Transfer pricing in The Netherlands: overview

Lucia Sahin and Jaap Andriessen, Loyens & Loeff

GLOBAL GUIDE 2017/18
TRANSFER PRICING

TRANSFER PRICING: GENERAL OVERVIEW

1. What are the main characteristics of transfer pricing law and policy in your jurisdiction?

Dutch corporate taxation is based on the “total profit” concept. The total profit concept provides that profit from an enterprise is the amount of the aggregate benefits that are derived from an enterprise, regardless of the name or form of the benefits (Article 3.8, Personal Income Tax Act (PITA)). The arm’s length principle is implicitly included in the roots of the Dutch tax system. Any advantages or disadvantages originating from the shareholder’s relationship must be eliminated from the total profit of the taxpayer. Around 2002, under pressure from the EU, The Netherlands explicitly included the arm’s length principle in legislation in Article 8b of the Corporate Income Tax Act (CITA).

This clarifies that under Dutch tax law, companies that are engaged in transactions with group companies are taxed on the profit that they would have realised if they had applied conditions that would also be applied between independent parties under market conditions.

The OECD Model Double Taxation Convention on Income and on Capital 1977 (OECD Model Tax Convention 1977) and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations play an important role in interpreting the arm’s length principle in The Netherlands. It is the main guidance used by the Tax and Customs Administration (Belastingdienst).

Additionally, specific guidance is given by the State Secretary of Finance in the Transfer Pricing Decree of 14 November 2013, IFZ 2013/184M (2013 Decree), which is binding for the Tax and Customs Administration.

2. What have been the main developments of significance for transfer pricing law and practice in your jurisdiction in the past 12 months?

In 2016, the Dutch legislative framework for local file and master file obligations was included in the Corporate Income Tax Act. These new requirements are an implementation of Article 13 of the base erosion and profit sharing (BEPS) action plan (Transfer Pricing Documentation and Country-by-Country Reporting, BEPS 13). Entities of a multinational group must comply with these requirements if the group’s revenue exceeded EUR50 million in the previous year (for example, a company must comply for 2016 if the 2015 group revenue exceeded EUR50 million).

Another recent development is the automatic exchange of information on advance pricing agreements (APAs) and other tax rulings. This information is exchanged with the countries concerned (for example, those involved in the transaction and the jurisdiction of the parent entity). The exchange of information on rulings is an implementation of the EU Directive 2015/2376, amending Directive 2011/16/EU on administrative co-operation in the field of taxation. This Directive implements Action 5 of the BEPS action plan (Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, BEPS 5).

The requirement to exchange information on rulings applies to both newly concluded rulings and any APA or ruling concluded after 1 January 2012. Taxpayers have the opportunity to provide the Tax and Customs Administration with the information that will be exchanged, but it is ultimately at the discretion of the Tax and Customs Administration what will be exchanged with the other countries. As APAs are now automatically exchanged, taxpayers seem less eager to conclude APAs with the tax authorities. Consequently, certainty in advance is not requested as much as before.

The worldwide trend of tax authorities being increasingly focussed on transfer pricing can also be seen at the Tax and Customs Administration in the increasing number of transfer pricing audits taking place.

TRANSFER PRICING LEGISLATION

Federal or national legislation

3. What is the main federal (national) legislation regulating transfer pricing in your jurisdiction?

Primary legislation

Article 3.8 of the Personal Income Tax Act (PITA) provides that advantages or disadvantages stemming from a shareholder’s relationship are eliminated from the profit of the taxpayer. Before the arm’s length principle was codified in the Corporate Income Tax Act (CITA), transfer pricing adjustments, both for personal as for corporate income tax purposes, were made based on Article 3.8 of the PITA (which also applies to corporate taxpayers through Article 8 of the CITA). Since 1 January 2002, the arm’s length principle has been implemented in Article 8b of the CITA. The codification is a translation of the arm’s length principle as provided in Article 9 of the Model Tax Convention on Income and on Capital (MTC), except for some slight differences. Additionally, paragraph 3 of Article 8b of the CITA provides the documentation requirements, which were expanded as of 1 January 2016 to include local file and master file obligations.

The Netherlands only has transfer pricing legislation at a state level.

Article 8b CITA

Article 8b CITA provides that:

- If an entity, directly or indirectly, participates in the management or supervision, or in the capital of another entity, and the agreed or imposed conditions (transfer prices) of the transactions between these entities deviate from the conditions that would have applied in the market between independent parties, the entities’ profit is determined as if the arm’s length conditions had been agreed on.

- The first paragraph applies in a similar manner if a person, directly or indirectly, participates in the management or supervision, or the capital of the one and the other entity.

- The entities must include information in their administration, which shows how the transfer prices in question were established, and from which it can be deduced whether the
transfer prices that were established would have been agreed on in the market between independent entities.

Related entities. Article 8b of the CITA only applies to legal entities subject to corporate income tax (Article 2, paragraph 1 sub b, General Tax Act (GTA)). Entities include, among others:

- Companies.
- Partnerships.
- Associations.
- Trusts.

Article 8b does not apply to non-arm’s length dealings between an individual shareholder and its company. For those transactions, Article 3.8 of the PITA still applies.

From the parliamentary proceedings, to qualify as a related entity, the shareholder, supervisor or manager must have sufficient authority to influence the transfer prices used for the transactions among the entities involved. It is determined on a case-by-case basis whether sufficient authority is present. If the taxpayer believes there is not sufficient authority to influence the conditions agreed on, they can request the tax inspector’s confirmation that the entities do not qualify as related entities.

Article 8b of the CITA covers transactions among both domestic related entities and internationally related entities. Therefore, cross-border transactions are treated in the same manner as domestic transactions, though they are clearly more often under scrutiny of the Tax and Customs Administration.

Adjustments. According to the 2013 Decree (see Question 1), the application of transfer pricing methods will not result in a set price, but rather in a range of prices that may have been agreed by market parties (as prices may differ because of the negotiating positions of the parties). To increase the reliability of comparables, statistical methods such as determining the interquartile range can be applied. If the transfer price used falls within the interquartile range, it is considered to be at arm’s length and no adjustment must be made. If the transfer price falls outside the interquartile range, and the taxpayer cannot substantiate the deviation, an adjustment is made.

An adjustment will only be made if the remuneration falls outside the interquartile range that has been determined for the specific year, as well as outside the interquartile range that has been determined by using multiple year data (that is, data of the specific year and prior years). Subsequently, if it is reasonable that one point within the interquartile range corresponds best with the conditions of the inter-company transaction, an adjustment of the transfer price takes place to this point. If no such point can be identified, The Netherlands takes the position that an adjustment must take place to the median value of the interquartile range. If, and to the extent the transfer price is already within the range, an adjustment of this transfer price to a new point within the range is only possible if the taxpayer substantiates the reasons for the adjustment, provided it is contractually agreed on and paid.

