

**BIJLAGE 2**  
**ANTWOORDEN**

**VERENIGDE STATEN**

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**I. U.S. Taxation of Dutch Resident with Specified U.S. Source Income**

*1.1 Our principal question is whether, in general, the Dutch resident can claim the Treaty benefits under the tax Treaty between your country and the Netherlands. Do you expect any problems in this respect? (You may refer to the more detailed questions below).*

Under the Treaty, the benefit of any reduction of, or exemption from, U.S. tax on dividends, royalty, interest, or other U.S.-source income is not contingent on the Dutch tax treatment of such income. Therefore, a Dutch individual resident should be able to claim treaty benefits with respect to the taxation of U.S.-source income in accordance with the relevant provisions of the Treaty.

*1.2 Will this Box III tax, under your national interpretation of the tax Treaty with the Netherlands, be classified as a tax on income (e.g. articles 6 - 21 OECD Model Treaty), or as a tax on capital (e.g. article 22 OECD Model Treaty)?*

Unlike the OECD Model Treaty, the U.S.-Netherlands Treaty does not contain provisions addressing taxes on capital. This is consistent with the most recent U.S. Model Treaty, wherein the U.S. Treasury Department adopted the approach of specifically identifying the taxes covered by the treaty rather than making general references to income taxes or capital taxes. In contrast to the 1948 U.S.-Netherlands Treaty, the 1992 U.S.-Netherlands Treaty does not mention the Dutch property tax, capital accretions tax, or extraordinary capital tax.

Whether the Investment Yield Tax is covered by the U.S.-Netherlands Treaty will depend on whether the tax is substantially similar to the Dutch taxes enumerated in the Treaty: the income tax, the wages tax, the company tax, and the dividend tax. Given that the Investment Yield Tax appears to have replaced the Dutch wealth tax, which is not mentioned in the Treaty, it is possible that the United States might take the position that the Investment Yield Tax is also not covered by the Treaty.

Generally speaking, the United States would look to the economic substance of the IYT in determining whether it is an income tax for purposes of the treaty. As a practical matter, I suspect that the United States will not care whether IYT imposed on a Dutch resident individual is a tax covered by the U.S.-Dutch treaty. I am assuming that a Dutch resident individual would ordinarily be subject to all of the provisions of the Income Tax Act, not just those pertaining to Box III income. In other words, a Dutch resident individual would be a Dutch taxpayer, even if no tax liability was imposed under Boxes I and II. Based on this assumption, a Dutch resident receiving U.S.-source investment income should qualify for treaty reduction of U.S. withholding tax. Please let me know if I have misunderstood the purpose of your question.

*1.3 Will the income subject to this Box III tax, insofar applicable to the tax Treaty between your country and the Netherlands, be qualified as having satisfied the subject-to-tax criterion (income or capital tax)?*

Article 4 of the Treaty defines a “resident” of a given State as “any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature.” An estate or trust is

considered to be a resident of a given State “only to the extent that the income derived by such estate or trust ... is subject to tax in that State as the income of a resident, either in its hands or in the hands of its beneficiaries.” If the Dutch “resident” in this case is not legally liable for any Dutch tax other than the Investment Yield Tax, and if the Investment Yield Tax is not within the scope of the taxes covered by the Treaty, then there is at least an argument that the United States could deny treaty benefits on the basis that the individual is not a Dutch resident for purposes of the Treaty.

2.1 *Will the introduction of the Investment Yield Tax (Box III) change your country’s attitude with respect to the granting of a withholding tax reduction, or of any other Treaty benefit, for interest, paid by a resident of your country? If so, please explain why.*

No.

2.2 *Same as above for royalties, paid by a resident in your country?*

No.

2.3 *Same as above for dividends, paid by a company resident in your country?*

No.

2.4 *Same as above for rent paid for using real property located in your country? (Stating the obvious: the rent is paid by a resident of your country, and the real estate is owned by a resident of the Netherlands.)*

No.

2.5 *Same as above for capital gains realized by a resident of the Netherlands upon disposal of real property located in your country?*

No.

2.6 (...)

## **II. U.S. Double Tax Relief for Dutch Taxation of U.S. Resident under Box III**

3.1 *Our principal question is whether, in general, the resident of your country can claim the Treaty benefits under the tax Treaty between your country and the Netherlands for income that is subject to the Box III tax in the Netherlands only. Do you expect any problems in this respect? (You may refer to the more detailed questions below.)*

Under U.S. tax law, in order for a foreign tax to be creditable against a U.S. resident’s U.S. tax liability the predominant character of the tax must be that of an income tax under U.S. tax principles. In other words, the tax must be “likely to reach net gain [in] the normal circumstances in which it applies.” This test requires: (1) that the tax is imposed upon or subsequent to the occurrence of events that would trigger realization of income under U.S. tax law; (2) that the tax is imposed on the basis of gross receipts or on deemed gross receipts; and (3) that the tax base is computed by reducing the gross receipts to recover significant costs and

expenses incurred in earning the income. It seems reasonably clear from your description that the Investment Yield Tax will not qualify as an income tax for U.S. foreign tax credit purposes. Alternatively, a tax that is imposed “in lieu” of an income tax may be creditable for U.S. tax purposes. To meet this test, the tax imposed must be a “tax” and must be a substitute for an income tax. For example, a gross withholding tax is a creditable tax that is “in lieu” of the generally imposed income tax. If the Investment Yield Tax is imposed in lieu of an income tax on the Box III items, then it should be creditable for U.S. tax purposes. If the Investment Yield Tax is imposed in addition to an income tax on these items, however, it likely would not be creditable for U.S. tax purposes.

