

**EXPLANATORY MEMORANDUM TO**  
**THE DOUBLE TAXATION RELIEF AND INTERNATIONAL TAX**  
**ENFORCEMENT (TAXES ON INCOME AND CAPITAL) (NETHERLANDS)**  
**ORDER 2009**

**2009 No. 227**

1. This explanatory memorandum has been prepared by HM Revenue & Customs and is laid before the House of Commons by Command of Her Majesty.

This memorandum contains information for the Select Committee on Statutory Instruments.

2. **Description**

The draft Order brings into effect those arrangements specified in the Double Taxation Relief and International Tax Enforcement Convention (“the Convention”) set out in the Schedule to the draft Order.

3. **Matters of special interest to the Select Committee on Statutory Instruments**

- 3.1 Type of resolution

The draft Order is subject to the affirmative resolution procedure.

- 3.2 Details of the Convention

Further details of the Convention scheduled to the draft Order are annexed to this memorandum.

4. **Legislative Background**

- 4.1 General

The Order is made under section 788(1) of the Income and Corporation Taxes Act (“ICTA”) 1988 (c. 1) and section 173(1) of the Finance Act (“FA”) 2006 (c. 25). Section 788 was amended by section 88(1) of the Finance Act 2002 (c. 23) and extended by section 277 of the Taxation of Chargeable Gains Act 1992 (c. 12).

Section 788 of ICTA 1988 provides the mechanism by which arrangements made with overseas territories for the purpose of affording relief from double taxation in relation to income tax, corporation tax and capital gains tax and taxes of a similar character in the other territory are given effect in the United Kingdom.

Section 173 of FA 2006 provides the mechanism by which such arrangements may also include provisions about, among other things, the exchange of

information foreseeably relevant to the administration, enforcement or recovery of any tax or duty.

The Convention is scheduled to the Order. It is thus given domestic legislative effect.

In accordance with section 788(10) of ICTA 1988 and section 173(7) of FA 2006, a draft of this Order is required to be laid before and approved by a resolution of the House of Commons prior to submission to Her Majesty in Council. Section 788(10) ICTA was substituted by section 176 of FA 2006.

#### 4.2 EU Legislation

This instrument does not implement EU legislation.

### 5. Extent

This instrument applies to all of the United Kingdom.

### 6. European Convention on Human Rights

The Financial Secretary to the Treasury (Stephen Timms) has made the following statement regarding Human Rights:

In my view the provisions of the draft Double Taxation Relief and International Tax Enforcement (Taxes on Income and Capital) (Netherlands) Order 2008 are compatible with the Convention rights.

### 7. Policy background

Double Taxation Conventions aim to eliminate the double taxation of income or gains arising in one country and paid to residents of another country. They do this by dividing the taxing rights that each treaty partner has under its domestic law over the same income and gains. They provide additional protection for taxpayers by specific measures combating discrimination in tax treatment. More generally, Conventions benefit the taxpayer by ensuring certainty of treatment and, as far as possible, by reducing compliance burdens. Conventions also serve an Exchequer protection role by including provisions to combat avoidance and evasion — not least by measures providing for the exchange of information between revenue authorities. They also encourage and maintain international consensus on the appropriate tax treatment of cross-border economic activity and thus promote international trade and investment.

### 8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no regulatory impact on business, charities or voluntary bodies. Taxpayers may have to make a claim to HM Revenue & Customs or the other

8.2 Under a Double Taxation Convention, one or both of the countries gives up all or part of their taxing rights so that a given source of income is taxed only once. Measured against a baseline of single taxation only, Conventions do not therefore generally have an exchequer cost; rather, by encouraging cross-border economic activity, they can lead to an increase in tax revenue. But where double taxation is unrelieved, the economic activity in question, and hence the higher tax revenue attributable to it, will often be only temporary.

**9. Contact**

Douglas Rankin at HM Revenue & Customs (Tel: 020 7147 2696 / Email: [Douglas.Rankin@hmrc.gsi.gov.uk](mailto:Douglas.Rankin@hmrc.gsi.gov.uk)) can answer any queries regarding the instrument.

## GENERAL

All the United Kingdom's recent Double Taxation Conventions largely follow the approach adopted in the OECD's *Model Tax Convention on Income and on Capital*. This Convention continues that approach.

## NOTES ON DETAILS

### ARTICLE 1 – PERSONS COVERED

This Article sets out the general scope of the Convention.

It provides that the Convention is to apply to persons who are residents of one or both of the Contracting States (the United Kingdom and the Netherlands).

### ARTICLE 2 – TAXES COVERED

This Article lists the taxes to which the Convention is to apply.

The existing United Kingdom taxes to which the Convention applies are income tax, corporation tax, capital gains tax, petroleum revenue tax and the supplementary charge in respect of ring fence trades. (See paragraph I of the Protocol regarding these last two mentioned taxes).

The existing Netherlands taxes to which the Convention applies are income tax, wages tax, company tax including the Government share in the net profits of the exploitation of natural resources levied pursuant to the Mining Act, and dividend tax.

The Convention will also apply to any identical or substantially similar taxes subsequently imposed by either country in addition to or in place of the taxes mentioned above, and it obliges each country to notify the other of significant changes in their taxation laws.

### ARTICLE 3 – GENERAL DEFINITIONS

This Article defines a number of terms used in the Convention and provides a rule for determining the meaning of terms not defined in the Convention.

(See paragraph 3 of the Protocol for clarification of the definition of “pension scheme”).

## **ARTICLE 4 - RESIDENCE**

This Article establishes the meaning of “resident of a Contracting State” and lays down detailed rules for resolving cases where individuals or other persons may be considered residents of both countries for tax purposes under their domestic laws.

Paragraph 1 defines the term “resident of a Contracting State”.