Secondary legislation

In addition to Article 8b of the CITA, several decrees have been issued by the State Secretary of Finance, which serve as a clarification of Dutch policy regarding transfer pricing. The decrees bind the Tax and Customs Administration, but not the taxpayers. The main decree is the 2013 Decree, which provides the Dutch approach to transfer pricing (see Question 1). The decree fills in the blanks (intentionally) left by the Organisation for Economic Co-operation and Development in its transfer pricing guidelines.

State or local transfer pricing legislation

4. What additional regional (local state) legislation and revenue authorities are relevant to transfer pricing in your jurisdiction?

The Netherlands does not have additional local legislation relevant to transfer pricing.

International transfer pricing treaties and agreements

5. What are the main international treaties and agreements that apply in your jurisdiction?

As a member of the Organisation for Economic Co-operation and Development and the European Union, The Netherlands is influenced by these institutions in relation to transfer pricing.

For further information on the position of the OECD Model Convention and the EU Joint Pricing Forum in Dutch tax law, see Question 6.

6. What impact do international treaties and agreements have in your jurisdiction?

OECD Model Tax Convention and Guidelines

The arm’s length principle is provided in Article 9 of the OECD Model Tax Convention on Income and on Capital (MTC). The application of the arm’s length principle is elaborated in the commentary to the MTC and in the Transfer Pricing Guidelines. As a member of the OECD, The Netherlands endeavours to include a clause in accordance with Article 9 in its bilateral treaties. The bilateral treaties can restrict the taxation right originating from domestic law, but cannot create taxation rights. The MTC forms the basis of treaty negotiations, as stated by the State Secretary of Finance (Tax Treaty Policy letter, 11 February 2018).

During the parliamentary proceedings of Article 8b of the Corporate Income Tax Act (CITA) it was mentioned that the Transfer Pricing Guidelines affect Dutch legal practice. The legislator clarified this statement by saying that the Transfer Pricing Guidelines are considered to be equivalent to the opinions of authoritative writers and the conclusions of the Advocate General of the Supreme Court. However, the Transfer Pricing Guidelines were incorporated in policy rules for the Tax and Customs Administration by means of the decree 21 August 2004 (IJZ2004/4680M). In the 2004 Decree, the State Secretary concluded that based on Article 3.8. Personal Income Tax Act, in principle, the Transfer Pricing Guidelines have direct effect in The Netherlands. In the 2013 Decree (see Question 1), the State Secretary repeated that he assumed the Transfer Pricing Guidelines, in principle, have a direct effect on Dutch tax law. These conclusions of the State Secretary of Finance on the direct application of the Transfer Pricing Guidelines in Dutch practice could be considered questionable, given the earlier mentioned considerations of the legislator as well as case law of the Supreme Court.

EU Joint Transfer Pricing Forum

An important objective of the EU Joint Transfer Pricing Forum (JTPF) is to remove double taxation and administrative burdens that impede an efficient implementation of transfer pricing rules. The Netherlands follows the recommendations of the EU JTPF to a large extent, unless The Netherlands has expressed its reservations.
7. What is the overall national transfer pricing policy in your jurisdiction?

Since 2001, the State Secretary of Finance has issued several decrees relating to transfer pricing. The decrees provide guidance on the interpretation and application of transfer pricing legislation and related issues in specific situations. The Tax and Customs Administration are bound by the decrees, but taxpayers can appeal to the courts on any provision applied by the tax authorities that originates from the decrees. If taxpayers take positions that deviate from those stated in the decrees, they can expect discussions with the Tax and Customs Administration, which may lead to controversy and potentially to litigation.

The most recent transfer pricing decree is the Transfer Pricing Decree of 14 November 2013 (IFZ 2013/184M). This replaces the transfer pricing decrees from 30 March 2001 (IFZ2001/295M) and 21 August 2004 (IFZ2004/680M). The 2013 Decree explains the views of the Tax and Customs Administration on recent Dutch case law in relation to financial transactions. The 2013 Decree also documents certain positions of the Tax and Customs Administration that were already taken in tax audits and advance pricing agreement processes. Several other decrees have also been updated, such as the:

- Advance Pricing Agreement Decree (DGB2014/3098).
- Decree on Financial Service Entities (DGB2014/3101).
- Question and Answer Decree (DGB2014/3102).

On 5 October 2015, the Dutch government published an appreciation letter regarding the publication of reports on the various base erosion and profit shifting (BEPS) action points. In this letter the State Secretary mentions that action points 8 to 10 of the BEPS action plan, "Aligning Transfer Pricing Outcomes with Value Creation" (BEPS B-10), are fully in line with the Dutch policy as included in the 2013 Decree.

The 2013 Decree includes four themes that reflect the position taken by the Tax and Customs Administration when conducting audits and reviewing APA requests. These four themes are:

- Every transaction must add value.
- People are the most important factor.
- A two-sided perspective must be taken.
- The (economic) behaviour of the parties is decisive, while the content of contracts is secondary.

Although the State Secretary indicated that the Dutch transfer pricing policy is fully in line with BEPS 8 to 10, some nuances must be understood.

Every transaction must add value

In Chapter 2 of the 2013 Decree, the State Secretary provides that each taxpayer needs to clearly consider more attractive alternatives before entering into a transaction with an affiliated party. In extreme cases, it is possible to disregard transactions, if more attractive alternatives are available, whereby he refers to paragraph 1.65 of the Transfer Pricing Guidelines. In his analysis, he refers to various paragraphs of Chapter 9 of the Transfer Pricing Guidelines (among others 9.38, 9.173, 9.174 and 9.175). The State Secretary appears to assume that both parties have all the relevant information at their disposal and that they will act according to a specific economic theory (contract theory). Unfortunately, third parties often act less rationally and also enter into agreements if the "total amount of cake" does not increase, but their share of the cake does.

Furthermore, the economic rationale of risk allocations must be reviewed, where elements of the degree of actual control and financial capacity to incur the risks play an important role. This requirement is in line with the revisions to Section D of Chapter I of the Transfer Pricing Guidelines, described in BEPS 8 to 10, which aims at shifting the focus to actual control and financial capacity to incur risk. If risks cannot be controlled, the 2013 Decree prescribes that they are assumed by the most diversified entity.