Even if the Investment Yield Tax is not creditable for U.S. tax purposes, a U.S. resident may deduct foreign taxes paid from his gross income in computing his taxable income. However, the deductibility of such taxes is subject to a number of limitations in the case of high-income individuals.

*4.1 Will your country grant avoidance for double taxation with respect to income from real estate located in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique. Please address in your answer both rental income and capital gains realised upon disposal of the Dutch real estate.*

Provided that the actual rental income is not subject to ordinary Dutch income taxation, the Investment Yield Tax arguably should be a creditable tax that is “in lieu” of an income tax. The same would be true for capital gains on the disposal of Dutch real estate. Article 6 should apply to rental income from real estate, and Article 14 should apply to capital gains from the sale of real estate.

*4.2 Will your country grant avoidance for double taxation with respect to income from profit shares in an enterprise that is carried out in the Netherlands, assuming that these profit shares are taxed under the regime of Box III in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique.*

Provided that a U.S. resident’s actual dividend income from a Dutch enterprise is not subject to ordinary Dutch income taxation, the Investment Yield Tax arguably should be a creditable tax that is “in lieu” of an income tax. (...)

*5.1 Can you think of any other international complications with respect to the introduction of the Investment Yield Tax (Box III) in the Netherlands? Can you think of any international situations or examples that we may have overlooked in relation to your country?*

No.

**VERENIGD KONINKRIJK**

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I refer to your memo of 14 December 1999. My responses to your questions (which are restated below for ease of reference) are as follows:

**1.1 Our principal question is whether, in general, the Dutch resident can claim the Treaty benefits under the tax Treaty between your country and the Netherlands. Do you expect any problems in this respect?**

In general terms, the Dutch resident ought to be entitled to claim benefits under the current UK/Netherlands double tax treaty (“the Treaty”). (See responses to question 2 below).

**1.2 Will the Box III tax, under your national interpretation of the tax Treaty with the Netherlands, be classified as a tax on income (e.g. articles 6-21 OECD Model Treaty), or as a tax on capital (e.g. article 22 OECD Model Treaty)?**

I do not see how this question is relevant to your other questions (see responses to questions 2, 3 and 4 below).

**1.3 Will the income subject to this Box III tax, insofar applicable to the tax Treaty between your country and the Netherlands, be qualified as having satisfied the subject-to-tax criterion (income or capital tax)?**

In general terms, a Dutch resident individual will qualify for relief from UK tax on UK source income/profits/gains under the terms of the Treaty (assuming such relief is available) irrespective of whether the income, profits or gains in question are subject to tax in the Netherlands. Thus, in relation to UK source income of a Dutch resident, the only requirements under the Treaty are as follows:-

1. The Dutch resident must qualify as a resident of the Netherlands for the purposes of Article 4(1) of the Treaty. This simply requires the individual in question to be resident for Dutch tax purposes in the Netherlands and to be liable to tax in the Netherlands “by reason of his domicile, residence, place of management or any other criterion of a similar nature”; and
2. Where relief is granted under the Treaty in respect of UK withholding tax or income tax, the basic requirement is simply that the income in question is “derived by and beneficially owned by a resident of the Netherlands”.

**2.1 Will the introduction of the Investment Yield Tax (Box III) change your country’s attitude with respect to the granting of a withholding tax reduction, or of any other Treaty benefit, for interest, paid by a resident of your country? If so, please explain why.**

The introduction of the Investment Yield Tax should not affect the UK’s attitude to the granting of an exemption from UK withholding tax nor should it affect the availability of an exemption from UK tax (i.e. income tax). This is because, in the first instance, relief from such taxes is available under Article 11(1) of the Treaty where the interest in

question is “derived and beneficially owned by a Dutch resident”. In other words there is no requirement (assuming the other conditions in the interest article in the Treaty are satisfied) for the interest in question to be taxed by the Netherlands in any particular way.

**2.2 Same as above for royalties, paid by resident in your country?**

The position in relation to UK source royalties beneficially owned by a Dutch resident individual is the same. In other words, UK source royalty income of a Dutch resident should qualify for relief from UK withholding tax and should be not subject to UK income tax in the hands of the recipient.

**2.3 Same as above for dividends, paid by a company resident in your country?**

There is no dividend withholding tax under UK domestic law. Under article 10(3)(a)(iii) of the Treaty, dividends derived from a UK company and which are beneficially owned by a Dutch resident are exempt from UK income tax in the hands of the recipient. The introduction of the Investment Yield Tax should not affect the position.

**2.4 Same as above for rent paid for using real property located in your country?**

UK source rental income of a Dutch resident will in the first instance be subject to UK withholding tax at the rate of 23% as well as to UK income tax in the hands of the recipient. The Treaty does not relieve such withholding tax or income tax and the introduction of the Investment Yield Tax will not affect the position.

**2.5 Same as above for capital gains realised by a resident of the Netherlands upon disposal of real property located in your country?**

The UK tax treatment of gains realised by non-residents on a disposal of land that is situated in the UK depends, broadly speaking, upon whether the property is or was (i) purchased with a view to making a profit on resale or (ii) purchased for investment purposes.

A capital gain realised by a Dutch resident individual in respect of UK land that was held for investment purposes will be outside the scope of UK capital gains tax under UK domestic rules.

A gain realised by a Dutch resident in respect of UK land that was purchased/held in order to realise a profit on resale will normally only be taxable in the UK if the Dutch resident has a UK permanent establishment to which the disposal is attributable in which case the gain (or so much of it as is attributable to the UK permanent establishment) will be taxable in the UK.

