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Case law **ECLI:NL:HR:2021:1845 - Supreme Court,
24-12-2021 / 20/03226**

subtype Pronunciation

Body Supreme Court of the Netherlands

Source Council for the Judiciary

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This topic contains the following sections.

Pronunciation

Content indication

art. 15, paragraph 3, 2010 Netherlands-Switzerland Agreement. Ship in (completion) phase and intended to lay pipes and move drilling platforms. Are the crew employed on board a ship operated in international

traffic?

Text

SUPREME COURT OF THE NETHERLANDS

TAX Chamber

Number 20/03226

Date December 24, 2021

JUDGMENT

in the case of

[X] at [Z] (hereinafter: interested party)

in return for

the STATE SECRETARY OF FINANCE

on the appeal in cassation against the decision of the Court of Appeal of The Hague of 11 August 2020, nos. BK-19/00610 and BK-19/00611 on the appeal of the interested party against a decision of the District Court of The Hague (nos. SGR 19 /932 and SGR 19/1153), regarding the income tax/national insurance contributions assessment imposed on the interested party for the year 2014 and the income tax assessment imposed for the year 2015.

1 Dispute in cassation

The interested party, represented by VJ de Groot, has lodged an appeal in cassation against the judgment of the Court of Appeal. The appeal in cassation is attached to this judgment and forms part of it.

The State Secretary, represented by [P], has filed a statement of defence.

On 30 April 2021, the Advocate General RECM Niessen concluded that the appeal in cassation was unfounded.

The interested party has responded in writing to the conclusion.

2 Principles in cassation

2.1

The interested party lived in the Netherlands in 2014 and 2015.

2.2

As of 1 April 2014, the interested party is employed by [A] SA (hereinafter: [A]), established in Switzerland. He performs his activities on ships of [B] SA (hereinafter: [B]) affiliated with [A]. The head office of [B] is located in Switzerland. [B] provides offshore services to clients in the oil and gas industry. The main services are the laying of pipelines on the seabed and the removal of platforms.

2.3

The interested party worked in 2014 and throughout 2015 on board [C], a vessel used for the lifting and moving of large platforms and the laying of pipelines for oil and gas transport (hereinafter: the vessel). The

ship was built at a yard in South Korea and was transferred to [Q] from November 18, 2014 for completion. The ship was docked in [Q] on January 8, 2015. The ship set sail for the first time in 2016.

2.4

In 2014 and 2015, the interested party did not perform any work in Switzerland and his wages received from [A] over those years are not included in the tax there.

2.5

Income tax assessments were imposed on the interested party for the years 2014 and 2015, whereby no deduction for the prevention of double taxation was granted for the wages received from [A].

3The dispute at the Court

3.1

The dispute before the Court included whether the interested party is entitled to a deduction for the prevention of double taxation for the years 2014 and 2015 on the basis of Article 15(3) of the Tax Treaty between the Netherlands and Switzerland of 26 February 2010 (hereinafter: the Treaty). for the wages received from [A].

3.2

Referring to the comments on Article 3(1)(e) and Article 8 of the 2008 OECD Model Convention, the Court held that the ship was not operated during the years 2014 and 2015 for the carriage of persons or goods in international traffic . In addition, the Court points out that during the construction or completion period in 2014 the ship spent more than ten months at the yard in South Korea and in 2015 in the port for almost the entire year. Although it can be assumed that persons and goods were transported during the shipment of the ship from South Korea to [Q], this concerns a specific transport movement during the construction phase of the ship with a view to its outfitting.

4Assessment of the complaints

4.1

The second complaint, which is directed against the judgment of the Court set out in 3.2, argues that the aim and scope of Articles 8 and 15(3) of the Treaty entail that the wage costs of employees during the construction or completion of a ship and transport movements prior to its first commercial activities fall within the scope of the latter paragraph.

4.2.1

As stated in section 4.4 of the Opinion of the Advocate General, the text of the Convention is as close as possible to the 2008 OECD Model Convention. Articles 3, paragraph 1, letter g, 8 and 15, paragraphs 3 of the Convention correspond verbatim to a translation of the English text of Articles 3(1)(e), 8 and 15(3) of the 2008 OECD Model Convention, so that the OECD Commentary on the latter Articles for the explanation of the former articles is of great significance.

4.2.2

Under Article 15(3) of the 2008 OECD Model Convention, remuneration derived in respect of an employment exercised on board a ship operated in international traffic may be taxed in the Contracting State in which the place of effective management of the enterprise is situated . It follows from the OECD commentary on Article 15 of the 2008 OECD Model Convention that this allocation rule is related to and based on the principle of Article 8 of the 2008 OECD Model Convention. The allocation rule included in that article for profits from the operation of ships in international traffic, refers, according to the OECD commentary, to profits directly related to commercial transport of persons and goods by ship in international

traffic and related and ancillary activities. Given the great significance of the OECD commentary for the interpretation of the Convention, the foregoing also applies to the interpretation of Article 15(3) of the Convention.

4.2.3

The facts established by the Court allow no other conclusion than that the ship is intended for the lifting and displacement of large platforms and the laying of pipelines for oil and gas transport, and that any transport of persons and goods on the ship is ancillary to the main activity. Then it cannot be said that the results from the operation of the ship are directly related to the commercial transport of persons and goods by ship in international traffic and related and ancillary activities. The question of whether Article 15(3) of the Convention also applies during the construction phase of a ship intended for use in international traffic therefore needs no discussion. The complaint fails.

4.3

The first complaint cannot lead to cassation either. The Supreme Court is not required to provide reasons for its decision. When assessing the complaint it is not necessary to answer questions that are important for the unity or development of the law (see [Article 81\(1\) of the Judicial Organization Act](#)).

5Conclusion

It follows from the foregoing that the appeal in cassation must be dismissed as unfounded.

6Process costs

The Supreme Court sees no reason for a conviction in the costs of the proceedings.

7Decision

The Supreme Court dismissed the appeal in cassation.

This judgment was delivered by Vice-President RJ Koopman as Chairman, and Counselors J. Wortel, AFMQ Beukers-van Dooren, MT Boerlage and PAGM Cools, in the presence of Acting Clerk F. Treuren, and pronounced in public on 24 Dec 2021.

[ECLI:NL:GHDHA:2020:1572](#) .

[ECLI:NL:PHR:2021:441](#) .

cf. HR 14 July 2017, [ECLI:NL:HR:2017:1326](#) , legal consideration 3.1.2.

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