An example is given in relation to the transfer of intangible assets. The State Secretary of Finance provides that a transfer of tangible or intangible assets to an affiliated party, which does not have the functionality to control the risk of these assets and does not add value to the asset, cannot be considered to be at arm's length (Chapter 8, 2013 Decree). Such transfer of assets would only take place if both parties to the transaction aim at an overall increase in profitability and if both parties are capable of controlling the risks they are said to assume. The increase of profitability due to the transferee being subjected to a lower effective tax rate does not lead to a different conclusion according to the State Secretary, as the transferee would be fully dependent on the knowledge and skills of the transferor. Further to this analysis, the State Secretary refers to paragraph 9.190 of the Transfer Pricing Guidelines, where an example of the transfer of intellectual property rights (IPRs) to a small company is given. We appreciate that the State Secretary wants to scrutinise situations where intellectual property rights (IPRs) are transferred by Dutch taxpayers to foreign (low-taxed) group companies which have limited substance. However, the State Secretary seems to assume that the transferee should have its own qualified personnel that have the required expertise to control the associated risks. In practice, transfers of IPRs between third parties are observed, where such parties rather engage experts from outside. Therefore, this argument appears to be questionable and unfounded. Under BEPS 8, this provision may be nuanced since, depending on the control of the functions relating to the development, enhancement, maintenance, protection and exploitation (DEMP) of the IPR, plus functions and financial capacity, profits are arguably attributed to the IPR owner. Consequently, an adjustment of the attributable profit may take place rather than ignoring the transaction. The State Secretary of Finance does acknowledge that in cases where IPRs were not transferred within the group and the legal owner does not execute the relevant functions itself the owner should be entitled to a lower remuneration.

People are the most important

According to the 2013 Decree, the location of people is the most important element when allocating risks, returns and even capital. The statement that people, and more specifically own employees, are the most important is also reflected in the example of the transfer of IPRs to a group company that misses functionality. According to BEPS 8 to 10 the transfer pricing should be in line with the DEMP functions performed by the group, and which also reflect the presence of employees.

When discussing intra-group procurement activities in Chapter 9 of the 2013 Decree, the State Secretary indicates that a routine remuneration, that is, a cost-based remuneration is most appropriate in determining the transfer prices used for a procurement office that has a routine character. Contrary to the State Secretary's view, BEPS 8 to 10 states in paragraph 7.15 that in cases like procurement, it would be more appropriate to incorporate a commission element into the price of the product or service, and not charge a service fee. The profit-split method can be used when the activities are part of the core activities of the multinational groups (MNE). Based on the 2013 Decree it can be concluded that if the procurement office realises high volume discounts, it is to pass these on to the group companies for whom the procurement activities are carried out, unless the discounts are due to the specific knowledge and skills of the procurement office.

This is in line with the position that is taken by the Tax and Customs Administration in practice. However, this position deviates from the contents of the relevant chapters of the Transfer Pricing global.practicallaw.com/transferpricing-guide
Guidelines, also after the revision of the Transfer Pricing Guidelines as proposed in BEPS 8 to 10, and the position taken by many foreign tax administrations. Charges for activities such as procurement may often be included in the price of products or services, and, therefore, a separate charge of fees may not be appropriate.

The two-sided perspective
The State Secretary indicates that a comparison of the conditions takes place from the perspective of all parties involved in the transaction (paragraph 9.63, Transfer Pricing Guidelines). This is in line with BEPS 8 to 10, which prescribes that the perspective of each of the parties should be considered. The State Secretary notes that in practice, transactions among unrelated entities will only take place if each party expects an increase in its profit.

The two-sided perspective is explicitly mentioned in Chapter 12 of the 2013 Decree, where financial transactions are discussed. The State Secretary takes the position that loans that are provided to group companies that have a credit rating lower than BBB- (or which becomes lower than BBB- due to entering into the financial transaction) are deemed to lead to non-arm’s length results, unless the taxpayer makes it plausible that entering into the financial transaction leads to an arm’s-length result for both the lender and the borrower. From the perspective of the lender, among other things, it is important to take into account whether it has a diversified portfolio. From the borrower’s perspective, it should be determined whether the leverage has a negative effect on the financing expenses of the company and as a result decreases the return on equity. A third party is said not to attract debt financing if this would result in a fall of its credit rating below BBB- (investment grade). If, and to the extent that as a result of an intragroup financial transaction the credit rating of a group company falls below investment grade, according to the 2013 Decree, this is deemed to lead to a non-arm’s-length outcome unless the taxpayer proves otherwise.

The economic behaviour of parties is decisive, the content of contracts is secondary
Attention must be given to the manner in which third parties would transact under comparable circumstances. The State Secretary explains in Chapter 2 of the 2013 Decree that a transfer pricing analysis starts with the transaction that is executed between affiliated parties (paragraph 1.64, Transfer Pricing Guidelines). In his view, the contents of legally binding agreements are the starting position, unless the factual behaviour or the behaviour under the contract theory would deviate from the contents of these agreements. This view can also be found in BEPS 8 to 10.

8. What are the main transfer pricing methodologies that are used to determine an arm’s length price in your jurisdiction?

All transfer pricing methods described in the Transfer Pricing Guidelines can be applied. The taxpayer must explain why a certain method has been deemed the most appropriate for the determination of the transfer pricing. This argument will usually be based on the commentary provided in the Transfer Pricing Guidelines. The Netherlands does not apply the “best method rule”. In practice, due to the availability of reliable cost categories and net profit margins of comparables in European databases, the transaction net margin method is applied most frequently.

9. To what extent, if any, does your jurisdiction follow the OECD transfer pricing guidelines?

See Question 6.

10. Is it possible to obtain any clearances or advance pricing agreements from the revenue authorities in respect of transactions?

Clearances
The Netherlands is known for its well-functioning advance pricing agreement (APA) practice, where the Tax and Customs Administration has a preference to conclude APAs. APA procedures are efficient and are usually finalised within a couple of months.

Over the last number of years, the Tax and Customs Administration has pursued a high level of transparency with taxpayers through co-operative compliance, known as horizontal monitoring. The key principles of horizontal monitoring are:

- Mutual trust.
- Understanding.
- Transparency.

In return for a taxpayer’s transparency, the Tax and Customs Administration is prepared to commit itself to resolving solving material issues, including transfer pricing issues, more quickly. A precondition for horizontal monitoring is that the taxpayer is in control (through the establishment of a “tax control framework”). Transfer pricing is an important element of taxpayers being in control. Some taxpayers choose not to enter into a formal horizontal monitoring agreement with the Tax and Customs Administration but act in a manner that is horizontal monitoring compliant.

Advance pricing agreements
To obtain an advance pricing agreement, the taxpayer must file a formal request with the Tax and Customs Administration. This request must be sufficiently substantiated, usually by providing an extensive transfer pricing analysis. The filing requirements for an APA have been provided in several decrees from the State Secretary of Finance. According to these decrees, the application for an APA must include all details regarding the transaction, such as (Decree of the State Secretary of Finance of 3 June 2014, DGB 2014/3098, paragraph 6):

- The entities or permanent establishments involved.
- Other jurisdictions involved in the transaction.
- The proposed transfer pricing method.

The APA request must also include an extensive comparability analysis (that is, a benchmark).

An APA is binding for both parties, provided that the facts and assumptions remain as stated in the APA. The Tax and Customs Administration have the right to terminate the APA if the facts and circumstances change. The taxpayer must notify the Tax and Customs Administration of relevant changes.

11. Where the revenue authorities make a transfer pricing adjustment, what is the effect of that adjustment on the other party to the transaction?

