Netherlands

Netherlands Clarifies Interpretation of Term Employer Under Tax Treaties

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On 21 December 2023, the State Secretary for Finance published a Decree on the interpretation of the term employer under tax treaties. The Decree results from a decision of the Dutch Supreme Court of 14 October 2022 (*see* Dutch Supreme Court: Later OECD Model Commentary of Limited Significance for Interpretation of 'Employer' under 1959 Treaty with Germany (17 October 2022)). The Court decided that subsequent commentary on the OECD Model Convention is relevant only if it constitutes a provisioning or clarification of the corresponding provision of the Model or previous relevant Model Commentary.

The most important aspects of the Decree are summarized below:

OECD Commentary on term employer

Due to the fact that the OECD Commentary on the term employer was significantly changed on 22 July 2010, the Decree distinguishes between tax treaties signed before and after that date.

Treaties signed after 22 July 2010

The commentary from 2010 is at the forefront in shaping the understanding of the term "employer.". This means that an authority relationship and (individualized) passing on of wage costs are no longer cumulative conditions for the presence of a (material) employer. In this explanation, these are just two factors that may be important within a broader assessment framework.

Treaties signed before 22 July 2010

The interpretation is based on various Supreme Court decisions of 1 December 2006, in which the Court deduced that an employer exists if the activities are carried out for the employer's account and risk. This is the case if (i) the benefits of the work and the resulting disadvantages and risks are for the employer's account; and (ii) the salary costs are borne by the employer. If the salary is paid by an employer in the other state, this condition is satisfied only if the wage costs are charged on individually.

Secondment within a group

Foreign employees who are employed in the Netherlands within a group relationship for no longer than a total of 60 working days per 12-month period are not deemed to have a Dutch employer within the meaning of the employment article under tax treaties.

The following conditions are important:

- the employee will not stay in the Netherlands for more than 183 days;

- the 60-day rule is tested per 12-month period, even if the 183 rule of the tax treaty is based on the calendar or tax year. For the concept of working days, sick days also count as working days;
- it is not about structural secondment. The 60-day rule applies to incidental secondments within a group and is not intended for employees who are posted to the Netherlands on a structural basis;
- the secondment takes place in the context of an exchange program or career development, or because of the specific expertise of the employee. To assess whether there is specific expertise, a minimum taxable salary applies; and
- the application of this rule of evidence does not lead to double exemption.

Decree no. 2023-24021 of 15 December 2023, published in the Official Gazette no. 31181 of 21 December 2023, applies from 1 January 2024.
