Transfer Pricing 2021

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Transfer Pricing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Getting The Deal Through

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Netherlands

Jimmie van der Zwaan and Thomas Dijksman
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OVERVIEW

Principal legislation

1 | Identify the principal transfer pricing legislation.

The arm's-length principle and the general documentation requirements are codified in article 8b of the Corporate Income Tax Act (CITA). The master file and local file documentation and country-by-country reporting obligations are enacted in article 29b et seq of the CITA. The State Secretary for Finance has issued several decrees providing guidance and insight on how the tax authorities apply the relevant rules. The most relevant decrees are:

- Stcrt No. 2018-6865, on the application of the arm's-length principle;
- Stcrt No. 2019/13003, on the renewed advance pricing agreement (APA) practice of the Dutch Tax Authority (DTA);
- Stcrt No. 2018-4380, on the installation of the transfer pricing coordination group;
- DB2015/462M, providing guidance on the contents of the master file, local file and country-by-country report;
- DGB 2014/3102, providing guidance on intragroup financial services activities in Q&A format;
- DGB 2014/296M, on the organisation and competence of the ruling team (for APAs and advance tax rulings);
- IFZ 2010/457M, on attribution of profits to permanent establishments; and
- Stcrt No. 2020-0000101607, on mutual agreement procedures.

Enforcement agency

2 | Which central government agency has primary responsibility for enforcing the transfer pricing rules?

The Coordination Group on Transfer Pricing within the DTA is responsible for consistent execution of policy within the DTA in the area of transfer pricing. Tax inspectors of the DTA must consult the Group when transfer pricing matters are investigated. Members of the Group may give binding advice on relevant decisions to tax inspectors. For APA procedures, there is a separate APA team within the DTA.

OECD guidelines

3 | What is the role of the OECD Transfer Pricing Guidelines?

It is generally accepted that article 9 of the OECD Model Tax Treaty, its commentary and the OECD Transfer Pricing Guidelines can be used as guidance to apply the arm's-length principle as codified in the Netherlands in article 8b of the CITA. The State Secretary for Finance has explicitly stated in the Transfer Pricing Decree that the OECD Transfer Pricing Guidelines are considered as a suitable interpretation and clarification of article 8b of the CITA.

Covered transactions

4 | To what types of transactions do the transfer pricing rules apply?

All transactions between associated entities are subject to transfer pricing rules.

Arm's-length principle

5 | Do the relevant transfer pricing rules adhere to the arm's-length principle?

Yes. There are no exceptions to the main rule.

Base erosion and profit shifting

6 | How has the OECD's project on base erosion and profit shifting (BEPS) affected the applicable transfer pricing rules?

On 11 May 2018, the updated decree on the application of the arm's-length principle was published to align with the outcomes of the OECD BEPS project and follow-up work, such as the work on hard-to-value intangibles. Furthermore, among other things practical guidance on application of several transfer pricing methods was included.

Master file and local file documentation and country-by-country reporting requirements were implemented in the Netherlands for fiscal years starting in 2016 onwards. The contents of the requirements are in line with the BEPS Action 13 final report. The threshold for country-by-country reporting obligations for a multinational enterprise (MNE) is a consolidated group revenue of €750 million. Master file and local file documentation is required for entities that are part of an MNE with a consolidated group revenue of €50 million or more.

PRICING METHODS

Accepted methods

7 | What transfer pricing methods are acceptable? What are the pros and cons of each method?

In line with the OECD Transfer Pricing Guidelines, the tax administration must begin a transfer pricing examination from the perspective of the method selected by the taxpayer. Nonetheless, the taxpayer must be able to substantiate why the chosen method is appropriate in view of the relevant facts and circumstances. It is explicitly not intended to prescribe a best method rule. The Transfer Pricing Decree refers directly to the OECD Transfer Pricing Guidelines. In Chapter 2 of these Guidelines, the following methods are described, which can be used to substantiate arm's-length pricing between associated enterprises.