Paragraph 2 confirms that “resident of a Contracting State” also includes a pension scheme (see paragraph III of the Protocol regarding the definition of “pension scheme”) and an organisation established and operated exclusively for religious, charitable, scientific, cultural, or educational purposes, which is a resident of a Contracting State according to its laws and all or part of its income or gains are exempt from tax under the domestic law of that State.

Paragraph 3 sets out the rules for determining the residence status of an individual who is dual resident under paragraph 1 of this Article.

Paragraph 4 provides a tie-breaker for persons other than individuals which are dual resident under paragraph 1 of this Article. It provides that competent authorities will determine the residence status of such persons by mutual agreement. Where no agreement can be reached between competent authorities, the person will not be considered a resident of either country for the purpose of claiming treaty benefits, with the exception of elimination of double taxation, non-discrimination and mutual agreement procedure articles.

The following agreement was reached between officials regarding the application of this provision:

### Dual Residence of Persons Other Than Individuals

1. Paragraph 4 of Article 4 of the Convention between the United Kingdom and the Netherlands provides a measure which addresses the residence for the purposes of the Convention of persons resident in both Contracting States. For ease of reference this measure will be referred to as ‘the tie-breaker test’.
2. The tie-breaker test provides that, in cases of dual residence, the competent authorities of the United Kingdom and the Netherlands shall determine by mutual agreement the Contracting State of which the person shall be deemed to be resident for the purposes of the Convention.
3. In the absence of agreement between the competent authorities the person shall not be considered to be a resident of either Contracting State for the purposes of claiming benefits provided by the Convention, except those provided by Article 21, Article 24 and Article 25 of the Convention.
4. In considering cases which fall within paragraph 4 of Article 4 of the Convention the

competent authorities shall have regard to:

- i) where the senior management of the person is carried on;
- ii) where the meetings of the board of directors or equivalent body are held;
- iii) where the person's headquarters are located;
- iv) the extent and nature of the economic nexus of the person to each State; and
- v) whether determining that the person is a resident of one of the Contracting States but not of the other State for the purposes of the Convention would carry the risk of an improper use of the Convention or inappropriate application of the domestic law of either State.

This list of factors is not exhaustive.

5. The competent authorities shall apply the provisions of paragraph 4 of Article 4 on a case by case basis. As the facts upon which an agreement is reached may change over time the competent authorities may revisit agreements, particularly where there are significant changes in the relevant facts.

6. Where a company was resident in both the Netherlands and the United Kingdom under the domestic law of those countries before the entry into force of this Convention, and the status of that company was determined by the residence “tie breaker” in the 1980 Convention (Article 4(3), which uses the criterion of place of effective management), the competent authorities of the Netherlands and the UK will not seek to revisit that determination so long as all the material facts remain the same. Where the material facts change after entry into force of this Convention, and the competent authorities determine that for treaty purposes the company should be regarded as a resident of the other country (or the competent authorities do not reach a mutual agreement), that new determination (or the loss of treaty benefits pursuant to the absence of a mutual agreement) will apply only to income or gains arising after the new determination (or notice to the taxpayer of the absence of an agreement).

Paragraph 5 provides that where a company participating in a dual listed company arrangement is resident both in the United Kingdom and the Netherlands, it shall be deemed to be resident only in the country where it is incorporated, provided it has its primary stock exchange listing in that country.

Paragraph 6 defines the term “dual listed company arrangement”.

## **ARTICLE 5 – PERMANENT ESTABLISHMENT**

This Article defines the term “permanent establishment” for the purposes of the Convention. It follows Article 5 in the OECD Model Tax Convention. Taken together with Article 7, it describes in general terms the circumstances and manner in which enterprises of one country may be taxed on their business profits arising in the other.

## **ARTICLE 6 – INCOME FROM IMMOVABLE PROPERTY**

This Article allows the country in which the property is situated to tax income from immovable property. It also defines immovable property.

## **ARTICLE 7 – BUSINESS PROFITS**

This Article provides that unless an enterprise of one country carries on business in the other through a permanent establishment situated there, its profits will be taxable only in its country of residence. Where the enterprise has a permanent establishment in the other country, that country will be entitled to tax profits attributable to the permanent establishment.

## **ARTICLE 8 – SHIPPING AND AIR TRANSPORT**

This article governs the taxation of shipping and air transport operated in international traffic.

Paragraph 1 provides that profits of an enterprise of one country from the operation of ships or aircraft in international traffic shall be taxable only in that country.

Paragraph 2 provides that profits from the operation of ships or aircraft include profits from the rental of ships, aircraft or the use, maintenance or rental of containers. In each case the use, rental or maintenance must be incidental to the operations in international traffic.

Paragraph 3 clarifies that paragraph 1 also applies to profits from participation in a pool, a joint business or an international operating agency.

## **ARTICLE 9 – ASSOCIATED ENTERPRISES**

This Article governs the evaluation for tax purposes of transfers of goods, services, finance and intangible property between associated enterprises. It is based on the “arm’s length” principle, which requires such transfers to be evaluated as if they had taken place between independent enterprises. (See paragraph IV of the Protocol which explains that the mere fact that associated enterprises have concluded arrangements such as cost sharing arrangements or general services agreements, for or based on the allocation of certain expenses, is not in itself a condition to determine whether two companies are associated or not).

Where such an adjustment is made to the profits of an enterprise by one country, the other country will make an appropriate adjustment to the amount of tax charged on those profits, in order to relieve the double taxation which might otherwise arise as a result of an adjustment by only one country.

## **ARTICLE 10 – DIVIDENDS**

This Article contains the rules for the taxation of dividends paid by a company that is a resident of one country to a resident of the other country.

Paragraph 1 provides that dividends paid by a company resident in one country to a resident of the other country may be taxed in that other country.

Paragraph 2 provides that the country of which the company paying the dividends is a resident may also tax the dividends, but it places a limit on the amount of tax which may be charged by that country.

