Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

Telephone Number

Refer Reply to:
CC:PLR-113042-98
Date:
October 28, 1998

Taxpayer =
Sub 1 =
Holding Co. =
Parent =
Trust =

Dear

This responds to your letter dated June 18, 1998 in which you request a ruling that premiums received by the Taxpayer on policies of insurance or reinsurance of United States risks are exempt from the insurance excise tax imposed by section 4371 of the Internal Revenue Code of 1986.

The ruling contained in this letter is predicated upon facts and representations submitted by, or on behalf of, Taxpayer and accompanied by a penalty of perjury statement executed by the appropriate party. This office has not verified any of the above material submitted in support of the request for a ruling. Verification of the factual information, representations, and other data may be required as part of the audit process.

Taxpayer, an insurance company, seeks to qualify for benefits under the United States-Netherlands Income Tax Convention (the Treaty) on the basis of Article 7, Article 23, and Article 26(1)(c)(i) and (c)(ii).

Taxpayer, Sub 1, Holding Co., Parent, and the Trust are all residents of the Netherlands. 100% of Taxpayer's shares is owned by Sub 1, which is owned 100% by Holding Co., which is owned 100% by Parent. Parent has issued 3 classes of stock, the principal class is ordinary shares. In addition, the company has issued preference shares and cumulative preference shares. All classes possess voting rights, each ordinary share represents one vote and each preference share represents votes. There were ordinary shares outstanding, preference shares outstanding, and cumulative preference shares outstanding as of December 31, 1997. The Trust as of December 31, 1997 owned shares which represents % of the ordinary shares. This percent of Parent's ordinary shares represents percent of the aggregate vote and value of the Taxpayer. The Trust issues "bearer depositary receipts," each of which represents a financial interest in one ordinary share, is negotiable under Dutch law, but gives the owner no

voting rights. The bearer depositary receipts are traded on the Amsterdam Stock Exchange.

Pursuant to Article 7 (Business Profits) and Article 23 (Other Income) of the Treaty, policies issued by an insurer or reinsurer that is a resident of the Netherlands may be exempt from the tax imposed by Section 4371 of the Code.

Subparagraph (1)(c)(ii) of Article 26 (Limitation on Benefits) provides a test under which certain companies that are directly or indirectly controlled by companies satisfying the publicly traded test of subparagraph (1)(c) may be entitled to the benefits of the Treaty. Under Article 26(1)(c)(ii), a resident of the Netherlands shall not be entitled to the benefits of the Treaty unless:

> A) more than 50% of the aggregate vote and value of all of its shares is owned, directly or indirectly, by 5 or fewer companies which are resident of either State, the principal classes of the shares of which are listed and traded as described in subparagraph (c)(i), and
>
> B) the company is not a conduit company, as defined in subparagraph 8(m).

Under Article 26(1)(c)(i), a resident of a Contracting State will be entitled to all the benefits of the Treaty if such resident company is a company in which

> 1) the principal class of its shares is listed on a recognized securities exchange located in either of the States and is substantially and regularly traded on one or more recognized securities exchanges.

Article 26(8)(b) states that "'shares' shall include depository receipts thereof or trust certificates thereof."

Article 26(8)(k) provides that the reference in subparagraph (c)(ii) and clauses (A) and (B) of subparagraph (c)(iii) of paragraph 1 to shares that are owned, directly or indirectly, shall mean that all companies in the chain of ownership that are used to satisfy the ownership requirements of the respective clause or subparagraph, must meet the residence requirements that are described in such clause or subparagraph.

The phrase "principal class of shares" in Article 26(l)(c)(i) is defined in Article 26(8)(a) of the Convention which provides that it is generally the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. Article 26(8)(b) provides that the term “shares” shall include depository receipts thereof or trust certificates thereof.

The phrase "substantially and regularly traded" in Article 26(l)(c)(i) is defined in Article 26(8)(f) of the Convention which provides that

> The shares in a class of shares are considered to be substantially and

regularly traded if:

i) trades in such class are effected on one or more of such stock exchanges other than in de minimis quantities during every month; and

ii) the aggregate number of shares of that class traded on such stock exchange or exchanges during the previous year is at least 6 percent of the average number of shares outstanding in that class during that taxable year.

Article 26(8)(m) states that the term "'conduit company' means a company that makes payments of interest, royalties and any other payments included in the definition of deductible payments ... in a taxable year in an amount equal to or greater than 90 percent of its aggregate receipts of such items during the same taxable year."