A transfer pricing adjustment in The Netherlands does not have a direct impact on the profit of the other party to the transaction. Moreover, a transfer pricing adjustment will, in principle, always result in a secondary transaction. This can take the form of:

- An adjustment in current account.
- A deemed dividend distribution.

global.practicallaw.com/transferpricing-guide
• An informal capital contribution.
A secondary transaction can result in a secondary adjustment (that is, taking into account interest income or the imposition of dividend withholding tax). However, not all countries employ the same system. If the taxpayer demonstrates that:
  • The other state does not recognise the secondary transaction as a result of which it does not give a credit for the dividend withholding tax.
  • There is no abuse of the rule on evading dividend withholding tax (Transfer Pricing Decree 2013).
A comparable relief is not provided to the taxpayer if the interest deduction is denied in the other state.

12. What are the reporting and other administrative obligations that apply to help the authorities evaluate transfer prices?

The obligation to include transfer pricing documentation in the taxpayer’s administration is needed to provide sufficient information to the tax authorities to assess whether the transfer price applied is at arm’s length. The documentation must consist of a comparability analysis as provided for in Chapter 1 of the Transfer Price Guidelines (this is not the extensive comparability analysis as required when filing for an advance pricing agreement). Based on the comparability analysis, taxpayers should be able to justify their choice of a particular transfer pricing method. Although a benchmark analysis is not mandatory, it is recommended that the taxpayer conducts one (parliamentary proceedings, Second Chamber, 2001-2002, 28 034, No. 5, p. 36).

The transfer pricing documentation must, in principle, be available at the moment that the transaction is carried out. However, if the taxpayer does not have the required transfer pricing documentation, the tax inspector will provide a reasonable period to prepare it. What is considered a reasonable period can range from four weeks up to three months, depending on the complexity of the transactions.

Not complying with the documentation requirements may lead to a shift of the burden of proof, from the tax authorities to the taxpayer. The standard of proof will not be increased. It is sufficient to show that the used transfer pricing is plausible (as opposed to proving it precisely).

In the fiscal year 2016 (that is, book years commencing on or after 1 January 2016), Dutch corporate taxpayers must comply with additional documentation requirements if they are part of a multinational group with an annual turnover of more than EUR50 million (Chapter VIIa, CIT). The new documentation requirements have been implemented in accordance with the Organisation for Economic Cooperation and Development's base erosion and profit shifting (BEPS) Action 13. The obligation is twofold:
  • A master file which must contain information regarding the overall group structure, internal dealings and intellectual property.
  • A local file which must contain information regarding the constituent entity that is located in The Netherlands and its part in the internal dealings (that is, transactions with group companies).

The documents must be in the taxpayer’s control by the deadline for filing the 2016 tax return (that is, in principle before 1 June 2017 for a financial year in accordance with the calendar year, which period may be extended in line with any extension obtained for filing the corporate income tax return). These new requirements have been implemented in accordance with the model texts of BEPS 13.

Further to the local file and master file obligations, The Netherlands also implemented the country-by-country reporting obligations into Dutch legislation for constituent entities which are part of a group with an annual consolidated group revenue of at least EUR750 million. The country-by-country reports allow for better risk assessment by various tax authorities. If the risk assessment shows a high risk of profit shifting, the tax authorities can request more information in the form of the master files and local files from taxpayers to further review the transfer pricing in place.

TRANSFER PRICING COURTS AND DISPUTE RESOLUTION

National courts and transfer pricing dispute resolution

13. What are the relevant national courts and what dispute resolution mechanisms exist for transfer pricing issues in your jurisdiction?

In The Netherlands, transfer pricing disputes are often settled by compromise. Alternatively, parties can choose to enter into a mediation process. This explains the scarcity of Dutch case law on transfer pricing disputes. If a taxpayer is confronted with double taxation, the Dutch competent authorities are also willing to cooperate at an early stage to remove the double taxation either through a mutual agreement procedure (MAP) or an arbitration procedure.

Many transfer pricing disputes in The Netherlands are solved in personal discussions with the tax inspector. In transfer pricing discussions, the tax inspector of the Dutch taxpayer generally is accompanied by a member of the transfer pricing co-ordination group of the Tax and Customs Administration. The Tax and Customs Administration's goal is often to reach a compromise. Dutch taxpayers frequently settle a discussion by entering into a settlement agreement in which the parties agree the transfer pricing method and margin to be applied to the transactions under consideration. To avoid future disputes, the taxpayer frequently files for an advance pricing agreement for subsequent years.

If the Tax and Customs Administration and taxpayer do not reach a compromise, the taxpayer can file an objection to the assessment. If the objection is denied then the taxpayer can bring its claim to the lower court. The court proceedings are comparable to any other Dutch tax litigation. In the court proceedings, the starting point of the Tax and Customs Administration will generally be their initial position prior to the settlement agreement discussions. This means their last bid in the settlement discussions is off the table. This means there is less incentive for taxpayers to litigate.

Broadly, the Dutch judicial system has three courts:
  • The Lower Court.
  • The Court of Appeal.
  • The Supreme Court.

In the first two courts, it is possible to litigate about factual matters. The Supreme Court only rules on the application of the law and does not rule on factual matters. After the Supreme Court has ruled in a case, it is possible for the taxpayer to file an appeal with the European Court of Justice.

International courts and transfer pricing dispute resolution

14. What international dispute resolution methods are available in your jurisdiction, and which are preferred for transfer pricing issues?

If taxpayers are confronted with double taxation as a result of a transfer pricing correction imposed either by the Tax and Customs Administration or foreign tax authorities, they can choose to file for

global.practicallaw.com/transferpricing-guide
a mutual agreement procedure (MAP) or start an arbitration procedure. A MAP is possible if The Netherlands has concluded a bilateral tax treaty that provides for a MAP. Initiation an arbitration procedure is in principle possible for EU situations under the Convention 90/436/EEC on the elimination of double taxation in connection with transfer pricing (Tax Arbitration Convention). Bilateral tax treaties may also contain an arbitration provision. The difference between a MAP and an arbitration procedure is that, in a MAP states have an obligation to make an effort to resolve the particular double taxation that has arisen, while in general in an arbitration case, the double tax treaty imposes an obligation on the treaty states to remove the double taxation. The Netherlands endeavours to include both types of provision in its treaties and in an EU context, they are obliged to remove the double taxation. In practice, arbitration is a more desired procedure.

The Directorate of International Fiscal Affairs in the Dutch Ministry of Finance is the competent authority to assist taxpayers that are confronted with taxation that is not in accordance with a treaty (Transfer Pricing Decree 2013). The Tax and Customs Administration's policy has always been to proactively avoid this type of situation and initiate consultations with taxpayers and foreign tax authorities at an early stage. This implies that consultations can be started before the national legal procedures have been applied. The Netherlands has confirmed this in a specific decree on MAPs (Decree of the State Secretary of Finance, 29 September 2008, No. IFZ2008/248M). The Dutch competent authorities endeavour to finalise a MAP within two years.