Sub-paragraph a) provides that the tax charged by that country may not exceed 10 per cent in general, and 15 per cent where the qualifying dividends are paid out of income or gains derived from immovable property as defined in Article 6 by an investment vehicle which distributes most of this income annually and whose income from such property is exempted from tax.

Sub-paragraph b) provides exceptions to the rule in sub-paragraph a). It exempts dividends from tax in the source country if they are beneficially owned by a company resident in the other country with direct or indirect control of at least 10 per cent of the voting power in the company paying the dividends; or are beneficially owned by a pension scheme (see paragraph III of the Protocol regarding the definition of “pension scheme”) or an organisation established for religious, charitable, scientific, cultural, or educational purposes.

(See paragraph V of the Protocol regarding claims made by authorised representatives of investment funds).

Paragraph 3 ensures that relief will not be available under the Article if it was the main purpose or one of the main purposes of any person concerned with an assignment of the dividends, or with the creation or assignment of the shares or other rights in respect of which the dividend is paid, or with the establishment, acquisition or maintenance of the company that is the beneficial owner of the dividends and the conduct of its operations, to take advantage of the Article. The final sentence provides that where one country intends to apply this paragraph, its competent authority shall in advance consult with the competent authority of the other country.

Paragraph 4 defines the term “dividends” (see paragraph VI of the Protocol regarding the treatment of income in connection with the liquidation of a company or purchased shares as dividends, rather than capital gains).

Paragraph 5 provides that paragraphs 1 and 2 shall not apply where a resident of a country receives dividends from the other country and the dividends are attributable to a permanent establishment through which that resident carries on business in the country of which the payer is a resident. In such circumstances, the taxation of the dividends is governed by Article 7 (Business Profits).



Paragraph 6 prevents the extra-territorial taxation by one country of dividends paid by a company that is a resident of the other country. The first country may not tax the dividends unless they are attributable to a permanent establishment in that country or are paid to a resident of that country. There is a similar provision concerning undistributed profits.

## **ARTICLE 11 – INTEREST**

This Article contains the rules for the taxation of interest paid by a resident of one country to a resident of the other country.

Paragraph 1 provides that interest arising in one country and beneficially owned by a resident of the other country shall be taxable only in that other country.

(See paragraph V of the Protocol regarding claims made by authorised representatives of investment funds).

Paragraph 2 defines “interest”.

Paragraph 3 provides that paragraph 1 shall not apply where a resident of a country receives interest from the other country and the interest is attributable to a permanent establishment through which that resident carries on business in the country of which the payer is a resident. In such circumstances, the taxation of the interest is governed by Article 7 (Business Profits).

Paragraph 4 provides that where, because of a special relationship between the payer and the beneficial owner, the amount of interest paid exceeds the amount which would have been paid in the absence of that special relationship. The Article will apply only to the interest that would have been payable in the absence of the special relationship. The “excess” part of the payment shall remain taxable according to the laws of each country.

Paragraph 5 ensures that relief will not be available under the Article if it was the main purpose or one of the main purposes of any person concerned with an assignment of the interest, or with the creation or assignment of the debt claim in respect of which the interest is paid, or with the establishment, acquisition or maintenance of the company that is the beneficial owner of the interest and the conduct of its operations, to take advantage of the Article. The final sentence provides that where one country intends to apply this paragraph, its competent authority shall in advance consult with the competent authority of the other country.

(See paragraph VII of the Protocol regarding the restriction of relief from UK tax where interest is paid to permanent establishments of Netherlands companies under certain conditions).

## **ARTICLE 12 – ROYALTIES**

This Article contains the rules for the taxation of royalties arising in one country and derived by a resident of the other country.

Paragraph 1 provides that royalties arising in one country and beneficially owned by a resident of the other country shall be taxable only in that other country.

Paragraph 2 defines the term “royalties”.

Paragraph 3 provides that paragraph 1 shall not apply where a resident of a country receives royalties from the other country and the royalties are attributable to a permanent establishment through which that resident carries on business in the country of which the payer is a resident. In such circumstances, the taxation of the royalties is governed by Article 7 (Business Profits).

Paragraph 4 provides that where, because of a special relationship between the payer and the beneficial owner, the amount of royalties paid exceeds the amount which would have been paid in the absence of that special relationship, the Article will apply only to the amount that would have been agreed upon by the two parties in the absence of the special relationship. The “excess” part of the payment shall remain taxable according to the laws of each country.

Paragraph 5 ensures that relief will not be available under the Article if it was the main purpose or one of the main purposes of any person concerned with an assignment of the royalties, or with the creation or assignment of the rights in respect of which the royalties are paid, or with the establishment, acquisition or maintenance of the company that is the beneficial owner of the royalties and the conduct of its operations, to take advantage of the Article. The final sentence provides that where one country intends to apply this paragraph, its competent authority shall in advance consult with the competent authority of the other country.

(See paragraph VII of the Protocol regarding the restriction of relief from UK tax where royalties are paid to permanent establishments of Netherlands companies under certain conditions).

## **ARTICLE 13 – CAPITAL GAINS**

This Article contains the rules for the taxation of gains deriving from the alienation of property situated in one country by a resident of the other.

Paragraph 1 provides that gains derived by a resident of one country that are attributable to the alienation of immovable property situated in the other country may be taxed in the country in which the property is situated.

Paragraph 2 provides that gains derived by an enterprise of a country from the alienation of movable property forming part of the business property of a permanent establishment maintained by that enterprise in the other country may be taxed in that other country. The paragraph also applies to gains derived from the alienation of such a permanent establishment (alone or with the whole enterprise).

Paragraph 3 provides that gains derived by a resident of a country from the alienation of ships or aircraft operated in international traffic or of movable property pertaining to the operation or use of such ships or aircraft shall be taxable only in the country where the alienator is resident.