**2.6 (...)**



- 3.1 Our principal question is whether, in general, the resident of your country can claim the Treaty benefits under the tax Treaty between your country and the Netherlands for income that is subject to the Box III in the Netherlands only. Do you expect any problems in this respect? (You may refer to the more detailed questions below).**

Please see response to question 4.1 below.

- 4.1 Will your country grant avoidance for double taxation with respect to income from real estate located in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique. Please address in your answer both rental income and capital gains realised upon disposal of the Dutch real estate.**

Rental income

A UK resident individual is liable, under UK domestic rules, to income tax in respect of his/her worldwide income. Under Article 6 of the Treaty, the Netherlands is entitled to tax Dutch source rental income. If the Investment Yield Tax constitutes “Netherlands Tax” within the meaning of Article 2(1)(b) of the Treaty (or if the definition of “Netherlands Tax” in the Treaty is extended to make it clear that Investment Yield Tax falls within the definition of “Netherlands Tax” for Treaty purposes), the UK will, under Article 22 of the Treaty give a credit for Dutch Investment Yield Tax against UK income tax provided that the Investment Yield Tax is “computed by reference to the same income by reference to which the [Investment Yield Tax] is computed” (see Article 22(1)(a)). If this proviso cannot be satisfied (i.e. because the Netherlands Investment Yield Tax is computed not by reference to the same income but by reference to the assumed capital value of the underlying land) credit relief might be available under UK domestic rules.

Under UK domestic rules, credit is available in computing the UK income tax liability if the relevant foreign tax is “computed by reference to income arising [in the Netherlands]” and corresponds to UK income tax and is charged on income.

In order therefore for a credit to be available to a UK resident (whether under the Treaty or under UK domestic rules), the Dutch Investment Yield Tax must be similar to or serve the same purpose as UK income tax. This in turn requires an analysis of the Dutch Investment Yield Tax within its Dutch Legislative context and an analysis of whether the Dutch Investment Yield Tax serves the same function as UK income tax.

In my view and on the basis of the information you have provided about the nature and mechanics of the Investment Yield Tax, there are material doubts that a credit would be available either under UK domestic rules or (if the Investment Yield Tax fell within the Treaty definition of “Netherlands Tax”), the Treaty.

Thus, by way of analogy the UK does not generally admit foreign net wealth taxes for UK foreign tax credit purposes. Specifically (and by way of example) the German wealth tax is not available for credit for UK income tax purposes.

Even if it were established that the tax serves the same purpose as UK income tax, it is neither charged on income nor is it computed by reference to income arising. Accordingly, as noted above, it seems unlikely that the tax would be available for credit in computing UK income tax.

Where a credit is not available under UK domestic rules, it may be possible to relieve the Dutch tax against UK income tax by way of deduction or expense.

In order for a deduction to be available, the Dutch Investment Yield Tax would need to constitute a tax on income. I suspect (in light of the various foreign capital and wealth taxes that are admissible for relief under the deduction or expense methods) that the Inland Revenue would be prepared to allow a UK resident to deduct or treat as an expense the actual amount of any Box III tax suffered, however, this depends on the approach that the Inland Revenue will take in practice. We have not yet been able to ascertain what position the Inland Revenue is likely to adopt for these purposes and will let you know what we find out.

#### Capital gains

Under UK domestic rules, foreign capital gains taxes are relieved under the credit method. (A credit would be available instead under Article 22 of the Treaty if the Box III tax constituted “Netherlands Tax” within the meaning of Article 2).

Although in principle the UK domestic rules governing the way in which foreign taxes that are available for credit against UK capital gains tax are similar to those that apply for income tax purposes (see 4.1 above), there is an Inland Revenue Statement of Practice (SP 6/88) that indicates that a more relaxed approach may be adopted for capital gains tax purposes. Thus, although, strictly speaking credit will only be available for UK capital gains tax purposes if the Box III tax is computed by reference to “any gain arising” and the Dutch tax is a tax on chargeable gains and corresponds to UK capital gains tax, the Statement of Practice, SP 6/88, makes it clear that credit will be available for overseas taxes that are payable by reference to increases in value even though there has been no disposal.

- 4.2 Will your country grant avoidance for double taxation with respect to income from profit shares in an enterprise that is carried out in the Netherlands, assuming that these profit shares are taxed under the regime of Box III in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique.**

The same analysis applies here as for question 4.1 above.

5. **Can you think of any other international complications with respect to the introduction of the Investment Yield Tax (Box III) in the Netherlands? Can you think of any international situations or examples that we may have overlooked in relation to your country?**

No.

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**I. Dutch resident taxpayer receives income from a source in your country.**

**Question 1**

*1.1 Our principal question is whether, in general, the Dutch resident can claim the Treaty benefits under the tax Treaty between your country and the Netherlands. Do you expect any problems in this respect? (You may refer to the more detailed questions below).*

**Answer**

In general, I do not expect any problems for Dutch residents in claiming the Treaty benefits under the Dutch-German tax Treaty. The main reason is that there is no subject-to-tax clause in the Dutch-German tax Treaty (see answer 1.3) and that Germany levies no withholding taxes on income of non-residents in most cases (see answer 2).

