The Transfer Pricing Law Review: Netherlands

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Overview

On the basis of general principles of Dutch tax law (i.e., the 'total profit concept'), profits derived from a business are determined based on the arm's-length principle. Article 3.8 of the Dutch Income Tax Act 2001 (ITA), which equally applies to the Dutch Corporate Income Tax Act 1969 (CITA), and Article 10 of the CITA allow the Dutch Revenue and Dutch tax courts to adjust taxable income reported by Dutch taxpayers to the extent that such income (or the lack thereof) is influenced by the relationship between a company and its shareholder.

As per 1 January 2002, the arm's-length principle, as laid down in Article 9 of the OECD Model Tax Convention (OMC), was codified in Article 8b of the CITA. Under Article 8b of the CITA, transfer pricing corrections can be made provided that an entity, directly or indirectly, participates in the management, supervision or capital of another corporate entity, or where the same person participates, directly or indirectly, in the management, supervision or capital of two corporate entities dealing with each other (i.e., related entities). Article 8b of the CITA applies to transactions between companies, partnerships and trusts, among others. Furthermore, under Article 18 of the CITA, the guidance of Article 8b of the CITA applies by analogy to Dutch permanent establishments (PE). However, Article 8b of the CITA does not cover individuals.[2]

According to the Parliamentary Papers,[3] Article 8b of the CITA applies where the shareholder, supervisor or manager has sufficient authority to influence the transfer prices applied between the parties involved.[4] In accordance with Article 9 of the OMC, the concept of 'related entities' has not been further defined or quantified for purposes of Article 8b of the CITA, to prevent the applicability of Article 8b of the CITA from being manipulated. Where the taxpayer has not presented or confirmed the existence of 'related entities', the tax inspector has to demonstrate that parties are in fact related. The burden of proof rests with the Dutch Revenue.

The Dutch Revenue generally follows the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (Paris: OECD 2022) (the OECD Guidelines) as regards the application of the arm's-length principle. The transfer pricing decree (the TP Decree)[5] provides further guidance on the position of the Dutch Revenue regarding the practical application of the arm's-length principle. In the TP Decree, the Dutch State Secretary of Finance (the State Secretary) states that the OECD Guidelines have direct effect in Dutch tax law, and advocates a dynamic interpretation of Article 8b of the CITA. A dynamic interpretation entails that the arm's-length principle is applied in Dutch tax law in accordance with the latest version of the OECD Guidelines (i.e., the 2022 version of the OECD Guidelines).[6]

The view expressed by the State Secretary on the dynamic interpretation of Article 8b of the CITA, however, is not in line with the status of the OECD Guidelines as expressed in the Parliamentary Papers:

> [F]or the purpose of the application of Article 8b of the CITA, courts are expected to also take into account what has been agreed on in the OECD Guidelines in this area. In this respect, the OECD Guidelines are comparable to the opinions of reputable authors and the conclusions of the Attorney General at the Supreme Court.

On the basis of the above, Visser and Van Kalmthout[7] argued that, contrary to the view expressed by the State Secretary in the TP Decree and the 2013 version of the TP Decree,[8] the OECD Guidelines cannot be considered to have direct effect in Dutch tax law. Therefore, Article 8b of the CITA has to be interpreted statically.

Effective as of 1 January 2022, legislation was implemented in the CITA (Articles 8ba to 8bd) to end the practice of allowing unilateral downward transfer pricing adjustments. On the basis of the long-standing 'informal capital' doctrine, benefits arising from shareholder motives are excluded from the tax base and are requalified as informal capital or deemed dividend. These unilateral adjustments could result in double non-taxation if there is no corresponding upward adjustment included in the taxable base of the related party in another jurisdiction.