Paragraph 4 provides that, subject to certain conditions, gains derived from the sale of shares in a company or other comparable interests where the shares or interests derive their value from immovable property situated in one country, may be taxed in that country. However, in certain circumstances, such gains are only taxable in the other country where the alienator is resident. This includes where the resident owned less than 50 per cent of the shares or interests before the first alienation; the gains are derived as the result of a corporate reorganisation, amalgamation, division or similar transaction; or where the resident is a pension scheme, provided that the gains are not derived from the carrying on of a business by that pension scheme.

Paragraph 5 provides that gains from the alienation of any property, other than that mentioned in paragraphs 1, 2, 3 and 4, shall be taxable only in the country where the alienator is resident.

Paragraph 6 provides that a country may tax gains, subject to certain conditions, derived by an individual from the alienation or deemed alienation of shares or other rights (or part of the associated rights) in a company resident in that country, after the individual has become resident in the other country. But where an assessment has been issued to the individual in respect of the alienation which was deemed to have taken place at the time the individual became resident in the other country, this provision shall only apply insofar as part of that assessment is outstanding.

Paragraph 7 confirms the right of a country to tax gains from the alienation of any property by a person (including an individual, company or trustee) who is or was a resident of that country at any time during the fiscal year in which the property is alienated or at any time during the six preceding fiscal years.

## **ARTICLE 14 – INCOME FROM EMPLOYMENT**

This Article contains the rules for the taxation of employment income.

Paragraph 1 provides the general rule that salaries, wages and other similar remuneration derived by a resident of one country is taxable only in that country, unless the employment is exercised in the other country in which case it may be taxed in that other country.

Paragraph 2 provides an exception to the general rule where an employee is present in the other country for not more than 183 days in any twelve-month period beginning or ending in the fiscal year concerned, the remuneration is paid by or on behalf of an employer who is not a resident of the other country and the remuneration is not borne by a permanent establishment which the employer has in the other country. Where all three conditions are satisfied, the remuneration will be taxable only in the employee's country of residence.

Paragraph 3 provides that the remuneration of an individual working on a ship or aircraft operated in international traffic shall be taxable only in the state of residence of the individual. (See paragraph 3 of Article 30 regarding the transitional arrangements for individuals who were in receipt of remuneration covered by the corresponding provision in the prior Convention immediately before entry into force of the new Convention).

## **ARTICLE 15 – DIRECTORS' FEES**

This Article provides that directors' fees may be taxed in the country of which the company paying them is a resident. (See paragraph VIII of the Protocol regarding the Dutch terms for Directors).

## **ARTICLE 16 – ENTERTAINERS AND SPORTSPERSONS**

This Article contains the rules for the taxation of income derived from personal activities as an entertainer or sportsperson.

Paragraph 1 provides that income of a resident of a country from his activities as an entertainer or sportsperson in the other country may be taxed in that other country.

Paragraph 2 provides that income may be taxed in the country in which those activities are exercised irrespective of whether the income accrues to the entertainer or sportsperson himself or to some other person.

Paragraph 3 provides an exception to the general rule for income derived by a resident of one country from his activities as an entertainer or sportsperson in the other country, if the visit to the other country is wholly or almost wholly supported by public funds from the first-mentioned country or takes place under a cultural agreement between the Governments of the two countries. In such cases, the income shall be taxable only in the country where the entertainer or sportsperson is resident.

## **ARTICLE 17 – PENSIONS**

Paragraph 1 provides that all pensions (including government service pensions) and other similar remuneration shall be taxed only in the country of which the pensioner is a resident. (See paragraph 4 of Article 30 regarding the transitional arrangements for

government service pensions which were taxable in the source country under the prior Convention).

Paragraph 2 provides for source country taxation of payments falling under paragraph 1 in certain circumstances. The source country may tax pension payments where the right to claim the payments has been exempted from tax in that country, or the contributions associated with the payments have been taken into account for tax relief purposes in that country; and the payments are not taxed in the other country or in a third country at the generally applicable rate for employment income or less than 90 per cent of the gross amount of the payments are taxed. This provision only applies if the total gross payments which would be taxable in the source country exceed 25,000 Euros during the fiscal year concerned. (See paragraph IX of the Protocol regarding exemption from Netherlands tax for British pensions and benefits received by the armed forces and reserve forces).

Paragraph 3 provides that if a lump sum pension payment is paid before the date on which the pension commences, it may be taxed in the country from which the pension derives. (See paragraph X of the Protocol regarding tax treatment of such lump-sum payments for the purposes of Netherlands personal allowances and benefits). However, if a lump sum payment is paid on or around the commencement of a periodic pension it is taxable only in the country from which the pension is derived.

Paragraph 4 deems payments under paragraph 2 to be derived in the source country to the extent that the right to claim the payments has been exempted from source country taxation or the contributions have been taken into account for tax relief purposes in the source country. It also provides that the transfer of a pension from a pension scheme in one country to a pension scheme in the other country shall not restrict the source country's taxing rights under this Article.

Paragraph 5 authorises the competent authorities of the two countries to settle the mode of application of paragraph 2 by mutual agreement.

Paragraphs 6 and 7 provide that, with certain conditions, contributions made by or on behalf of an internationally mobile worker to a pension scheme that is recognised for tax purposes in the worker's "home" country will qualify for tax relief in the country where that worker is working.

Paragraph 8 defines the term "pension scheme" for the purposes of paragraphs 6 and 7 and clarifies that a pension scheme is recognised for tax purposes in a country if the contributions to the scheme would qualify for tax relief in that country and if the employer's contributions to the scheme are not deemed in that country to be taxable income of the individual.

## **ARTICLE 18 – GOVERNMENT SERVICE**

This Article contains rules for the taxation of remuneration paid in respect of Government Service.

