



# Mobility: Tax alert

January 2024

## Netherlands

New 60-days decree published for inter-company secondments

### Executive summary

A new '60-day decree' was published on 21 December 2023. This decree updates the previous decree dated 12 January 2010 concerning interpretation of the term 'employer' in tax treaties. This change follows a judgement of the Dutch Supreme Court on 14 October 2022, which ruled on the applicability of new OECD commentary in the interpretation of the term of 'employer' in a previously concluded tax treaty.

It is important to note that this decree only applies to the situation where an employee of one entity is working for another entity. The decree will not apply where there is a permanent establishment involved.

The decision contains a practical approval for short-term secondments, also known as the 60-day rule.

### Interpretation of term 'employer' under tax treaties

Based on the aforementioned ruling of 14 October 2022, a distinction is made in the interpretation of the term 'employer' between tax treaties signed before 22 July 2010 and those signed on or after 22 July 2010.

For tax treaties signed after 22 July 2010, the OECD commentary of that date takes precedence. Under this OECD commentary, whether there is an (actual) or notional employer or not is assessed based on a holistic approach; one specific element - such as the individual cost allocation - is not decisive in itself.

For tax treaties signed on or before 22 July 2010, the ruling of the Supreme Court of 1 December 2006 should be taken to determine whether or not there is an employer. This means that there are cumulative requirements to recognising whether there is an actual or notional employer in the work country, i.e.:

- ▶ There is a relationship of authority (power to issue instructions)
- ▶ The cost of the activities (remuneration) is borne by the entity and the work is performed for that entity's risk and benefit. If wages are paid by another entity, these salary costs must be specifically and individually charged or passed on.

The decree contains practical approval for short-term secondments, also known as the 60-day rule. For transfers within a group of companies to the Netherlands it is assumed in advance that there is no Dutch (economic) employer under the employment article of tax treaties, provided that the following conditions are met:

- ▶ It concerns a secondment within a group of companies.
- ▶ The secondment does not last longer than 60 working days in a period of 12 months. This refers to any period of 12 months, even if the relevant tax treaty applies the 183-day rule per calendar or tax year.
- ▶ The employee does not remain in the Netherlands for more than 183 days.
- ▶ It is not a permanent secondment; the 60 days rule can only be applied to short term, occasional secondments.
- ▶ The secondment takes place as part of an exchange programme, for career development or due to the specific expertise of the employee. The latter applies when the salary criterion for the 30% facility is met.
- ▶ Applying the exemption may not lead to a double tax exemption.

The decision does not specify what is a permanent secondment and what is short term, occasional secondment.

### Next Steps

Your EY advisor would be happy to discuss the possible implications of this decree with you. Also, if you have a ruling with the Dutch tax authorities which is based on the old 60 days decree, please discuss with your EY advisor whether the ruling would still be valid.

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