Transfer Pricing

Netherlands: Trends & Developments
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practiceguides.chambers.com 2021
Trends and Developments

Introduction
Transfer pricing matters have increasingly been gaining the attention of the Dutch Tax Authorities (DTA). This trend is evidenced by an increasing number of transfer pricing audits and disputes. Moreover, in recent years, we have noticed an increased appetite on the part of the DTA to join bilateral and multilateral transfer pricing audits.

The public opinion on the taxation of multinational enterprises and the OECD’s Base Erosion and Profit Shifting (BEPS) project have contributed to the increased attention paid to transfer pricing matters.

The BEPS project led to a new version of the OECD Transfer Pricing Guidelines, published in 2017 (OECD TPG), which, inter alia, contain extensive transfer pricing compliance requirements for multinational enterprises, such as country-by-country reporting (CbCR) and master file and local file documentation. The Netherlands has generally adopted the 2017 OECD TPG and introduced master file, local file and CbCR compliance requirements accordingly. The Netherlands has also adapted tools to use the CbCR information as an audit selection tool.

In 2018, the Dutch Ministry of Finance published a new Transfer Pricing Decree (Decree No 2018-6865) to reflect BEPS-related developments in the policy of the DTA and to provide further (domestic) guidance on the application of the arm’s-length principle. The Decree also provides guidance where the OECD TPG do not indicate a clear position or where there is room for different interpretations. The expectations are that Decree 2018-6865 will be replaced by a new decree by the end of 2021. The new decree will likely include the Dutch position on the guidance of Chapter X on financial transactions.

These recent developments have significantly changed the international tax environment in which MNEs operate. Stakeholders in the field of taxation all agree that more audits and transfer pricing disputes can be expected in the near future. That said, in particular when compared to other jurisdictions, the DTA is still very open to discussing transfer pricing and tax-related issues in advance. In most cases, the DTA is willing to provide clarity and certainty in advance on the tax and transfer pricing consequences of envisaged investments in the Netherlands. As set forth below, the advance pricing agreement (APA) programme has been amended as per mid-2019, and in general allows for an open and constructive dialogue with the DTA to get certainty in advance.

APA Developments
The tax-ruling practice in the Netherlands has a long-standing track record, where many MNEs have obtained certainty over time in relation to their tax position in the Netherlands. As of July 2019, a new decree on international tax rulings entered into force (Decree No IFZ 2019/13003). The Decree provides specific guidance on how an APA can be obtained in the Netherlands and it explains the enhanced APA process.

Under the new decree, APAs are only concluded if the taxpayer has sufficient economic nexus in the Netherlands. Furthermore, the new decree specifies that the DTA will not enter into APAs in cases where one of the following statements apply:
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• the only or predominant reason for the (structure of) the transaction(s) is obtaining a tax benefit in the Netherlands or any other jurisdiction; or
• the main transaction is with a low-tax or non-co-operative jurisdiction.

There are a few additional developments that impact the APA environment. First, the APA team has further standardised its approach and policy for handling and processing APA requests. While this standardisation may allow for simplification, it does not necessarily always do justice to the unique merits of the case. Second, under the new APA policy, it is no longer possible to obtain certainty in advance for so-called informal capital structures and in light of the development of the arm’s-length standard, the Netherlands is reconsidering its position on informal capital structures in general. Third, the DTA have expressed a preference for concluding bilateral or multilateral APAs, but unilateral APAs continue to be common market practice in the Netherlands. Fourth, after the conclusion of an APA in the Netherlands, an anonymised summary of the agreement (or decision not to grant the APA) will be published in public registers, and on the website of the DTA. Furthermore, tax rulings are exchanged with other EU member states which are potentially affected by the ruling.

Finally, whereas it was in the past possible to conclude an APA within a few months (from filing the request), it is now commonly observed that the process of concluding an APA may take significantly longer due to the new tax landscape in which the DTA and taxpayers operate. Moreover, the transaction will not be judged in isolation, the APA team instead wants to gain a general understanding of the full value chain of the group. As a result, we see fewer APAs being concluded on routine activities and an increased interest in concluding APAs on more complex business operations located in the Netherlands.

Audit Landscape and Trends in the Netherlands

In general, Dutch tax inspectors have a well-developed level of knowledge to handle transfer pricing matters. If a case involves a more complex transfer pricing matter, the competent tax inspector will typically involve their colleagues from the Transfer Pricing Co-ordination Group, which is the transfer pricing specialist centre of the DTA. The specialists from the Transfer Pricing Co-ordination Group generally have well developed technical skills.

