THE TAX DISPUTES AND LITIGATION REVIEW

TENTH EDITION

Editor
David Pickstone

THE LAWREVIEWS

THE TAX DISPUTES AND LITIGATION REVIEW

TENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
David Pickstone

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADER
Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS
Rebecca Mogridge, Katie Hodgetts, Joey Kwok

BUSINESS DEVELOPMENT ASSOCIATE
Archie McEwan

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Richard Cosgrove

SUBEDITOR
Martin Roach

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-279-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ASBZ ADVOGADOS

BAE, KIM & LEE LLC

BPV HÜGEL RECHTSANWÄLTE GMBH

THE CHAMBERS OF MIHIR NANIWADEKAR

CUATRECASAS

DDTC CONSULTING

GALICIA ABOGADOS

GORRISSEN FEDERSPIEL

KPMG LAW ADVOKATFIRMA AS

LENZ & STAEHELIN

LEXVALOR ABOGADOS

LOYENS & LOEFF

MAISTO E ASSOCIATI

MAPLES AND CALDER

OLD SOUTH BRITISH CHAMBERS

SCORDIS, PAPAPETROU & CO LLC

STEWARTS

STIBBE

STREAMSOWERS & KÖHN

TMI ASSOCIATES

TRIPLEOKLAW

VASIL KISIL & PARTNERS

WASELIUS & WIST

CONTENTS

PREFACE

It is increasingly common for tax practitioners to be involved in disputes that span multiple jurisdictions. We operate in a global economy. Supply chains cross continents, and the increasing role of technology accelerates the pace at which economic activity becomes divorced from the structures intended to tax it. The pace of economic and technological change potentially increases the gap between the reality of commerce and that of taxation.

Although supranational agencies, such as the European Commission and the Organisation for Economic Co-operation and Development, work hard to keep pace with change, there is an inevitable lag between intention and action. Of late we have seen individual countries start to take unilateral actions, with digital taxation being a prime example. In coming years, a combination of economic developments and unilateral actions by individual countries is likely further to emphasise the importance of double tax treaties and the OECD multilateral instrument.

As the chapters of this book were being written, there were already important changes taking place in the political landscape in the United States and Europe, and in the global economy, that will affect international cooperation on tax and trade. For example, the past year has seen a ground-breaking deal agreed by 136 countries, accounting for more than 90 per cent of global GDP, to impose a minimum tax rate of 15 per cent on multinational enterprises.

In the light of the economic effects of the global pandemic, tax authorities are under unprecedented pressure to increase tax yield, and this will only increase the pressure on tax authorities to collect what is seen as a fair share of tax from international businesses operating on their shores. For our profession, this means a likely increase in the frequency of tax disputes, an ever-increasing international element to them and the ensuing need to work more closely with international colleagues as complex, multi-jurisdictional issues arise. It comes as no surprise that the authors of many chapters continue to identify international tax issues and offshore structures as areas of key focus for their own domestic tax authorities.

Regardless of whether tax authorities increase in cooperation or increase in competition, one thing is certain: they will not stand still. Tax, and particularly the international approach to tax, is a permanent fixture on the political agenda. The resulting frequent (and sometimes abrupt) changes in key elements of tax law inevitably lead to high value and complex disputes which often take many years to resolve.

The purpose of this book is to provide insight into the issues that give rise to tax disputes in different jurisdictions, the procedures for resolving those disputes and the powers and approach of local tax authorities. It is hoped that it will provide valuable insight into the process, timescale and cost of resolving complex difficulties when they arise across more than one jurisdiction.

We are lucky to have contributions from many leading and impressive tax practitioners across a wide range of jurisdictions. Each provides an up-to-date insight into dealing with contentious tax issues in their jurisdiction. I have enjoyed and learned from reading their contributions and I hope you will do, too.

I would like to thank my colleagues Victor Cramer, Lee Ellis and Cristiana Bulbuc for their valuable assistance in compiling this edition.

David Pickstone
Stewarts
London
February 2022

Chapter 15

NETHERLANDS

Reinout de Boer, Michael Molenaars, Rogier van der Struijk, Mieke Lavreysen and Tirza Cramwinckel[1]

I INTRODUCTION

i General approach to tax controversies

In the Netherlands, a relatively open and approachable attitude from the Dutch Tax Administration is typical in the tax controversy landscape. In general, a risk reduction strategy in tax disputes is preferred, both by the Dutch Tax Administration and taxpayers. The strategy of the Dutch Tax Administration is focused on improving voluntary compliance of taxpayers (both individuals and companies) up front rather than corrections and sanctions afterwards. Traditionally, the Dutch Tax Administration has been willing to cooperate on mitigating uncertainty for taxpayers up front, especially by means of the Dutch ruling practice under which taxpayers can apply for advanced tax rulings and advance pricing agreements with the Dutch Tax Administration (see Section VII). In recent years the Dutch ruling practice has been revised in light of growing political attention on taxation and transparency. Under the revised rules, taxpayers must meet stricter measures to obtain a Dutch international tax ruling, such as that the taxpayer needs to have sufficient 'economic nexus'.