In the State Secretary of Finance's experience, in several cases, double taxation can be fairly easily removed in a consultation process by exchanging facts and circumstances which are relevant for the case with the other state. Consequently, the Tax And Customs Administration are willing to start talks with a treaty partner at an early stage, when the taxpayer expects that because of a transfer pricing correction imposed by the other state, they will be confronted with double taxation. According to the 2013 Transfer Pricing Decree taxpayers can file a request for a MAP when they think there is a situation in which double taxation may arise. This approach has already been applied in practice.

Provisions designed to strengthen the MAP are contained in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, commonly referred to as the Multilateral Instrument (MLI). The State Secretary of Finance has stated in his Appreciation Letter that the Dutch tax treaty policy already meets the minimum requirements as demanded by the MLI, which are an implementation of the Organisation for Economic Co-operation and Development's base erosion and profit shifting Action 14 on dispute resolution mechanisms. The minimum requirement under the MLI is for states to include a MAP clause in tax treaties between all participating jurisdictions. The Netherlands intends to opt for inclusion of a mandatory arbitration clause in its tax treaties. This goes beyond the minimum requirements of the MLI and therefore will only be included in tax treaties with jurisdictions which will also opt for this clause.

TRANSFER PRICING CASE LAW

15. What are the most significant case law developments on transfer pricing in your jurisdiction?

Since transfer pricing disputes are often settled by compromise and many taxpayers agree transfer pricing in advance with the Tax and Customs Administration by concluding an APA, Dutch case law on transfer pricing disputes is scarce. Historically, many cases have been won by the taxpayer due to the allocation of the burden of proof. However, recently, various cases have been decided in favour of the Tax and Customs Administration. These cases have concerned aggressive structures with little substance, where transfer pricing arguments were not upheld. These cases had many characteristics of abuse.

Case law from the lower courts is not addressed in this chapter.

Recent cases

Swiss paper trader. The taxpayer (A BV) was involved in purchasing and selling paper. The purchasing and selling activities were carried out by E. E. was the director of A BV, and, together with his wife, held all the shares in A BV. In 1994, a Swiss company was established. The sole director of the Swiss company was a tax adviser that also served as director of various other companies that were registered at the same address. The functions of the Swiss director consisted of preparing the administration, corresponding, invoicing and filing corporate income tax returns.

As of 1996, part of the purchasing and selling of the paper was carried out through the Swiss company. However, E conducted the factual purchasing and selling activities, while using the same office space and phone line as was used for A BV. E was not an employee of the Swiss company nor had he received an order from the Swiss company to purchase and sell the paper. After the inception of the Swiss company, E determined on a case-by-case basis whether a transaction took place from the Swiss company or from A BV. Both entities had the same suppliers of paper, the same products, the same customers and the same carriers. The only difference lay in the invoicing and payment.

The Court of Appeal ruled that the income generated by the Swiss company must be taken into account at the level of the Dutch taxpayer under the deduction of an administrative fee for the Swiss company's services based on a cost-plus of 15%. Certain expenses could not be included in the cost basis, like, factoring and insurance fees. This was confirmed by the Supreme Court (Supreme Court 4 January 2013, No. 11/00762, EBN 2013/77).

In our view, this decision is in line with the approach taken by the Tax and Customs Administration where group companies without sufficient substance are remunerated based on the cost-plus method and the residual profit is allocated to the Dutch taxpayer. It is remarkable that in the Swiss Paper Trader case, the Tax and Customs Administration did not take the position that the Swiss company had a permanent establishment in The Netherlands or that it was effectively managed from The Netherlands.

Starbucks state aid decision. The relevant state aid case for the Dutch transfer pricing practice is the Starbucks case concerning an APA. On 21 October 2015, the final decision of the European Commission in the Starbucks state aid case was published. In the Final Decision, the Commission concluded that the APA concluded between the Tax and Customs Administration and Starbucks Manufacturing EMEA BV (Starbucks Manufacturing) constituted state aid which is prohibited by Article 107 of the Treaty on the Functioning of the European Union. According to the Commission, two aspects of the APA cannot be justified:

- The royalty paid by Starbucks Manufacturing.
- The price charged for green coffee beans by a related entity.

The royalty paid by Starbucks Manufacturing for the use of knowhow did not adequately reflect market value, according to the Commission. Only Starbucks Manufacturing was required to pay for using this know-how whereas no other Starbucks group company or independent roasters to which roasting was outsourced were required to pay a royalty for using the same know-how in essentially the same situation. The Commission found that in the case of Starbucks Manufacturing the existence and level of the royalty meant that a large part of its taxable profits were unduly shifted.

Furthermore, the Commission found that Starbucks Manufacturing's tax base was unduly reduced by the inflated price it paid for green coffee beans to a Swiss group company, Starbucks Coffee Trading Sarl. Due to this high key cost in coffee roasting, Starbucks Manufacturing's coffee roasting activities alone would not actually generate sufficient profits to pay the royalty for coffee roasting know-how. The Commission found that the royalty mainly
shifted profits generated from sales of other products sold to the Starbucks outlets, which represent most of the turnover of Starbucks Manufacturing.

In a letter of 27 November 2015, the Minister and State Secretary of Finance gave a reaction to the Commission's final decision. They stated that the ruling practice is important for maintaining an attractive business climate and that any decision against the ruling practice could have a negative impact on the business climate.

The Netherlands has filed an appeal with the European Court of Justice (ECJ). The ECJ will ultimately rule whether the APA concluded with Starbucks Manufacturing constitutes prohibited state aid.

Historical cases of note

Non-business-like loan case. In this landmark case (25 November 2011, No. 08/05323, BNB 2012/37), the Supreme Court ruled that in order to qualify a loan as (non) business-like, it must be determined whether the interest rate is at arm's length or can be adjusted to an arm's length rate without becoming profit participating. The analysis must be made at the moment that the loan is granted, based on the existing terms, conditions and circumstances of the loan agreement. If a loan is considered to be non-business-like, it has the following consequences:

The arm's length interest rate on a non-business-like loan is set at the rate that the borrower would have paid if it had attracted the loan from a third party under a guarantee from the actual lender, that is, under a deemed guarantee.

A write-off on a non-business-like loan is not tax deductible for the lender.

In the 2013 Transfer Pricing Decree (see Question 1), the State Secretary indicated that, in his view, a loan is deemed to be non-business-like if the borrower has a credit rating that is worse than BBB- (or becomes worse than BBB- as a result of the loan) unless the taxpayer proves otherwise. Furthermore, in his view, if the credit rating of the lender is worse than that of the borrower, a risk-free interest rate must be considered arm's length, since no value can be attributed to the deemed guarantee.

