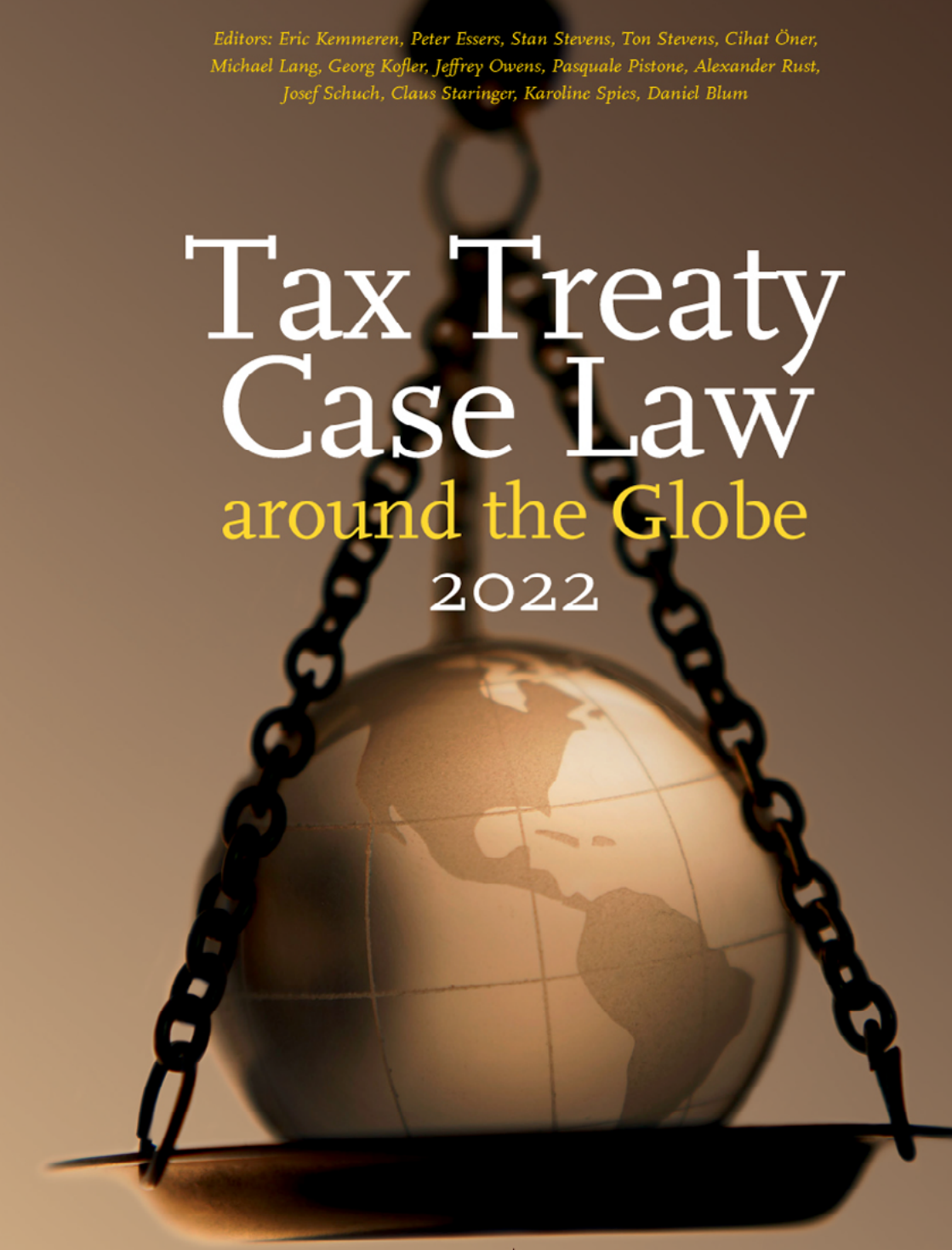
Editors: Eric Kemmeren, Peter Essers, Stan Stevens, Ton Stevens, Cihat Öner, Michael Lang, Georg Kofler, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch, Claus Staringer, Karoline Spies, Daniel Blum

# Tax Treaty Case Law around the Globe 2022



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# Tax Treaty Case Law around the Globe 2022

**Why this book?**
This book is a unique publication that provides a global overview of international tax disputes in respect of double tax conventions and thereby fills a gap in the area of tax treaty case law. It covers the 37 most important tax treaty cases that were decided around the world in 2021. The systematic structure of each chapter allows for the easy and efficient study and comparison of the various methods adopted for applying and interpreting tax treaties in different cases. With the continuously increasing importance of tax treaties, Tax Treaty Case Law around the Globe 2022 is a valuable reference tool for anyone interested in tax treaty case law, including tax practitioners, multinational businesses, policymakers, tax administrators, judges, and academics.