In order to avoid or mitigate tax disputes, it is beneficial for the taxpayer to have a good relationship with the Dutch Tax Administration. This may increase the taxpayer's chances of preventing or settling the tax controversy at an early stage (see Section VII).

As a result of the changing global tax atmosphere, taxpayers are likely to be confronted with tax audits and tax disputes by the Dutch Tax Administration more frequently, especially concerning tax structures that are perceived as potentially aggressive tax planning.

ii Matters of tax disputes

Tax disputes may arise in various circumstances, for example, resulting from a tax audit initiated by the Dutch Tax Administration, questions asked by the Administration (e.g., after having reviewed a tax return filed by a taxpayer) or after an additional tax assessment or a tax penalty (see Section IV). Further, the Administration may receive information from a third party investigation or from foreign tax authorities, take notice of a transaction in the public press, or find a matter within scope of certain areas of the Administration's focus for risk management (e.g., large foreign real estate companies and VAT carousel fraud, as mentioned in the Administration annual plan of 2021). These events may lead to controversies between a taxpayer and the Administration.

In general, the Administration's tax audits can focus on a variety of taxpayers, from individuals (i.e., personal income tax and inheritance tax), to small-sized business (i.e., income

1 Reinout de Boer and Michael Molenaars are partners, Rogier van der Struijk is a senior associate, Mieke Lavreysen is a junior associate, and Tirza Cramwinckel is a staff associate at Stibbe.

tax and VAT), and large companies (i.e., corporate income tax, VAT, withholding taxes and wage taxes). According to recent case law, the Administration is focusing on challenging matters in which a tax mismatch is created by the taxpayer (e.g., a deduction of a payment without an inclusion) or in cases where tax deduction is created artificially (e.g., interest payments to offset against taxable profits).

Furthermore, also in the light of the global tax climate, the Administration focusses on combating and preventing tax avoidance, as well as transfer pricing, when dealing with large companies (see Sections VIII and X).

II COMMENCING DISPUTES

i Legal remedies in tax matters

In the Netherlands, taxpayers can seek a legal remedy against tax controversies with the Dutch Tax Administration with regard to all types of Dutch taxes. These legal remedies are, in principle, only available against tax assessments, self-assessment payments[2] and decisions of the Administration against which an objection may be lodged. Common examples include decisions that determine and govern the deduction of fiscal losses, decisions imposing fines, decisions on requirements for information and decisions on the application for a refund of VAT.

ii Objection phase

In the Netherlands, a tax dispute generally commences if a taxpayer disagrees with a decision against which an objection may be lodged (such as a tax assessment issued by the Administration), and files an objection. This should be done six weeks after the decision of the Administration that gives rise to the disagreement; after this period, in principle the appeal will be declared inadmissible absent an excusable reason for exceeding the term. In practice, taxpayers can file a pro forma objection and add their arguments later, within an additional time frame approved by the Administration. The main aim of the objection phase is for the Administration to reconsider its decision (e.g., after clarification of viewpoints on both sides). In principle, the Administration has six weeks to issue a decision when an objection is filed, but this period may be extended.

The objection phase ends when the Administration issues a decision. The taxpayer can challenge this decision before a tax court, again within six weeks of the decision being issued (see Sections III and Section VI).

III THE COURTS AND TRIBUNALS

In the Netherlands, the judicial system consists of three judicial levels of tax courts: in first instance, the Lower Court; in second instance, the Court of Appeal; and in last instance, the Supreme Court of the Netherlands.

The annual report of the Dutch courts over 2020 shows that the average processing time of tax cases in second instance was 65 weeks. According to the Dutch Supreme Court annual report for 2020, the average processing time of a tax case was around a year.