As regards 2022, a downward adjustment of the Dutch tax base is denied to the extent that no corresponding upward adjustment is included in the taxable base of the related party in another jurisdiction. The Dutch taxpayer claiming the downward adjustment has to plausibly argue (*aannemelijk maken*) with respect to which specific transaction a corresponding upward adjustment is included in the taxable base of the related party. If the remuneration is determined based on the transactional net margin method (TNMM), it is practically impossible to demonstrate in relation to which specific transaction a corresponding upward adjustment is included in the tax base of the related party. Typically, there are many interrelated inter-company transactions that cannot be priced separately. As such, this is exactly a reason upon which the TNMM is considered the most appropriate to determine the remuneration.

Filing requirements

Effective as of 1 January 2016, in addition to the pre-existing general transfer pricing documentation requirements as included in Article 8b, Paragraph 3 of the CITA (the General Requirements), the master file and local file requirements (the Specific Requirements) were introduced in Article 29g of the CITA.

i General Requirements

Article 8b, Paragraph 3 of the CITA requires Dutch taxpayers to document the transactions entered into with 'related entities'. This includes both cross-border and domestic transactions (including transactions between companies that form part of a Dutch fiscal unity pursuant to Article 15 of the CITA).

The documentation should contain a description of the characteristics of the goods and services, a functional analysis of the parties involved in the transactions, the contractual terms of the transactions, the economic conditions and the business strategies. In this regard, the taxpayer should include the following information in the documentation:

a. the manner in which the transfer prices are established; and
b. the deduction method upon which the transfer prices would have been agreed between independent entities.

Dutch taxpayers are not obliged to perform a benchmarking analysis to substantiate the arm's-length nature of the transfer pricing. Therefore, not having a benchmarking analysis available does not shift the burden of proof to the taxpayer. In the TP Decree, the State Secretary indicated that taxpayers that prepare a local file, as described further below, will also fulfil the documentation requirements of Article 8b, Paragraph 3 of the CITA.[9]

The transfer pricing documentation does not have to be filed with the Dutch Revenue. Nevertheless, it should be established at the moment at which the taxpayer enters into the transaction. However, the Parliamentary Papers provide Dutch taxpayers a 'grace period', if they do not have the required documentation available when requested by the Dutch Revenue. This grace period ranges between four weeks and three months, depending on the complexity of the transaction.

ii Specific Requirements

A Dutch taxpayer that forms part of a multinational group that reported a (worldwide) consolidated revenue of at least €50 million in the preceding financial year is obliged to prepare a master file and local file according to Article 29g of the CITA. The Specific Requirements apply irrespective of whether the Dutch taxpayer was engaged in any inter-company transaction during the year under review. For example, a Dutch holding company that only earns exempt income (i.e., under the participation exemption) is also obliged to prepare a master file and a local file.

The information items to be included in the master file and local file are identical to the items listed in Annex I and II to Chapter V of the OECD Guidelines.[10]

The master file and local file are not required to be filed with the Dutch Revenue. However, Dutch taxpayers have to include the master file and local file in their administration before the due date of the Dutch corporate income tax return. In practice, if the financial year equals the calendar year, the due date for the Dutch corporate income tax return is five months after the end of the financial year under review (i.e., before 1 June 2023 for the financial year 2022). With a tax return filing extension, the Dutch corporate income tax return will need to be filed within 16 months of the end of the relevant financial year (i.e., before 1 May 2024 for the financial year 2022). Although taxpayers are (legally) allowed to file the Dutch corporate income tax return before preparing the master file or local file, taxpayers are strongly recommended to apply the reverse order to ensure that the transfer pricing positions taken in the tax return are in line with, and substantiated in, the master file and local file (i.e., if not, the taxpayers may bear the risk of being charged with intentionally filing an incorrect tax return).