Paragraph 1 provides that salaries, wages and other similar remuneration paid by a country, or of one of its political subdivisions or local authorities, will generally be taxable only in that country. However, such remuneration will be taxable only in the other country if the services are rendered in that other country by a national of that other country who is resident there or by a resident of that country who, although not one of its nationals, did not become a resident solely to render the services. (See paragraph XI of the Protocol regarding the inclusion of such income in the basis upon which taxes are imposed on Netherlands residents).

Paragraph 2 provides that paragraph 1 shall not apply to remuneration for services rendered in connection with the carrying on of a business. Such income will be dealt with under Articles 14, 15 and 16 as appropriate.

## **ARTICLE 19 – STUDENTS**

This article contains the rules which govern the taxation of visiting students and business apprentices. It provides that payments for the maintenance, education or training of a student or business apprentice who is present in a country for full-time education or training and who, immediately before visiting that country, was a resident of the other country, will not be taxed in the first-mentioned country, provided the payments are made from sources outside that country.

## **ARTICLE 20 – OTHER INCOME**

This Article contains the rules for the taxation of income not dealt with elsewhere in the Convention.

Paragraph 1 provides that any item of income not specifically covered elsewhere in the Convention, apart from income paid out of trusts or in the estates of deceased persons in the course of administration, will be taxable in the country of which the beneficial owner is a resident.

Paragraph 2 provides that paragraph 1 shall not apply, except in the case of income from immovable property, where the beneficial owner of the income is a resident of a country and carries on business in the other country through a permanent establishment and the income is attributable to that permanent establishment. In such circumstances, the taxation of the income is governed by Article 7 (Business Profits).

Paragraph 3 provides that where, because of a special relationship between the resident under paragraph 1 and some other person, or between both of them and some other person, the amount of income referred to in that paragraph exceeds the amount (if any) which would have been agreed upon between them in the absence of that special relationship, the Article will apply only to the amount that would have been agreed upon by the two parties in the absence of the special relationship. The “excess” part of the income shall remain taxable according to the laws of each country.

Paragraph 4 ensures that relief will not be available under the Article if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the rights in respect of which the income is paid, or with the establishment, acquisition or maintenance of the company that is the beneficial owner of the income and the conduct of its operations, to take advantage of the Article. The final sentence provides that where one country intends to apply this paragraph, its competent authority shall in advance consult with the competent authority of the other country.

## **ARTICLE 21 – ELIMINATION OF DOUBLE TAXATION**

This Article sets out the methods by which the countries will relieve double taxation.

Paragraph 1 sets out the Netherlands “exemption with progression” method of taxation. This means that items of income which may be taxed in the United Kingdom in accordance with the Convention can be included in the basis upon which taxes are imposed on Netherlands residents.

Paragraphs 2 and 3 set out the Netherlands methods for relieving double taxation on certain types of income. For the items of income mentioned under paragraph 2, the Netherlands exempts income derived by a Netherlands resident which is taxed in the United Kingdom in accordance with the Convention, and for the items of income mentioned under paragraph 3, the Netherlands gives credit for United Kingdom tax paid in accordance with the Convention against the Netherlands tax liability of a Netherlands resident.

Paragraph 3 does not restrict any allowance accorded by Netherlands domestic law for the avoidance of double taxation to the extent that the calculation of the amount of the deduction of Netherlands tax concerns the aggregation of income from more than one country and the carry forward of the tax paid in the United Kingdom on the said items of income to subsequent years.

Paragraph 4 provides that the Netherlands will give credit for United Kingdom tax paid on items of income to the extent that the items of income have been taken into account under the exemption with progression method described in paragraph 1.

Paragraph 5 sets out how the United Kingdom will relieve double taxation.

Sub-paragraph (a) provides that Netherlands tax on profits, income or chargeable gains from sources within the Netherlands (excluding tax on undistributed profits) is to be allowed as a credit against any United Kingdom tax computed by reference to the same income, profits or chargeable gains.

Sub-paragraph (b) provides that, in the case of a dividend paid by a company resident in the Netherlands to a company resident in the United Kingdom which controls at least 10 per cent of the voting power in the paying company, the credit will take into account



Netherlands tax payable by the company in respect of the profits out of which the dividend is paid.

Paragraph 6 provides that, for the purposes of the preceding paragraphs of this Article, profits, income and capital gains owned by a resident of one country which may be taxed in the other country under the terms of the Convention, will be deemed to arise from sources in that other country.

Paragraph 7 contains a rule to determine which country will relieve double taxation in cases where a tax charge arises only under the special rule in Article 13(7). The country which is entitled to tax only under Article 13(7) will relieve any double taxation that would otherwise occur owing to the charge of tax in the other country.

This paragraph also confirms that the normal rules will apply in cases where a tax charge arises under paragraphs (1), (2), (4) or (6) of Article 13.

## **ARTICLE 22 – MISCELLANEOUS PROVISIONS**

This article includes a number of provisions which are not specifically covered elsewhere in the Convention.

Paragraph 1 applies to income or gains that are not fully taxable in one country, but are only taxable on the amount remitted to that country or received there. Any relief given in the other country on such income or gains will apply only to the amount that is taxed in the first country.

Paragraph 2 ensures that nothing in the Convention prevents a country from taxing its own resident partners on his share of any income, profits or gains of a partnership established under the laws of the other country.

Paragraph 3 provides rules relating to income, profits and gains derived from a fiscally transparent entity. The income, profit or gain will be treated as belonging to a resident of a country to the extent that the taxation law of that country treats it as belonging to him (and not to the entity itself).

Paragraph 4 provides that where both countries consider that the same item of income, profit or gain under paragraph 3 is derived by one of its residents, neither country shall be prevented from taxing that item of income, profit or gain.

Paragraph 5 provides that the competent authority of one country may grant the benefits of the Convention to a resident of the other country in respect of an item of income, profit or gain, even though that item of income, profit or gain is not treated as belonging to the resident under the laws of the other country, in cases where such income would have been exempt from tax in the other country if it had been treated as belonging to that resident.