2 With respect to taxes on the basis of self-assessment, such as Dutch VAT, dividend withholding tax and wage tax.

In the Lower Court, the tax case is decided upon by one or three independent judges, appointed depending on the type and complexity of the case. During the procedure the taxpayer is able to further substantiate his or her grounds of appeal, while the tax inspector can file a statement of opposition. Both parties have the right to file documents with the court (as a main rule) up to 10 days before the date of the court hearing. A hearing usually takes place which for tax cases is in principle behind closed doors. The Lower Court will decide on questions relating to the facts of the case as well as the underlying questions related to the interpretation of the law.

Both parties have the right to file an appeal against the judgment of the Lower Court with the Court of Appeal within six weeks of the judgment being given. The procedure is similar to the procedure in the Lower Court, and focuses on parties' objections to the judgment. In principle, the taxpayer and tax inspector can bring forward new evidence, arguments and documents.

The procedure before the final instance, the Dutch Supreme Court, can be initiated by either the taxpayer or the Dutch Tax Administration (as represented by the Dutch State Secretary of Finance). The time frame for lodging a cassation appeal is six weeks after the decision of the Court of Appeal.

The cassation procedure has a slightly different character than hearings in the Lower Court and the Court of Appeal. At hearings of the Supreme Court, parties will only have the opportunity to challenge the explanation or interpretation of the law as it has been applied by the Court of Appeal. The Supreme Court does not adjudicate facts, but determines whether there has been a breach of law, or whether a decision has been inadequately motivated or is incomprehensible. A taxpayer should therefore carefully analyse the lower courts' decision and prudently formulate grounds in any cassation appeal.

In general, the cassation procedure takes places on the basis of written documents. Hearings before the Supreme Court are not common. Cases before the Supreme Court are decided upon by three or, in more difficult cases, five justices. In important cases, an advocate-general is involved to give his independent view on the case in the form of a 'conclusion'. The Supreme Court can rule the cassation appeal to be founded or unfounded, or (if it requires a reconsideration of the facts) it can refer the case back to the Court of Appeal.

Generally, case law of the Lower Court and the Court of Appeal do not create binding precedents for other taxpayers, as they may still be overruled by the Dutch Supreme Court. These judgments therefore cannot guarantee a certain outcome for a taxpayer, but they provide guidance of the treatment of certain tax matters. Judgments of the Dutch Supreme Court provide binding views on the interpretation and explanation of the law.

IV PENALTIES AND REMEDIES

i Types of administrative and criminal penalties

The Dutch State Taxes Act includes two types of administrative penalties and one category of criminal penalty.

The administrative penalties can be distinguished into administrative penalties for omissions, such as late filing or late payment, and negligence penalties for tax offences (both acts and omissions) involving intentional acts or gross negligence that, for instance, involve failure to pay taxes in a timely fashion or file tax returns correctly.

Criminal tax penalties can be imposed by the Dutch Tax Administration on taxpayers for serious infringements, such as not providing the Administration with the requested information, and for criminal conduct, for instance in case of deliberate failure to file a tax return.

There is guidance with regard to imposition of administrative penalties by the Administration, which includes, for example, mitigating and aggravating circumstances to be taken into account with respect to the amount of the penalty.

Furthermore, the Dutch Criminal Code provides a legal basis to penalise criminal offences in relation to taxes, such as forgery of documents. Criminal tax offences are not handled by the Dutch Tax Administration but by means of prosecution by the public prosecutor's office. The prosecutor's office may opt to settle a criminal tax case by means of a transaction, whereby the taxpayer generally has to pay a sum of money to the Dutch treasury and fulfil one or more financial conditions.

Guidelines on how cases are to be selected for administrative or criminal prosecution, as set out in the Guidelines for the Registration and Handling of Tax Offences. A relevant indicator is whether the amount of tax loss for the state exceeds €100,000.

Penalties for tax offences and criminal penalties may also be imposed on co-principals and accomplices. Tax advisers can be classed as accomplices. From 1 January 2020, penalties imposed on advisers for tax offences for aiding or abetting tax avoidance or fraud in respect of allowances may (under certain circumstances) be made public on the Dutch Tax Administration's website.

ii Legal remedies and arguable position of the taxpayer

Administrative penalties will be imposed on a taxpayer by the Dutch Tax Administration in the form of a decision against which an objection may be lodged (see Section II).

If a taxpayer has an arguable position, the Administration cannot impose an administrative penalty. In short, a taxpayer may have an arguable position if his or her position is reasonably legally defendable, based on jurisprudence, law and doctrine. Case law shows that this must be determined on a case-by-case basis.

V TAX CLAIMS

i Recovering overpaid tax

In the Netherlands, the approach to recovering overpaid taxes depends on whether it concerns a tax payable on the basis of self-assessment, such as Dutch VAT and dividend withholding tax, or a return-based tax, such as Dutch corporate income tax and personal income tax.