If a taxpayer does not (in time) include the master file and local file in its administration, the requirements are not met. As a result, the Dutch Revenue is allowed to impose penalties and issue an 'information decision'. An 'irrevocable information decision' will shift the burden of proof to the taxpayer and will also increase such burden of proof (i.e., in contrast, not meeting General Requirements of Article 8b, Paragraph 3 of the CITA will only shift the burden of proof and not increase it). Since

transfer pricing is not an exact science and transfer prices will generally be determined based on various subjective elements that are open to discussion with the Dutch Revenue (e.g., exit charges, compensation payments and profit splits), an increased burden of proof could have significant impact on transfer pricing corrections.

iii An overview of the main differences between General and Specific Requirements

Reference	Transactions between	Documentation standard	Timing	Burden of proof (in principle) with
General Requirements (Article 8b of the CITA)	Dutch and foreign related entities (including Dutch companies of a fiscal unity)	Open	FY + 16 months	Dutch Revenue
Specific Requirements (Article 29g of the CITA)	Foreign and Dutch related entities (including fiscal unity companies)	Fixed (based on OECD template)	Dutch Revenue Request + (maximum) 3 months	Taxpayer (if fixed standard not met)

Country-by-country reporting

Country-by-country (CbC) reporting requirements were introduced on 1 January 2016 in Article 29e of the CITA. A Dutch taxpayer has a CbC reporting obligation if it forms part of a multinational group that has reported consolidated (worldwide) group revenue of at least €750 million in the preceding financial year.

The CbC notification should be filed ultimately on the last day of the financial year. Subsequently, if no other group entity files the CbC report, the CbC report should be submitted to the Dutch Revenue within 12 months of the end of the financial year under review. Both the notification and the CbC report need to be filed digitally, in a XML-format drawn up by the State Secretary. Failure to meet the CbC reporting obligations may result in a fine of €900,000 (i.e., for repeat offenders).

Presenting the case

i Pricing methods

In the TP Decree, the State Secretary indicates that, in line with Paragraph 4.9 of the OECD Guidelines, the Dutch Revenue will conduct a transfer pricing audit from the perspective of the method applied by the taxpayer at the time of the transaction. Consequently, Dutch taxpayers have a certain degree of freedom regarding their choice of any of the five transfer pricing methods described in the OECD Guidelines, provided that the method applied leads to arm's-length results for the specific transaction. In practice, the TNMM with total cost or turnover as net profit indicator as well as the comparable uncontrolled price method (CUP) for financing transactions are most often applied in practice. However, as a result of increased scrutiny on one-sided transfer pricing methods by Dutch and other tax authorities, the (residual) transactions profit split method is increasingly applied in practice.

Commonly-used database providers in the Netherlands include Bloomberg, Bureau van Dijk, Thomson Reuters and Moody's. For benchmark analyses, the Dutch Revenue generally allows these analyses to be based on pan-European database information. This is due to the fact that the limited size of the Dutch economy prevents the availability of sufficient unrelated-party transactions. In practice, the Dutch Revenue may require taxpayers to account for incremental risk on certain transactions due to the location of the beneficiary through the use of, for example, country risk premiums. Furthermore, with the inclusion of example calculations thereof in the OECD Guidelines, the Dutch Revenue is more likely to accept comparability adjustments, such as working capital adjustments.

In our practical experience, the Dutch Revenue is specifically critical of databases used to determine royalties brand or trademark remunerations, or both, in business-to-business situations where such charges reduce the Dutch taxable basis. In the view of the Dutch Revenue, such benchmarks cannot be used because they are of the opinion that the information included in these databases is not sufficiently detailed to conduct an appropriate comparability analysis in a suitable manner.

An arm's-length compensation must, in principle, be determined on a transactional basis according to the OECD Guidelines. In practice, complications connected to the determination of prices on a transactional basis may occur. In the situation that an assessment per transaction is not possible, for instance, when large numbers of similar transactions are involved, the transactions can be assessed on an aggregated basis to determine the arm's-length character. In these circumstances, the taxpayer is obliged to substantiate that the transfer price taken into account with regard to the aggregated transaction as a whole is in accordance with the arm's-length principle (reference is made to Section 2.2 of the TP Decree as well as to the Dutch Car-importer case law of the Dutch Supreme Court).[11]

In the TP Decree, the State Secretary indicates that statistical tools, such as the interquartile range, can be applied to increase the reliability of the comparable data. Therefore, a correction cannot take place if the price applied for the inter-company transaction is within this range.

