RIC") from gains realized on the disposition of real property situated in the United States are not eligible for benefits under Article 35 and are subject to U.S. tax under paragraph 1 of Article 14.

Pursuant to section 897(h)(1) of the Internal Revenue Code, as amended, certain amounts distributed by qualified investment entities (REITs and certain RICs) that would have otherwise been treated as distributions from gains realized on the disposition of real property situated in the United States are treated and taxed as dividends. Such amounts will be treated as dividends that are eligible for exclusion under paragraph 1 of Article 35.

Paragraph 2 of Article 35 also provides that income of a trust, company, or other organization is not exempt under Article 35 if it is derived from carrying on a trade or business or from a related person that is not itself eligible for benefits under Article 35. Paragraph XXXVII of the Understanding accompanying the Protocol signed on March 8,

2004 provides that for purposes of paragraph 2 of Article 35, a person will be considered to be a "related person" if more than 80 percent of the vote or value of any class of shares is owned by the person deriving the income.

Agreed to by the undersigned competent authorities:

Frank Y. Ng
U.S. Competent Authority

Maarten Brabers
Netherlands Competent Authority

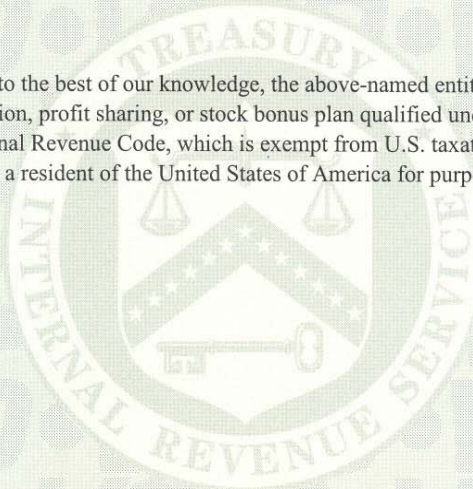


DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
PHILADELPHIA, PA 19255

Date: 7/12/2007

Taxpayer: ABC PENSION PLAN
TIN: XX-XXXXXXX
Tax Year: 2007

I certify that, to the best of our knowledge, the above-named entity is a trust forming part of a pension, profit sharing, or stock bonus plan qualified under section 401(a) of the U.S. Internal Revenue Code, which is exempt from U.S. taxation under section 501(a), and is a resident of the United States of America for purposes of U.S. taxation.



Andrew E. Zuckerman
Field Director, Philadelphia Accounts Management Center