Recovering overpaid taxes with respect to tax on the basis of self-assessment

With regard to taxes levied on the basis of self-assessment, overpaid tax can be recovered by submitting an application to the Dutch Tax Administration. The details of the formal procedure depend on the type of tax. Generally speaking, for the repayment of Dutch dividend withholding tax, taxpayers can submit an application to the Administration. An objection can be lodged against a decision by the Administration regarding an application. The specific details of the application procedure, necessary documentation and time frame

depends on the legal grounds for the repayment request (e.g., basis in Dutch tax law, EU law or a double taxation treaty). In principle, such a request is timely filed if it is submitted within three years after the end of the calendar year in which the dividend was distributed.

Recovering overpaid taxes with respect to a return-based tax

With regard to a return-based tax, overpaid tax is recovered in a different way. For taxes such as Dutch corporate income tax and personal income tax, taxpayers have to file a tax return, which will result in a tax assessment made by the Dutch Tax Administration. In case of a provisional tax assessment, taxpayers can submit a request for adjustment to the provisional tax assessment. In case of a (final or additional) tax assessment, the taxpayer can lodge an objection against this decision (see Section II). Overpaid taxes must therefore be challenged by means of seeking a legal remedy against the tax assessment.

Interest on overpaid taxes

Under certain circumstances, interest on overpaid tax can be reimbursed. Interest on overpaid indirect taxes, such as Dutch VAT or dividend withholding tax, can be reimbursed in the event the tax inspector has not made a refund decision in time. In case of direct taxes, such as Dutch corporate income tax, reimbursement of interest on overpaid tax only takes place if certain criteria are met (e.g., it took the Dutch Tax Administration more than three months to impose the tax assessment and the tax assessment is imposed after 1 July of the year after the tax year). In light of the covid-19 pandemic, specific rules regarding interest apply.[3]

Civil proceedings between commercial parties

If a tax dispute arises between commercial parties, the involved parties can institute civil proceedings. With respect to warranties or indemnities given by commercial parties in the course of transactions, parties usually adhere to statutory limitations and filing extensions (while allowing extra time to be able to process the claims). In practice, purchaser and seller may conclude other, shorter, time frames, depending on the type of commercial party and willingness to remain responsible for tax.

ii Challenging administrative decisions

Dutch Tax Administration is bound by the principles of good governance

Taxpayers can challenge administrative decisions on the ground that the Dutch Tax Administration has violated (one or more) principles of good governance. The conduct of the Administration in relation to the taxpayer is regulated by these general principles, including the principles of protecting legitimate expectations, equality, due care, fair play and proportionality. Violation of the principles of proper administration can have legal consequences, depending on the principle and the circumstances of the case (e.g., the consequences may vary from a reduction of interest to a lower tax assessment).

3 General information about the measures of the Dutch Tax Administration regarding covid-19 is available at www.belastingdienst.nl/wps/wcm/connect/nl/coronavirus/coronavirus.

Principle of protection of legitimate expectations

An important principle in Dutch tax case law is the principle of protection of legitimate expectations, which means safeguarding taxpayer's interests in situations where he or she believes he or she can legitimately rely on expectations raised by the Dutch Tax Administration. The application of this principle can result in an outcome that is in accordance with expectations, but contrary to the law (*contra legem*). A successful appeal based on the principle of legitimate expectation requires a taxpayer to prove that promises or other statements were made by the Administration based on which the taxpayer, in the given circumstances, could reasonably infer whether, and if so, how the inspector would exercise his powers in a specific case. Such promises or statements may concern, inter alia, individual commitments by a tax inspector, guidance given by the Administration, agreements in the form of a tax ruling, or (implicitly deduced) standpoints of view. The application of the principle of honouring legitimate expectation depends on the circumstances of the case.

Principle of equality

Based on the principle of equality, unequal treatment by the Dutch Tax Administration of equal cases is not permitted. This intends to safeguard taxpayer's interest in situations where discrimination in the Administration's way of administering tax law may arise. Much depends on the circumstances of the case, but if a taxpayer successfully manages to make an appeal to the principle of equality, the Supreme Court has ruled that this may result in an outcome that is contrary to the law (*contra legem*).

