

The logo for Bol International, consisting of the lowercase letters 'bol' in a white, sans-serif font, enclosed within a white square border. The background of the slide is a top-down view of a desk with a succulent, a black notebook, a pen, and a pair of glasses.

Case Study: Varifocal View on the Home Office

2024 World Conference LEA Global

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Home Office: Not a Bad Place



OECD Model Convention

A model for the negotiation, interpretation and application of bilateral tax conventions, playing a crucial role in removing tax-related barriers to cross border trade and investment, helping to prevent tax evasion and avoidance, and providing a means to settle on a uniform basis the most common problems that arise in the field of international double taxation.

Taxation on business profits

Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein (*Article 7 OECD Model Convention*).

Permanent establishment

The term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on (*Article 5 OECD Model Convention*).

Elements

- A premises with a certain degree of permanence at the disposal of the enterprise
- Depends on the enterprise having effective power to use that location

Commentary (2017)

Even though part of the business of an enterprise may be carried on at a location such as an individual's home office, that should not lead to the automatic conclusion that that location is at the disposal of that enterprise simply because that location is used by an individual (e.g. an employee) who works for the enterprise. Whether or not a home office constitutes a location at the disposal of the enterprise will depend on the facts and circumstances of each case.

- In many cases, the carrying on of business activities at the home of an individual (e.g. an employee) will be so intermittent or incidental that the home will not be considered to be a location at the disposal of the enterprise.
- Where, however, a home office is used on a continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has required the individual to use that location to carry on the enterprise's business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise (*paragraph 18, Commentary on Article 5*).

Status OECD Commentary

Non-legally binding instruments, but great assistance in the application and interpretation of the convention, and in particular, the settlement of any disputes (*paragraph 29, General Remarks on the Model Convention*)

