

NETHERLANDS SOCIAL SECURITY PENSIONS—TAXATION WHEN THE RECIPIENT IS A NEW ZEALAND RESIDENT

PUBLIC RULING BR Pub 07/10

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 03/01 which was published in *Tax Information Bulletin*, Vol 15, No. 2 (February 2003) and applied until 30 November 2006. This was a re-issue of BR Pub 98/6, which was published in *Tax Information Bulletin*, Vol 10, No 12 (December 1998). This new ruling takes into account the Income Tax Act 2004 and other minor changes in legislation since BR Pub 03/01 was published. This ruling will apply for an indefinite period beginning on 1 December 2006.

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Law

All legislative references are to the Income Tax Act 2004 and to the Double Tax Convention between the Netherlands and New Zealand, which appears in Schedule 1 to the Double Taxation Relief (Netherlands) Order 1981, S.R. 1981/43 (“the Double Tax Convention”).

This Ruling applies in respect of Article 19(2) of the Double Tax Convention.

The Arrangement to which this Ruling applies

The Arrangement is the periodic payment of a Netherlands social security pension to a person who is a resident of New Zealand for tax purposes.

This person may be a national of the Netherlands, or of New Zealand, or of both countries. For the purposes of this Ruling the word “national” has the meanings attributed to it by Article 3(1)(h) of the Double Tax Convention.

How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- When a New Zealand tax resident receives a Netherlands social security pension, and that person is also a New Zealand citizen, the pension is taxable only in New Zealand.
- When a New Zealand tax resident, who is not a New Zealand citizen, receives a Netherlands social security pension, the pension may be subject to tax in both the Netherlands and New Zealand; with the Commissioner giving a credit for tax paid in the Netherlands in accordance with New Zealand’s foreign tax credit rules.

The period for which this Ruling applies

This Ruling will apply for an indefinite period beginning on 1 December 2006.

This Ruling is signed by me on the 21st day of December 2007.

Susan Price
Senior Tax Counsel

COMMENTARY ON PUBLIC RULING BR Pub 07/10

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in public ruling BR Pub 07/10 (the Ruling).

Background

The subject matter covered in the Ruling was previously dealt with in Public Rulings BR Pub 03/01 (*Tax Information Bulletin*, Vol 15, No. 2 (February 2003)) and BR Pub 98/6 (*Tax Information Bulletin*, Vol 10, No 12 (December 1998)). The Ruling has been amended to take into account the introduction of the Income Tax Act 2004.

This Ruling clarifies New Zealand's jurisdiction to tax pensions paid by the Netherlands, including when New Zealand's right to do so is an exclusive right. There has been some confusion about the New Zealand tax treatment of social security pensions paid by the Netherlands Government to people living in New Zealand. Some taxpayers believe the pensions are not taxable in New Zealand if the recipients are not New Zealand citizens.

All legislative references are to the Income Tax Act 2004, unless otherwise specified.

Legislation

Section BD 1(2) reads as follows:

Exempt income

- (2) An amount of income of a person is exempt income if it is their exempt income under a provision in subpart CW (Exempt income) or CZ (Terminating provisions).

Section CW 23(1) and (2) reads as follows:

Exempt income

- (1) The following are exempt income:
 - ...
 - (e) an overseas pension.

Meaning of overseas pension

- (2) In this section, overseas pension means -
 - (a) an overseas pension, to the extent of sums subtracted under section 70 of the Social Security Act 1964, by the department currently responsible for administering the Act, from –
 - (i) a monetary benefit paid under Part 1 of the Act; or
 - (ii) a monetary benefit, other than New Zealand superannuation or a veteran's pension, paid under the Social Welfare (Transitional Provisions) Act 1990:
 - (b) an overseas pension to the extent to which it is subject to an arrangement under section 70(3) of the Social Security Act 1964 but not to the extent of the equivalent amount of New Zealand superannuation, veteran's pension, or income-tested benefit paid under section 70(3)(b) of the Act.

Article 19(2) of the Double Taxation Convention (in schedule 1 to the Double Taxation Relief (Netherlands) Order 1981) reads as follows:

- a. Any pension paid by, or out of funds created by, one of the States or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority and any pension paid to an individual under the social security scheme of one of the States, may be taxed in that State.
- b. However, such pension shall be taxable only in the State of which the individual is a resident if he is a national of that State.

Article 3(1)(h) of the Double Taxation Convention defines the term “national” to mean:

1. in the case of the Netherlands, any individual possessing the nationality of the Netherlands, and any legal person, partnership and association deriving its status as such from the laws in force in the Netherlands;
2. in the case of New Zealand, any individual possessing citizenship of New Zealand and any legal person, partnership and association deriving its status as such from the laws in force in New Zealand.

Article X of the Protocol to the Double Tax Convention states:

X. With reference to Articles 18 and 19

It is understood that the term “pensions and other similar remuneration” includes only periodical payments.

Application of the Legislation

Under the Income Tax Act 2004, persons who are resident in New Zealand are subject to New Zealand tax on their worldwide income. Double Tax Conventions and Agreements with other countries override the Income Tax Act and determine which country has jurisdiction to tax the income in question. Among other issues, the Double Tax Convention between the Netherlands and New Zealand determines the tax treatment of periodic pensions paid by an organisation in one country to residents of the other country.