Principle of due care

The principle of due care safeguards a careful and prudent decision-making process and the enforcement of decisions taken by the Dutch Tax Administration. The impact of the principle of due care is usually limited, but a trend in taxpayers invoking this principle may be noticed. Violation of the principle of due care does not, in principle, lead to annulment of the contested assessment. Only in particular circumstances (e.g., the misuse of audit powers) where the Administration has acted so carelessly an appeal on the principle of due care could result in more far-reaching measures, such as the exclusion of information from the judicial procedure. According to case law, complaints such as carelessness in the gathering of information from third parties involved, failure to adequately communicate about procedural consequences and slow or inaccurate settlement of the tax assessment can result in a reduction in tax interest.

iii Claimants and related parties

In principle, it is not possible for parties other than the taxpayers to submit an application for recovery of the specific tax involved or to file an appeal against a tax-assessment or self-assessment. Some exceptions do exist, in particular conditions (e.g., persons having a joint interest in the decision of the Dutch Tax Administration). The reclaiming of overpaid tax does not (directly) affect other parties.

As a main rule in Dutch tax law, a tax payable can only be offset against a tax payable of the same taxpayer, which however may work out differently in case a fiscal unity for Dutch corporate income tax purposes is in place.

VI COSTS

i Costs in the objection phase

The Dutch Tax Administration does not charge costs for handling an objection of the taxpayer. A taxpayer can request a reimbursement for costs incurred in relation to its objection. Such a request is granted only if certain conditions are met (e.g., the Administration makes a culpable mistake and revises its earlier decision). The standard reimbursement of costs was €261 in 2021, but may be higher (or lower) depending on the complexity of the case at hand.

ii Costs in the appeal procedure before tax court

To initiate proceedings before the court, a taxpayer has to pay a court registration fee. The amount of the fees depends on the nature of the taxpayer, the characteristics of the case and the instance. In 2021, the fees were generally between €49 and €541.

As a main rule, if the tax court rules wholly or partly in favour of the taxpayer, the costs of the proceedings incurred the taxpayer are eligible for reimbursement. It should be noted that the reimbursement of costs is based on standardised amounts and is usually not cost-effective. However, under special circumstances the court can grant additional or integral reimbursement of the costs of the proceedings. Case law shows that this may be the case under specific circumstances (e.g., the taxpayer incurred high costs through careless actions of a tax inspector).

VII ALTERNATIVE DISPUTE RESOLUTION

There are several alternative dispute resolution (ADR) mechanisms in the Netherlands to resolve tax disputes between taxpayers and the Dutch Tax Administration. It should be pointed out that the risk of tax disputes may be reduced by a taxpayer's preventive undertakings (e.g., prior consultation with the Dutch Tax Administration to facilitate discussions in advance that would otherwise be conducted after the fact, or applying for an advanced tax ruling or advance pricing agreement). In practice, the Administration and the taxpayer may reach a settlement agreement to settle or prevent a dispute or insecurity.

i Tax rulings and horizontal monitoring agreements

The Dutch practice of tax rulings essentially brings forward a potential controversy between the Administration and the taxpayer on the interpretation of Dutch tax law or the Dutch tax treatment of certain transactions. It provides taxpayers the opportunity to openly discuss the relevant facts, and the treatment under Dutch tax law, of the case at hand with the Administration's tax specialists prior to entering into such a transaction. If the Administration and the taxpayer come to an agreement, the dispute is settled and an advance pricing agreement or advanced tax ruling agreement is formed.

Under certain circumstances, taxpayers also have the possibility of entering into horizontal monitoring agreements with the Administration. The intention of such arrangements is to have a transparent and open relationship with the Administration, in which both parties discuss relevant issues on a real-time basis to enhance compliance in an efficient way.

Tax rulings and horizontal monitoring agreements may be considered ADR mechanisms, as they offer instruments to resolve potential controversies with the Administration at an early stage.

ii Meditation

Taxpayers may initiate mediation with the Dutch Tax Administration at any stage of a tax controversy or dispute. It should be noted that not all disputes are suitable for mediation. Most suited are matters that do not exclusively relate to the interpretation of the law, but merely involve the personal relationship between parties, where intervention by a third and independent party can offer solace. For example, a taxpayer may be upset about his or her treatment by the Administration during a tax audit. If mediation is effective, the parties enter into a (binding) settlement agreement. In the event a regular administrative or legal proceeding has already been started, this procedure resumes solely with regard to the unresolved issues. The Administration usually works with independent and professional conflict mediators who are registered with the Dutch Federation of Mediators. The costs of solving a tax controversy by mediation are generally lower than the costs of a regular administrative and legal proceedings.

iii Mutual agreement procedures and arbitration

Taxpayers with cross-border activities may be confronted with double taxation. In this respect, most Dutch tax treaties provide mutual agreement procedures (MAPs).