Traditional methods

The following traditional methods are regarded as the most suitable and direct means of establishing a transfer price as the price can be traced directly.

The comparable uncontrolled price (CUP) method compares the price charged for transactions between associated enterprises with the price charged for comparable transactions under comparable circumstances between unrelated parties. The CUP method is particularly reliable where an independent enterprise sells the same products in the same quantity and in the same market under the same conditions as those sold between associated enterprises. A disadvantage is that an external CUP is often hard to find since relevant information is frequently unavailable. An internal CUP can be used when a taxpayer sells products to an associated enterprise as well as to an independent enterprise. The CUP can be quite strict in its application. If products, quantities or parties involved in the transaction are not comparable from a two-sided perspective, this will possibly lead to non-acceptance. The advantage is that it is the most direct and reliable way to find a comparable price. The CUP method is mainly applied to financial transactions.

The cost-plus method increases the relevant costs incurred with an appropriate markup. The cost-plus method is a gross compensation since it is, in most cases, not applied to all the costs incurred by the taxpayer. Based on the OECD Transfer Pricing Guidelines, the cost-plus method is considered most useful where:

- semi-finished goods are sold between associated enterprises;
- the associated parties have concluded joint facility agreements or long-term buy-and-supply arrangements; or
- the controlled transaction is the provision of services.

In the Netherlands, in practice, the costs that are included in the cost base for applying the cost-plus method can be subjected to close scrutiny.

The resale price method deducts an appropriate margin from the resale price to an independent third party to determine the intercompany price for a product purchased from an associated party. The margin is set in a way that enables the reseller to cover its selling and operating expenses and make an appropriate profit. According to the OECD Transfer Pricing Guidelines, the resale price method is most useful where it is applied to marketing operations. In practice, it is important to compare the selling and other operating expenses of the comparables as this will be a good indicator of the comparability of the functions and risk profiles. It can also be useful to perform a sanity check on operating profit level as the tax authorities can argue that the resale price method is a one-sided method, and the tested party should then be entitled to a routine profit.

Transactional methods

The following transactional methods examine the profits that arise from transactions between associated enterprises.

The most frequently used method is the transactional net margin method (TNMM). The TNMM compares the profits that comparable independent entities realise while performing comparable functions. The TNMM measures the profit relative to a profit level indicator (eg, costs, sales or assets). Compared with the cost-plus method, the TNMM on costs remunerates a percentage over all costs. The TNMM has the advantage that it compares the functional profile of an entity instead of specific transactions. Therefore, it can be easier to find comparables. Another advantage is that it is easier to determine the annual corporate income tax due. In practice, this can also cause the TNMM to be a preferred method for the tax authorities when the choice of this method is in line with the functions and risk profile of the entity. To apply this method, the tested party should be considered as the least complex entity.

The transactional profit split method divides the combined profit realised from transactions between associated enterprises based on an economically valid key on which unrelated parties could have agreed. This method is used when both entities make unique and valuable contributions, or where operations are highly integrated and a one-sided approach would not be appropriate. An advantage of applying this method is that the allocation of profits may be based on the division of functions between the entities, especially when there is no more direct evidence of how independent parties would split the profit in comparable circumstances. This means that internal company data can be used to determine an allocation key. The transactional profit split method is mostly used in bilateral or multilateral situations as more countries then have to agree with the applied allocation key.

Multinational enterprises can also use methods not described in the OECD Transfer Pricing Guidelines, although it should then be explained why such a method is considered more appropriate.

Tangible property transactions

For tangible property transactions, generally, a fair market value should be determined, which means that the CUP method is the preferred method.

Intangible property transactions

For intangible property transactions, the Dutch Tax Authority (DTA) prefers that the less complex functions are compensated first and that the residual profit is then allocated to the intangibles or key value drivers. This approach only works provided that all other functions, risks and assets receive an arm's-length compensation.