The DTA has not published a list of specific areas subject to heightened audit scrutiny. That said, based on our experience and the limited case law that is available within the field of transfer pricing in the Netherlands, a number of areas of increased focus can be identified:

• the arm’s-length nature of transactions with low-tax jurisdictions;
• transactions with captives (ie, MNE reinsurance companies);
• the arm’s-length nature of loan transactions and guarantees;
• business restructuring transactions (eg, valuation analyses performed for IP transfers and characterisation of transactions); and
• transactions with IP companies without sufficient economic substance.

The recent regulatory developments, as discussed in APA Developments, have provided the DTA with additional ammunition to challenge the transfer pricing set-up of MNEs, with accompanying risks of transfer pricing adjustments being imposed. In addition, taxpayers have far-reaching information sharing obligations in the Netherlands.

These new developments around information access, may cause the DTA to have a strategically more advanced position in certain transfer
pricing audit discussions compared to taxpayers. Therefore, it is key that taxpayers consider their (and the DTA’s) options and potential outcomes when entering into discussions with the DTA, as well as during the audit process. This may lead to a more procedural, juridical approach aimed at securing a taxpayer’s position in front of the competent court rather than a relatively informal discussion with the tax inspector, as has been the more common approach in the Netherlands. In audit discussions the DTA is – in our experience – less comfortable with a more juridical approach.

Another important trend observed in the Netherlands is that the DTA has strengthened and expanded its capabilities in the field of data analytics. In recent tax audits we have observed that the DTA used sophisticated data analytics tools, which combined CbCR data with data derived from various other (public) sources.

Finally, we are observing an increase in bilateral or multilateral audits, where the Netherlands collaborates with tax authorities of other jurisdiction(s) which have common or complementary interests to achieve the co-ordinated control of the tax liability of MNEs.

Disputes
As a result of the prior more informal Dutch culture that applied to transfer pricing matters during an audit, limited case law on transfer pricing matters is available. To the extent transfer pricing jurisprudence is available, the focus is typically on factual matters rather than on matters of law. However, in recent years a shift away from the more informal audit-level resolution approach has been observed and there is an increased willingness on the part of taxpayers and the DTA to resolve tax disputes in court. A number of transfer pricing cases (e.g., on business restructurings) are currently being discussed in court.

Addressing Double Taxation
If a company faces, or is likely to face, double taxation arising from transfer pricing or cross-border taxation conflicts, the company may apply for the elimination of double taxation by way of a mutual agreement procedure (MAP) under a bilateral tax treaty. In this regard, it is important to note that the Netherlands has one of the most extensive tax treaty networks in the world and that the Dutch authorities can generally be considered supportive in addressing the risk of double taxation.

In 2019, the OECD released a follow-up of the initial peer review reports (as issued in 2017) in relation to the implementation of BEPS Action 14 on the improvement of tax dispute resolution mechanisms. The outcome of the peer review was that the Netherlands meets most of the BEPS Action 14 minimum standards relating to the availability of, and access to, MAPs. In Stage 2 of the peer review, the OECD observed that the Netherlands has addressed most of the shortcomings identified in the first stage of the peer review report. In addition to this, the Netherlands has signed the Multilateral Instrument (MLI) and opted in (without any reservations) on the MAP article.

On 11 June 2020, the Dutch Ministry of Finance issued a new decree on MAPs. The MAP Decree (Decree No 2020-0000101607) provides a further description and interpretation of the mutual agreement procedure on the basis of bilateral tax treaties, the EU Arbitration Convention, or the Tax Arbitration Act.

Within the EU, companies that are resident in an EU member state may also apply for a procedure based on the EU Arbitration Convention (90/463/EEC), provided that the other EU member state is a signatory to it (as is the Netherlands). The EU Arbitration Convention explicitly caters to the handling of transfer pricing issues between
associated enterprises resident within an EU member state. It has some key advantages over regular bilateral tax treaties, including that it applies to situations of permanent establishments of EU companies in other EU states as well. It also guarantees the elimination of double taxation within a specified time period of two years.

If EU member states have not reached an agreement to eliminate the double taxation after the two-year period, the case must be referred to an arbitration committee. This committee has to present its advice within six months. After the arbitration committee has given its advice, the competent authorities of the member states are obliged to resolve double taxation within six months; otherwise, the advice of the arbitration committee becomes final.

In addition to the double taxation mechanisms outlined above, the Netherlands has also implemented the EU Directive on Tax Dispute Resolution (EU/2017/1852). The arbitration procedure on the Dutch Arbitration Act starts with a complaint being filed by the taxpayer to the competent authorities. This complaint has to be made within three years from receipt of the first notification of the action resulting in double taxation. If accepted by all competent authorities, the MAP will start. The competent authorities aim to settle the dispute within two years, but this is not a formal deadline.

