

TRACTATENBLAD

VAN HET

KONINKRIJK DER NEDERLANDEN

JAARGANG 2009 Nr. 217

A. TITEL

*Verdrag tussen het Koninkrijk der Nederlanden, ten behoeve van de Nederlandse Antillen, en de Caymaneilanden krachtens de volmacht, gedateerd 1 september 2009, van het Verenigd Koninkrijk van Groot-Brittannië en Noord-Ierland inzake de uitwisseling van informatie betreffende belastingen;
(met Protocol)
Willemstad, 29 oktober 2009*

B. TEKST

Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the Cayman Islands as authorised under the letter of entrustment dated 1 September 2009 from the United Kingdom of Great Britain and Northern Ireland for the Exchange of Information with respect to Taxes

The Government of the Kingdom of the Netherlands, in respect of the Netherlands Antilles,

and

the Government of the Cayman Islands,

Desiring to strengthen the relationship between them through cooperation in taxation matters,

Have agreed as follows:

Article 1

Scope of the Agreement

1. The competent authorities of the Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.

2. As regards the Kingdom of the Netherlands, this Agreement shall apply only to the Netherlands Antilles.

Article 2

Jurisdiction

A requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

Article 3

Taxes covered

1. The taxes which are the subject of this Agreement are:
 - a) in the Netherlands Antilles,
 - (i) the income tax (inkomtenbelasting);
 - (ii) the wages tax (loonbelasting);
 - (iii) the profit tax (winstbelasting); and
 - (iv) the surtaxes on the income and profit tax (opcenten op de inkomsten- en winstbelasting);
 - b) in the case of the Cayman Islands, taxes of every kind and description existing on the date of signature.

2. This Agreement shall also apply to any identical taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of signature of the Agreement in

addition to or in place of the existing taxes. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Parties in the form of an exchange of letter. The competent authorities of the Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

Article 4

Definitions

1. For the purposes of this Agreement, unless otherwise defined:

a) the term “Party” means the Kingdom of the Netherlands, in respect of the Netherlands Antilles, or the Cayman Islands as the context requires;

b) the term “the Netherlands Antilles” means the part of the Kingdom of the Netherlands that is situated in the Caribbean Sea and consisting of the Island Territories of Bonaire, Curaçao, Saba, St. Eustatius and St. Maarten (Dutch part) including the territorial waters thereof and the part of the seabed and its subsoil under the Caribbean Sea over which the Kingdom of the Netherlands has sovereign rights in accordance with international law but excluding the part thereof relating to Aruba;

c) the term “Cayman Islands” means the territory of the Cayman Islands and includes the territorial sea and areas within the maritime boundaries of the Cayman Islands and any area within which in accordance with international law the rights of the Cayman Islands with respect to the seabed and sub-soil and their natural resources may be exercised;

d) the term “competent authority” means

(i) in the case of the Netherlands Antilles, the Minister of Finance or his authorized representative;

(ii) in the case of the Cayman Islands, the Tax Information Authority;

e) the term “person” includes an individual, a company and any other body of persons;

f) the term “company” means any body corporate or any entity that is treated as a body corporate for tax purposes;

g) the term “publicly traded company” means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold “by the public” if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;

h) the term “principal class of shares” means the class or classes of shares representing a majority of the voting power and value of the company;

i) the term “recognised stock exchange” means the stock exchanges of the Netherlands Antilles, the Cayman Islands and any stock exchange agreed upon by the competent authorities of the Parties;

j) the term “collective investment fund or scheme” means any pooled investment vehicle, irrespective of legal form. The term “public collective investment fund or scheme” means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed “by the public” if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

k) the term “tax” means any tax to which the Agreement applies;

l) the term “applicant Party” means the Party requesting information;

m) the term “requested Party” means the Party requested to provide information;

n) the term “information gathering measures” means laws and administrative or judicial procedures that enable a Party to obtain and provide the requested information;

o) the term “information” means any fact, statement or record in any form whatever;

p) the term “criminal tax matters” means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party;

q) the term “criminal laws” means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes.

2. As regards the application of this Agreement at any time by a Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of the applicant Party prevailing over a meaning given to the term under other laws of that Party.

Article 5

Exchange of information upon request

1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of an applicant Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request:

a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;

b) information regarding the ownership of companies, partnerships, trusts, foundations, “Anstalten” and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

5. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:

a) the identity of the person under examination or investigation and the tax period of the person concerned;

b) to the extent known, the name and address of any person believed to be in possession of the requested information;

c) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

d) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement; and, to the fullest extent possible:

e) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;

f) the tax purpose for which the information is sought;

g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

6. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant Party.

Article 6

Tax examinations abroad

1. A Party may, on request, allow representatives of the competent authority of the other Party to enter its territory to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the applicant Party shall notify the competent authority of the requested Party of the time and place of the meeting with the individuals concerned.