Like the OECD in its project on base erosion and profit shifting, the Transfer Pricing Decree also refers to the functions on the development, enhancement, maintenance, protection and exploitation of intangibles. It is stated in the Decree that development and enhancement will generally be given more weight.

The hard-to-value intangibles doctrine, which was developed by the OECD, is also implemented in the Transfer Pricing Decree. According to the Decree, if a hard-to-value intangible is transferred to a related party, and the actuals deviate by 20 per cent or more from the forecasted figures, the tax inspector of the DTA may retroactively challenge the transfer price on this basis. This is itself not a justification for a transfer pricing adjustment, but de facto postpones the assessment to a later time.

Services

For intragroup services, the TNMM on cost method is generally accepted, provided that the service provider does not create or maintain any intangibles relating to the transactions.

Loans and advances

Generally, the CUP method is applied for loans. This is because a large number of financial transactions are available in databases.

Cost-sharing

8 Are cost-sharing arrangements permitted? Describe the acceptable cost-sharing pricing methods.

A cost contribution arrangement is accepted by the DTA provided that the arm's-length compensation that the parties involved receive is related to their functions performed, taking into account the risks assumed and assets used. Further included in the Transfer Pricing Decree is that a party assuming certain risks must also control those risks and have the financial capacity to bear those risks. A party that is merely involved in financing the arrangement may, generally speaking, only receive a risk-adjusted rate of return.

Best method

9 | What are the rules for selecting a transfer pricing method?

There is no hierarchy of methods in the Netherlands, nor are there any restrictions. In principle, the taxpayer is free to choose any method that reaches an arm's-length outcome. The taxpayer must substantiate why a certain method was chosen. The starting point for an examination by the tax authorities should be the method applied by the taxpayer.

Taxpayer-initiated adjustments

10 | Can a taxpayer make transfer pricing adjustments?

If the transfer pricing adjustment is based on the arm's-length principle, then transfer pricing adjustments are also allowed after fiscal year end. A primary adjustment (ie, a correction to the profit of a company) must always be followed by a secondary adjustment, which is the translation of the adjustment to the profit and loss accounts and to the balance sheet (eg, a profit distribution or an informal capital contribution). It depends on accounting principles and intercompany agreements whether commercial price adjustments are still allowed after year end.

Safe harbours

11 | Are special 'safe harbour' methods available for certain types of related-party transactions? What are these methods and what types of transactions do they apply to?

There is specific policy for financial intermediary services that applies to back-to-back loans. This policy is also applicable to similar lease and royalty structures. For these types of transactions, the equity at risk relating to the transactions may be limited by contract to the lowest of 1 per cent of the loan volume or €2 million. For lease and royalty transactions, the equity at risk may be limited to the lowest of 50 per cent of the payments received or €2 million. The taxpayer must run a real risk relating to the transactions for this amount. This policy can be seen as a safe harbour to the extent that if the taxpayer complies with this regime, it is aware of which transfer pricing methods and principles are accepted.

For low value-adding services, a simplified method of substantiation is allowed. This is in accordance with paragraphs 7.43–7.65 of the OECD Transfer Pricing Guidelines. Application of the TNMM on costs with a markup of 5 per cent is then accepted as an arm's-length outcome.

DISCLOSURES AND DOCUMENTATION

Documentation

12 | Does the tax authority require taxpayers to submit transfer pricing documentation? Regardless of whether transfer pricing documentation is required, does preparing documentation confer any other benefits?

The documents that must be submitted without specific request by a tax inspector are the notification and filing of a country-by-country report for multinational groups that exceed the €750 million annual revenue threshold. Filing of a country-by-country report is only required if the ultimate parent entity or the surrogate parent entity is tax-resident in the Netherlands. A taxpayer can also choose to opt for an EU local filing.