The EU Arbitration Convention and the EU Tax Dispute Resolution Mechanisms Directive, adopted on 10 October 2017 by the European Council, was implemented by the Netherlands in the Tax Arbitration Law per 1 July 2019. These frameworks provide taxpayers with the possibility of initiating international dispute resolution with respect to the risk of double taxation. A taxpayer may request the Netherlands to enter into a MAP and, if necessary, a subsequent arbitration procedure. The scope of this law includes both transfer pricing cases and interpretation cases. On 21 September 2020, the Dutch State Secretary of Finance provided information on the use of arbitration to settle tax disputes by the Netherlands. To date, no arbitration proceedings have been initiated between the Netherlands and another treaty country. A dispute is usually settled in the MAP prior to arbitration.

In 2020, 218 MAPs were started in the Netherlands (76 transfer pricing cases and 142 other cases). Compared to the average time to close a MAP (35 months for transfer pricing cases and 18.5 months for other cases), cases are closed in relatively short time in the Netherlands (9.41 months in the Netherlands, compared to an average of 35 months in other jurisdictions; and 9.41 months compared to 18.5 for other cases).[4] Furthermore, the Netherlands has become a party to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). The Netherlands has opted to apply MLI's mandatory binding treaty arbitration provision.

Strictly speaking, these procedures neither directly nor formally involve taxpayers; the taxpayer is an interested party to the procedure between the jurisdictions involved (see

4 OECD Mutual Agreement Procedure Statistics (2020) – Netherlands (www.oecd.org/ctp/dispute/mutual-agreement-procedure-statistics.htm).

Section IX). The Netherlands is of the point of view that the use of arbitration in certain cases is preferable, and will therefore be reticent in recovering procedural costs of arbitration from taxpayers.[5]

iv General bilateral negotiations with the Dutch Tax Administration

Of course, the taxpayer and the Dutch Tax Administration always may try to bilaterally solve and settle current or future controversies by means of negotiations or in a settlement agreement, without the involvement of a mediator or court, or other formal procedures. Generally, an open and good relationship between the Dutch Tax Administration and the taxpayer provides an efficient basis in this respect.

VIII ANTI-AVOIDANCE

i Fraus legis doctrine

In the Netherlands, in general, a distinction is made between the concepts of tax avoidance and tax evasion. Tax avoidance is not legally permissible. With respect to tackle tax evasion, the Dutch Supreme court has developed the unwritten doctrine of abuse of law. Under this doctrine, transactions can be ignored or re-characterised for tax purposes, if the arrangement is predominantly tax-driven and not driven by commercial considerations, and the object and purpose of the law are being breached. If the Dutch Tax Administration successfully invokes the *fraus legis* doctrine, the tax shall be levied as if the legal act has been eliminated from the constellation of facts in the specific case, or as if the legal act has been substituted by a legal act that would have led to taxation in accordance with tax laws. Recent Dutch Supreme Court case law shows examples of cases in which the *fraus legis* doctrine prevents interest deduction on a group loan, especially in the context of tax-driven acquisition arrangements and artificially created profit draining.[6] Currently, similar cases are pending before court, so further developments can be expected.

The *fraus legis* doctrine serves as the national general anti-avoidance rule. Apart from the general *fraus legis* doctrine, it should be noted that Dutch tax law includes several targeted anti-abuse provisions, such as with respect to limitation on interest deduction.

ii GAAR and fraus legis doctrine

Through the implementation of the EU Anti-Tax Avoidance Directive, the Dutch government expressed their view that the doctrine of abuse of law (*fraus legis*) covers the scope of the general anti-abuse rule included in the directive. The Netherlands has therefore decided that the GAAR in Article 6 of the Anti-Tax Avoidance Directive does not have to be implemented in Dutch national legislation, but can be read into the *fraus legis* doctrine. As a consequence, the *fraus legis* doctrine must be interpreted in conformity with EU law in certain cases, which may lead to alignment of the *fraus legis* doctrine with the corresponding EU concept.

