PS LA 2002/1 - Pensions paid to Australian residents by the Netherlands Government for government service in the former Netherlands East Indies

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Practice Statement Law Administration

PS LA 2002/1

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This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

SUBJECT:	**Pensions paid to Australian residents by the Netherlands Government for government service in the former Netherlands East Indies**
PURPOSE:	**To guide ATO personnel in applying Articles 18 and 19 of the Australia-Netherlands Double Tax Agreement (DTA) to Netherlands East Indies government service pensions.**

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STATEMENT

1. This practice statement sets out the taxation position under the *Australia-Netherlands Double Tax Agreement* (the Netherlands Agreement) of pensions received by Australian residents from the Netherlands Government for government service in the former Netherlands East Indies (now Indonesia). This Statement also deals with pensions paid by the Netherlands in respect of government service to the Netherlands.
2. This practice statement concerns the application of Articles 18 and 19 of the Netherlands Agreement, as defined in the *International Tax Agreements Act 1953*.

3. Under the terms of the Netherlands Agreement, a pension paid to an Australian resident by the Netherlands Government in respect of service to the Netherlands Government is a pension of the type described in Article 19. Accordingly, subject to two exceptions, those pensions may be taxed by both countries, with Australia providing a foreign income tax offset for any Netherlands tax paid.

4. The first exception is a pension paid to a resident of Australia by the Netherlands Government in respect of service to the former Netherlands East Indies Government. This pension is treated as subject to Article 18 and therefore is taxable only by Australia.

5. The second exception is where such a pension is paid in respect of services rendered in connection with any trade or business carried on by the Netherlands Government. In that case, Article 19 provides for the pension to be taxed only by Australia under Article 18.

6. Where an Australian resident receives a pension in respect of service to both the Governments of the former Netherlands East Indies and the Netherlands, the full pension is assessable in Australia. However the Netherlands will only seek to tax at source that part of the pension that relates to service to the Netherlands Government, and an Australian foreign income tax offset will be allowed in respect of that Netherlands tax.

7. To ensure the Netherlands only deducts Netherlands tax in respect of the Netherlands Government service element of a pension, Australian residents should provide the Netherlands tax authorities (Belastingdienst / Particulieren / Ondernemingen Buitenland) with evidence of their Australian residency (see paragraph 15 of this practice statement). The ATO can provide a certificate of Australian residency. For information on certificates of residency visit the ATO website at ato.gov.au.

EXPLANATION

Background

8. In 1949, the Netherlands East Indies ceased to exist after the creation of the independent state of Indonesia. Initially pension rights accrued by government employees for service to the former Netherlands East Indies Government were adopted and maintained entirely by the Indonesian Government. However, following negotiations between the Netherlands and Indonesia, the Netherlands agreed to assume all government service pension rights of former Netherlands East Indies Government employees living outside Indonesia. In consideration for this, the Indonesian Government transferred funds to the Netherlands Government to fund the future pension payments.

Pensions under the Netherlands Agreement

9. Articles 18 and 19 of the Netherlands Agreement deal with the allocation of taxing rights between Australia and the Netherlands over pensions. The Netherlands Agreement is structured so that Article 18 (which is a general provision dealing with 'Pensions and Annuities') applies to all pensions other than those dealt with under Article 19 (which deals specifically with 'Government Service' remuneration). Therefore, in applying the Netherlands Agreement, pensions paid to an individual in respect of services rendered in the discharge of governmental functions to either the Netherlands or Australia fall primarily for consideration under Article 19. Pensions not dealt with under that article, which include pensions paid in respect of services rendered in connection with a government trade or business undertaking, are dealt with under Article 18.

Former Netherlands East Indies government service pensions

10. The Netherlands State Secretary of Finance has issued a resolution dated 28 June 1996 (nr.IFZ96/863M) dealing with Netherlands government service pensions paid in consideration for services rendered to former Netherlands overseas territories such as the former Netherlands East Indies. The resolution states that under certain conditions such pensions paid to non-residents of the Netherlands will be treated by the Netherlands, for tax treaty purposes, as a private pension rather than as a government service pension.

