

Subpart A.—Tax Conventions

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AGREEMENT IDENTIFIES U.S. AND DUTCH PENSION PLANS FOR TAX TREATY BENEFITS

Washington – The Competent Authorities of the The Netherlands and the United States reached a mutual agreement on the qualification of certain Dutch and U.S. pensions for treaty benefits under Article 35 of the US-Netherlands Income Tax Treaty. The agreement specifies the procedures for claiming treaty benefits in each country and the methods each country will use to grant treaty benefits.

The agreement constitutes a Mutual Agreement in accordance with the Convention between the Kingdom of the Netherlands and the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed on December 18, 1992, and amended by Protocol signed on October 13, 1993.

The agreement is as follows:

Chapter I

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

Questions have been raised regarding the types of US and Netherlands resident tax exempt trusts, companies or other organisations providing pension or retirement benefits that qualify for treaty benefits under article 35 of the Convention between the Kingdom of the Netherlands and the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed on 18 December 1992, and amended by Protocol signed on 13 October 1993 (in the following: the Treaty). In practise there are many different types of funds or plans established to provide pension or retirement benefits and it is not always clear which of these funds

or plans fulfill the requirements of article 35 of the Treaty. This issue is being discussed between the Netherlands and the US competent authorities under the mutual agreement procedure of article 29 of the Treaty, with the following initial conclusions.

In view of the present uncertainty it has been decided to identify all the different types of US and Netherlands resident tax exempt trusts, companies or other organisations providing pension or retirement benefits that are considered to fall within the scope of article 35 of the Treaty and also to indicate the appropriate procedures for filing a request for an application of treaty benefits under said treaty provision.

In the course of the mutual agreement discussions it became apparent that, whereas with respect to certain types of US and Netherlands resident tax exempt trusts, companies or other organisations providing pension or retirement benefits it is beyond doubt that they fall within the scope of article 35 of the Treaty, with respect to other types of US and Netherlands resident tax exempt trusts, companies or other organisations providing pension or retirement benefits this is less clear. The Netherlands and US authorities concluded that all the different types of Netherlands and US resident tax exempt trusts, companies or other organisations providing pension or retirement benefits mentioned in chapter II and IV of this agreement would be considered to fall within the scope of article 35 of the Treaty.

However, in order to ensure that treaty protection is restricted to qualifying US resident tax exempt trusts providing pension or retirement benefits, the Netherlands competent authority would -at least for the time being- prefer a closer monitoring of all requests filed for an application of treaty benefits under article 35 of the Treaty.

It is understood that for the purpose of this publication the term “Code section” refers to sections of the US Internal Revenue Code and that the term “trust” includes a custodial account treated as a trust for US federal income tax purposes.

Chapter II

US resident tax exempt trusts providing pension or retirement benefits

Subject to the conditions of article 26, article 35, paragraph 2, and article 34, paragraph 4, of the Treaty:

1. a US resident tax exempt trust providing pension or retirement benefits under a Code section 401 (a) qualified pension plan, profit sharing plan or stock bonus plan (including Code section 401 (k) arrangements); or

2. a US resident tax exempt trust providing pension or retirement benefits under a Code section 457(b) pension plan or under a Code section 403(b) plan; or

3. a US resident tax exempt trust which is an Individual retirement account (Code section 408), a Roth Individual retirement account (Code section 408A), or a Simple retirement account, or a US resident tax exempt trust which is providing pension or retirement benefits under a Simplified employee pension plan; or

4. a US resident common trust fund or group trust which is tax exempt under Code section 501 (a) with respect to funds that equitably belong to its participating trusts, all of which are entities mentioned under point 1) above; or

5. a US resident common trust fund or group trust which is tax exempt under the Internal Revenue Code with respect to funds that equitably belong to its participating trusts, some of which are trusts other than those mentioned under point 1) above, but all of which are trusts mentioned under point 1), 2), or 3) above, is considered to qualify for treaty benefits under article 35 of the Treaty and may claim application of treaty benefits with respect to income derived from the Netherlands referred to in article 10 (dividends) of the Treaty. The Netherlands does not apply a withholding tax on outgoing interest payments as meant in article 12 of the Treaty.