Car importer's case. In this case (Supreme Court 28 June 2002, No. 36 446, VN 2002/34.9), a Dutch taxpayer was involved in the import and sale of cars and other products to the distribution trade. The Dutch taxpayer was a subsidiary of a Japanese group. The Tax and Customs Administration started an audit to verify whether the appropriate transfer prices were used for the car imports. Following the tax audit, the Tax and Customs Administration imposed a higher tax assessment. The taxpayer objected to the higher profit following the transfer pricing adjustment. Reference was made to Article 10 of the double tax treaty between The Netherlands and Japan, which accords with Article 9 of the OECD Model Tax Convention, making the case relevant for more or less all Dutch treaty situations.

The Supreme Court notes that while the parent company can autonomously decide on the transfer prices used, this does not necessarily mean that the transfer prices used should not be considered arm’s length. Further, the Supreme Court noted that the inter-company relationship does not have to be reviewed at a transaction level to determine whether the transactions are at arm's length. A margin that is too low on product B could be compensated by a high margin on products B, C, D and E. The Supreme Court decided in favour of the taxpayer.

Swedish Grandmother case. In the Swedish Grandmother case (Supreme Court, 31 May 1978, BNB 1978/252), the parent company had provided a loan to the taxpayer's Dutch subsidiary. This loan was interest-free and the absence of interest was said to be due to the existing group relationship. The Dutch subsidiary was included in a fiscal unity (Dutch tax consolidation regime with the taxpayer). It was ruled that the benefit for the Dutch fiscal unity, being the amount saved by not having to pay interest, was correctly not included as profit, as it was not derived from the enterprise. The amount of interest that was not paid was qualified as a deemed capital contribution.

TRANSFER PRICING ADJUSTMENTS
Adjustments and penalties

16. Where the revenue authorities make an adjustment of transfer prices for tax purposes, can any other penalties also be imposed in addition to that adjustment?

Dutch legislation does not contain specific penalties relating to transfer pricing. However, the general penalties put down in the General Tax Act (GTA) apply. Further guidance on the imposition of penalties can be found in the Decree Administrative Penalties Tax Authorities.

Depending on the degree of intent to avoid tax or the gross negligence of the taxpayer, penalties may vary from zero to 100% of the additional tax due. If the taxpayer willfully misrepresented the facts in his or her tax return, that is, in case of fraud, a penalty of 50% of the additional tax due can be imposed. In cases of negligent misrepresentation the penalty can be 25%. In either case, in special circumstances the penalty can be doubled to 100% and 50%, respectively. In The Netherlands, a tax adviser can also be fined as an accomplice.

The State Secretary indicated, during the parliamentary proceedings, that due to the complexity of the issues, penalties would only be imposed in cases where it can be demonstrated that a non-arm’s length transfer price has been agreed on following a purely wilful act. Therefore, no penalty would be imposed in the case of gross negligence or conditional intent.

Penalties are a non-deductible item for Dutch tax purposes.

TRANSFER PRICING DEVELOPMENT AND REFORM

17. Are there any current trends, developments or reform proposals that have or will affect the area of transfer pricing in your jurisdiction?

Transfer pricing policy and practice has been affected in many ways over the past few years. The Dutch tax authorities (that is, the Tax and Customs Administration) has found support for the Dutch transfer pricing policy in international initiatives such as the Organisation for Economic Co-operation and Development’s base erosion and profit shifting (BEPS) project. Overall, the Tax and Customs Administration have become stricter and require a more thorough substantiation of the transfer prices applied, and with the implementation of BEPS Action 13 the compliance burden has been increased. With the Commission also entering the debate on state aid cases, a proper substantiation of transfer prices used is vital.

TAX AVOIDANCE: GENERAL OVERVIEW

18. What have been the main national and international trends affecting tax enforcement and anti-avoidance practice in your jurisdiction in the past 12 months?

Over the past 12 months, several international initiatives have affected Dutch anti-avoidance practice. Base erosion and profit shifting (BEPS) has taken shape in The Netherlands with the implementation in 2016 of a general anti-avoidance rule (GAAR) and the anti-hybrid instrument rule from the Directive 2003/123/EC amending Directive 90/435/EEC on the taxation of parent companies and subsidiaries (Amended Parent-Subsidiary Directive). The Netherlands implemented these provisions without limitation to EU situations. In the EU, certain anti-tax avoidance provisions have been included in Directive (EU) 2016/1164 laying
down rules against tax avoidance practices that directly affect the functioning of the internal market (Anti-tax Avoidance Directive) (ATAD), member states must implement these provisions into their domestic legislation.

Furthermore, the publication of the Multilateral Instrument for the implementation of BEPS (MLI) has made clear that multiple anti-abuse provisions will be implemented in Dutch bilateral tax treaties. The MLI aims to incorporate several anti-abuse provisions into the tax treaties of over 100 jurisdictions. In this way, it is hoped to implement these provisions swiftly, in accordance with the BEPS action. The Netherlands is part of the ad hoc group and has published its position regarding the MLI (in a letter from the State Secretary of Finance dated 28 October 2016).

19. How does your jurisdiction make the distinction between abusive tax avoidance and legitimate tax planning?

Dutch tax law contains the abuse of law doctrine (fraus legis), which has been crystallised in case law. The Supreme Court ruled that for fraus legis to be present, two cumulative requirements should be met:

- The sole or predominant motive for the transaction is the avoidance of tax, that is, apart from the tax benefit, there are no meaningful business reasons for the transaction under consideration.
- If the tax consequences of the transaction were allowed, they would be in conflict with the purpose and rationale of the relevant tax law.

A taxpayer wishing to argue plausibly that the first requirement is not met, should note that the court will look at whether considerations other than tax have played more than just a secondary role (see among others Supreme Court 21 November 1984, No. 22/092, BNB 1985/32). If other considerations are considered to be present, then there is no fraus legis. If fraus legis is present, this may have two consequences:

- The transaction is eliminated.
- The transaction is substituted by an adjacent fact pattern that does fall under a specific rule.

So far, the Supreme Court has not applied fraus tractatus in its strict meaning, that is, that the tax consequence of a transaction was in conflict with the purpose and rationale of a tax treaty, where the predominant motive for the transaction was the avoidance of tax.

20. Do the revenue authorities in your jurisdiction offer any guidance on the distinction between legitimate tax planning mechanisms and abusive or aggressive tax avoidance?

In uncertain cases, approval can be requested from the Tax and Customs Administration. It is possible to get approval in advance for other structures in the form of an advance pricing agreement or advance tax ruling (see Question 18). It is common to enter into discussion with the tax authorities in the hope of reaching an agreement on the tax implications of a certain structures or transaction.

Tax anti-avoidance provisions

21. Can you identify any direct or indirect impact in your jurisdiction of the OECD or other recent international initiatives to combat abusive tax avoidance?