Taxpayer meets the requirements of Article 26(1)(c)(ii) because more than 50% of its shares are directly or indirectly owned by a publicly traded entity whose principal class of shares is substantially and regularly traded on a recognized securities exchange, all companies in the chain of ownership are residents of the Netherlands, and the Taxpayer is not a conduit. During 1997, of the depositary receipts issued by Trust, representing percent of the total receipts outstanding, were traded on the Amsterdam Stock Exchange and trades were effected in more than de minimis quantities during each month of the year. Further, Taxpayer is a resident of the Netherlands, and all of its outstanding shares are owned by Sub 1, a corporation resident in the Netherlands. In turn, all of Sub 1's shares are owned by Holding Co., a corporation resident in the Netherlands. All of Holding Co.'s shares are owned by Parent, a Netherlands resident. Taxpayer represents that percent of Parent's ordinary shares are owned by Trust, a resident of the Netherlands and a publicly traded company. This percent of Parent's ordinary shares represents percent of the aggregate vote and value of the Taxpayer. Accordingly, more than 50% of the aggregate vote and value is owned, directly or indirectly by Trust, a resident of the Netherlands.

Taxpayer represents that its outstanding stock is substantially and regularly traded on the Amsterdam Stock Exchange. Since the Amsterdam Stock Exchange is a recognized stock exchange under Article 26(8)(d)(ii) of the Convention, Taxpayer contends that it qualifies for exemption from the excise tax on the basis of Article 26(l)(c)(i).

Taxpayer represents that the Trust issues bearer receipt certificates, which represent the ordinary shares in Parent, that there are shares in this class, that the bearer receipt certificates are listed on the Amsterdam Stock Exchange. Taxpayer also represents that trades in these shares were effected, other than in de minimis quantities, on the Amsterdam Stock Exchange during every month of its 1997 tax year. Taxpayer also represents that during its 1996 year, out of the outstanding shares of stock of the Trust, a total of 835 million were traded on the Amsterdam Stock Exchange. That is, shares were traded will exceed 6 percent of its outstanding stock in 1996 and 1997. Article 26(8)(f)(ii). On the basis of the information submitted by Taxpayer, there was substantial and regular trading in the stock of the person that is the ultimate

owner of percent of the Taxpayer's outstanding shares. Therefore, Taxpayer meets the limitations on benefits test in Article 26(l)(c)(i) and 26(8)(f) of the Treaty.

The Taxpayer represents that it does not make payments of interest, royalties or any other type of deductible payments in an amount equal to or greater than 90% of its aggregate receipts of such items. Therefore, Taxpayer is not a conduit company as defined in Article 26(8)(m) of the Treaty, and meets the requirements set forth in Article 26(1)(c)(ii)(B). Therefore, Taxpayer meets the limitation on benefits test in Article 26(l)(c) of the Convention.

Pursuant to paragraph (8)(a) of the enclosed Agreement, Taxpayer's liability for Federal Excise Tax, as agreed upon, including liability resulting from reinsurance of U.S. risks with persons not entitled to exemption under the Convention or another convention, will commence for the taxable period immediately following the taxable period within which the agreement is signed by the Commissioner. The letter of credit required by paragraph (5)(a) of the enclosed Agreement, in the amount of $75,000, must be in effect within 30 days of the date the Agreement is finally signed for the Commissioner.

Any person otherwise required to remit the Federal excise tax on foreign insurance or reinsurance policies issued by you pursuant to section 46.4371-1(a) of the Excise Tax Regulations may rely upon a copy of this letter and/or a copy of the approved Closing Agreement as authority that they may consider premiums paid to you on and after January 1, 1998 as exempt under the United States-Netherlands Income Tax Convention from the Federal excise tax.

This is a ruling and is directed only to the Taxpayer named above. Section 6110(j)(3) of the Internal Revenue Code provides that this ruling may not be used or cited as precedent by any other Taxpayer. Furthermore, this ruling does not address the issues of whether Taxpayer is an insurance company or whether premiums paid to Taxpayer are deductible under section 162 of the Internal Revenue Code.

Sincerely,

_____

W. Edward Williams
Senior Technical Reviewer
Branch 1
Associate Chief Counsel (International)

Enclosures:

Copy of approved Closing Agreement
Copy for section 6110 purposes

CLOSING AGREEMENT ON FINAL DETERMINATION COVERING SPECIFIC MATTERS

Under section 7121 of the Internal Revenue Code of 1986,

and the Commissioner of Internal Revenue make the following closing agreement:

WHEREAS, under the business profits article and the other income article (Article 7 and Article 23 of the Income Tax Treaty Between the Netherlands and the United States signed December 18, 1992) (the "Treaty"), insurance or reinsurance premiums paid to a resident of the Netherlands are exempt from the Federal excise tax imposed by section 4371 *et seq.* of the Internal Revenue Code of 1986, as amended, (the "Code") to the extent that the Dutch insurer does not reinsure such risks with a person not entitled to exemption from such tax under the Treaty or another convention and only if the insurer or reinsurer qualifies under Article 26 of the Treaty.