Observations and reservations

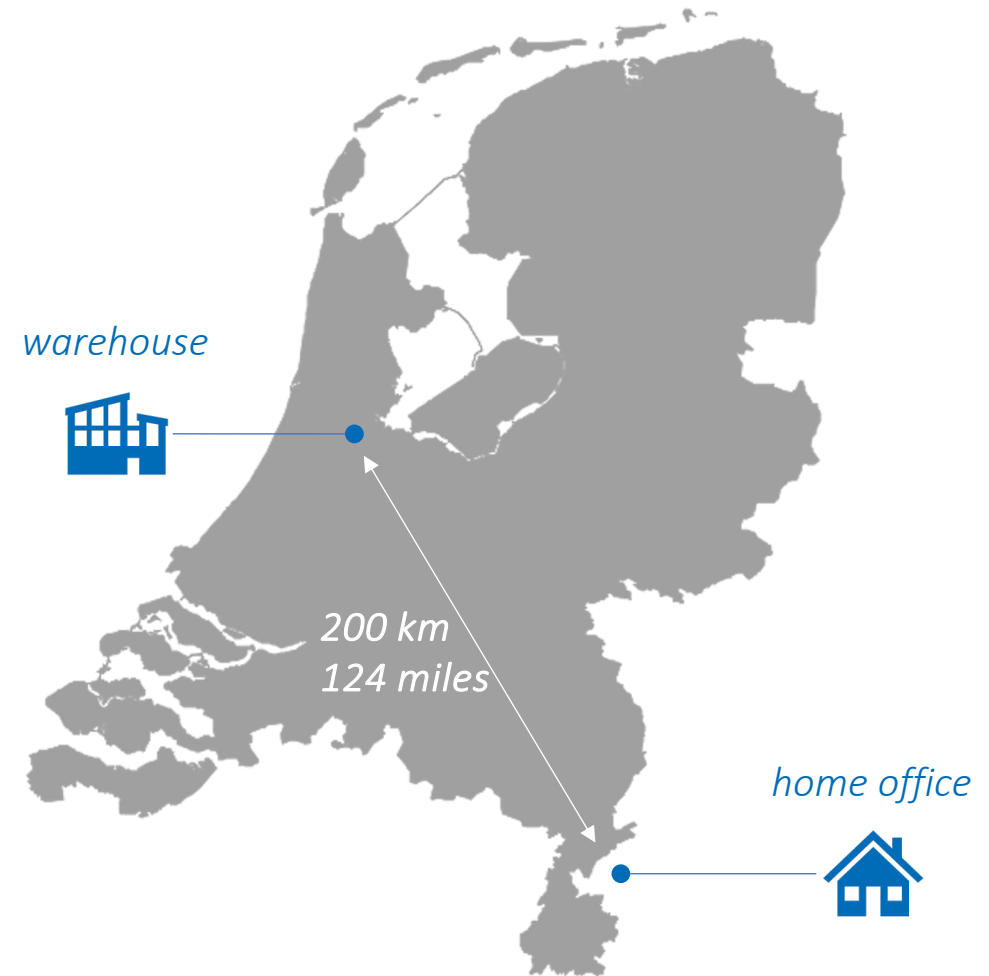
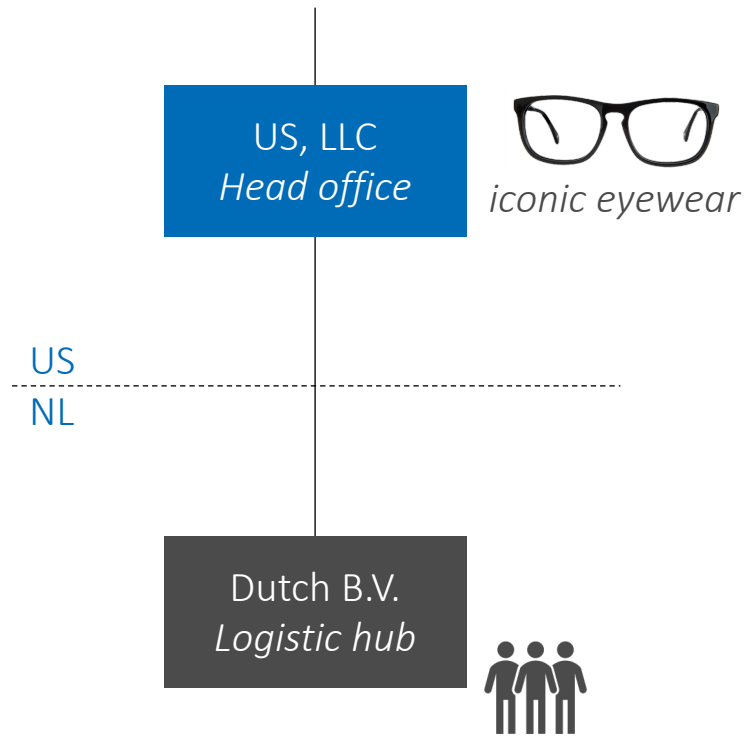
- An observation indicates that a member country does not agree with the interpretation given in the OECD Commentary on a certain provision.
- A reservation expresses disagreement with the text of the OECD Model (*paragraph 30 and 31, General Remarks on the Model Convention*).

Relation with previous versions (dynamic)

Other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations (*paragraph 35, General Remarks on the Model Convention*).

The Netherlands

Dutch Supreme Court 14 October 2022: limited meaning ('beperkte betekenis') should be given to the OECD Commentary of a later date, if this Commentary is not merely meant as a 'specification or clarification' ('precisering of verduidelijking') of a previously concluded tax treaty (illustrative: severance payments).



Case law

At the disposal: access to the home office?