As at 1 January 2016, the general anti-abuse rule (GAAR) of the Amended Parent-Subsidiary Directive has been implemented into the Corporate Income Tax Act (CITA). The provision aims at combating abusive structures by including shareholders with a substantial interest in an entity located in The Netherlands into corporate income tax as a foreign taxpayer. If the taxpayer holds these shares with its main purpose or one of its main purposes being to avoid income tax or dividend withholding tax, the shareholding can be considered an “artificial arrangement” (or an artificial series of arrangements). This is because it is said not to reflect economic reality.

Further to the GAAR, a specific anti-abuse rule was included in Article 13, paragraph 17 of the Dutch CITA to prevent abusive situations where hybrid instruments are used to achieve a deduction non-inclusion situation (that is, where the payment is deductible in the source state, because it qualifies as an interest payment, but from a Dutch perspective it is treated as a dividend and is therefore exempt under the participation exemption). This anti-abuse rule excludes the payment from the scope of the participation exemption if it leads to a deduction in the source country.

Some of the base erosion and profit shifting (BEPS) action points require internationally co-ordinated implementation. This has taken shape in the multilateral instrument (MLI) and the Anti-tax Avoidance Directive (ATAD). The State Secretary states, in his letter regarding the position of The Netherlands, that the Dutch tax treaty policy currently already meets the minimum requirement for dispute resolution which are required under Action 14. However, the State Secretary intends to also opt for mandatory arbitration (see Question 14). Furthermore, The Netherlands wishes to include the anti-abuse provisions of Action 6 of the BEPS action plan (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances), and of Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status), into its treaties via the MLI. Going forward, BEPS actions 6 and 7 are part of Dutch tax treaty policy, and will act as the standard in new tax treaty negotiations. The inclusion of these provisions into tax treaties can therefore, in the view of the State Secretary, be considered to be an implementation of the Dutch treaty policy. The State Secretary intends to opt for the inclusion of a principal purpose test (PPT) as implementation of Action 6 and to follow the permanent establishment concept as described in Action 7.

The ATAD was agreed upon by the EU member states in 2016, obliging member states to implement several anti-abuse provisions into their legislation by 2019 (such as controlled foreign company rules, and interest deduction limitations, among others). The Netherlands has not yet submitted a bill to parliament to implement ATAD. Therefore, it remains to be seen how The Netherlands will implement the rules. Because the ATAD requires all EU member states to implement the anti-avoidance provisions up to a certain minimum standard, implementing these measures is not anticipated to lead to a shift of the tax avoidance to another country. Furthermore, the EU has come to a political understanding regarding an additional directive (referred to as ATAD-2) which aims at implementing additional anti-abuse provisions in relation to hybrids. ATAD-2 replaces the anti-hybrid rules from ATAD-1 and extends the implementation period to 1 January 2020 for the anti-hybrid rules, except for the anti-reverse hybrid rules, which should be implemented by 2022.
22. Does your jurisdiction have GAAR designed to prevent or reduce abusive tax avoidance?

The general anti-avoidance rule (GAAR) of the Amended Parent-Subsidiary Directive was implemented into the Corporate Income Tax Act (CITA), as a provision to combat abusive structures. Besides this GAAR, the *fraus legis* principle applies in Dutch law (see Question 20). Further, the Tax and Customs Administration may take a substance-over-form approach or consider the transaction to be a sham (for example, *Supreme Court 27 June 1973, No. 17 146, BNB 1973/187*).

In addition, the Dutch CITA contains various specific anti-abuse provisions. These include the application of anti-base erosion rules and restrictions on using carry forward losses. In most cases, the specific anti-abuse provisions have been codified following case law where the taxpayer won the case or where the State Secretary of Finance stated that the transactions entered into by the taxpayer were abusive, that is, that there was *fraus legis*.

The following case law was the reason for implementing anti-base erosion rules:
- Supreme Court 23 August 1995, No. 29 521, BNB 1996/3.
- Supreme Court 20 September 1995, No. 29 737, BNB 1996/5.

23. What are the legislative provisions that are designed to reinforce GAAR and any other abusive tax avoidance provisions?

See Question 22.

24. Identify and discuss any case law of interest concerning GAAR and any other cases dealing with abusive tax avoidance in your jurisdiction.

Recent case law relevant to abusive tax avoidance

The most recent Supreme Court landmark case, where *fraus legis* was claimed by the State Secretary of Finance is the Swiss bank case. On 23 April 2017, the Dutch Supreme Court ruled *fraus legis* (No. 15/05353). In this case, a group bought several entities from third parties on various occasions. In the year of acquisition, these entities had already made a profit that had yet to be taxed. The acquired entities would then be used in investment or financing activities. The taxable profit present in the companies would be set off against payments to a group company that provided intercompany financing. Any profits arising from the entities after acquisition would be exempt due to the participation exemption.

The structure made use of a loophole in the CITA. The Court of Appeal of Amsterdam had ruled in this case that the use of this loophole constituted *fraus legis*, as it was contrary to the aim and purpose of Article 20a of the CITA. Article 20a prevents the trade in entities that have losses that can still be compensated. In the structure in the case at hand there was no trade in companies with losses that could be compensated, but with profits that could be offset against costs present in the group. The penalty imposed by the Amsterdam court was overturned by the Court of Appeal, as the court was of the opinion that the taxpayer had a reportable position (*pleitbaar standpunt*). The Supreme Court confirmed the Court of Appeal's ruling.

Other recent landmark cases of the Supreme Court, where *fraus legis* was claimed by the State Secretary of Finance are two cases from 7 February 2014. In these cases, the authors' firm successfully represented the two taxpayers on the issue of whether shares can be classified as debt for Dutch tax law purposes. The Supreme Court ruled that the classification of shares under Dutch civil law, whether contributions on shares are available for recourse by creditors, is decisive. These cases were the Australian RPS case and the Banking syndicate case (*Supreme Court, 7 February 2014, BNB 2014/79 and BNB 2014/80*). In these cases, the Supreme Court ruled that the civil law qualification, in principle, is leading and cannot be disregarded for tax purposes. As taxpayers have the freedom to choose between equity and debt financing, in the view of the Supreme Court the choice of this type of equity financing does not constitute *fraus legis*. If an instrument should be qualified as an equity instrument, according to the Dutch civil law, it should also be treated as an equity instrument for tax purposes. In these cases, the instruments were used to create a deduction non-inclusion situation, by making use of the participation exemption.

Nowadays, for cases such as the Australian RPS case, the 2016 anti-avoidance measure included in Article 13, paragraph 17 of the Corporate Income Tax Act (CITA), denies the application of the participation exemption in a hybrid mismatch situation (that is, if payments are deductible in the country of the participation).