5 Kamerstuk II 2018-19, 35110, nr. 3, p. 7.

6 Recent examples are the ruling of the Dutch Supreme Court of 16 July 2021 (ECLI:NL:HR:2021:1152) and the ruling of the Dutch Supreme Court of 9 July 2021 (ECLI:NL:HR:2021:1102).

iii Base erosion and profit shifting developments

With regard to the OECD's BEPS Action plan, the Dutch government is actively cooperating at European and international levels in combating international tax evasion and tax avoidance in the context of base erosion and profit shifting (BEPS). Recent developments in Dutch tax law since the initiation of the BEPS project include:

a As a result of an amendment of the EU Parent-Subsidiary Directive to counter tax abuse, the Dutch participation exemption regime has been amended. Broadly speaking, dividend income is no longer exempt from the Dutch corporate income tax base if the dividend is deductible at the level of the entity distributing the dividend.

b As a result of EU Anti-Tax Avoidance Directive, the Netherlands implemented earnings stripping rules and a controlled foreign corporation regime in 2019.

c The Netherlands has signed the MLI in double taxation treaty situations, which means that, in principle, tax treaties concluded by the Netherlands are affected by the MLI as of 1 January 2020 if they qualify as 'covered'.[7] Change[s] in this respect are the introduction of a principal purpose test and amendment of the preamble to include that double taxation treaties are not only intended to prevent double taxation, but also to prevent double non-taxation or reduced taxation. The Netherlands prefer a principal purpose test to a limitation on benefits provision, mainly because a principal purpose test is considered more appropriate in most situations. Nevertheless, the principal purpose test is principle-driven rather than rule-driven (as is the limitation on benefits), which makes it less clear which structures will be affected by the principal purpose test.

d The Dividend Withholding Tax Act 1965 has been amended whereby co-operatives that are mainly involved in holding or financing activities (and that, up to now, were able to distribute profits without triggering dividend withholding tax unless in cases of abuse) become subject to Dutch dividend withholding tax upon distributing profits. Also additional measures were taken as per 1 January 2020 to take the so-called 'Danish Cases' heard by the Court of Justice of the European Union[8] into consideration.

e The Netherlands has enacted laws to meet obligations with respect to, *inter alia*, country-by-country reporting, automatic exchange of rulings and information about reportable cross-border arrangements.

f The Netherlands has enhanced substance requirements (e.g., economic nexuses).

g Introduction of a Dutch conditional withholding tax on interest and royalty payments to related entities in low tax jurisdictions and in abusive situations as of 1 January 2021. The Netherlands has passed a bill introducing a conditional withholding tax on dividends to related entities in low tax jurisdictions and in abusive situations per 1 January 2024.

7 An overview is provided on the website of the Dutch Ministry of Finance www.rijksoverheid.nl/documenten/brochures/2020/02/17/multilateraal-instrument-mli-en-nederlandse-belastingverdragen.

8 *T Denmark and Y Denmark v. the Danish Ministry of Taxation* (Joined Cases C–116/16 and C–117/16; *N Luxembourg 1, X Denmark A/S, C Danmark I and Z Denmark ApS v. the Danish Ministry of Taxation* (Joined Cases C–115/16, C–118/16, C–119/16 and C–299/16).

IX DOUBLE TAXATION TREATIES

The Netherlands is well known for its extensive network of double taxation treaties. In light of the ongoing international public debate on aggressive international tax planning, the Dutch government is more closely monitoring its double tax treaty network, especially with regard to arrangements which were created solely to obtain access to treaty benefits. In this respect, the importance of business motives, commercial and economic considerations and relevant substance seems to be of increasing when considering tax residency under a tax treaty. The Dutch government aims to discourage the use of so-called letterbox companies (i.e., companies with no or very limited activities that add no real value to the real economy). Further developments in this respect may be expected, according to the findings of the recent report of the Dutch commission on conduit companies of 22 November 2021.

Under the Dutch application of the principal purpose test of the MLI (see Section VIII), taxpayers may be denied treaty benefits. In his respect, artificial tax planning to obtain treaty benefits may in some specific cases be challenged through a 'substance over form' approach.

Dutch case law has determined that the OECD Commentary is a relevant factor that should be taken into consideration when deciding on a case. Dutch (tax) courts also take the jurisprudence of the European Court of Justice and the European Court of Human Rights into account when deciding on cases.

X AREAS OF FOCUS

Broadly speaking, the current focus of the Dutch government is to find a balance between countering international aggressive tax planning by promoting transparency and making rules abuse-proof and not harming the Dutch economy and business climate. The Dutch government is cooperative when taking measures at the international level. At the national level, the Dutch Tax Administration points out in its annual plan for 2021 that its enforcement of tax laws will be focused on areas such as combating tax fraud, the use of tax structures, foreign temporary employment agencies, turbo-liquidations and real estate companies.[9]

Furthermore, based on the Dutch implementation of the EU Directive Mandatory Disclosure Rules (MDR/DAC6), intermediaries and taxpayers with an EU nexus must report potentially aggressive cross-border tax arrangements to the Administration. The Administration published guidance with examples of arrangements that need to be reported under one or more of the Hallmarks of DAC6. The Administration has set up a mandatory disclosure team, which has an open attitude towards questions regarding practical and material aspects of DAC6 and embodies their open approach. The Dutch implementation of DAC6, which is a 'pure' implementation and contains open norms, underlines the active attitude of the Dutch government in combating unwanted international tax evasion.

