

GMS Flash Alert

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Netherlands – All Days of Stay Count for 183-Day Rule

The Netherlands' Supreme Court ("Hoge Raad") adheres to the "days of physical presence" method in the OECD Model Convention.¹

WHY THIS MATTERS

The decision by the Hoge Raad clears up what the word "stay" in the Netherlands' 183-day rule covers. In the case it reviewed, the Court considered if the word "stay" was limited to working days or if all the days of the stay have to be taken into account. The Court's decision was that **all days** (regardless of whether for business or personal reasons) count. This determines the taxing rights of the Dutch authorities.

In order to prevent unexpected tax consequences, employees on assignment to the Netherlands and their global mobility managers should bear this in mind.

Background

For the purposes of allocating the right to tax salary from employment, a 183-day rule has been included in tax treaties. If a resident of another state is employed by a foreign employer to work in the Netherlands and there is no economic employer or permanent establishment of the foreign employer in the Netherlands, then the Netherlands only has the power to tax if the employee spends at least 183 days in the Netherlands during a 12-month period (or calendar year, depending on the text of the treaty).

Proceedings before the Hoge Raad

A resident of Belgium worked less than 183 days in the Netherlands. However, he also stayed in the Netherlands for

personal reasons. In total, he stayed more than 183 days in the Netherlands. The question on which the Hoge Raad had to rule was how “stay,” as it appears in the 183-day rule, should be interpreted. Is this limited to working days or do all the days of the stay have to be taken into account?

The Court’s decision was that **all days** count.

Easy-to-Apply Benchmark

The Commentary to the OECD Model Convention is important for the interpretation of tax treaties. It contains guidelines for the interpretation of tax treaties. With regard to the interpretation of “stay” for the purposes of the 183-day rule, the Hoge Raad refers to the “days of physical presence” method. This means that each day (or part thereof) that an employee stays in the state of employment must be taken into account. It is irrelevant whether the employee’s stay is for business or personal reasons.

For this reason the salary of the Belgian employee who worked less than 183 days in the Netherlands, but whose stay in the Netherlands amounted to more than 183 days, was subject to Dutch personal income tax (if and to the extent that the activities were performed in the Netherlands). This benchmark is easy to apply in practice.

FOOTNOTE:

1 See (in Dutch): HR 14-07-2017, nr. 16/03578 (ECLI:NL:HR:2017:1326) .

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