Master file and local file documentation must only be available in the taxpayer's administration at the ultimate date of filing of the tax return. The threshold for preparing the master file and local file documentation is an annual group revenue of €50 million. The master file and local file documentation should, after this date, be available for the tax authorities without delay. The master file and local file requirements are aligned with the Action 13 final report of the OECD's project on base erosion and profit shifting (BEPS).

There also is a general transfer pricing documentation requirement that is applicable to all related-party transactions. This type of documentation is free in format but should substantiate the applied pricing.

Generally speaking, maintaining proper transfer pricing documentation shifts the burden of proof to the tax authorities.

Country-by-country reporting

13 | Has the tax authority proposed or adopted country-by-country reporting? What are the differences between the local country-by-country reporting rules and the consensus framework of Chapter 5 of the OECD Transfer Pricing Guidelines?

The Netherlands has implemented country-by-country reporting for fiscal years from 2016 onwards. It is implemented in line with the final report of BEPS Action 13.

Timing of documentation

14 | When must a taxpayer prepare and submit transfer pricing documentation?

For country-by-country reporting purposes, a notification must be filed by each group entity of a multinational group with an annual revenue of €750 million or more. This notification must ultimately be filed on the last day of the fiscal year. If a filing obligation exists in the Netherlands for country-by-country reporting, the report must be filed within 12 months after the last day of the fiscal year.

For master file and local file documentation, there is no requirement to submit. The master file and local file documentation should be part of the taxpayer's administration at the ultimate filing date for the corporate income tax return. Subsequently the master file and local file documentation should be available upon request.

Transfer pricing documentation based on the general transfer pricing documentation requirement should, in principle, be available contemporaneously. When taxpayers form a fiscal unity for corporate income tax purposes and, consequently, only have to file one corporate income tax return, the pricing of the related-party transactions that take place within the fiscal unity must still be documented and substantiated.

Failure to document

15 | What are the consequences for failing to submit documentation?

Based on legislation, fines up to a maximum of €830,000 can be imposed on the taxpayer for non-compliance with notification and filing obligations for country-by-country reporting. In practice, we have not encountered any fines that were imposed in this respect. We have learnt that the Dutch Tax Authority applies this legal possibility restrictively.

ADJUSTMENTS AND SETTLEMENT

Limitation period for authority review

16 | How long does the tax authority have to review an income tax return?

In general, the tax inspector has three years to impose a final assessment after the end of the fiscal year. This period is extended with any extension granted for filing the tax return. If new facts appear or if the taxpayer is in bad faith, the tax inspector can impose additional assessments until five years after fiscal year end, plus any extension granted. Arrangements that are reported under the EU mandatory disclosure regime do not prevent the existence of a new fact.

Rules and standards

17 What rules, standards or procedures govern the tax authorities' review of companies' compliance with transfer pricing rules? Does the tax authority or the taxpayer have the burden of proof?

In principle, the tax inspector can request any relevant information from the taxpayer that it deems relevant to determine the taxable profit. This is a broad authority that also covers transfer pricing-related queries. When a full audit is performed by the tax authorities, they usually follow their Tax Audit Guidelines. Transfer pricing discussions with the Dutch Tax Authority (DTA) can also take place without a formal tax audit.

Disputing adjustments

18 If the tax authority asserts a transfer pricing adjustment, what options does the taxpayer have to dispute the adjustment?

The taxpayer can dispute the adjustment by filing for objection and, if this is denied, by going to court. In practice, there are not many examples of transfer pricing issues that are brought to court, as the arm's-length principle can be a grey area, and the tax authorities are, in general, willing to negotiate with taxpayers that are in good faith. If the taxpayer maintains proper transfer pricing documentation, the burden of proof for the tax authorities can be quite heavy. There has been a slight increase in transfer pricing cases, however.