2. At the request of the competent authority of one Party, the competent authority of the other Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party.

3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first-mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

Article 7

Possibility of declining a request

1. The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the requested Party may decline to assist where the request is not made in conformity with this Agreement.

2. The provisions of this Agreement shall not impose on a Party the obligation to supply information which is subject to legal privilege or would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, informa-

tion of the type referred to in Article 5, paragraph 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.

3. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy.

4. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.

5. The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

Article 8

Confidentiality

Any information received by a Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction or used for any other purpose without the express written consent of the competent authority of the requested Party.

Article 9

Costs

Incidence of costs incurred in providing assistance shall be agreed by the competent authorities.

Article 10

Language

Requests for assistance and answers thereto shall be drawn up in English.

Article 11

Mutual agreement procedure

1. Where difficulties or doubts arise between the Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavour to resolve the matter by mutual agreement.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of the Parties may mutually agree on the procedures to be used under Articles 5 and 6.

3. The competent authorities of the Parties may communicate with each other directly for purposes of reaching agreement under this Article.

4. The Parties shall agree on other forms of dispute resolution should this become necessary.

Article 12

Entry into force

This Agreement shall enter into force on the first day of the second month after the later of the dates on which each of the Parties has notified the other, in writing, of the completion of its necessary internal procedures for entry into force. Upon the date of entry into force, it shall have effect;

a) for criminal tax matters on that date, but only in respect of taxable periods beginning on or after January 1st, 2010 or, where there is no taxable period, all charges to tax arising on or after January 1st, 2010; and

b) for all other matters covered in Article 1 on that date, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date.

Article 13

Termination

1. This Agreement shall remain in force until terminated by one of the Parties. Either Party may terminate the Agreement, through diplomatic channels, by giving notice of termination to the other Party at least six months before the end of any calendar year after the expiration of a period of three years from the date of its entry into force. In such event

the Agreement shall cease to have effect for taxable years and periods beginning after the end of the calendar year in which the notice of termination has been given.

2. In the event of termination, both Parties shall remain bound by the provision of Article 8 with respect to any information obtained under the Agreement.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

DONE at Willemstad, this 29th day of October 2009, in duplicate, in the English language.

For the Kingdom of the Netherlands, in respect of the Netherlands Antilles:

E. T. M. DE LANNOOY

For the Cayman Islands:

S. BULGIN

Protocol between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the Cayman Islands as authorised under the letter of entrustment dated 1 September 2009 from the United Kingdom of Great Britain and Northern Ireland concerning the interpretation and application of the Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the Cayman Islands as authorised under the letter of entrustment dated 1 September 2009 from the United Kingdom of Great Britain and Northern Ireland for the Exchange of Information with respect to Taxes

The Government of the Kingdom of the Netherlands, in respect of the Netherlands Antilles,

and

the Government of the Cayman Islands

(the "Parties"),

Desiring to facilitate the exchange of information with respect to taxes,

Have agreed as follows:

I.

Ad Article 5(5)(g)

With respect to subparagraph g) of paragraph 5 of Article 5 of the Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the Cayman Islands as authorised under the letter of entrustment dated 1 September 2009 from the United Kingdom of Great Britain and Northern Ireland for the Exchange of Information with respect to Taxes (herein after referred to as “the Agreement”) it is understood that the term “pursued all means available in its own territory” includes the requesting Party using exchange of information mechanisms it has in force with any third country in which the information is located.

II.

Ad Article 5

If personal data is exchanged under the Agreement, the following additional provisions shall apply:

a) The receiving authority may use such data only for the stated purpose and shall be subject to the conditions prescribed by the supplying authority; such use is also permitted, subject to the written consent required under Article 8, for the prevention and prosecution of serious crimes and for the purpose of addressing serious threats to public security;

b) The receiving authority shall on request inform the supplying authority about the use of the supplied data and the results achieved thereby;

c) Personal data may be supplied only to the responsible agencies. Any subsequent supply to other agencies may be effected only with the prior approval of the supplying authority;

d) The supplying authority shall be obliged to take all reasonable care to ensure that the data to be supplied are accurate and that they are necessary for and proportionate to the purpose for which they are supplied. Any bans on data supply prescribed under applicable domestic law shall be observed. If it emerges that inaccurate data or data which should not have been supplied have been supplied, the receiving authority shall be informed of this without delay. That authority shall be obliged to correct or erase such data without delay;

e) Upon application the person concerned shall be informed of the supplied data relating to him and of the use to which such data are to be put. There shall be no obligation to furnish this information if on balance it turns out that the public interest in withholding it outweighs the

interest of the person concerned in receiving it. In all other respects, the right of the person concerned to be informed of the existing data relating to him shall be governed by the domestic law of the Party in whose sovereign territory the application for the information is made;