In addition, a taxpayer-initiated shift within the range will only be accepted by the Dutch Revenue where the taxpayer:

a. has substantiated the changed circumstances justifying an adjustment of the transfer price; and
b. formalised the amended pricing in an agreement and actually charged said price between the parties.

If the price applied falls outside of this range, the State Secretary takes the position that the transfer prices should be adjusted to the median (i.e., the middle point of a range of observations). Moreover, with respect to the use of multi-year data, the Dutch Revenue will first assess whether the remuneration for the inter-company transaction falls within the arm's-length range determined for the year under review. If the remuneration falls within the annual range, no adjustments will be made. However, if the remuneration falls outside the annual range, the Dutch Revenue will assess whether the weighted remuneration for the inter-company transaction determined over a number of years falls within the multiple-year range. When the remuneration falls outside of both the arm's-length annual range and the multiple-year range, an adjustment will be made.

ii Authority scrutiny and evidence gathering

The Coordination Group Transfer Pricing (CGTP) was established to ensure the coordination within the Dutch Revenue on the practical application of transfer pricing rules and the coordination of knowledge. Although the local tax inspectors are in charge of the assessment of the taxpayer's return, they are supported by the CGTP in transfer pricing matters.

The Dutch Revenue mainly focuses on the topics included in the TP Decree, such as business restructuring (specifically involving transfers of part of the business out of the Netherlands), (the transfer and pricing of) intangibles, intra-group services, procurement activities, intra-group guarantees, captive insurance companies and Dutch participants in cost contribution arrangements (CCAs). There is also a focus on the transfer pricing position of group companies that incur continuous loss. In these discussions, particular attention is given by the Dutch Revenue to assess whether the relevant inter-company transaction is commercially rational from the perspective of the Dutch taxpayer as well as the related entity. A more recent trend is the focus of the Dutch Revenue on the arm's-length nature of valuations prepared by Dutch taxpayers (i.e., reference is also made to Paragraph 5 of the TP Decree). This has led to the formation of the National Business Valuation team (NBVT) of the Dutch Revenue. The NBVT includes registered business valuation specialists and can be contacted for tax related valuation discussions.

Upon the introduction of the Specific Requirements, the State Secretary indicated that master file and local file documentation could be requested by the Dutch Revenue following a risk assessment of the CbC report. However, recent experience shows that the Dutch Revenue has requested master file and local file documentation in relation to the assessment of the tax return or even as a general request.

A Dutch taxpayer is required to provide the Dutch Revenue with all information that could (hypothetically) be reasonably relevant for the levying of Dutch taxes on the taxpayer. The Dutch Revenue may also ask information on the relevant taxpayer from third parties that are required to maintain an administration under Dutch tax law (e.g., Dutch companies). Dutch taxpayers are not, however, required to provide the Dutch Revenue with advice received from a tax adviser or accountant and the correspondence with their attorney (in their function as an attorney).

Intangible assets

There is no definition of intangibles in Dutch law. As a general rule, Dutch tax law respects the content of the legal rights and the contractual arrangements that exist between related parties. Consequently, the legal owner of an intangible is therefore, in principle, also considered the owner for tax purposes. The State Secretary, however, deems it reasonable to attribute no more than a limited remuneration to the legal owner of the intangible if it lacks the necessary functionality to control and incur the related risks.[12] Moreover, a transaction is not in accordance with the arm's-length principle if the intangible is transferred to a group company that does not add value to the relevant assets as it lacks the necessary functionality.