XI OUTLOOK AND CONCLUSIONS

Looking forward, no specific legislative changes regarding the Dutch system of tax litigation in the landscape of tax controversies are expected. However, there are other interesting developments, such as the Dutch State Secretary's announcement that legal protection under

9 Belastingdienst Jaarplan 2021 (www.rijksoverheid.nl/documenten/jaarplannen/2020/11/11/jaarplan-belastingdienst-toeslagen-en-douane-2021).

the Dutch implementation of the framework of international exchange of information will be investigated in 2022. Further, developments under DAC7 (the EU Directive on automatic exchange of information with respect to digital platforms) need to be awaited. Finally, it can be pointed out that the Dutch State Secretary of Finance has made a request to taxpayers and tax advisers to develop a tax good governance standard. The idea behind this initiative is that tax abuse cannot be tackled by the law alone.

By way of a tax controversy strategy in practice, taxpayers may consider further developing tax risk-management policies, procedures and processes in this changing tax environment. Taxpayers need to be proactive to prevent and manage tax disputes and disagreements with the Dutch Tax Administration. Of course, in times of increasing legal uncertainty, it is beneficial if the taxpayer already has a good understanding of the various mechanisms available for dispute resolution and to help prevent tax controversies with the Dutch Tax Administration.

Appendix 1

ABOUT THE AUTHORS

REINOUT DE BOER

Stibbe

Reinout is a partner in Stibbe's Amsterdam tax practice group and specialises in domestic and international taxation with an emphasis on M&A, private equity transactions and corporate reorganisations. He heads the Dutch tax controversy practice of Stibbe and advises in a wide range of international tax litigation cases.

MICHAEL MOLENAARS

Stibbe

Michael Molenaars is a partner at Stibbe and is the head of its tax practice group. He specialises in domestic and international taxation with an emphasis on M&A and private equity transactions, corporate reorganisations and investment fund structures. Michael guides large multinational companies, financial institutions and private equity firms through every stage of technically complex issues, including contentious issues. He is also a frequent speaker on international tax issues and has co-authored several books and articles on international taxation.

ROGIER VAN DER STRUIJK

Stibbe

Rogier van der Struijk is a senior associate at Stibbe. He specialises in international corporate taxation of Dutch and foreign multinationals, advising clients on complex matters such as tax-efficient structuring of investments and divestments. He has experience in various industries, such as financial services, advising clients on the tax aspects of large cross-border investments. Furthermore, he is experienced in tax controversy work, including tax litigation and is a senior member of Stibbe's tax controversy practice, with a specific focus on cases before the Supreme Court. He is a member of the Dutch Bar association and the Dutch Association of Tax Advisers, and is a deputy judge in the tax chamber of the Arnhem district court.

MIEKE LAVREYSEN

Stibbe

Mieke Lavreysen is a junior associate and a member of Stibbe's tax controversy practice who specialises in domestic and international corporate taxation of Dutch and foreign multinationals. Mieke holds master's degrees from the University of Chicago Law School

(LLM 2019) and Radboud University (Dutch corporate law LLM 2018 and Dutch tax law (LLM 2018). She is a member of the Dutch Bar association and is a prospective member of the Dutch Association of Tax Advisers.

TIRZA CRAMWINCKEL

Stibbe

Tirza Cramwinckel is a tax professional in Stibbe's Amsterdam tax practice group. She specialises in tax controversy, tax litigation and procedural tax law. She is a member of Stibbe's tax controversy practice. Furthermore, she is a PhD researcher and lecturer in tax law at Leiden University, the Netherlands, and she regularly publishes in tax literature.

STIBBE

Beethovenplein 10
1077 WM Amsterdam
The Netherlands
Tel: +31 20 546 06 06
Fax: +31 20 546 01 23
reinout.deboer@stibbe.com
michael.molenaars@stibbe.com
rogier.vanderstruijk@stibbe.com
mieke.lavreysen@stibbe.com
tirza.cramwinckel@stibbe.com
www.stibbe.com

an LBR business

ISBN 978-1-83862-279-4