**Historical case law relevant to abusive tax avoidance**

The key historical case on the field of abuse of law is that of the Supreme Court of 27 December 1967, No. 15772, BNB 1968/80. In this case, the Supreme Court held that the transfer of shares by the shareholders to a newly established company should be ignored for income tax purposes, based on the application of the *richtige heffing* doctrine. The *richtige heffing* doctrine dates back to 1925 when it was included in the Dutch legal system. Under this doctrine a transaction or construction can be ignored, if it does not impose an actual change in the facts and circumstances of a case and if it would not have been implemented if the construction did not limit the ability to levy tax. As a result of the transfer of shares to the newly established company, the levying of tax on dividends from the transferred company was shifted from a dividend tax (at the time at a progressive rate of up to 68%) to a capital gains tax (at the time 20%). Instead of the individual shareholders receiving a dividend from their former subsidiary, by transferring the shares, they received a tax-exempt repayment of the transfer debt. The Supreme Court held that a taxpayer is, in principle, free to transfer his or her shares to avoid tax on future dividends, but not if the taxpayer remains entitled to the dividends after the transfer. In this case, the taxpayer did not employ the permitted means to avoid tax.

The practical scope of this case was clarified in the case law on holding and cash box constructions (*holding-en kasgeld constructies*) that followed in the 1980s and 1990s where *fraus legis* was claimed (for example, *Supreme Court, 24 September 1980, BNB 1980/331 and 332, Supreme Court 11 July 1990, BNB 1990/290-293*). The main objective of the taxpayers in these cases was to convert a dividend that was taxed at high progressive rates in the personal income tax into a low taxed capital gain.

**TAX AVOIDANCE PENALTIES**

**Civil and administrative penalties for abusive tax avoidance**

25. What civil and administrative penalties can be imposed in abusive tax avoidance cases in your jurisdiction?

In principle, no penalties are imposed in the case of *fraus legis*. Since the taxpayer is following the literal meaning of the law in cases of *fraus legis* it should have a reasonably reportable position (*pleitbaar standpunt*), as a result of which no penalty should be imposed. However, for the first time in history, in the Swiss bank case, the lower court of North Holland applied penalties where
fraus legis was applied (see Question 24). However, these penalties were overturned by the Court of Appeal of Amsterdam. The case is currently (at the time of writing) pending at the Supreme Court.

Legislative provisions

The general penalty provisions of the General Tax Act (GTA) apply in cases where the abusive tax avoidance provisions are applied, if the taxpayer did not take a reportable position (pleitbaar standpunt) in its tax return. That is, if a taxpayer is considered to have a reportable position, but if the court eventually decides that fraus legis should apply, no penalty should be imposed.

A fine will only be imposed in cases of intent or gross negligence of the taxpayer and not in cases of tax planning where the taxpayer has a reportable position. Depending on the degree of intent to avoid tax or the gross negligence of the taxpayer, the penalties may vary from zero to 100% of the additional tax due (see Question 17). If the taxpayer willfully misrepresented the profit reported in his or her tax return (fraud) or the taxpayer can be blamed for the misrepresentation (gross negligence), a penalty of 50% and 25% respectively of the additional tax due can be imposed. In special circumstances this penalty can be increased to 100% and 50%, respectively. For these cases, the tax adviser may also be fined as an accomplice.

Criminal penalties for abusive tax avoidance

26. What criminal penalties can be imposed in abusive tax avoidance cases in your jurisdiction?

In addition to the administrative penalties, Articles 68 and 69 of the General Tax Act contain provisions by which a taxpayer or its tax adviser can be prosecuted. Similar to the administrative penalties, a distinction is made between gross negligence and wilful misrepresentation. The maximum sentences range from six months in prison for cases of gross negligence to a maximum of six years in prison for cases of fraud. Maximum fines for these crimes range from a category two fine (EUR4,100, as of 2016) for gross negligence to category 5 fines (EUR82,000, as of 2016) for wilful misrepresentation. In cases of wilful misrepresentation, the maximum fine can be increased to an amount equivalent to the unpaid tax, if this is higher than the category 5 fine. A tax adviser being prosecuted for wilful misrepresentation can also be banned from further work as tax adviser.

TAX AVOIDANCE DEVELOPMENTS AND REFORM

27. Are there any current trends, developments or reform proposals that have or will affect the area of tax avoidance in your jurisdiction?

The implementation of the Anti-tax Avoidance Directive (ATAD) will certainly have a big impact on anti-tax avoidance measures in The Netherlands and the rest of Europe. ATAD contains a number of anti-abuse provisions, including interest deduction limitations, controlled foreign company rules and anti-hybrid measures that all member states must implement. As the final implementation of these provisions is left to the member states, it is still uncertain how this will take shape. However, it is certain that it will have a major impact on tax planning in the EU. EU member states are obliged to have the ATAD provisions implemented into their national law before 1 January 2019. With the coming of ATAD-2, the implementation period for the anti-hybrid rules has been extended until 1 January 2020 (and 2022 for reverse anti-hybrid rules).

Furthermore, the multilateral instrument (MLI) should enable countries to implement anti-abuse provisions in their bilateral tax treaties effectively. As over a hundred jurisdictions are part of the ad hoc group of the MLI, the potential impact on bilateral tax treaties is immense. Similar to the ATAD, it is currently unclear what the exact impact will be, as countries still have various options within the MLI and will still need to ratify the MLI in their own jurisdictions.

THE REGULATORY AUTHORITIES

Tax and Customs Administration (Belastingdienst)
T +31 555 385 385 W www.belastingdienst.nl

Outline structure. The Tax and Customs Administration (Belastingdienst) is the organisation that handles all tax matters, such as assessments and APA requests. Please note that the provided phone number is only a general number. An inspector is appointed for each specific case.

Responsibilities. Overseeing all tax related matters, such as tax returns and assessments and proving certainty in advance.

ONLINE RESOURCES

Jure
W www.jure.nl

Description. This website publishes cases of legal or public interest. No English translation is available.

W www.wetten.overheid.nl

Description. This website publishes all Dutch laws and decrees. The site is maintained by the government. No English translation is available.
Practical Law Contributor profiles

Lucia Sahin, Senior Associate
Loyens & Loeff
T +31 10 224 6301
F +31 10 224 4813
E lucia.sahin@loyensloeff.com
W www.loyensloeff.com

Professional qualifications. Tax adviser.
Areas of practice. Transfer pricing and international tax structuring with a specific focus on intellectual property. Lucia has a geographical focus on Spain and Latin America.
Non-professional qualifications. Guest lecturer on BEPS related subjects at International Tax Centre in Leiden
Recent transactions
- Advising and implementing on a new IPR structure and how to align it with the business operations for a US tech company including retail.
- On-shoring IPR to The Netherlands for an international retailer.
- Converting a European limited risk organisation with country subsidiaries, through cross-border legal mergers, to a single European limited risk distributor/legal entity with branches throughout Europe.
Languages. Dutch, English, Spanish

Jaap Andriessen, Associate
Loyens & Loeff
T +31 10 224 6117
F +31 10 224 4813
E jaap.andriessen@loyensloeff.com
W www.loyensloeff.com

Professional qualifications. Tax Adviser.
Areas of practice. Transfer pricing; international tax law.
Professional associations/memberships. Associate member of the Dutch Association of Tax Advisers.