*1.2 Will this Box III tax, under your national interpretation of the tax Treaty with the Netherlands, be classified as a tax on income (e.g. articles 6 - 21 OECD Model Treaty), or as a tax on capital (e.g. article 22 OECD Model Treaty)?*

**Answer**

There is no definition of the taxes on income and the taxes on capital neither in the national tax laws of Germany and the Netherlands nor in the Dutch-German tax Treaty. From the German perspective (i.e. literature and constitutional court (Bundesverfassungsgericht) the Box III tax is likely to be classified as a tax on capital (i.e. ordinary property tax) because the taxable base is independent from the actual income/revenue and rather depends on a standardised yield or deemed income (in Germany we use the expression „Soll-Ertragsteuer“ which includes a property tax („Vermögensteuer“)).

*1.3 Will the income subject to this Box III tax, insofar applicable to the tax Treaty between your country and the Netherlands, be qualified as having satisfied the subject-to-tax criterion (income or capital tax)?*

**Answer**

No. There exists no subject-to-tax clause in the Dutch-German tax Treaty. Therefore, the Treaty benefits (for private investors) that are granted by Germany as the state of source do not depend on the structure of the Dutch tax system.

**Question 2**

*2.1 Will the introduction of the Investment Yield Tax (Box III) change your country's attitude with respect to the granting of a withholding tax reduction, or of any other Treaty benefit, for interest, paid by a resident of your country? If so, please explain why.*

Answer

There will be no change. According to article 14 of the Dutch-German tax Treaty Germany is not allowed to levy any withholding tax on interest paid to a private Dutch investor. This rule is, in principle, already in line with the national German income tax law (a withholding tax on interest paid to non-residents is in general not imposed). Furthermore, there is no subject-to-tax clause with respect to a reduction of a withholding tax on income paid to Dutch investors.

2.2 *Same as above for royalties, paid by a resident in your country?*

Answer

There will be no change. According to article 15 of the Dutch-German tax Treaty Germany is not allowed to levy any withholding tax on royalties paid to a private Dutch investor. Compared with the national German income tax law, the withholding tax is thus reduced from 25 p.c. to nil. There is, however, no subject-to-tax clause for the reduction of the withholding tax. Only in the case of a Dutch base *company* (not a private person!) which has no own business and which is not the beneficial owner of the royalties, there is no reduction of the withholding tax (§ 50 Abs. 1a Einkommensteuergesetz (EStG)). Though this national German tax rule is in conflict with the Dutch-German tax treaty it will not be refused by German tax courts.

2.3 *Same as above for dividends, paid by a company resident in your country?*

Answer

There will be no change. In Germany, a withholding tax of 15 p.c. is levied on dividends paid by a German company to a Dutch shareholder (article 13 of the Dutch-German tax Treaty). Compared with the national German income tax law, the withholding tax is thus reduced from 25 p.c. by 10 percentage points. There is, however, no subject-to-tax clause for the reduction of the withholding tax.

2.4 *Same as above for rent paid for using real property located in your country? (Stating the obvious: the rent is paid by a resident of your country, and the real estate is owned by a resident of the Netherlands.)*

Answer

There will be no change. Rents paid for using real property are taxed in the state where the building is located (i.e. Germany, article 4 of the Dutch-German tax Treaty). The tax is calculated by assessing the non-resident Dutch tax payer in Germany with the relevant income (§ 50 Einkommensteuergesetz (EStG)). There are no special treaty benefits.

2.5 *Same as above for capital gains realized by a resident of the Netherlands upon disposal of real property located in your country?*

**Answer**

There will be no change. Capital gains upon the disposal of real property are taxed in the state where the building is located (i.e. Germany, article 4 of the Dutch-German tax Treaty). These capital gains in the hands of private investors (natural persons), however, are only taxable if they are realized within ten years after the acquisition of the building (land) (see §§ 22, 23 Einkommensteuergesetz (EStG)). In case they are taxable, the tax is calculated by assessing the non-resident Dutch tax payer in Germany (§ 50 Einkommensteuergesetz (EStG)). There are no special treaty benefits.

2.6 (...)

**II. Resident taxpayer in your country receives income from a Dutch source**

**Question 3**

3.1 *Our principal question is whether, in general, the resident of your country can claim the Treaty benefits under the tax Treaty between your country and the Netherlands for income that is subject to the Box III tax in the Netherlands only. Do you expect any problems in this respect? (You may refer to the more detailed questions below.)*

**Answer**

As there is no subject-to-tax clause in the Dutch-German tax Treaty there is no general restriction to claim benefits under the tax Treaty. With respect to the fact that income is subject to Box III tax, there could, however, arise some problems in the case of profit shares (see answer 4.2 below).

**Question 4**

4.1 *Will your country grant avoidance for double taxation with respect to income from real estate located in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique. Please address in your answer both rental income and capital gains realised upon disposal of the Dutch real estate.*

**Answer**

According to article 4 of the Dutch-German tax Treaty income from immovable property can only be taxed in the state of source (i.e. state in which the immovable property/ real estate is located = Netherlands). The right to tax income covers both rental income and capital gains upon the disposal of real estate located in the Netherlands. Article 4 of the Dutch-German tax Treaty does neither define „income“ nor does it contain any rules how such income should be determined. Thus, the relevant definitions and rules for income computation are those of the contracting states. In case the Netherlands are the state of source the Dutch rules are relevant. Therefore, although the income is subject to Box III tax, both the income and the capital gains are taxable in the Netherlands (see also Court of Arnhem from 12.3.1988, BNB 1988/305 that judged that a fictive (deemed) rental

income in case of owner occupied houses is an income that falls under article 6 of the Dutch-Austrian tax Treaty (corresponds to article 4 of the Dutch-German tax Treaty)).