WHEREAS, Section 3.02 of Rev. Proc. 92-39, provides that if a treaty permits an exemption from tax only to the extent that the foreign insurer or reinsurer does not reinsure the risks with a person not entitled to an exemption on such policy, the person required to remit the tax may consider the policy exempt only if, prior to filing the return for the taxable period, such person has knowledge that the foreign insurer or reinsurer has entered into a closing agreement to be liable as a United States taxpayer for Federal excise tax due under section 4371 *et seq.* of the Code on premiums from policies reinsured with reinsurers that are not entitled to exemptions from the excise tax under the Treaty or any other convention and on premiums paid or accrued when the Dutch insurer or reinsurer did not qualify under the treaty for exemption from the excise tax imposed by section 4371 *et seq.* of the code.

WHEREAS, the foreign insurer and reinsurer represents that it is and will continue to be eligible for benefits under the convention; and

WHEREAS, the foreign insurer or reinsurer (hereinafter referred to as "the taxpayer") wishes to have its policies of insurance or reinsurance considered exempt from tax under the treaty: IT IS HEREBY DETERMINED AND AGREED THAT:

(1) Taxpayer shall, for purposes of this closing agreement, be liable as a United States Taxpayer for the Federal excise tax due under section 4371 *et eq.* of the Code on premiums from policies reinsured with reinsurers that are not entitled to exemptions from the excise tax under the Convention or any other convention and from policies issued to outstanding when taxpayer did not qualify under the Convention for exemption from the excise tax imposed by section 4371 *et seq.* of the code.

(2) (a) Returns of Federal excise tax due under and pursuant to this closing agreement and section 4371 *et seq.* of the Code shall be made by Taxpayer, or on Taxpayer's behalf, by filing Form 720, Quarterly Federal Excise Tax returns for each return period covered by this closing agreement.

(b) If Taxpayer reinsures, in whole or in part, a policy of insurance or reinsurance with any person(s) not entitled to exemption from the excise tax under the Treaty or any other convention or if Taxpayer issues or has outstanding a policy or policies when the Taxpayer did not qualify under the Convention for exemption from the excise tax imposed by section 4371 *et seq.* of the Code, the tax reportable on the return, Form 720, shall be computed on the basis of the percentage of such policy reinsured or on the basis of the premium accrued or received during the time period when Taxpayer did not qualify for exemption under the Treaty. For purposes of the preceding sentence, Taxpayer may consider a reinsurer to be entitled to exemption from the excise tax under the Treaty or another treaty if the reinsurer is a party to a closing agreement with the Internal Revenue Service under this Treaty or another treaty, or the reinsurer provides evidence that it is a resident of the United States or a country with which the United States has in effect a convention that waives the excise tax without an explicit "anti-conduit" clause.

(c) Such returns shall be filed with the Director, Internal Revenue Service Center, Philadelphia, Pennsylvania 19225, U.S.A.

(d) Taxpayer, or Taxpayer's authorized representative, shall make the required Federal tax deposits of the Federal excise tax in such manner and at such times as are prescribed by regulations and explained in the instructions for Form 720.

(3) Taxpayer agrees that, for purposes of determining its Federal excise tax liability pursuant to this closing agreement and for purposes of verifying Taxpayer's entitlement to benefits under the Convention, Taxpayer will maintain for a period of six years from the end of each taxable period to which this closing agreement applies accounts and records of items of insurance and reinsurance that will be made available upon written request by the Internal Revenue Service at the place mutually agreed upon by the Service and Taxpayer. Taxpayer will also maintain for six years and make available for inspection records to establish eligibility for Convention benefits. Taxpayer will be allowed 60 days, or other period of time determined as reasonable by the Assistant Commissioner (International), within which to make available its accounts and records.

(4) If it is determined that there is an underpayment in respect of any excise tax determined to be due pursuant to this closing agreement and section 4371 *et seq.* of the code, the Internal Revenue Service shall issue a statement of notice and demand for the tax due plus any interest and applicable penalties. Notice of any underpayment shall be sent to the Taxpayer at the name and address shown on Form 720, if a Form 720 was filed for the period for which an underpayment is determined by the Internal Revenue

Service, or otherwise to the Taxpayer's registered address in the Netherlands. Payment of all additional amounts due shall be made in accordance with the terms specified in the statement of notice and demand. Collection of such amounts not paid per notice and demand shall be in accordance with paragraph 5 hereof.