11. The conditions set out in the resolution are:

- the Netherlands Government pension is paid to a non-resident of the Netherlands in consideration for services rendered to the former Netherlands overseas territories;
- the individual recipient is a resident of a State which has concluded a treaty for the avoidance of double taxation with the Netherlands; and
- that treaty includes a provision on government pensions stating that the Netherlands has the right to tax the pension in respect of services rendered to the Netherlands in the discharge of functions of a governmental nature (or other words of a similar meaning).

12. The resolution lists the Netherlands' existing tax treaties which contain the relevant provision. The Australia-Netherlands Double Tax Agreement is included in that list.

13. Consequently, the Netherlands Government is of the view that pensions (and parts thereof) paid to Australian residents by the Netherlands Government for services to the Netherlands East Indies Government are to be treated as being dealt with under Article 18 of the Netherlands Agreement. That view is accepted by Australia.

14. Article 18 provides that a pension paid to a resident of one of the States 'shall be taxable only in' that State. Therefore, pension income (and parts thereof) paid by the Netherlands Government for service to the former Netherlands East Indies Government are treated as taxable exclusively in Australia and exempt from Netherlands taxation.

15. The Netherlands Ministry of Finance has advised that by referring to the Australia-Netherlands Double Tax Agreement and providing all relevant information, non-residents of the Netherlands can file an application for an exemption from Netherlands tax for such pensions (and parts thereof) with the following tax authorities (the title in the address shown below may be translated as 'Tax and Customs Administration/Individuals and Enterprises/Abroad'):

    Belastingdienst/Particulieren/Ondernemingen Buitenland
    PO Box 2865
    6401 DJ HEERLEN
    The Netherlands

Netherlands government service pensions

16. When a pension payment consists of an element paid by the Netherlands Government for services rendered in the discharge of governmental functions to the Netherlands Government, the payment is dealt with under Article 19. Once the pension is classified as being paid in respect of a governmental function (and not a Government trade or business undertaking), the Article provides that the pension 'may be taxed' in the State to which the services were rendered. The Article does not affect Australia's domestic law taxation of the world wide income of its residents. This means that where such a pension is paid to a resident of Australia both States may tax the pension income, though the primary taxing rights lie with the Netherlands.

17. In these cases, Australia is obliged by Article 23 of the Netherlands Agreement to provide relief from double taxation pursuant to the foreign income tax offset provisions of the Australian domestic tax law. That is, the Australian resident taxpayer includes the Netherlands pension in assessable income in Australia but can claim a foreign income tax offset in respect of any Netherlands tax paid on the Netherlands pension.

Amendment history

Date of amendment	Part	Comment
xx April 2014	Contact details	Updated.
3 May 2013	Paragraph 7	Updated for clarification and include link to ato.gov.au
5 December 2011	Paragraph 2	Paragraph 2 be updated to read, '… Articles 18 and 19 of the Netherlands Agreement, as defined in the International Tax Agreements Act 1953 '.
	Legislative references	The references in the Legislative References section of the LAPS be updated (underlined) to read: – Article 18 of the Netherlands agreement as defined in the International Tax Agreements Act 1953 – Article 19 of the Netherlands agreement as defined in the International Tax Agreements Act 1953 – Article 23 of the Netherlands agreement as defined in the International Tax Agreements Act 1953
14 September 2010	Contact details	Updated.
28 October 2009	Paragraphs 3	Update reference of 'foreign tax credit relief' to 'foreign income tax offset'.
	Paragraphs 6 & 17	Update reference of 'foreign tax credit' to 'foreign income tax offset'.
	Contact details	Updated.
16 September 2008	Contact details	Updated.
7 April 2008	Contact details	Updated.
12 December 2006	Contact details	Updated.

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Legislative references	International Tax Agreements Act 1953 Art 18 International Tax Agreements Act 1953 Art 19 International Tax Agreements Act 1953 Art 23
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