The view of the State Secretary is in line with the OECD Guidelines. According to the OECD Guidelines, profits derived from exploiting the intangible should be allocated by reference to the development, enhancement, maintenance, protection and exploitation (DEMPE) functions in relation to this intangible.[13] The State Secretary considers the functions of development and enhancement to be the most important in this analysis.[14]

In the TP Decree, a specific approach has been adopted with respect to hard-to-value-intangibles.[15] As also acknowledged in the OECD Guidelines, it may be difficult for the Dutch Revenue to assess the value of these intangibles at the time of transaction due to uncertainties regarding the future value development. Therefore, when there is a discrepancy of more than 20 per cent between the actual results and the projections that cannot be explained based on the facts and circumstances occurring after the date of the price determination, the Dutch Revenue will challenge the arm's-length nature of the price.[16] The intangible will not be regarded as 'hard-to-value' if the deviation occurs after a period of five years after the realisation of the revenues.

Settlements

Historically, Dutch taxpayers have often settled transfer pricing disputes with the Dutch Revenue. Such a settlement may be reached before the audit is finalised (i.e., before the final audit report is issued), but settlements may also be reached during the objection and appeal phase. There is no (fixed) formal procedure to conclude a settlement with the Dutch Revenue. In any case, a settlement has to be formalised in a 'determination agreement'.

In general, a determination agreement concluded with the Dutch Revenue to formalise a settlement will cover past years (i.e., the years under audit). However, Dutch taxpayers may also rely on the determination agreement for future years, provided that such is explicitly included in that agreement. Dutch taxpayers also have the possibility to obtain confirmation in advance (with respect to future years) in the form of a unilateral, bilateral or multilateral advance pricing agreement (APA). These APAs may also cover an open position in previous years as a result of a rollback mechanism. APAs and other rulings issued after 1 July 2019 are subject to the new ruling practice included in the Ruling Decree.[17]

Some notable changes, with regards to the prior ruling practice, are as follows:

a. the exchange of cross-border rulings and APAs;
b. publication of anonymised summaries; and
c. the economic nexus requirements.

A determination agreement is, in principle, binding on the taxpayer as well as the Dutch Revenue. The settlement, as formalised in the determination agreement, cannot be overturned or challenged afterwards (e.g., in the event of new insights or case law). However, the determination agreement may be subject to critical assumptions on the circumstances. A breach of these assumptions may result in a termination. Moreover, if a Dutch taxpayer files a request for a mutual agreement procedure (MAP) after reaching a settlement with the Dutch Revenue, the Dutch Revenue will not be bound by the determination agreement.

Investigations

The corporate income tax return must be filed within five months (or 16 months, in the case of a filing extension) after the end of the financial year. After the filing of the tax return, the Dutch Revenue can initiate an audit process, which often includes a transfer pricing review. The final assessment needs to be raised within three years of the tax return (including the extension period, if applicable).

The Dutch Revenue may under certain conditions issue an additional assessment. In general, an additional assessment can only be issued within a period of five years (to be prolonged with the above-mentioned extension period) after the end of the relevant financial year, if new information – a 'new fact' – has come to light of which the Dutch Revenue was not aware (and could not reasonably have been aware) at the time that the original final assessment was issued. The five-year period may be extended to 12 years if the company paid insufficient tax in respect of an asset held, or profit that arose, abroad. The Dutch Revenue does not need to prove that a new fact has come to light, in the event the company has not acted in good faith and knows, or should have known, that the original final assessment was too low or that, erroneously, no assessment was issued at all.

The Dutch Revenue may also issue an additional assessment if the final assessment was issued incorrectly (or not at all) due to an error and the taxpayer was aware or reasonably should have been aware that the assessment was incorrect. If the amount of tax due on the assessment is at least 30 per cent lower than the amount due based on tax law, the taxpayer is deemed to be aware that it is incorrect.

If the Dutch taxpayer does not agree with the final or additional assessment, it can file an objection within six weeks of the date of the assessment. The Dutch Revenue has to reconsider its assessment and issue a decision on the objection within six weeks (may be extended within six weeks). Hereafter, the Dutch taxpayer may challenge the decision on objection before the Lower Court within another six weeks.