Article 18 of the Double Tax Convention sets out which country has the jurisdiction to tax pensions paid by one country to the residents of the other country. This Article, however, does not apply to pensions paid out:

- under social security schemes; or
- for services rendered to the country paying the pension.

Article 19 deals with these two classes of pension. Article 19(2) states that a social security pension may be taxed by the country from which it is paid but the pension shall be taxed only in the country in which the recipient of the pension is resident if the recipient is also a national of the country of residence. Therefore, a social security pension paid to a New Zealand tax resident who is also a national of New Zealand may be taxed only in New Zealand.

However, if the recipient is a New Zealand tax resident, but is not a New Zealand citizen, New Zealand does not have an exclusive right to tax the pension. In those circumstances the Double Tax Convention does not restrict either the Netherlands or New Zealand from taxing the pension and the pension could be taxed in both the Netherlands and New Zealand under their domestic law. Persons who are not New Zealand citizens and have tax deducted by the Government of the Netherlands from their Netherlands social security pensions are entitled to tax credits under section LC 1. When this occurs the Commissioner will, in accordance with New Zealand's foreign tax credit rules, give the recipient a tax credit for the tax paid in the Netherlands. However, these tax credits cannot exceed the amount of tax due in New Zealand.

Residence and Nationality

Article 4 of the Double Tax Convention sets out rules for determining the residence (for the purpose of the Double Tax Convention) of a person who is resident for tax purposes in both the Netherlands and New Zealand under their domestic law. The term "national" in the case of New Zealand is defined in the Double Tax Convention as:

... any individual possessing citizenship of New Zealand and any legal person, partnership and association deriving its status as such from the laws in force in New Zealand

(The rules determining how New Zealand citizenship is acquired are set out in the Citizenship Act 1977.) Hence, under the Double Tax Convention a person who is a citizen of New Zealand is a national of New Zealand.

Accordingly, under Article 19(2)(b) of the Double Tax Convention New Zealand has an exclusive right to tax a Dutch social security pension when the recipient is determined to be a New Zealand tax resident under Article 4 and is also a New Zealand citizen. (This will be so whether or not that person is also a Dutch national. In the case of dual nationality, the recipient will still satisfy the requirements of Article 19(2)(b) – New Zealand tax residency and New Zealand citizenship – and the additional fact of possessing Dutch nationality does not alter the conclusion that only New Zealand may tax the pension.)

Liability to tax under New Zealand domestic law

The Double Tax Convention need not be considered unless an amount of Netherlands pension is taxable under New Zealand domestic law. A Netherlands pension could be fully or partly exempt from tax under section CW 23 of the Income Tax Act 2004. Section CW 23(2)(a) may apply where the New Zealand benefit payable to a Netherlands pensioner has been reduced in terms of section 70(1) of the Social Security Act 1964.

Section 70(1) of the Social Security Act 1964 applies where the recipient of a Netherlands pension is also entitled to a benefit of a similar nature under New Zealand social welfare legislation. In that event the New Zealand benefit is to be reduced by the amount of a Netherlands pension and the effect of section CW 23(2)(a) is as follows:

- When the amount of the New Zealand superannuation or veteran's pension payable has been reduced by the amount of a Netherlands pension under section 70(1) of the Social

Security Act 1964, section CW 23(2)(a) does not apply. Therefore, the full amount of the Netherlands pension is taxable under New Zealand domestic law.

- However, when an entitlement to another type of New Zealand benefit has been reduced by the amount of a Netherlands pension, the Netherlands pension is exempt income under section CW 23(2)(a) to the extent that the New Zealand benefit has been reduced. Therefore, when a deduction from a New Zealand benefit entitlement has been made under section 70(1) of the Social Security Act 1964 and the amount of a Netherlands pension exceeds the amount of the New Zealand benefit entitlement, the amount exceeding the New Zealand benefit entitlement is taxable under New Zealand domestic law.

(Note: the section CW 23 exemption does not apply to New Zealand superannuation and veterans' pensions. They are specifically excluded from this section and are assessable income).

Section CW 23(2)(b) applies when an arrangement has been made in respect of an overseas pension under section 70(3) of the Social Security Act 1964. Under section 70(3) of the Social Security Act 1964 an arrangement may be made to pay the full amount of an overseas pension to the chief executive of the department responsible for administering that Act (which is currently the Ministry of Social Development) in order to receive the full rate of a benefit payment under that Act, the Social Welfare (Transitional Provisions) Act 1990, Part 6 of the War Pensions Act 1954 or the New Zealand Superannuation and Retirement Income Act 2001. This option is available to recipients of Netherlands pensions from 1 July 2002 under the Social Security (Alternative Arrangement for Overseas Pensions) Amendment Regulations 2002. When such an arrangement is made, the Netherlands pension is not taxable under New Zealand domestic law (but the equivalent amount of the New Zealand benefit would be taxable under section CW 23(2)(b)).

Example 1

A taxpayer is a Dutch citizen who immigrated to New Zealand two years ago. He receives a Netherlands social security pension. He has not become a New Zealand citizen, but is a tax resident of New Zealand. Both New Zealand and the Netherlands may tax his pension. New Zealand will grant him a tax credit for the tax charged on the pension by the Netherlands.

Example 2

A taxpayer has Dutch nationality and immigrated to New Zealand five years ago. She receives a Netherlands social security pension. However, unlike the taxpayer in Example 1, she has become a New Zealand citizen. Only New Zealand may tax the social security pension that she receives from the Netherlands.