In a recent case, the Court of Appeal (13 March 2020) ruled that the taxpayer (a zinc smelting company) still performs entrepreneurial activities after a business restructuring and that it is more than a mere toll manufacturer, which was the standpoint of the company. The profit split method was considered the most appropriate method to determine the arm's-length compensation. The DTA and the company came to an agreement on the calculation of the arm's-length profit after the court sessions.

RELIEF FROM DOUBLE TAXATION

Tax-treaty network

19 Does the country have a comprehensive income tax treaty network? Do these treaties have effective mutual agreement procedures?

The Netherlands has signed around 90 tax treaties and has signed and ratified the EU Arbitration Convention. According to the OECD MAP Peer Review Report, around 10 per cent of the Netherlands' treaties do not contain the full equivalent of article 25(1) of the OECD Model Tax Convention. Therefore, the Netherlands is encouraged to either amend this via the Multilateral Convention or via bilateral treaty negotiations.

The Dutch Tax Arbitration Act was enacted on 16 July 2019. This is an implementation of the EU Directive on Tax Dispute Resolution. The Act ensures binding resolution of tax disputes between EU member states if needed.

The new Decree of 11 June 2020 (Stcrt No. 2020-0000101607) on mutual agreement procedures provides guidance on whether to base the procedure on the:

- Dutch Tax Arbitration Act;
- applicable double tax treaty; or
- EU Arbitration Convention.

Requesting relief

20 How can a taxpayer request relief from double taxation under the mutual agreement procedure of a tax treaty? Are there published procedures?

There is a decree that describes Dutch practice relating to mutual agreement procedures (MAPs). The taxpayer must address his or her request to the International Fiscal Affairs and Consumer Tax Department at the Ministry of Finance.

When relief is available

21 When may a taxpayer request assistance from the competent authority?

The taxpayer may file a request if it has reasonable expectation that double taxation not in accordance with a double tax treaty will occur. The request must be filed within three years after the announcement from which the double taxation appears.

Limits on relief

22 Are there limitations on the type of relief that the competent authority will seek, both generally and in specific cases?

If the competent authorities reach an agreement, implementation in the Netherlands will follow. This will lead to ex officio reduction if the tax assessment was already final and is not restricted by any time limits.

Success rate

23 How effective is the competent authority in obtaining relief from double taxation?

From the MAP Statistics 2017, for the Netherlands, it appears that in 59 per cent of the cases that were closed, agreement was reached that fully eliminated double taxation. In 12 per cent of the cases closed, unilateral relief was granted. According to a 2016 measurement, the average duration of a MAP on profit allocation was 34 months.

ADVANCE PRICING AGREEMENTS

Availability

24 Does the country have an advance pricing agreement (APA) programme? If so, is the programme widely used? Are unilateral, bilateral and multilateral APAs available?

The APA team of the Dutch Tax Authorities concluded 144 APAs in 2019. This was a little less compared with 2018 (163). It is expected that this number will decrease in the future. It is also possible to request bilateral and multilateral APAs. The average time to finalise an APA was around 12 months in 2019.

Process

25 Describe the process for obtaining an APA, including a brief description of the submission requirements and any applicable user fees.

The process of requesting an APA is included in a decree that was published on 19 June 2019. In general, the request must include a detailed description of the relevant facts and circumstances and a clear standpoint on the tax consequences of the anticipated transactions. It must be supplemented with, among other things, an analysis of the suitability of the chosen transfer pricing method. Before filing the request, it is possible to arrange a pre-filing meeting during which what information will be especially relevant can be discussed.

One of the main differences compared with the previous APA decree is that access to the ruling practice will only be granted if the multinational carries out operational activities in the Netherlands that meet a newly introduced 'economic nexus' criterion. Furthermore, rulings will no longer be granted if tax savings are the main purpose of the transaction or structure, or if the request concerns a legal entity that is tax-resident in a tax jurisdiction that is listed on the Dutch regulation (or blacklist) for low-tax jurisdictions or non-cooperative jurisdictions for tax purposes. The blacklist is updated annually.