Litigation

i Procedure

Transfer pricing disputes are rarely brought before a tax court in the Netherlands.

The Dutch taxpayer may challenge the decision on objection issued by the Dutch Revenue and file an appeal at the Lower Court. Hereafter, the decision of the Lower Court may be appealed at the Court of Appeal. Both the Lower Court and the Court of Appeal can assess the facts as well as the application of the law. Finally, a decision issued by the Court of Appeal can be appealed at the Supreme Court. The Supreme Court only decides on the application of the law.

ii Recent cases

ECLI:NL:RBZWB:2017:5965 (9 September 2020)

The Dutch Revenue bears a 'double' burden of proof when it challenges the transfer pricing position of a taxpayer.[18] According to the Supreme Court, the Dutch Revenue has to first prove that the inter-company transaction took place because of shareholder motives, rather than business motives. In addition, the Dutch Revenue has to argue the non-arm's-length character of the transfer prices applied.

The *Zinc* case provides more insight regarding the division of the burden of proof.[19] In this case, the Lower Court confirmed that the tax inspector has a double burden of proof. The court also indicated that the tax inspector will, in principle, not be able to argue a shift of the burden of proof to the taxpayer (if the taxpayer has filed a correct tax return). The *Zinc* case also seems to imply that the Dutch Revenue cannot prove that a transaction was not based on business motives (the first part of the burden of proof), where proper transfer pricing documentation was prepared, because this proves that the taxpayer intended to apply arm's-length pricing. Although an appeal was lodged against the decision of the Lower Court, the case was settled by the taxpayer and the Dutch Revenue before the Court of Appeal.

Secondary adjustment and penalties

Under Dutch tax law, upward or downward primary adjustments require the recognition of secondary transactions in the tax accounts of the company (i.e., deemed distributions to the shareholder, informal capital contributions to the company or a deemed loan between the company and the related entity). In turn, these secondary transactions may themselves trigger secondary adjustments (e.g., the recognition of Dutch dividend withholding tax on deemed dividend distributions or the imputation of arm's-length interest on a deemed loan).

Where benefits are provided by one sister company to another, such benefits will be treated as a deemed dividend distribution to the common shareholder followed by a deemed capital contribution to the benefiting company. In its judgement dated 31 May 1978, the Dutch Supreme Court ruled that the benefit obtained by a Dutch company, resulting from an interest-free loan payable granted by its Swedish (indirect) shareholder, did not constitute business profit for the Dutch company. Instead, a deemed capital contribution by the Swedish shareholder was recognised.[20] The downward adjustment was made irrespective of a pick-up of deemed interest income at the level of the Swedish shareholder. As discussed in Section I, as of 1 January 2022, unilateral downward adjustments of the Dutch taxable base are denied in such situation.

In the Parliamentary Papers, the State Secretary indicated that due to the complexity of transfer pricing, penalties will only be imposed when it is plausible that clearly intentional actions have resulted in a non-arm's-length transfer pricing position taken in the tax return. No penalties would be imposed in the case of gross negligence and conditional intent. However, the Dutch Revenue seems to have abandoned this lenient practice and is increasingly imposing penalties in transfer pricing cases.[21]

Broader taxation issues

i Diverted profits tax, digital sales taxes and other supplementary measures

The Netherlands does not provide for a diverted profit tax, digital sales tax or other tax measures supplementing transfer pricing rules. Changes in this regard may be expected in the coming years because the European Commission seems willing to introduce a digital levy tax in the European Union.