(5) (a) Taxpayer shall, as security for payment of tax, cause an irrevocable letter of credit to be issued by a United States bank that is a member of the Federal Reserve System or a United States branch or agency of a foreign bank that is on the National Association of Insurance Commissioners list of banks for which letters of credit may be accepted, in favor of the Internal Revenue Service in the amount of $75,000 or such amount as may from time to time be mutually agreed upon by Taxpayer and the Service. Such letter of credit must be in effect within 30 days of the date that the closing agreement is signed for the Commissioner of Internal Revenue.

(b) Such letter of credit may be drawn upon after and to the extent that:

(1) The Service issues a statement of notice and demand for any tax due shown on a Form 720 (original, amended or substitute for return) that is not paid with such return; or

(2) Any proposed additional excise tax due shall have been sustained by the Internal Revenue Service Regional Director of Appeals having jurisdiction over such matters, or

(3) The time for filing a protest of such proposed additional tax due shall have expired, provided that the statement of notice and demand shall have been issued as provided in paragraph 4 hereof

(c) If, after the conditions in paragraph 5(b) hereof have been met, the tax, interest, and any applicable penalties, are not paid in accordance with the terms of the statement of notice and demand, collection of such amounts will be made by resorting to such letter of credit, to the extent thereof, before any levy or proceeding in court for collection is instituted against Taxpayer.

(d) If such letter of credit is drawn upon, it must be reinstated to (amount as may have been agreed upon by the Service and Taxpayer), within 60 days after the date drawn upon.

(6) (a) Solely by reason of Taxpayer and the Commissioner having entered into this closing agreement, any person otherwise required to remit the federal excise tax on foreign insurance or reinsurance policies pursuant to section 46.4374-1(a) of the Excise Tax Regulation may consider premiums paid to Taxpayer after the effective date of this agreement as exempt under the Treaty from the Federal excise tax.

(b) Taxpayer agrees that the Commissioner, or his or her authorized delegate, may disclose Taxpayer's name as an insurer or reinsurer that qualifies for exemption from the excise tax under the Treaty by publication or otherwise.

(7) (a) This closing agreement shall include, as an attachment hereto, a statement from the Competent Authority of the Netherlands, with an English translation, certifying that Taxpayer is a resident of the Netherlands in the Treaty.

(b) The statement certifying to the residency of the taxpayer shall be effective for a period of 3 calendar years beginning with the year of receipt. The taxpayer agrees to renew the certificate of residency every three years, and its own certification of eligibility for benefits under the Convention every year, on or before the expiration date of the original certificate, and to provide an original and one copy of the recertification along with a photocopy of this closing agreement to:

Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, DC 20224, U.S.A.
Attn: CC:INTL:1

Taxpayer also agrees to notify the Competent Authority of the Netherlands and the Internal Revenue Service of any change that may result in its disqualification for receiving Treaty benefits.

(8) (a) This closing agreement shall be effective for the taxable period immediately following the taxable period within which the agreement is signed by the Commissioner. This agreement shall thereafter continue in effect unless terminated as provided by paragraph (b) of this paragraph.

(b) This agreement may be terminated by either Taxpayer or the Commissioner by giving the other written notice of the notifying party's intent to terminate. The decision to terminate is solely at the discretion of the party giving such notice. This agreement shall be terminated on the last day of the return period within which the written notice of termination is given.

(c) Taxpayer hereby agrees to file a return, Form 720, marked "Final return" for the taxable period within which this agreement terminates pursuant to paragraph 8(b) hereof and to furnish a duplicate of such "Final Return" to:

Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224, U.S.A.
Attn: CC:INTL:1

(d) Taxpayer agrees that the letter of credit issued pursuant to paragraph 5 hereof shall remain in effect for a period of not less than 60 days after the "Final Return" has been filed in accordance with subparagraph (c) hereof, or until the examination of Taxpayer's returns is completed and any additional tax due has been paid, whichever is later.

WHEREAS, The determination set forth above are hereby agreed to by said taxpayer;

NOW THIS CLOSING AGREEMENT WITNESSETH, that said taxpayer and said Commissioner of Internal Revenue hereby mutually agree that the determination set forth shall be final and conclusive, subject, however, to reopening in the event of fraud, malfeasance, or misrepresentation of material facts and provided that any change or modification of applicable statutes or tax conventions will render this agreement ineffective to the extent that is dependent upon such statutes or tax treaties.

IN WITNESS WHEREOF, the above parties have subscribed their names to these
presents, in triplicate.

Signed this (Date) day of (Month), (Year)

By _____

Title _____

Commissioner of Internal Revenue

By _____
Michael Danilack, III
Associate Chief Counsel (International)
Date _____

By _____
John T. Lyons
Assistant Commissioner (International)
Date _____