In order to avoid double taxation in Germany, both the rental income and the capital gains upon the disposal of real estate located in the Netherlands are exempted with progression from the German personal income tax according to article 20 of the Dutch-German tax Treaty. For the exemption method with progression the income is computed according to the German rules. The fact, that there might be no tax payable in the Netherlands (due to deductions) or that the Box III tax might not qualify as an income tax under the German tax law (see answer 1.2 above), is not relevant for the exemption, because the tax Treaty does not include a subject-to-tax clause.

- 4.2 *Will your country grant avoidance for double taxation with respect to income from profit shares in an enterprise that is carried out in the Netherlands, assuming that these profit shares are taxed under the regime of Box III in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique.*

Answer

It is not clear whether article 5 of the Dutch-German tax Treaty (corresponds to article 7 of the OECD Model Treaty) always applies to the above mentioned profit shares in an enterprise. Article 5 only applies to business profits that can be allocated to a permanent establishment. In this case, the computation of the income of the permanent establishment should be based on the arm's length principle and should consider earnings and expenses. Thus, as opposed to Box III, the income can also be negative. As a result, there could be a conflict to the determination of taxable income within Box III.

In case article 5 applies, the avoidance of double taxation in Germany is the same as with income from real estate, i.e. exemption with progression (see answer 4.1 above). The fact, that there might be no tax payable in the Netherlands (due to deductions) or that the Box III tax might not qualify as an income tax under the German tax law (see answer 1.2 above), is not relevant for the exemption, because the tax Treaty does not include a subject-to-tax clause.

Other forms of profit shares (other than shareholdings) could be: (typical) silent partnerships (no participation in the self-created goodwill; untypical silent partnerships are taxed according to article 5 of the Dutch-German tax Treaty), income bonds or profit-sharing loans. According to the Dutch-German tax Treaty the income of these profit shares is taxed like dividends if they cannot be attributed to a permanent establishment (article 13). As the Box III tax rate amounts to 30 p.c. there could be a conflict with the Treaty provisions as the taxation in the state of source is limited to 15 p.c. In case there is no such conflict and article 13 applies, double taxation of the income is avoided in Germany by a direct tax credit (article 20 of the Dutch-German tax Treaty). According these Treaty provisions and the relevant provisions of the national German tax law (§ 34c Einkommensteuergesetz (EStG)), however, a foreign tax can only be credited against



German income tax if it is a similar (i.e. income) tax. As the Box III tax is likely to be a property tax (see answer 1.2 above), it cannot be credited against income tax but only be deducted from the income tax base in Germany (e.g. the tax base in Germany is the income (profit share) minus the Dutch tax). Thus, double taxation would only be mitigated and not completely avoided.

**Amendment to answer 4.2 in the case of profit shares that are taxed according to article 13 of the Dutch-German tax Treaty**

In the Dutch-German tax Treaty (as in the OECD Model Treaty) there is link between the taxation of dividends in the state of source and the avoidance of double taxation in the state of residence. According to article 13 of the Dutch-German tax Treaty (corresponds to article 10 of the OECD Model Treaty) the state of source (i.e. the Netherlands) is only allowed to levy a withholding tax on dividends (and on other profit shares mentioned above) in the limits of the treaty (i.e. 15 p.c.). Therefore, the state of source is not allowed to levy a tax other than a withholding tax (e.g. an investment yield tax which is not a withholding tax) on dividends paid to non-residents. Moreover, in case a withholding tax is levied, the tax rate must not exceed 15 p.c. One may argue that a taxation that causes a conflict with article 13 of the Dutch-German tax Treaty is an internal matter of the state of source. According to article 20 of the Dutch-German tax Treaty (corresponds to article 23A of the OECD Model Treaty) the state of residence (i.e. Germany) is, however, only obliged to avoid double taxation on dividends with respect to a foreign (i.e. Dutch) tax on dividends that is levied in accordance with article 13. In the Dutch-German tax Treaty the method for avoiding international double taxation is the direct tax credit. This means that Germany is obliged to credit a Dutch withholding tax on dividends within the amount or percentage mentioned in article 13 (i.e. 15 p.c.). In other word this means that Germany is not obliged by the tax Treaty to credit a tax other than a withholding tax mentioned in article 13 (e.g. a property tax) or to credit that amount of a withholding tax in excess of 15 p.c.

If international double taxation is not avoided by the tax Treaty, the domestic German law is relevant (i.e. § 34c Einkommensteuergesetz (EStG)). According to this paragraph a foreign tax can only be credited against German income tax if it is a similar (i.e. income) tax. If the foreign tax is not similar to the German income tax (e.g. because it is a property tax), it can only be deducted from the income tax base in Germany (e.g. the tax base in Germany is the income (profit share) minus the Dutch tax).

**Example:**

Value of the profit shares 1000, dividends 10, Dutch tax 12 (1.2 p.c. from 1000), maximum under article 13 is 1.5 (15 p.c. from 10). As the Dutch investment yield tax is not a withholding tax Germany is not obliged to credit this tax on the personal income tax. Instead, double taxation is mitigated by deducting the investment yield tax from the German income tax base as an (business) expense. The tax base can even become negative (tax base = 10 - 12 = -2).

To sum up we can conclude that the Dutch investment yield tax cannot be credited against German personal income tax even if the tax rate would not exceed 15 p.c.

**Question 5**

*Can you think of any other international complications with respect to the introduction of the Investment Yield Tax (Box III) in the Netherlands?*

See for profit shares answer 4.2 above, if the income cannot be allocated to a permanent establishment and thus the articles for dividends or interest apply.