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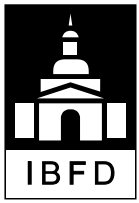


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# Preface

Both the OECD Model Tax Convention on Income and on Capital (OECD Model) and the United Nations Model Double Taxation Convention (UN Model) are designed as tools for legislative harmonization and, therefore, often serve as a basis for tax treaty negotiations between different jurisdictions worldwide. At the same time, however, the interpretation of a particular tax treaty provision may still differ from country to country due to a number of reasons. The risk of double/multiple (non)-taxation is, therefore, not entirely removed, and this will adversely affect the international exchange of goods and services and the movement of capital, technology and persons. In order to facilitate a uniform interpretation of tax treaties worldwide and, hence, reduce the risk of double/multiple (non)-taxation, basic knowledge is needed on how various tax treaty issues are resolved by different jurisdictions.

It is widely known that a unified approach to the interpretation and application of international tax treaty rules may benefit not only the countries/parties to a certain tax treaty but also their taxpayers, as well as international trade and investments in general. This topic is, therefore, an ongoing concern for many tax practitioners, representatives of international organizations, public officers and tax scholars.

The Tax Treaty Case Law around the Globe 2022 Conference was held by Tilburg University on 12-14 May 2022, in a hybrid format for the first time, in the aftermath of the COVID-19 crisis. This international event took place for the eleventh time and was jointly organized by the European Tax College of Tilburg University and the Institute for Austrian and International Tax Law of WU. The conference was dedicated to the analysis of the most important cases on international tax treaty law decided in 2021 in different tax jurisdictions worldwide. Thirty-two cases were presented by outstanding tax experts from more than 20 different countries. Each presentation was followed by an intensive and fruitful discussion. The participants in the conference compared the interpretative approaches existing in both OECD and non-OECD member countries and came up with comprehensive conclusions and suggestions. The main scientific results of the conference are presented in this book.

Each chapter in this book is dedicated to a court case or a number of cases relating to a particular article of the tax treaty at issue (often based on the OECD or UN Model) that was decided in a certain jurisdiction in 2021. Every chapter is structured in a similar way, presenting the facts of the case,

the decision and reasoning of the court, as well as the observations and conclusions of the authors, including the possible impact of the decision on international tax law development in the respective country and other jurisdictions.

This clear and concise structure enables a solid and accessible overview of the global case law on tax treaty application in 2021. The systematic structure of each chapter allows different tax treaty case law to be studied and compared in a comprehensive and efficient way.

The editors believe that the chapters presented in this book are of high value and will, therefore, be of particular interest to tax consultants, public officers, academics and all those interested in international tax law. The fact that many domestic decisions are otherwise available only in the national language makes the material contained in this book even more valuable.

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Tilburg, March 2023

# Part 1

# Interpretation and Residence

# Chapter 1

# The Netherlands: The Definition of "International Traffic" in Article 3(1)(e) of the OECD Model: Which Vessel Types Qualify? – *Dutch High Court 24 December 2021, nr. 20/03226, BNB 2022/37*

Ton Stevens

## 1.1. Introduction

In December 2021, the Dutch Supreme Court rendered an interesting decision on the applicability of article 15(3) of the Netherlands-Switzerland Income Tax Treaty (2010), which is almost identical to article 15(3) of the OECD Model (in the pre-2017 version) on the wages earned by a Dutch resident seaman who worked on board a construction vessel. Although the case handles the applicability of article 15(3), the specific issue dealt with in the court case was the reference in article 15(3) to the definition of "international traffic" in article 3(1)(e) of the OECD Model and whether or not construction vessels could qualify as ships operated in international traffic. The special issue in this particular case was the fact that the construction vessel was not operated yet during the working periods of the Dutch seaman but was still in the construction phase. Therefore, two issues were to be decided by the Dutch tax courts in this case: (i) can construction vessels qualify as ships under article 3(1)(e) of the OECD Model?; and (ii) can a ship that is not in the operational phase but still in its construction phase already qualify as a ship operated in international traffic?