Regarding EU State Aid case law, on 24 September 2019, the General Court of the EU annulled the European Commission's decision in the *Starbucks* case.[22] The European Commission was of the opinion that the agreed remuneration by the Netherlands and Starbucks was not in accordance with the arm's-length principle. The Commission found that the Netherlands had therefore granted State Aid to Starbucks in the form of a selective tax advantage. However, the Commission did not manage to demonstrate the existence of a selective economic advantage within the meaning of Article 107 of the Treaty on the Functioning of the European Union.

ii Tax challenges arising from digitalisation

In 2021, the Inclusive Framework agreed on a two-pillar solution to address the tax challenges arising from the digitalisation of the economy.[23] The State Secretary has expressed his support for a swift implementation of both pillars.[24]

iii Transfer pricing implications of covid-19

In response to the consequence of the covid-19 pandemic on the transfer pricing policies applied by related entities, on 18 December 2020, the OECD released guidance (the Guidance) on the transfer pricing implications of the pandemic. The Guidance can be relied on by Dutch taxpayers. In addition, the Dutch government introduced a temporary emergency employment measure (the NOW). The NOW provided Dutch employers with a grant to allow them to continue to finance the wages of Dutch employees. However, on 1 April 2022, the NOW was discontinued.[25]

iv Double taxation

A Dutch taxpayer has multiple options to resolve double taxation. All bilateral tax treaties (Tax Treaties) concluded by the Netherlands contain a MAP provision similar to Article 25, Paragraph 1 of the OECD Model Convention. In addition, as part of its Tax Treaty policy, the Netherlands also intends to include mandatory binding arbitration (MBA) clauses, in line with Article 25, Paragraph 5 of the OMC, in its Tax Treaties. Unfortunately, not all Tax Treaty partners have agreed to include an MBA provision. Furthermore, domestic statutory provisions regarding MAP and MBA are included in the Law on Fiscal Arbitrage (WFA), which constitutes the implementation of EU Dispute Resolution Directive in Dutch law. Finally, Dutch taxpayers can rely on the EU Arbitrage Convention (the Convention) to eliminate double taxation. The practical application of MAPs and (mandatory binding) arbitration under the Tax Treaties, the WFA and the Convention is further outlined in the MAP Decree.[26]

Once the Dutch and foreign competent authorities have reached consensus and the taxpayer accepts the outcome, the outcome has to be implemented regardless of any domestic time limits or court decisions. However, it the Dutch taxpayer does not obtain a satisfactory outcome, it may still invoke the domestic legal proceedings against an assessment, given that the time limit has not lapsed.

v Consequential impact for other taxes

Transfer pricing adjustments are primarily of importance in the context of the Dutch (corporate) income tax. However, a transfer pricing adjustment can also have consequences for VAT and customs purposes. A transfer pricing adjustment may affect the pricing of the products and impact the customs value of the imported goods. Consequently, an adjustment required by the Dutch Revenue may have an impact on the tax levied. When a transfer price adjustment does not relate to an individual transaction, it is unlikely to have consequences for other taxes. These implications should be carefully analysed on an individual basis.

When demonstrating the arm's-length value for customs purposes, it is customary to share transfer pricing reports in which it is established that the transaction value has not been influenced by a related entity.

Outlook and conclusions

As discussed in Section I, from 1 January 2022, the Netherlands implemented ground-breaking legislation to end its long-standing practice of allowing unilateral downward transfer pricing adjustments based on the arm's-length principle. The legislation denies a downward adjustment to the extent that no corresponding upward adjustment is included in the taxable base of the related party in another jurisdiction.

In addition to the above, it should be noted that the Netherlands implemented the mandatory disclosure rules for intermediaries and taxpayers, as recommended by BEPS Action 12 and imposed by Council Directive 2018/822/EU, of 25 May 2018 (Mandatory Disclosure Directive). The Mandatory Disclosure Directive entails the obligation for intermediaries and taxpayers (if applicable) to disclose to the relevant tax authorities within the European Union information on certain arrangements that have tax relevance and indicate a potential risk of tax evasion. Arrangements that meet certain characteristics, or hallmarks, should be reported to the Dutch Revenue. The Dutch Revenue will exchange the reported arrangements with the other involved EU Member States. According to the hallmark regarding arrangements involving transfer pricing methods (Category E), the following arrangements should be disclosed:

a. an arrangement that involves the use of unilateral safe-harbour rules;
b. an arrangement involving the transfer of hard-to-value-intangibles; and
c. an arrangement involving an intra-group cross-border transfer of functions or risks (or both) and assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 per cent of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

Finally, the State Secretary has expressed his support for both Pillar One and Two as agreed on by the Inclusive Framework to address the tax challenges arising from the digitalisation of the economy. It is expected that, once ready for implementation, both pillars will be brought into Dutch law.