Reimbursement of costs / home office compensation

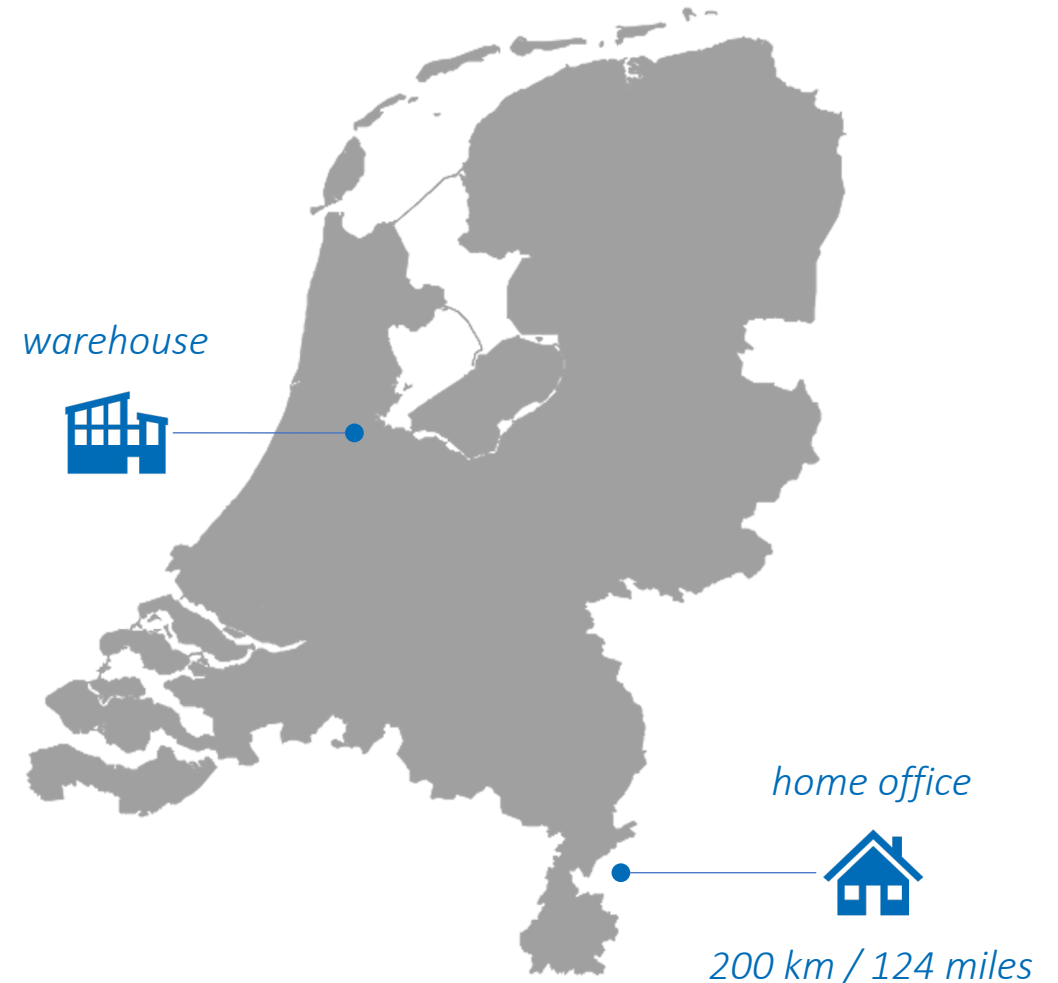
Ruling practice

- Certainty in advance for taxpayers
- Summaries are being published on an anonymous basis
- Annual Report 2023 all relevant facts and circumstances, but home office compensation highlighted
- 12 summaries on home office as PE

Factors

- Reimbursement of costs: Home office compensation or general reimbursement?
- Employee's versus employer's choice (motive)
- Nature of the activities? (Negative List and Agency PE)

Other sources?



Agreement on the interpretation of Article 5 of the tax treaty (permanent establishment) for teleworking employees
Signed on 23 November 2023 (*Staatscourant 2023, nr. 33856, 8 December 2023*)

Three scenarios

1. Incidental teleworking; no permanence
2. Structural teleworking with the possibility to work on site; in principle not at the disposal, but...
3. Structural teleworking and mandatory; in principle at the disposal of the employer (three situations given)

Practical guidance

- 50% threshold; less than 50% within a 12-month period, no PE
- Preparatory or auxiliary activities (Negative List)

Note: Home office compensation not mentioned once. Remains a decisive factor (?)