## **ARTICLE 23 – OFFSHORE ACTIVITIES**

This Article contains the rules for the taxation of offshore activities.

Paragraph 1 provides that this Article shall apply to offshore activities regardless of any other provisions of this Convention.

Paragraph 2 defines “offshore activities” as activities carried on offshore in a country in connection with the exploration or exploitation of the seabed and its subsoil and their natural resources, situated in that country.

Paragraph 3 sets out the general rule that an enterprise of one country carrying on offshore activities in the other country shall be deemed to carry on its offshore activities there through a permanent establishment, unless the activities do not exceed 30 aggregated days in any twelve month period.

Sub-paragraphs a) and b) set out the rules for associated companies for the purposes of this provision. Where an enterprise resident in one country is carrying on offshore activities in the other country and is associated with another enterprise carrying on similar activities, and the activities carried on by both enterprises when added together amount to a period exceeding 30 days, then each enterprise shall be deemed to be carrying on its activities for a period exceeding 30 days in any twelve month period. Enterprises shall be regarded as associated if one enterprise holds directly or indirectly at least one third of the capital of another enterprise or if a person holds directly or indirectly at least one third of the capital of both enterprises.

Paragraph 4 sets out the activities which are deemed not to be included in the term “offshore activities” for the purposes of paragraph 3.

Paragraph 5 provides that gains derived by a resident of one country from the alienation of rights to assets from offshore activities in the other country may be taxed in that other country.

Paragraph 6 sets out the rules for taxation of employment income from offshore activities. It provides that salaries, wages and other similar remuneration derived by a resident of one country in respect of employment connected with offshore activities in the other country may, to the extent that the employment is exercised offshore in that other country, be taxed in that other country. However, it also provides that salaries, wages and other similar remuneration derived by a resident of one country in respect of an employment exercised aboard a ship or aircraft, with respect to certain offshore activities mentioned in paragraph 4, shall be taxable only in the country where the employee is resident.

Paragraph 7 provides that the Netherlands will give relief from double taxation where tax has been paid in the United Kingdom on business profits or employment income of a permanent establishment in the Netherlands involved in offshore activities in connection with paragraph 3 of this Article and according to paragraph 5 and 6 a) of this Article.

## **ARTICLE 24 – NON-DISCRIMINATION**

Subject to certain conditions this Article provides that neither country shall impose discriminatory taxes or other requirements on the nationals, permanent establishments and enterprises of the other.

Paragraph 1 sets out the basic principle: nationals of one country shall not be subjected in the other country to any taxation, or any requirement connected with taxation, which is more burdensome than those imposed on nationals of the other country who are in the same circumstances, particularly with respect to residence.

Paragraph 2 is concerned with the taxation of permanent establishments; it provides that a permanent establishment maintained by an enterprise of one country in the other country may not be exposed in that other country to taxation which is less favourably levied than the taxation levied on enterprises of that other country carrying on the same activities.

Paragraph 3 provides that, unless certain paragraphs of other Articles apply, interest, royalties and other disbursements paid by a resident of one country to a resident of the other country shall be deductible in computing the payer's taxable profits in the same way as if they had been paid to a resident of the first country.

Paragraph 4 provides that enterprises of one country which are wholly or partly owned or controlled, directly or indirectly, by residents of the other country, shall not be subjected to any taxation, or any requirement connected with taxation, which is more burdensome than the taxation or requirements to which other similar enterprises of the first country are subjected.

Paragraph 5 provides that this Article does not oblige a country to grant to individuals not resident in that country any of the personal allowances, reliefs and reductions for tax purposes which are granted to residents of that country.

Paragraph 6 provides that, subject to paragraph 8 of this Article, individuals who are residents of the Netherlands shall be entitled to the same personal allowances, reliefs and reductions for the purposes of United Kingdom taxation as British subjects not resident in the United Kingdom.

Paragraph 7 provides that, subject to paragraph 8 of this Article, individuals who are residents of the United Kingdom shall be entitled to the same personal allowances, reliefs and reductions for the purposes of Netherlands tax as Netherlands nationals not resident in the Netherlands.

Paragraph 8 provides that this Convention does not entitle an individual who is a resident of one country and whose income from the other country consists solely of dividends, interest or royalties (or solely any combination thereof) to the personal allowances, reliefs and reductions of the kind referred to in this Article for the purpose of taxation in that other country.

## **ARTICLE 25 - MUTUAL AGREEMENT PROCEDURE**

This Article authorises the competent authorities of the two countries to endeavour to resolve, by mutual agreement, cases of taxation not in accordance with the Convention and to settle points of doubt or difficulty in the application or interpretation of the Convention.

Paragraph 1 provides that, where a person considers that the actions of one or both countries will result in taxation not in accordance with the Convention, he may present his case to the competent authority of the country of which he is a resident or national. This right applies irrespective of any remedies provided by domestic law. The paragraph also sets out time limits for the presentation of a case: a case must be presented within three years of the first notification of the action resulting in taxation not in accordance with the Convention or, if later, within six years from the end of the taxable year or chargeable period in respect of which that taxation is imposed or proposed.

Paragraph 2 requires the competent authority to which the case is presented to endeavour, if it considers the objection justified and if it is unable to deal with the matter unilaterally, to resolve the case by mutual agreement with the competent authority of the other country. The paragraph also provides that any agreement reached between the competent authorities shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the countries, except such limitations as apply for the purposes of giving effect to such an agreement.

Paragraph 3 provides that the competent authorities shall endeavour to resolve by mutual agreement any difficulties or doubts arising over the interpretation or application of the Convention. It also provides they may consult on cases not provided for in this Convention, for the purposes of eliminating double taxation and to consider measures to counteract improper use of provisions of the Convention.

Paragraph 4 permits the competent authorities to communicate directly with one another (i.e. not through diplomatic channels) for the purposes of reaching agreement under the Article.