## 1.2. Facts of the case

Mr. X worked in 2014 and 2015 as "second mate" (second officer) on board a construction vessel. The vessel was designed for the single-lift installation and removal of large oil and gas platforms, as well as the installation of record-weight pipelines.[1] Mr. X lived (tax resident) in the Netherlands and was employed by a Swiss company (a sister company of the Swiss single

1. Tax court cases in the Netherlands are strictly anonymized. However, given the facts of the case ("world largest construction vessel" that was built between 2014 and 2015 in South Korea and Rotterdam), it was rather easy to find out the vessel's name: Pioneering Spirit. Surprisingly, the same vessel played a role in the Norwegian Supreme

ship company that owned and exploited the construction vessel). The vessel was built in South Korea starting in 2014, and in 2016 it started its first operations.[2] Mr. X was working during 2014 and 2015 for several periods "on board" the vessel, either at the Korean construction yard or in the Rotterdam harbour (where the outfitting and completion of the vessel construction was carried out). His remuneration was not taxed in Switzerland. Mr. X worked also on board the vessel when it sailed from the Korean construction yard to the outfitting location in the Rotterdam harbour. The following working periods can be distinguished:

– from 1 April 2014 to 17 November 2014: construction yard in South Korea;
– from 18 November 2014 to 8 January 2015: sailing from South Korea to Rotterdam; and
– from 8 January 2015 to 31 December 2015: outfitting location in Rotterdam.

## 1.3. The Dutch Supreme Court decision

### 1.3.1. Question/issue disputed

The court case dealt with the question of whether the income earned by the Dutch seaman (Mr. X) should be qualified as remuneration derived from employment that is exercised aboard a ship operated in international traffic (article 15(3) of the Netherlands-Switzerland Income Tax Treaty (2010)). If the answer to the question was positive (standpoint of the taxpayer), taxation rights would be allocated to Switzerland as the contracting state in which the place of effective management of the shipping enterprise was situated. In that case, the remuneration would be exempted[3] in the Netherlands based on article 22(2) of the tax treaty. In case of a negative answer (standpoint of the Dutch tax authorities), the taxation rights would be allocated to the Netherlands (article 15(1) of the tax treaty), as Mr. X did not work at all between 2014 and 2015 in Switzerland (working state).

More specifically, the question before the Dutch Supreme Court was whether the activities of seamen during the construction phase and the sailing period

Court decision (NO: *Høyesterett* [Supreme Court], 8 June 2021, HR-2021-1243-A), *Farid Ati Allah & Others v. Skatteetaten (Poseidon)*, Case Law IBFD discussed by E. Furuseth during this year's Tax Treaty Case Law around the Globe seminar. *See* ch. 25 of this book.

2. In Norway as can be derived from the Norwegian *Poseidon* court case.
3. Exemption with progression reservation.

to a testing/completion site could be qualified as working aboard a ship that is operated in international traffic?

### 1.3.2. The Court's decision

The decision of the Dutch Supreme Court can be summarized as follows.

The Supreme Court started by stating that articles 3(1)(g), 8 and 15(3) of the Netherlands-Switzerland Income Tax Treaty (2010) are almost identical to those articles[4] of the OECD Model (2008) (art. 3(1)(e) OECD Model). For that reason, the OECD Commentary on those articles is, in the view of the Dutch Supreme Court, of "utmost importance" for the interpretation of those articles.

The Court continued its decision by stating that article 15(3) and article 8 are two sides of the same coin in the sense that they provide for special allocation rules for the operation of ships or aircrafts in international traffic. From the Commentary on Article 8 of the OECD Model, the Court found that profits derived from the exploitation of ships in international traffic meant profits directly related with the commercial transportation of goods and persons by ship in international traffic (including connected or ancillary activities).

The Court then decided that the facts of the case left no other conclusion than that the vessel was destined for the lifting and removal of big platforms and pipelaying. The transport of goods and persons by the ship was only incidental to this main activity. In such a case, it could not be said that profits from the exploitation of the vessel were directly connected with the commercial transport of goods and persons by ship in international traffic (including connected or ancillary activities).

In the view of the Dutch Supreme Court, there was no further need to answer the question of whether article 15(3) of the Netherlands-Switzerland Income Tax Treaty (2010) is also applicable during the construction phase of a ship that is destined for use in international traffic.

4. Art. 3(1)(g) of the *Netherlands-Switzerland Income Tax Treaty* (2010), Treaties & Models IBFD being identical to art. 3(1)(e) of *OECD Model Tax Convention on Income and on Capital* (17 July 2008), Treaties & Models IBFD.

**Notes**

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