Treaty between Netherlands and Belgium (2023)

Not yet into force, Explanatory memorandum / notes to the Treaty

Analysis

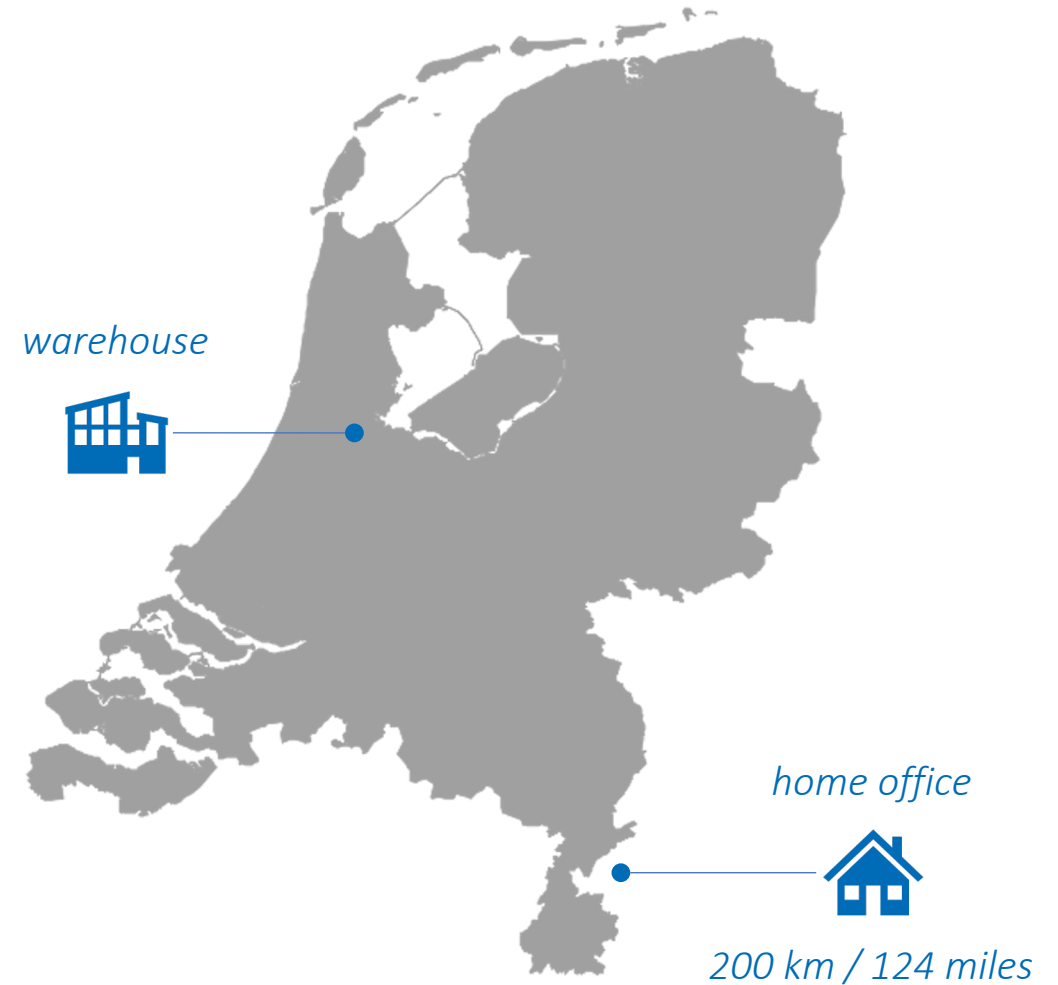
Dutch view

No home office compensation is being paid (!)
Employee's choice (personal reasons), not the employer's
>> Not at the disposal

Agreement NL-BE

Situation 2: structural and possibility to work on site
Office available, but realistic commute?
Employee's choice
>> Not at the disposal

Conclusion: No PE



Closing the warehouse (2024)