Time frame

26 | How long does it typically take to obtain a unilateral and a bilateral APA?

In general, the tax authorities endeavour to conclude APAs within eight weeks. However, complex cases may take longer in practice. In 2019, it took around 12 months on average to conclude an APA.

Duration

27 | How many years can an APA cover prospectively? Are rollbacks available?

Generally an APA will cover five years at maximum. In exceptional cases with long-term contracts, a maximum term of 10 years can be agreed upon.

A rollback is possible in bilateral and multilateral APA's as long as:

- all the countries involved agree;
- the relevant facts and circumstances in the relevant period were similar; and
- the rollback does not lead to non-taxation of profits.

Scope

28 | What types of related-party transactions or issues can be covered by APAs?

All types of intercompany transactions can be covered. In 2019, the numbers of topics covered were:

- sales (30);
- procurement (5)
- bilateral or multilateral APAs (13);
- financial services (28);
- principal structure or EMEA or European head office (7);
- sales support (14);
- administrative services (9);
- profit split (5);
- profit allocation permanent establishment (12);
- manufacturing (3);
- logistics (6);
- head office (2);
- IT services (1);
- valuation (2);
- informal capital or deemed dividend (2);
- research and development (1); and
- re-invoicing (3).

Independence

29 | Is the APA programme independent from the tax authority's examination function? Is it independent from the competent authority staff that handle other double tax cases?

The APA team operates separately from the Coordination Group on Transfer Pricing (which has an examination function regarding transfer pricing or at least coordinates the local tax inspector in this respect). Nevertheless, both are part of the Dutch Tax Authority. The handling of requests for mutual agreement procedures is the responsibility of the International Fiscal Affairs Department at the Ministry of Finance.

Advantages and disadvantages

30 | What are the key advantages and disadvantages to obtaining an APA with the tax authority?

The advantage of concluding an APA is certainty about the tax authorities' acceptance of the taxpayer's transfer pricing system. It may also be expected that the tax authorities will defend the taxpayer's case in any upcoming mutual agreement procedure.

Some companies perceive it to be a disadvantage that the ruling will be exchanged with EU and OECD countries that are connected to the entity with which the ruling is concluded. An example of this would be by being the country of residence of a related party that is involved in the transactions or a related party that is either the immediate parent, the ultimate parent or the ultimate beneficial owner (in conduit-type arrangements).

SPECIAL TOPICS

Recharacterisation

31 | Is the tax authority generally required to respect the form of related-party transactions as actually structured? In what circumstances can the tax authority disregard or recharacterise related-party transactions?

The tax authorities may, in extreme cases, recharacterise or ignore part of a transaction if the risk allocation that follows from a related-party transaction would not occur between unrelated parties. For example, relating to a loan transaction, this can only be applied when an arm's-length loan transaction cannot be achieved by adjusting the loan conditions.

Relating to transfers of intangible assets, according to the Transfer Pricing Decree, the value of the intangible asset for both the seller and the buyer should be taken into account when determining a transfer price for the intangible. If the value for the buyer does not exceed the value for the seller, then the Dutch Tax Authority (DTA) takes the point of view that the transfer would not take place between third parties. The result of the valuation is different from determining an arm's-length price since it does not include a two-sided perspective to the transaction.

The Transfer Pricing Decree further states that any tax payable following the transaction should also be taken into account. This paragraph of the Decree further refers to paragraph D2 of Chapter 1 (recognition of the accurately delineated transaction) of the OECD Transfer Pricing Guidelines, which includes a section on non-recognition. Non-recognition may only be applied if a transaction would be completely commercially irrational.

Selecting comparables

32 | What are some of the important factors that the tax authority takes into account in selecting and evaluating comparables? In particular, does the tax authority require the use of country-specific comparable companies, or are comparables from several jurisdictions acceptable?