The taxpayer will be informed of the outcome of the procedure and if the taxpayer accepts that outcome, the dispute will be settled by means of a formal settlement agreement. Where one of the competent authorities does not accept the complaint or no agreement is concluded between the competent authorities, the taxpayer can file a request to install an Arbitration Commission to settle the dispute.

Other Developments

BEPS 2.0

Another important recent development is what is commonly referred to as BEPS 2.0. BEPS 2.0 refers to the OECD’s efforts to reach a multilateral, consensus-based solution to the tax challenges arising from the digitalisation of the economy and consists of Pillar One (Profit Allocation and Nexus) and Pillar Two (Global Minimum Tax Rate). In the international discussions evolving around this topic, the Netherlands is one of the driving forces in achieving a co-ordinated approach to reach consensus on BEPS 2.0.

On 10 February 2021, the Dutch State Secretary of Finance stated in an online conference organised by the Dutch Association of Tax Advisors (NOB) that agreement on BEPS 2.0 should be reached by July 2021. If agreement is not reached by July 2021, the State Secretary of Finance indicated that the Netherlands will push for European measures in this regard.

State aid

An important development which has captured ongoing attention in recent years is the topic of state aid. In 2015, the European Commission issued a decision in which it concluded that the APA between the DTA and Starbucks constituted state aid. The DTA appealed this decision and, in September 2019, the General Court of the European Union annulled the decision of the European Commission on the ground that the existence of an advantage was not sufficiently demonstrated enough (ie, the European Commission had not satisfied the burden of proof test).

In 2017, the European Commission also opened a state aid investigation into a Dutch tax ruling concluded between the DTA and IKEA and, in 2019, a ruling concluded between the DTA and Nike. Regarding the ruling between the DTA and Nike, the provisional view of the European Com-
mission was that the Netherlands granted state aid to Nike. Nevertheless, the Dutch government has publicly stated that it considers its ruling practice in accordance with OECD requirements. It can be expected that state aid cases in the EU will remain an active topic in the coming years.

**COVID-19**
While the Netherlands has not provided any COVID-19-specific guidance related to transfer pricing, Dutch government measures – more specifically the Dutch subsidy relief programme “temporary emergency bridging measure to retain jobs” (Tijdelijke noodmaatregel overbrugging voor behoud van werkgelegenheid, or NOW) – may have an impact on transfer pricing and profitability. Hence, that impact needs to be carefully reviewed. Depending on the facts and circumstances of the case, the transfer pricing implications may be different.

**Horizontal tax monitoring**
In 2020 the DTA introduced a new approach to its horizontal tax monitoring programme. In essence, the HTM programme allows for a co-operative tax compliance programme applied between a taxpayer and the DTA. Under this new approach to horizontal tax monitoring, a selection of 100 large, important or complex taxpayers have been selected for individual tax monitoring plans. Other large companies and medium-sized companies can conclude new HTM agreements, albeit under stricter requirements and for a limited duration of three years.

**Transfer pricing mismatches**
Finally, in March 2021, a public internet consultation was launched in relation to a draft legislative proposal that, in the spirit of developments in international tax policy, counters transfer pricing mismatches. In particular, the proposal seeks to deny a downwards transfer pricing adjustment in the Netherlands, insofar as no corresponding (transfer pricing) income inclusion is part of the taxable base of the affiliated company on the other side of the transaction. Furthermore, the draft legislative proposal seeks to deny an upwards transfer pricing adjustment of the acquisition price of an asset insofar as no corresponding inclusion is part of the taxable base of the affiliated company transferring the asset. Finally, the legislative proposal denies the depreciation/amortisation deduction of qualifying assets that have been transferred five years prior to the effective date based on a transition rule. The Dutch government has expressed its intention to implement the legislative proposal – albeit with some amendments – by 1 January 2022.
Baker McKenzie is represented in 46 countries and has a leading global transfer pricing practice, providing clients with world-class service in all facets of transfer pricing. Supported by more than 240 advisers, lawyers and economists, the firm’s transfer pricing team advises global companies on transfer pricing matters including design/planning, financial modelling, implementation, documentation, audit defence and litigation. It has extensive experience in competent authority procedures and has successfully accompanied and advised clients in numerous sizeable and high-profile advance pricing agreements and mutual agreement procedures. Baker McKenzie’s economists specialise in transfer pricing and work in close co-operation with transfer pricing lawyers, providing economic modelling that takes into account specific transfer pricing requirements. Its transfer pricing experts have a unique awareness of international transfer pricing policy. As a law firm, Baker McKenzie’s advice is legally privileged subject to local laws and regulations; its lawyers can litigate against tax authorities if disputes arise.

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