Paragraph 5 provides that, in the cases where the competent authorities are unable to reach an agreement under paragraph 2 within two years, the unresolved issues will, at the request of the person who presented the case, be solved through an arbitration process.

It also provides that, unless a person directly affected by the case does not accept the mutual agreement reached by the competent authorities, the decision of the arbitration panel is binding on both countries and must be implemented regardless of any time limits in the domestic laws of both countries. The competent authorities are obliged to settle by mutual agreement the way in which this paragraph is to be applied.

Paragraph 6 provides that the arbitration process referred to in paragraph 5 shall not apply to cases falling under the corporate tie-breaker provision determining company residence under paragraph 4 of Article 4.

## **ARTICLE 26 – EXCHANGE OF INFORMATION**

This Article contains rules governing the exchange of information between the countries.

Paragraph 1 requires the competent authorities to exchange such information as is foreseeably relevant for carrying out the provisions of the Convention or of their domestic laws. The exchange of information is not restricted by Articles 1 and 2, which means that information concerning persons not resident in either country and information relevant to all taxes, not just those covered by the Convention, may be exchanged.

Paragraph 2 provides that information exchanged in accordance with paragraph 1 shall be treated as secret (i.e. confidential), although it may be disclosed to certain specified persons or authorities. Such information may be disclosed in public court proceedings or in judicial decisions.

Paragraph 3 imposes certain limitations on the exchange of information. Paragraphs 1 and 2 cannot impose an obligation on a country to carry out administrative measures at variance with the laws and administrative practices of either country, to supply information which is not obtainable under the laws or in the normal course of the administration of either country or to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information whose disclosure would be contrary to public policy.

Paragraph 4 provides that the country from which information is requested shall use its information gathering powers to obtain the requested information even though that country may have no domestic tax interest in that information. The obligation is subject to the limitations of paragraph 3 but a country cannot decline to supply information solely because it has no domestic tax interest in that information.

Paragraph 5 makes clear that paragraph 3 cannot be applied to permit a country to decline to supply information requested solely because the information is held by certain financial institutions. However a country may decline to supply information which is covered by professional privilege provisions in domestic law.

## **ARTICLE 27 – ASSISTANCE IN THE COLLECTION OF TAXES**

This Article provides the rules under which the countries may provide assistance to each other in the collection of their taxes.

Paragraph 1 sets out the principle that the countries shall be obliged to assist each other in the collection of taxes owed (i.e. “revenue claims”) provided the conditions of the Article

are met. The assistance is not restricted by Articles 1 and 2 and competent authorities may by mutual agreement settle the mode of application of the Article.

Paragraph 2 defines the term “revenue claim” for the purposes of the Article. The definition applies to any amount owed in respect of all taxes that are imposed on behalf of the countries, but only insofar as that taxation is not contrary to the Convention or any other instrument to which the countries are parties. It also applies to interest, administrative penalties and costs of collection or conservancy related to such amount. Assistance is not therefore restricted to taxes to which the Convention generally applies pursuant to Article 2, as is confirmed in paragraph 1.

Paragraph 3 sets out the conditions under which a request for assistance in collection can be made. The revenue claim has to be enforceable under the laws of the requesting country and be owed by a person who, at that time, cannot, under the law of that country, prevent its collection. This will be the case where the requesting country has the right, under its internal law, to collect the revenue claim and the person owing the amount has no administrative or judicial rights to prevent such collection.

Paragraph 4 enables a country to safeguard its collection rights by taking measures of conservancy even where it cannot yet ask for assistance in collection.

Paragraph 5 provides that the time-limits of the requested country, beyond which a revenue claim cannot be enforced or collected, shall not apply to a revenue claim in respect of which the other country has made a request under paragraph 3 or 4.

Paragraph 6 ensures that any legal or administrative objection concerning the existence, validity or the amount of a revenue claim of the requesting country shall not be dealt with by the requested country’s courts and administrative bodies. This prevents administrative or judicial bodies of the requested country from being asked to decide matters which concern whether an amount, or part thereof, is owed under the internal law of the other country.

Paragraph 7 provides that if, after a request has been made under paragraph 3 or 4, the conditions that applied when such request was made cease to apply, the country that made the request must promptly notify the other country of this change of situation. It provides that, following the receipt of such a notice, the requested country may ask the requesting country to either suspend or withdraw the request. If the request is suspended, the suspension should apply until such time as the requesting country informs the other country that the conditions necessary for making a request are again satisfied, or that it withdraws the request.

Paragraph 8 contains certain limitations to the obligations imposed on the country which receives a request for assistance.

## **ARTICLE 28 – MEMBERS OF DIPLOMATIC OR PERMANENT MISSIONS AND CONSULAR POSTS**

This Article ensures that diplomatic or consular officials shall not receive less favourable treatment under the Convention than they are entitled to under international law or under the provisions of special agreements (such as the Vienna Convention on Diplomatic Relations).

## **ARTICLE 29 – TERRITORIAL EXTENSION**

This Article provides that the Netherlands may extend the Convention to parts of the Kingdom of the Netherlands outside Europe, if the part concerned imposes taxes substantially similar in character to those to which the Convention applies. Any such extension shall take effect from a specified date and is subject to modifications and conditions to be agreed in an exchange of diplomatic notes. Unless otherwise agreed, the termination of the Convention shall also terminate any extension to any part which it has been extended under this Article.

## **ARTICLE 30 – ENTRY INTO FORCE**

This Article contains the provisions governing how and when the Convention will enter into force and take effect.

Paragraph 1 provides that each country will notify the other through diplomatic channels of the completion of the necessary domestic legal procedures required to bring the Convention into force. The Convention will enter into force on the fifth day after the date of the later of the notifications from the two countries.