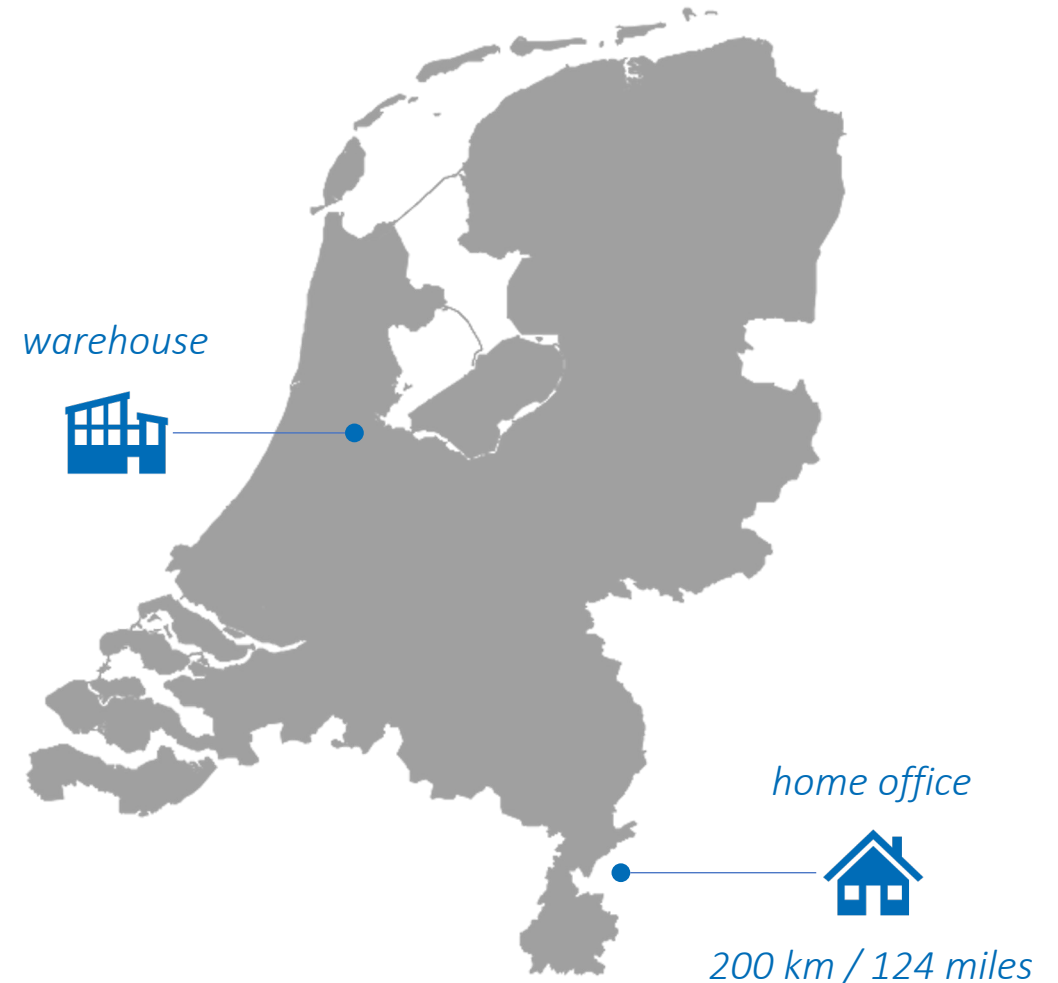
Agreement NL-BE

Shift from situation 2 to situation 3

Does/can this taint the motive (employee's motive)?

Should the outcome be different?

Conclusion: No PE (?)



General position

Activities of an employee in a home office generally do not constitute a permanent establishment of the employer. An employer typically does not have a sufficient power of disposal over the employee's premises (and the home office). *(Änderung des Anwendungserlasses zur Abgabenordnung (AEAO), 5 February 2024)*

Even if:

- the employer assumes the costs for the home office and its equipment (!) (i.e. home office compensation)
- the employee rents premises to the employer (unless the employer is actually authorised to use the premises for other purposes)
- the employee is not provided with another office by the employer (!)

Case at hand

Conclusion: No PE

Country where the PE is situated (location of the home office) has to argue a PE is present! Local perspective is decisive.

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