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

Any type of US resident tax exempt trust not mentioned above, which consid-

ers itself to qualify for treaty benefits under article 35 of the Treaty, may present its case to the Netherlands tax unit BPO buitenland, Heerlen (address: P.O. Box 2865, 6401 DJ HEERLEN, The Netherlands), or to the US competent authorities requesting for a competent authority consideration under article 29 of the Treaty.

Chapter III

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

The Netherlands has two methods for granting treaty benefits for income referred to in article 10 (dividends) of the Treaty, these methods being: the so-called exemption method (in which case the treaty rate is applied at source) and the so-called refund method.

As a general rule, the Netherlands applies the exemption method when granting treaty benefits in the case of Dutch source dividend income received by a resident of the US, which means that treaty benefits will be granted by means of an exemption from Netherlands withholding tax at source. In view of the Netherlands competent authority's preference for a closer monitoring of all requests filed for an application of treaty benefits under article 35 of the Treaty, a US resident tax exempt trust (including a US common trust fund or group trust) mentioned in point 1) through 5) of chapter II of this publication shall - as a general rule - be required to use the refund method when filing its request for an application of treaty benefits under article 35 of the Treaty. Only if certain conditions are fulfilled, such US resident tax exempt trust may use the exemption method when filing its request for an application of treaty benefits under article 35 of the Treaty.

The Netherlands regulations for the implementation of the Treaty, published in the "Staatscourant" 5 January 1994, nr. 3 and lastly amended on December 1996 ("Staatscourant" 30 December 1996, nr. 250), give a detailed description of the procedures to be applied in the case of respectively the exemption method and the refund method.

The exemption method may be used if the US resident tax exempt trust requesting treaty benefits under article 35 of the Treaty:

* has been issued a certification letter (Form 6166) by the US Internal Revenue Service for the taxable year(s) in question, stating that the trust in question is a trust forming part of a pension, profit sharing, or stock bonus plan qualified under Code section 401 (a) of the Internal Revenue Code (an example of a certification letter (Form 6166) is attached); or

* has been issued a so-called "qualification" certification by the competent Netherlands tax authorities, stating that the trust in question is a US resident tax exempt trust as described in article 35, paragraph 1, of the Treaty.

Requests for a "qualification" certification may be filed with the tax unit BPO buitenland, Heerlen (address: P.O. Box 2865, 6401 DJ HEERLEN, The Netherlands).

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

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

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

*the US resident tax exempt trust in question has not claimed an application of treaty benefits under article 35 of the Treaty for five consecutive calendar years. Since a certification letter (Form 6166) issued by the US Internal Revenue Service is not valid indefinitely, a US resident tax exempt trust which has been issued a certification letter (Form 6166) by the US Internal Revenue Service may also file a request for a "qualification" certificate with the competent Netherlands tax authorities.

Irrespective of the above, use of the refund method is mandatory in any taxable year for a US resident tax exempt trust mentioned under point 2) or 3) of chapter II, if less than 70% of the total amount of the withdrawals from such US trust during that year is used to provide pension or retirement benefits.

Where assets of the pension fund(s) or pension plan(s) are held in custodial accounts, the amended form IB 92 USA will require a certification that the claim for a refund of Dutch dividend tax is filed for the benefit of the custodial accounts in question.

The status of all US resident tax exempt trusts providing pension or retirement benefits and claiming treaty benefits under article 35 of the Treaty may at any time be subject to verification by the competent Netherlands tax authority. If considered necessary, use will be made of the exchange of information procedure (article 30 of the Treaty).

The Netherlands regulations for the implementation of the Treaty (including the "special arrangements" issued by the Netherlands competent authority in the relation to the US) and Form IB 92 USA will - where necessary - be amended in accordance with the above. A model of the "special arrangements" is published in the Infobulletin of 12 January 1999.

The new procedures will become applicable beginning with dividends made payable after 30 June 2000. The presently existing procedures will remain applicable for dividends made payable before or on 30 June 2000.

