



Mobility: Tax alert

February 2022

The Netherlands

Changed view on international allocation of severance payments

Executive summary

On 4 February 2022 the Netherlands published a new Decree regarding the international allocation of severance payments for regular employees. This Decree replaces the previous Decree dated 23 April 2015.

Under the old Decree, the Netherlands in principle considered the last 12 months of employment as the basis for the international allocation of severance payments, in accordance with the OECD guidelines. However, it has since become apparent that a number of tax treaty partners of the Netherlands interpret the OECD-commentary differently. This has given rise to a (partial) revision of the old Decree.

Background

The Dutch view regarding the international allocation of severance payments for regular employees has changed several times over the last two decades. In June 2004, in the absence of clear rules, the Dutch Supreme Court ruled that the allocation of a severance payment should be based upon the employment history in the year of termination and the four preceding years. Subsequently, in June 2014 the revised OECD Model Tax Convention guidance was published. This was followed on 23 April 2015 by an announcement that the Netherlands would apply the OECD-guidelines when allocating taxation rights between the Netherlands and its tax treaty partners.

Old Decree dated 23 April 2015

Considering the OECD guidelines, in the old Decree, the Netherlands took in principle the last 12 months of employment as the basis for the international allocation of severance payments. The country that had taxation rights over the employment income during those last 12 months, also had the right to tax the severance payment.

Reason for amendment

During the past few years, it has become apparent that, unlike the Netherlands, various tax treaty partners do not apply the 12-month allocation period as the main rule. As such, the Netherlands has now decided to change its interpretation of the OECD commentary so that going forward, the allocation rules for severance payments will be the same as that of its treaty partners.

New Decree dated 4 February 2022

Under the new Decree, the Netherlands will in future allocate severance payments by reference to the length of service. This is usually the full length of service with the employer making the severance payment. If full details of the employment history are not known so that the correct allocation cannot be reasonably estimated, then the last 12 months of the employment will be used as before.

The right to tax the severance payment will not automatically fall to the country where the employment was actually performed. In principle, it is decisive whether that country, on the basis of the tax treaty, actually had the right to tax the regular wages paid for those activities.

Whether or not the severance payment is borne wholly or partly by an employer in the other treaty country will not be relevant to the interpretation of the OECD guidance in the Netherlands.

Entry into force

The new Decree can be applied to severance payments that were received on or after 4 February 2022. The new Decree can also be applied to tax assessments that have not become final by 4 February 2022, provided that the taxpayer can demonstrate that the new Decree does not result in any part of the payment not being taxed in both countries.

Should double taxation arise, the Netherlands will, upon request, try to resolve the matter with the treaty partner concerned in accordance with the OECD commentary mutual agreement procedure.

Next steps

For all severance payments that were received on or after 4 February 2022, the new Decree can be applied.

For severance payments received before this date, and for which the personal income tax assessment has not yet become final by 4 February 2022, the position can be reviewed to determine which Decree is more favourable for the employee but subject to the proviso that none of the severance payment may be received tax free in both countries. If the new Decree results in a more favourable outcome, the new Decree can be applied if claimed before the tax assessment becomes final i.e., 6 weeks after the date the final tax assessment is issued.

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