It will take effect:

- a) in the case of the United Kingdom for income tax and capital gains tax for any year of assessment beginning on or after 6<sup>th</sup> April in the calendar year next following the year in which the Convention enters into force. Similarly, for corporation tax, the relevant date is 1<sup>st</sup> April in the calendar year next following the year in which the Convention enters into force.
- b) in the case of the Netherlands for taxes withheld at source on amounts paid or credited on or after the 1<sup>st</sup> January in the calendar year next following the year in which the Convention enters into force. In respect of other Netherlands taxes, for taxable years and periods beginning on or after the 1<sup>st</sup> January in the calendar year next following the year in which the Convention enters into force.

Paragraph 2 provides that the former Convention between the United Kingdom and the Netherlands signed on 7 November 1980 as amended by Protocols signed on 12 July 1983 and 24 August 1989 will no longer have effect in respect of any tax in accordance with the dates and conditions set out under paragraph 1 and will terminate on the last such date.

Paragraphs 3 and 4 provide that, notwithstanding paragraph 2 of this Article, the prior Convention will continue to apply to certain individuals.

Paragraph 3 provides that, notwithstanding paragraph 3 of Article 14, where, immediately before the entry into force of this Convention, an individual was in receipt of remuneration from employment covered under the corresponding provision in the prior Convention, that individual may elect that the provisions of the prior Convention may continue to apply for a three-year period after entry into force of this Convention. (See paragraph XIII of the Protocol regarding the method of double taxation relief applied in the Netherlands for such income).

Paragraph 4 provides that, notwithstanding the provisions of Articles 17 and 21 of this Convention, where, immediately before the entry into force of this Convention, an individual was in receipt of government service pension payments covered under the prior Convention, that individual may elect that the provisions of the prior Convention may continue to apply.

## **ARTICLE 31 – TERMINATION**

This Article provides that the Convention may be terminated by either country giving notice of termination through diplomatic channels. Notice shall be given at least six months before the end of any calendar year after the expiry of five years from the date the Convention enters into force.

In the event of termination, the Convention shall cease to have effect:

- a) in the case of the United Kingdom for income tax and capital gains tax for any year of assessment beginning on or after 6<sup>th</sup> April in the calendar year next following the year in which the notice has been given. Similarly, for corporation tax, the relevant date is 1<sup>st</sup> April in the calendar year next following the year in which the notice has been given.
- b) in the case of the Netherlands for taxes withheld at source on amounts paid or credited on or after the 1<sup>st</sup> January in the calendar year next following the year in which the notice has been given. In respect of other Netherlands taxes, for taxable years and periods beginning on or after the 1<sup>st</sup> January in the calendar year next following the year in which the notice has been given.

## **PROTOCOL**

The Protocol contains clarificatory material relating to the Articles above and which forms an integral part of the Convention.

Paragraph I: clarifies that the petroleum revenue tax and the supplementary charge in respect of ring fence trades listed under the UK's taxes in Article 2(3)(b) have only been included for the purposes of allowing the Netherlands to give relief for these taxes in



accordance with Article 21 (the Netherlands would be unable to give relief under its domestic legislation otherwise).

Paragraph II: clarifies that, in the case of an individual living aboard a ship, the phrase “any other criterion of a similar nature” used in paragraph 1 of Article 4 includes the home harbour of that ship.

Paragraph III: clarifies the definition of “pension scheme” in the Netherlands and the United Kingdom for the purposes of the relevant provisions under this Convention, and to confirm that dividends will be exempt from tax in the source country if the beneficial owner of the dividends is a pension scheme resident in the other country. The paragraph also allows competent authorities to agree to include in this definition substantially similar pension schemes which are introduced after signature of the Convention.

Paragraph IV: clarifies that the existence of a cost-sharing arrangement or general services agreement between two enterprises, covering certain matters, is not in itself a condition (as referred to in paragraph 1 of Article 9) which determines whether two companies are associated or not.

Paragraph V: confirms that an authorised representative of an investment fund established in the United Kingdom or the Netherlands may make a claim for treaty benefits under Articles 10 and 11. The paragraph also permits competent authorities to consult together to facilitate claims and resolve any doubts over eligibility.

Paragraph VI: clarifies that the Netherlands will deem income received in connection with the liquidation of a company (in whole or in part) or purchased shares as dividends, rather than capital gains.

Paragraph VII: restricts relief from UK tax where interest or royalties are paid to permanent establishments of Netherlands companies under certain conditions.

Paragraph VIII: explains the meaning of the Dutch terms “bestuurder” or “commissaris” referred to in Article 15 (Directors’ fees).

Paragraph IX: confirms that former members of the armed forces or reserve forces (regardless of nationality) who are in receipt of British pensions and benefits, in respect of illness, injury or disability, will be exempt from Netherlands tax as far as they are exempt from United Kingdom tax. It also clarifies that such exempted pensions paid to a Netherlands resident will be taken into account for the purposes of granting personal allowances and benefits in the Netherlands.

Paragraph X: clarifies that lump-sum payments which are paid before the date on which the pension commences (paragraph 3 of Article 17) to a Netherlands resident will be taken into account for the purposes of granting personal allowances and benefits in the Netherlands in the fiscal year in which the lump sum is received.

Paragraph XI: confirms that paragraph 1 of Article 18 under which employment income for government services paid by the United Kingdom is only taxable there, does not



prevent the Netherlands from applying paragraph 1 of Article 21 thereby allowing the Netherlands to include such income in the basis upon which taxes are imposed on Netherlands residents.

Paragraph XII: clarifies that where income relating to a pipeline between the two countries may be taxed in the United Kingdom, the Netherlands will only give relief if such income is actually taxed in the United Kingdom.

Paragraph XIII: clarifies that the Netherlands will apply its exemption method to relieve double taxation for individuals in receipt of remuneration from working on a ship or aircraft immediately before the entry into force of this Convention (paragraph 3 of Article 30).