Chapter IV

Netherlands resident tax exempt companies providing pension or retirement benefits

Subject to the conditions of article 26, article 35, paragraph 2, and article 34, paragraph 4, of the Treaty, a Netherlands resident tax exempt company constituted and operated exclusively to administer or provide benefits as meant in article 5, paragraph b), of the Netherlands corporation tax act (including a Netherlands resident tax exempt company constituted and operated exclusively to administer or provide benefits under a pension plan as meant in article 8, paragraph 1, under f), of the Netherlands income tax act) is considered to qualify for treaty benefits under article 35 of the Treaty and may claim application of treaty benefits with respect to income derived from the United States of America referred to in article 10 (dividends) and in article 12 (interest) of the Treaty.

Any type of Netherlands resident tax exempt company not mentioned above, which considers itself to qualify for treaty benefits under article 35 of the Treaty, may present its case to the United States competent authority, or to the Netherlands competent authority requesting for a competent authority consideration under article 29 of the Treaty.

Chapter V

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

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

A Netherlands resident tax exempt company described in this agreement should claim exemption from US income tax withholding under Article 35 of the 1992 Netherlands-US income tax treaty on dividends or interest income referred to in articles 10 and 12, respectively, of that treaty by providing a properly completed IRS Form W-8BEN to the withholding agent or payer of such income before the income is paid or credited to the company. A company filing Form W-8BEN should cite Article 35 of the treaty on line 10 thereof, and state that it is a Netherlands resident tax exempt company described in this agreement.

Notwithstanding the foregoing, until December 31, 2000, and to the extent provided in transition rules set forth in regulations under Internal Revenue Code section 1441 and Notice 99-25, 1999-20 I.R.B. 75, a Netherlands resident tax exempt company may provide, and a withholding agent may rely upon, other appropriate documentation of the company's exempt status, including, for example, a Form 1001, supplemented by a statement, or a valid Netherlands Form IB 93 USA

(certified by the tax inspector competent in the case of the Netherlands tax exempt company in question) stating that the company is a Netherlands resident tax exempt company described in this agreement.

Alternatively, the company may seek a refund of taxes withheld on such dividend or interest income by timely filing a United States income tax return and claiming a refund of such taxes.

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

A Netherlands resident tax exempt company as meant in article 5, paragraph b), of the Netherlands corporation tax act (including a Netherlands resident tax exempt company providing pension or retirement benefits as meant in article 8, paragraph 1, under f), of the Netherlands income tax act) may have the Netherlands tax authority concur in its claim of tax exempt status by means of a so-called article 26 declaration (Form IB 93 USA), certified by the tax inspector competent in the case of the Netherlands tax exempt company in question. This will not, however, preclude an audit and determination of the company's substantive liability.

As noted in Article 6 of the Protocol, Article 35(2) of the Treaty provides that dividends from a Real Estate Investment Trust are not eligible for Article 35 benefits. Article 35(2) also provides that income of an exempt pension trust is not exempt under Article 35 if it is received from a related person that is not itself an exempt pension trust. Paragraph VIII of

the Agreed Minutes to the Protocol provides the understanding of the negotiators that for purposes of Article 35(2), a person will be considered to be a "related person" if more than 80 percent of the vote or value of any class of shares is owned by the person deriving the income.

Chapter VI

Tax exempt trusts, companies or other organisations providing other employee benefits

In order to determine whether a clarification of the qualification under article 35 of the Treaty for the various types of tax exempt trusts, companies or other organisations providing other employee benefits is also considered necessary, comments or questions regarding this issue are invited and may be sent to one of the following addresses:

Ministry of Finance of the Netherlands
Directorate for International Tax Policy
and Legislation
P.O. Box 20201
2500 EE Den Haag
The Netherlands

Assistant Commissioner
(International)
attn. Tax Treaty Division
Internal Revenue Service
P.O. Box 23598
Washington, D.C. 20024
United States of America

Attachment:
Form 6166 (Rev. 6-96)