*Can you think of any international situations or examples that we may have overlooked in relation to your country?*

no

N O B

**FRANKRIJK**

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I. Dutch resident taxpayer receives income from French source

1. **Question 1**

1.1 *Our principal question is whether, in general, the Dutch resident can claim the Treaty benefits under the tax Treaty between your country and the Netherlands. Do you expect any problems in this respect? (You may refer to the more detailed questions below).*

We understand that Dutch tax residents would not be taxed on Box III actual income but on a deemed income equal to 4% of the. The taxable basis would be completely disconnected from the actual revenues.

From a French standpoint, we believe that the proposed modification in Dutch law will not affect the benefit of the French-Dutch tax treaty dated March 16, 1973 (the “Treaty”) with respect to actual French source income received by a Dutch tax resident. Indeed, regarding the elimination of double taxation, the Treaty applies only to actual revenues (dividends, interests, royalties, etc.) and does not contain any specific provisions for taxation on a “deemed basis”.

It should be noted however, that, since article 10-3(b)(i) of the Treaty contains a subject-to-tax criterion for the benefit of the transfer to a Dutch tax resident individual of the tax credit attached to dividends paid out by French companies, we believe that this transfer will not be possible if the proposed Dutch tax bill is adopted (see 1.3, 2.3 and 2.5 below).

1.2 *Will this Box III tax, under your national interpretation of the tax Treaty with the Netherlands, be classified as a tax on income (e.g. articles 6 - 21 OECD Model Treaty), or as a tax on capital (e.g. article 22 OECD Model Treaty)?*

It is difficult to say whether this box III tax under our domestic interpretation, would be classified as either a tax on income or as a tax on capital. However, as far as a deemed income is taxed, without any further adjustment with respect to the actual revenues of the assets of the said box III, we assume that this tax will not be qualified as a tax on income, but more likely as a tax on capital.

1.3 *Will the income subject to this Box III tax, insofar applicable to the tax Treaty between your country and the Netherlands, be qualified as having satisfied the subject-to-tax criterion (income or capital tax)?*

According to the Dutch tax bill, actual income falling in Box III will be exempted from income tax while an annual deemed income may be recognized to the Dutch tax resident even if no actual income is received.

Consequently we believe that the income subject to this box III tax will not qualify as having satisfied the subject-to-tax criterion of article 10-3(b)(i) of the Treaty.

**2. Question 2**

2.1 *Will the introduction of the Investment Yield Tax (Box III) change your country's attitude with respect to the granting of a withholding tax reduction, or of any other Treaty benefit, for interest, paid by a resident of your country? If so, please explain why.*

We remind you that interests having their source in France, paid to Dutch tax residents, suffer an effective 10% withholding tax in France as limited by the provisions of article 11-2 of the Treaty. Double taxation is avoided for Dutch beneficiaries through a reduction of Dutch income tax under the conditions set forth by article 24(B)(b) of the Treaty.

In this respect, the fact that the said interest will be taxable in the Netherlands on a deemed income system does not raise specific issue from a French standpoint. As far as said interests are effectively received by a Dutch tax resident, the limitation of the French withholding tax rate will apply irrespective of the fact that said interests would actually be taxed in the Netherlands or not.

2.2 *Same as above for royalties, paid by a resident in your country?*

According to article 12-1 of the Treaty, French source royalties paid to a Dutch beneficiary are taxable only in the Netherlands. This treatment shall not thus be affected by the Dutch tax treatment of said royalties.

2.3 *Same as above for dividends, paid by a company resident in your country?*

Article 10-3(b)(i) of the Treaty provides that the tax credit (i.e. *avoir fiscal*) attached to dividends paid out by French companies is granted namely to individual Dutch tax residents who are taxable in the Netherlands upon the dividends and the corresponding *avoir fiscal*.

Since dividends falling in Box III, paid by a French company to an individual Dutch tax resident, will not be effectively subject to taxation in the Netherlands for their gross amount plus the *avoir fiscal*, the subject-to-tax condition set forth by article 10-3(b)(i) of the Treaty will not be satisfied. Consequently the transfer of the *avoir fiscal* will no longer benefit to individual Dutch tax residents.

For example, if a French tax resident individual receives in 1999 a dividend of 100 from a French company, he will be entitled to an *avoir fiscal* of 50 which may be offset against his French personal income tax<sup>1</sup>.

In the same way, if a Dutch tax resident individual receives in 1999 a dividend of 100 from a French company, he will be entitled, pursuant to article 10-3(b)(i) of the treaty, to a payment from the French treasury equal to 50 (i.e. the amount of the *avoir fiscal* he would be entitled to, should he be a French tax resident individual), provided he is effectively subject to Dutch

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<sup>1</sup> Since the *avoir fiscal* is equal to 50% of the distributed dividend and the normal rate of corporate income tax (disregarding any additional contributions) is 33.1/3%, the *avoir fiscal* is in theory equal to the corporate income tax paid on the profits corresponding to the distributed dividend ( $50\% \times (100 - 33.1/3) = 33.1/3$ ) and thus permits to avoid a double taxation of the distributed dividend.

personal income tax on the total amount made of the gross (100) and the *avoir fiscal* (50) received by him (please note however that, since both the 100 dividend and the 50 payment received by the Dutch tax resident individual will be subject to the 15% withholding tax set forth by article 10-2(b) of the Treaty, the Dutch tax resident individual will receive a total net payment of  $(100+50) \times 85\% = 127.5$ ).

On the contrary, if, because of the proposed Dutch tax bill, the Dutch tax resident individual is not effectively subject to Dutch personal income tax on the gross amount of the dividend plus the *avoir fiscal*, he will not be entitled to a payment from the French treasury equal to the amount of the *avoir fiscal*: he will thus only receive a total payment of 100 (less the 15% withholding tax set forth by article 10-2(b) of the Treaty, i.e. a net payment of  $100 \times 85\% = 85$ ).