The DTA generally accepts pan-European searches. The taxpayer should be able to explain the search strategy, which can be scrutinised if the tax authorities do not agree with the applied pricing.

Secret comparables

33 What is the tax authority's position and practice with respect to secret comparables? If secret comparables are ever used, what procedures are in place to allow a taxpayer to defend its own transfer pricing position against the tax authority's position based on secret comparables?

There are no specific procedures for secret comparables.

Secondary adjustments

34 Are secondary transfer pricing adjustments required? What form do they take and what are their tax consequences? Are procedures available to obtain relief from the adverse tax consequences of certain secondary adjustments?

Secondary transactions are required from a Dutch perspective. A transfer pricing correction is not just a correction to the profit of a company. It must appear from the administration of the taxpayer how a correction will be processed in the books. A secondary transaction can, for instance, take the form of a settlement in the current accounts, a dividend distribution, an informal capital contribution or an accrual of interest.

Non-deductible intercompany payments

35 Are any categories of intercompany payments non-deductible?

If interest deduction limitation rules kick in, interest deduction could be limited. For instance, article 10a of the Corporate Income Tax Act sets out an anti-abuse rule regarding interest paid to associated entities. Where tainted legal acts are concluded (eg, dividend distribution, capital contribution or (partial) acquisition by the taxpayer) that are financed with debt from associated entities, the interest can be deducted only if the legal act and the financing are commercially motivated.

Anti-avoidance

36 What legislative and regulatory initiatives (besides transfer pricing rules) have the government taken to combat tax avoidance with respect to related-party transactions? What are the penalties or other consequences for non-compliance with these anti-avoidance provisions?

The Netherlands ticked the box for all the measures that were covered by the Multilateral Instrument (MLI) except for article 12 of the MLI (commissionaire arrangements). The Netherlands has also implemented controlled foreign corporation legislation and a 30 per cent earnings before interest, taxes, depreciation and amortisation interest limitation rule based on the first EU Anti-Tax Avoidance Directive.

The second EU Anti-Tax Avoidance Directive, which essentially covers hybrid mismatches between EU member states and between EU member states and non-EU countries, was implemented in 2020. Deduction of expenses can be denied if there is no inclusion of the corresponding income by a related party or permanent establishment and if it involves:

- a hybrid financial arrangement;
- payments to a hybrid entity; or
- a hybrid permanent establishment.

Location savings

37 How are location savings and other location-specific attributes treated under the applicable transfer pricing rules? How are they treated by the tax authority in practice?

Location savings are considered as a comparability factor according to the OECD Transfer Pricing Guidelines. The Netherlands follows an OECD conforming interpretation of the arm's-length principle and also applies this to location savings. If prices in another market are significantly different (eg, lower), then this would not result in additional profit for the local entity because of location savings. Instead, this would mean that comparables should be searched for within the same or a similar market. It should be considered to what extent location savings are passed on to clients or suppliers between third parties.

Branches and permanent establishments

38 How are profits attributed to a branch or permanent establishment (PE)? Does the tax authority treat the branch or PE as a functionally separate enterprise and apply arm's-length principles? If not, what other approach is applied?

There is a decree in which the profit allocation to permanent establishments is covered. This decree follows the OECD report on attribution of profits to permanent establishments that was published in 2010.

In the Netherlands, a functionally separate entity approach is followed. For the allocation of equity and debt, the Netherlands prefers the capital allocation approach in which the capital structure of the general enterprise is followed. The reason for this is that the permanent establishment, in principle, maintains the same credit rating. While determining an arm's-length interest rate, the fungibility approach is the preferred method, which takes into account a risk-weighted part of the interest expenses.

Exit charges

39 Are any exit charges imposed on restructurings? How are they determined?

Yes. For calculating an exit charge following, for instance, an IP transfer, a valuation report should be prepared from the perspective of both the buyer and the seller, and, subsequently, an arm's-length price should be determined.