f) The receiving authority shall bear liability in accordance with its domestic laws in relation to any person suffering unlawful damage as a result of supply of data pursuant to this Agreement. In relation to the damaged person, the receiving authority may not plead in its defence that the damage had been caused by the supplying agency;

g) If the domestic law of the supplying authority provided, with respect to the personal data supplied, for erasure within a certain period of time that authority shall inform the receiving authority accordingly. Irrespective of such periods, supplied personal data shall be erased once they are no longer required for the purpose for which they were supplied;

h) The supplying and the receiving authority shall be obliged to keep official records of the supply and receipt of personal data;

i) The supplying and the receiving authority shall be obliged to take effective measures to protect the personal data supplied against unauthorised access, unauthorised alteration and unauthorised disclosure.

III.

Ad article 12

In the event that a Party applies prejudicial or restrictive measures based on harmful tax practices to residents or nationals of the other Party, either Party may immediately initiate Competent Authority proceedings to resolve the matter. A prejudicial or restrictive measure based on harmful tax practices is a measure applied by one Party to residents or nationals of either Party on the basis that any one or more of the following applies:

a) the other Party does not engage in effective exchange of information;

b) because it lacks transparency in the operation of its laws, regulations or administrative practices; or,

c) on the basis of no or nominal taxes.

Without limiting the generality of the term, “prejudicial or restrictive measure” is not limited solely to taxation matters and includes the denial of a deduction, credit or exemption, the imposition of a tax, charge or levy, or special reporting requirements, but does not include any generally applicable measure, applied by either Party against, amongst others, members of the OECD generally.

IV.

In the light of the experience of operating the Agreement, or to reflect changing circumstances, either Party may wish to propose a variation in the terms of this Agreement. If so, it is understood the other Party will agree to hold timely discussions with a view to revising the terms of the Agreement.

- a) The competent authorities may initiate discussions in case:
 - (i) the Kingdom of the Netherlands, in respect of the Netherlands Antilles, enters into an agreement with another jurisdiction comparable to the Cayman Islands which provides for other forms of exchange of information;
 - (ii) the Cayman Islands enters into an agreement with another jurisdiction which provides for other forms of exchange of information;
 - (iii) the Cayman Islands introduces new legislation which enables other forms of exchange of information;
 - (iv) the Netherlands Antilles introduces new legislation which enables other forms of exchange of information.
- b) If the Netherlands Antilles enters into arrangements with another jurisdiction comparable to the Cayman Islands for the provision of information with respect to taxes that are less burdensome in any material respect than the provisions of the Agreement, the Cayman Islands may initiate discussions with the Netherlands Antilles with a view to modifying the Agreement to have similar effect;
- c) If the Cayman Islands enters into arrangements with another jurisdiction comparable to the Netherlands Antilles for the provision of information with respect to taxes that are less burdensome in any material respect than the provisions of the Agreement, the Netherlands Antilles may initiate discussions with the Cayman Islands with a view to modifying the Agreement to have similar effect.

V.

This Protocol shall form an integral part of the Agreement between the Kingdom of the Netherlands, in respect of the Netherlands Antilles, and the Cayman Islands as authorised under the letter of entrustment dated 1 September 2009 from the United Kingdom of Great Britain and Northern Ireland for the exchange of information with respect to tax matters, and shall enter into force on the same date as the Agreement.

VI.

The Parties may, by mutual arrangement, amend this Protocol at any time in writing. Such amendment shall enter into force on the first day of the second month after the Parties have notified each other in writing

that the constitutional or internal requirements for the entry into force of the amendment have been complied with.

IN WITNESS WHEREOF the undersigned, being duly authorised in that behalf by their respective Governments, have signed this Protocol.

DONE at Willemstad, this 29th day of October 2009, in duplicate, in the English language.

For the Kingdom of the Netherlands, in respect of the Netherlands Antilles:

E. T. M. DE LANNOOY

For the Cayman Islands:

S. BULGIN

D. PARLEMENT

Het Verdrag, met Protocol, behoeft ingevolge artikel 91 van de Grondwet de goedkeuring van de Staten-Generaal, alvorens het Koninkrijk aan het Verdrag, met Protocol, kan worden gebonden.

G. INWERKINGTREDING

De bepalingen van het Verdrag, met Protocol, zullen ingevolge zijn artikel 12 juncto artikel V van het Protocol in werking treden op de eerste dag van de tweede maand na de laatste van de data waarop de Verdragsluitende partijen elkaar schriftelijk in kennis hebben gesteld van de voltooiing van de voor inwerkingtreding vereiste interne procedures.

Uitgegeven de *dertigste* november 2009.

De Minister van Buitenlandse Zaken,

M. J. M. VERHAGEN