2.4 *Same as above for rent paid for using real property located in your country? (Stating the obvious: the rent is paid by a resident of your country, and the real estate is owned by a resident of the Netherlands.)*

No issue shall be outlined for rental income arising from real property situated in France since it is taxable only in France according to article 6-1 of the Treaty. As such, any modification in Dutch law will not affect the French tax treatment of such rental income.

2.5 *Same as above for capital gains realized by a resident of the Netherlands upon disposal of real property located in your country?*

No issue shall be outlined for capital gains realized upon a disposal of real property situated in France since it is taxable only in France according to article 13-1 of the Treaty. As such, any modification in Dutch law will not affect the French tax treatment of such capital gains.

2.6 (...)

II. French resident tax payer receives Dutch source income

### 3. Question 3

3.1 *Our principal question is whether, in general, the resident of your country can claim the Treaty benefits under the tax Treaty between your country and the Netherlands for income that is subject to the Box III tax in the Netherlands only. Do you expect any problems in this respect? (You may refer to the more detailed questions below.)*

We do not expect any difficulties on this subject (see 4.1 and 4.2 below).

### 4. Question 4

4.1 *Will your country grant avoidance for double taxation with respect to income from real estate located in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique. Please address in your answer both rental income and capital gains realised upon disposal of the Dutch real estate.*

No issue will arise from the proposed change in the Dutch tax law as the Treaty provides for a taxation only in the Netherlands of Dutch source real estate income (see article 6-1 for rental income and article 13-1 for capital gains upon disposal).

4.2 *Will your country grant avoidance for double taxation with respect to income from profit shares in an enterprise that is carried out in the Netherlands, assuming that these profit shares are taxed under the regime of Box III in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique.*

As long as the phrase “*the profits shares in an enterprise that is carried out in the Netherlands*” means “*the part of the profits of an enterprise which carries on a business in the Netherlands through a permanent establishment situated therein*”, no issue will arise from the proposed change in the Dutch tax law as these profits are taxable only in the Netherlands pursuant to article 7-1 of the treaty.

## **5. Question 5**

*Can you think of any other international complications with respect to the introduction of the Investment Yield Tax (Box III) in the Netherlands? Can you think of any international situations or examples that we may have overlooked in relation to your country?*

We do not see any other international complications nor any international situations or examples that you may have overlooked with respect to the proposed change in the Dutch tax law.

N O B

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**I. Dutch resident taxpayer receives income from a source in Belgium.**

**Question 1**

1.1 *Our principal question is whether, in general, the Dutch resident can claim the Treaty benefits under the tax Treaty between your country and the Netherlands. Do you expect any problems in this respect? (You may refer to the more detailed questions below).*

A Dutch resident can claim the benefits under the existing tax treaty between Belgium and The Netherlands (“The Treaty”) in Belgium irrespective of how he will be taxed in The Netherlands. For the application of the Treaty in Belgium, the various classes of income derived from a source in Belgium will be defined according to the Treaty’s definition or according to Belgian law (article 3 §2 of the Treaty). Therefore, a change in the taxation or in the definition of income in The Netherlands would have no impact on the Belgian taxation of income derived by a Dutch resident from a Belgian source, since the Treaty only determines whether such income is taxable in Belgium or in the Netherlands and does not determine how the income should be taxed in the country having taxation power.

1.2 *Will this Box III tax, under your national interpretation of the tax Treaty with the Netherlands, be classified as a tax on income (e.g. articles 6 - 21 OECD Model Treaty), or as a tax on capital (e.g. article 22 OECD Model Treaty)?*

The Box III tax is a levy on deemed income (i.e. 4% of the average value of the capital). Since the amount of tax will depend only upon the amount of the capital, irrespective of the income produced by it, there is a risk that the Box III tax not be considered as an Income tax.

1.3 *Will the income subject to this Box III tax, insofar applicable to the tax Treaty between your country and the Netherlands, be qualified as having satisfied the subject-to-tax criterion (income or capital tax)?*

This is not relevant in respect of the taxation in Belgium of a Dutch taxpayer receiving income from a Belgian source. Under the Treaty (which is, however, under renegotiation) the Treaty benefit would be granted irrespective of whether the Dutch taxpayer is taxed or not in The Netherlands.

This question would be relevant only if the Treaty were to require that there be effective taxation in the residence country in order to have exemption in the source country. Belgium has some tax treaties which provides such requirement in the context of the article on miscellaneous income (article 21 of the OECD model treaty) or more in general in the article on avoidance of double taxation (article 23 of the OECD model treaty).

**Question 2**

2.1 *Will the introduction of the Investment Yield Tax (Box III) change your country’s attitude with respect to the granting of a withholding tax reduction, or of any other Treaty benefit, for interest, paid by a resident of your country? If so, please explain why.*

- 2.2 *Same as above for royalties, paid by a resident in your country?*
- 2.3 *Same as above for dividends, paid by a company resident in your country?*
- 2.4 *Same as above for rent paid for using real property located in your country? (Stating the obvious: the rent is paid by a resident of your country, and the real estate is owned by a resident of the Netherlands.)*
- 2.5 *Same as above for capital gains realized by a resident of the Netherlands upon disposal of real property located in your country?*
- 2.6 *(...)*

Under the Treaty, a change in taxation in The Netherlands would have no impact on Belgium's attitude with respect to the granting of any Treaty benefit. Any Treaty benefit in respect of any income will be granted irrespective whether such income is taxed or not in The Netherlands and irrespective of how it is taxed.