Temporary exemptions and reductions

40 Are temporary special tax exemptions or rate reductions provided through government bodies such as local industrial development boards?

The innovation box grants taxpayers a favourable tax rate of effectively 7 per cent for qualifying income from self-developed intangible assets. The entrance tickets are a research and development certificate and, if the company is part of a group that has a consolidated revenue that exceeds €250 million over five years or earns a qualifying income from intangible assets of more than €37.5 million over five years, a patent. Software, drug permits and plant variety rights, among other things, can be accepted instead of a patent if they relate to an intangible asset.

UPDATE AND TRENDS

Tax authority focus and BEPS

41 What are the current issues of note and trends relating to transfer pricing in your country? Are there particular areas on which the taxing authority is focused? Have there been any notable legislative, administrative, enforcement or judicial developments? In particular, how is the OECD's project on base erosion and profit shifting affecting both policymakers and tax administrators?

The tax authorities are focusing more on the development, enhancement, maintenance, protection and exploitation of intangibles functions, substance and a two-sided approach. The latter two are also an indirect consequence of left-wing political pressure and the EU state aid cases

against Starbucks, Nike and IKEA relating to their corporate income tax rulings in the Netherlands. In general, there is still an increasing focus on transfer pricing, which is leading to an increase in transfer pricing disputes or adjustments.

Additionally, the attention from tax authorities regarding financial transactions between affiliated entities has increased since BEPS and the covid-19 pandemic. Among other things, the economic circumstances, the credit rating of the borrower and the lender and borrower perspectives are relevant to determining an arm's-length interest rate. This is also included in the OECD Transfer Pricing Guidance on Financial transactions, which was published in February 2020 as a follow up on BEPS.

Coronavirus

42 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Payment extensions

Entrepreneurs may request an extension for tax payments from the Dutch tax authorities until October 2020. This applies to personal income tax, corporate income tax, wage tax and value added tax. Once the request has been received by the tax authorities, tax collection actions will be postponed, and taxpayers will immediately be granted the tax payment extension. The individual assessment of the request will take place at a later time. As a condition, companies that receive a tax deferral longer than three months must endeavour to improve their cash position. Therefore, the following conditions are set if the tax deferral would be higher than €20,000:

- no bonuses to management or dividends to shareholders may be paid; and
- no stock buy-backs

Reduction of tax interest

Interest on underpaid taxes has been reduced from 4 per cent to 0.01 per cent since 23 March 2020. This applies to all tax liabilities.

No administrative penalties

The Dutch tax authorities will temporarily not impose administrative penalties on entrepreneurs for late tax payment if the entrepreneurs face financial difficulties owing to the pandemic and request an extension. This will apply to personal income tax, corporate income tax, wage tax and value added tax.

NOW measure

Companies that employ staff and expect a turnover loss of at least 20 per cent owing to the pandemic can claim compensation towards wages from the Temporary Emergency Bridging Measure for Sustained Employment (NOW). As a result, companies can claim a maximum of 90 per cent of wages, depending on how much turnover is lost.

Corona reserve

The expected loss for 2020 can be deducted in the 2019 corporate income tax return. The corona reserve may not exceed the profit of 2019. Without this measure, loss carryback would only be possible after filing the 2020 tax return, which would delay the tax repayments until the 2020 tax return assessment. With the corona reserve, companies can effectively already claim a carryback.

The following conditions apply to the creation of a fiscal corona reserve:

- there is an expected loss related to the covid-19 pandemic in the fiscal year 2020;
- the expected pandemic-related loss cannot exceed the total loss expected by the taxpayer for the fiscal year 2020;
- the addition to the corona reserve in the 2019 financial year amounts to a maximum of the profit for the 2019 financial year that would apply without the creation of the reserve;
- the corona reserve will be fully included in the profit no later than the fiscal year 2020; and
- the addition to the corona reserve is included in the 2019 corporate income tax return under 'miscellaneous tax reserves'.

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