Footnotes

[1] Taco Wiertsema is counsel and Pauline Thio is an associate at Atlas Tax Lawyers.

[2] On the basis of the arm's-length principle, (business) income earned by individuals in transactions with (foreign) related entities can also be adjusted. Reference is made to the ruling of the Supreme Court dated 25 November 2011, ECLI:NL:HR:2011:BP8952, which deals with a non-arm's-length loan.

[3] Parliamentary Papers II 2001/02, 28 034, nr. 5, pp. 47–48.

[4] Parliamentary Papers II 2001/02, 28 034, No. 3, pp. 7–8 and 19–23.

[5] Decree of the State Secretary of Finance, dated 22 April 2018, No. 2018-6865.

[6] In Paragraph 7 of the TP Decree, in Example O, the dynamic interpretation of Article 8b of the CITA is illustrated.

[7] See E.A. Visser, Verrekenprijzen; een drieluik p. 26 (Kluwer 2005); and L.F. van Kalmthout, Verrekenprijzen, in Over de grenzen van de vennootschapsbelasting: Opstellen aangeboden aan prof. Mr. D. Juch ter gelegenheid van zijn afscheid als hoogleraar aan de Universiteit van Tilburg p. 99 (Kluwer 2002).

[8] Decree of the State Secretary of Finance, dated 26 November 2013, IFZ 2013/184M.

[9] Paragraph 13 of the TP Decree.

[10] Regulation of the State Secretary of Finance dated 30 December 2015, nr. DB2015/462M.

[11] Decision dated 28 June 2002 of the Supreme Court nr. ECLI:NL:HR:2002:AE4718.

[12] Decree of the Dutch State Secretary of Finance dated 22 April 2018, nr. 2018-6865, Paragraph 5.7.

[13] OECD Guidelines, Paragraph 6.32.

[14] Decree of the Dutch State Secretary of Finance dated 22 April 2018, nr. 2018-6865, Paragraph 5.1.

[15] Reference is made to the OECD Guidelines, Paragraph 6.189.

[16] Decree of the Dutch State Secretary of Finance dated 22 April 2018, nr. 2018-6865, Paragraph 5.3.

[17] Decree of the Dutch State Secretary of Finance, dated 19 June 2019, nr. 2019/12002.

[18] Decision of the Dutch Supreme Court, dated 28 June 2002, ECLI:NL:HR:2002:AE4718.

[19] Decision of the Dutch Supreme Court, dated 28 June 2002, ECLI:NL:HR:2002:AE4718 and Decision of the Zeeland-West-Brabant Lower Court dated 9 September 2017, ECLI:NL:RBZWB:2017:5965.

[20] Decision of the Dutch Supreme Court, dated 31 May 1978, nr. ECLI:NL:PHR:1978:AX2866.

[21] Decision dated 17 January 2014 of the Zeeland-West-Brabant Lower Court, nr. ECLI:NL:RBZWB:2014:150.

[22] Decision of the General Court of the European Union, dated 24 September 2019, ECLI:EU:T:2019:669.

[23] Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021 – OECD.

[24] Letter of the State Secretary of Finance, dated 14 March 2022, 2022-0000090872.

[25] Letter of the State Secretary of Economic Affairs and Climate Policy, dated 25 February 2022, CE / 22075312.

[26] Decree of the State Secretary of Finance dated 11 June 2020, nr. 2020-0000101607.

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