## **II. Resident tax payer in your country receives income from a Dutch source**

### **Question 3**

- 3.1 *Our principal question is whether, in general, the resident of your country can claim the Treaty benefits under the tax Treaty between your country and the Netherlands for income that is subject to the Box III tax in the Netherlands only. Do you expect any problems in this respect? (You may refer to the more detailed questions below.)*

We understand that the Box III tax will not affect the Dutch tax regime of interest, royalties and dividends derived by a Belgian resident from a Dutch source. It will affect only income (including capital gains) derived from Dutch real property or from profit shares in an enterprise that is carried out in The Netherlands.

Accordingly, we do not expect problems in respect of a Belgian resident claiming the Treaty benefit for avoidance of double taxation on such income. Belgian residents will be entitled to claim tax exemption in Belgium for profit shares and income from real property that are taxable in The Netherlands pursuant to the Treaty, even if the only taxation in The Netherlands is the Box III tax.

### **Question 4**

- 4.1 *Will your country grant avoidance for double taxation with respect to income from real estate located in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique. Please address in your answer both rental income and capital gains realised upon disposal of the Dutch real estate.*

Income derived by a Belgian resident from real estate located in The Netherlands would be taxable only in The Netherlands according to article 6 of the Treaty. Capital gains realized on such real estate will be taxable only in the Netherlands, according to article 13, §1 of the Treaty. According to article 24, §2, 1°, of the Treaty, such income and capital gains will be tax exempt in Belgium.

Currently, there is no tax on capital (vermogensbelasting) in Belgium. Should Belgium levy such tax on capital, it would not apply to real estate located in the Netherlands, pursuant to articles 23 and 24 of the Treaty.

When the Box III tax qualifies as an income tax under Belgian tax law, the income will probably be deemed to have been derived from real property within the meaning of article 6 paragraph 1 of the Treaty. Belgium will not consider the deemed return of 4% on capital as an income. Only the actual income will be considered for Belgian tax purposes. Such income will be tax exempt in Belgium if the Treaty provides that it is taxable in The Netherlands (which is the case for income from real property located in The Netherlands).

4.2 *Will your country grant avoidance for double taxation with respect to income from profit shares in an enterprise that is carried out in the Netherlands, assuming that these profit shares are taxed under the regime of Box III in the Netherlands? If so, which article(s) of the Treaty will apply, and please describe the mechanism of the avoidance technique.*

Income from profit shares in a corporation is considered dividend for Belgian tax purposes. Dividends received from the Netherlands by a Belgian resident are taxable in Belgium, according to article 10 of the Treaty. For Belgian tax purposes, the foreign withholding tax on dividends is deductible from the gross amount. Should The Netherlands levy Box III tax on the income from profit shares in a Dutch corporation (dividends) received by a Belgian resident, it is not clear whether such tax would be deductible from the gross amount for Belgian tax purposes. If such tax can be individualized (i.e. 30% x 4% x dividend), there are strong arguments to defend that such tax should be deductible from the gross amount for Belgian tax purposes. It is, however, not sure whether The Netherlands could levy such tax on dividends. Indeed, should the Box III tax qualify as an income tax, The Netherlands could not levy any other tax than withholding tax at the reduced rate, pursuant to articles 10 and 24 of the Treaty. Should box III tax qualify as a tax on capital, The Netherlands would not have the taxation power pursuant to articles 23 and 24 of the Treaty.

If taxable in The Netherlands (pursuant to articles 7 or 14 of the Treaty), a profit sharing in an enterprise (other than a corporation with legal personality) carried out in The Netherlands will be tax exempt in Belgium, pursuant to article 24 §2, 1° of the Treaty. The Box III tax will have no impact on whether the income will be taxable in Belgium or in The Netherlands.

However, in case the enterprise carried out in The Netherlands would result in losses during Year 1, we understand that no losses could be carried forward to Year 2 in The Netherlands. For Belgian tax purposes, such losses could be deducted from the Belgian income in respect of Year 1. Since such loss would not be deducted from Dutch income in Year 2, it would not be recaptured in Belgium in Year 2 pursuant to article 24, §2, 5° of the Treaty.

Please note that in 4.1. and 4.2. above, the exemption does not prevent Belgium to take into account the thus exempted gains and income for the determination of the tax rate on the other income of the taxpayer.

**Question 5**

*Can you think of any other international complications with respect to the introduction of the Investment Yield Tax (Box III) in the Netherlands? Can you think of any international situations or examples that we may have overlooked in relation to your country?*

Should the Box III tax qualify as tax on capital, it could not be levied by The Netherlands on the investments made by Belgian residents, other than investments in real property located in The Netherlands or in movable property attributable to a permanent establishment or to a fixed base in The Netherlands (articles 23 and 24 of the Treaty).

We understand that the Box III tax would not affect interest, royalties and dividends paid from a Dutch source to a Belgian resident. It is not clear, however, whether such tax would affect the capital invested in The Netherlands, from which the interest, royalties or dividends would be derived. In such case, the Box III tax could be contrary to articles 10, 11 or 12 of the Treaty (or to article 23 of the Treaty if it is considered as tax on capital), which give the power of taxation to the country of residence. It is indeed not sure whether Box III tax could be considered as a withholding tax. Should it be the case, it could not exceed the maximum rates provided for in the Treaty, applied to the income (interest, dividend or royalties) actually paid to the Belgian resident.

We do not see other international complications with respect to the introduction of the Box III tax in The Netherlands.