

Treaty law interpretation of benefits derived from directly held lucrative interests

On January 28, 2026 the Appeals Court in 's-Hertogenbosch rendered an important judgment in a case litigated by KPMG Meijburg & Co (the judgment has not yet been published). The case concerned an individual living in Germany who held a lucrative interest in a Dutch company. The lucrative interest was held in the form of depositary receipts. In 2018 the individual had derived income from this lucrative interest in the form of dividends and a capital gain. Just like the District Court, the Appeals Court has now also ruled that the Netherlands is limited in the tax that it may levy on this income, because the income does not fall under the employee article in the tax treaty (as the tax inspector argued), but under the dividend and capital gains article (as the taxpayer argued).

Facts, dispute and positions taken by the parties

Established facts in this case were that the taxpayer lived in Germany and that the depositary receipts held by him constituted a lucrative interest. In 2018 the taxpayer received a dividend from this lucrative interest (on which 15% dividend withholding tax had been withheld) as well as realizing a capital gain.

The taxpayer and the Dutch tax authorities disagreed about the article of the treaty under which this income fell. The tax inspector argued that the income in its entirety fell under the treaty article regarding income from 'dependent employment' (the employee article), so that the Netherlands was allowed to tax a large part of this income. According to the tax inspector, this treaty article applied given the objective of the lucrative interest scheme and because this was the 'true nature' of the income, i.e. renumeration for the work performed under the employment contract.

The taxpayer argued that the income fell under the dividend article in the treaty (insofar as this concerned the dividends) and under the capital gains article (insofar as this concerned the capital gain), so that the Netherlands was only allowed to levy 15% tax on the dividends. According to the taxpayer, the precedence rule in national law did not allow the income to be classified under the employee article on the basis of the 'true nature' principle. The true nature, according to the taxpayer, is income from shares and a result realized from the sale of the shares.

Judgment

The Zeeland-West Brabant District Court had previously ruled ([ECLI:NL:RBZWB:2024:1503](#)) that the dividend fell under the dividend article in the tax treaty and the capital gain under the capital gains article. According to the District Court, under treaty law the income was not income from dependent employment. Therefore, the Netherlands had only a limited right to tax. The Appeals Court has now upheld that judgment.

Grounds

The Appeals Court followed the District Court by finding that:

- The dividend fell within the treaty definition of dividends. There is also nothing to show that this would not apply to dividends derived from shares belonging to a lucrative interest. The dividend article in the treaty therefore applied.
- Capital gains fall under the capital gains article in the treaty, all the more so since this also follows from the OECD Commentary.
- The dependent employment article in the treaty (also) does not apply. The relevant terms in this respect - 'salaries, wages and other similar remuneration' - are not defined in the tax treaty or in the explanatory notes. What the income is according to Dutch law is therefore relevant. Under Dutch law, the income is 'result from other activities'. The government had deliberately opted to not make income from lucrative interest a component of income from employment or the definition of salary. Argued along these lines, there is also no income from employment. The tax inspector's argument that the context requires a different interpretation because the 'true nature' of the income received is income from employment, was also not accepted; partly with a view to the proper observance of the tax treaty. This, because it would in effect create a fiction. Moreover, no specific attention was paid to lucrative interests when the tax treaty was concluded, which makes it impossible to see how the context of the treaty would require a different interpretation to one that is in line with the way in which the income received is manifested, i.e. dividends and capital gain.

Specific to the Appeals Court proceedings, the tax inspector put forward the following argument, but the Appeals Court also did not accept that argument.

- With reference to specific passages in the OECD Commentary, in particular section 12.2 of the OECD Commentary to Article 15, the tax inspector argued that the lucrative interest is indeed income from employment for treaty purposes. That Article stipulates that the employment article applies to share options provided by an employer. According to the Appeals Court, that same commentary however also shows that the employment article no longer applies once the share options have been exercised or sold. According to the Commentary, the subsequent appreciation in the value of the shares falls under the capital gains article. The taxpayer had stopped being an option holder well before 2018, but was an irrevocable holder of depositary receipts. According to the Appeals Court, the capital gains article therefore applies to the taxpayer, both on the basis of the treaty and on the basis of the OECD Commentary. The Appeals Court derived confirmation of this finding from the Decree on Lucrative Interests in International Situations, which stipulates that if a taxpayer holds their lucrative interest indirectly via a holding company, the (redistributed) lucrative benefits fall under the dividend article or the capital gains article. In answer to a question from the Court, the tax inspector stated that in those

cases the employment character does not take precedence over the investment character under treaty law. The Appeals Court found it difficult to reconcile that argument with the tax inspector's true nature argument. According to the Appeals Court, the answer to the question of what the true nature of the income is cannot be dependent on the choice of a taxpayer.

The Appeals Court concluded that, for treaty purposes, the benefits the taxpayer derived from the lucrative interest must be classified under the dividend article and the capital gains article. The taxpayer therefore was (once again) proven right.

KPMG Meijburg & Co comments

The debate about the interpretation of income from lucrative interest under treaty law has been ongoing for some time now. In the professional literature, there are doubts about whether, for treaty purposes, this income can simply be classified under the employee article (dependent employment). The Dutch tax authorities believe it can be; the Decree on Lucrative Interests in International Situations attests to this. That Decree explains that the acquisition and appreciation in value of the lucrative interest are connected to being employed or another form of allocation such that this income falls under the dependent employment article. This Appeals Court judgment means that a court has again ruled in favor of the taxpayer and against the Dutch tax authorities: the income does not fall under the dependent employment article, but under the dividend and/or capital gains article in the treaty. We are still waiting to see whether the Deputy Minister of Finance will appeal this judgment before the Dutch Supreme Court.

KPMG Meijburg & Co
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