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Tax Controversy 2022

Netherlands: Law & Practice

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Stibbe

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CONTENTS

1. Tax Controversies p.4
1.1 Tax Controversies in this Jurisdiction p.4
1.2 Causes of Tax Controversies p.4
1.3 Avoidance of Tax Controversies p.4
1.4 Efforts to Combat Tax Avoidance p.4
1.5 Additional Tax Assessments p.4

2. Tax Audits p.5
2.1 Main Rules Determining Tax Audits p.5
2.2 Initiation and Duration of a Tax Audit p.5
2.3 Location and Procedure of Tax Audits p.6
2.4 Areas of Special Attention in Tax Audits p.6
2.5 Impact of Rules Concerning Cross-Border Exchanges of Information and Mutual Assistance between Tax Authorities on Tax Audits p.6
2.6 Strategic Points for Consideration during Tax Audits p.7

3. Administrative Litigation p.7
3.1 Administrative Claim Phase p.7
3.2 Deadline for Administrative Claims p.7

4. Judicial Litigation: First Instance p.7
4.1 Initiation of Judicial Tax Litigation p.7
4.2 Procedure of Judicial Tax Litigation p.7
4.3 Relevance of Evidence in Judicial Tax Litigation p.8
4.4 Burden of Proof in Judicial Tax Litigation p.8
4.5 Strategic Options in Judicial Tax Litigation p.8
4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation p.8

5. Judicial Litigation: Appeals p.8
5.1 System for Appealing Judicial Tax Litigation p.8
5.2 Stages in the Tax Appeal Procedure p.8
5.3 Judges and Decisions in Tax Appeals p.9

6. Alternative Dispute Resolution (ADR) Mechanisms p.9
6.1 Mechanisms for Tax-Related ADR in this Jurisdiction p.9
6.2 Settlement of Tax Disputes by Means of ADR p.11
6.3 Agreements to Reduce Tax Assessments, Interest or Penalties p.12
6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests p.12
6.5 Further Particulars Concerning Tax ADR Mechanisms p.12
6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax p.13

7. Administrative and Criminal Tax Offences p.13
7.1 Interaction of Tax Assessments with Tax Infringements p.13
7.2 Relationship between Administrative and Criminal Processes p.13
7.3 Initiation of Administrative Processes and Criminal Cases p.14
7.4 Stages of Administrative Processes and Criminal Cases p.14
7.5 Possibility of Fine Reductions p.15
7.6 Possibility of Agreements to Prevent Trial p.15
7.7 Appeals against Criminal Tax Decisions p.15
7.8 Rules Challenging Transactions and Operations in this Jurisdiction p.15

8. Cross-Border Tax Disputes p.15
8.1 Mechanisms to Deal with Double Taxation p.15
8.2 Application of GAAR/SAAR to Cross-Border Situations p.16
8.3 Challenges to International Transfer Pricing Adjustments p.17

8.4 Unilateral/Bilateral Advance Pricing Agreements p.18
8.5 Litigation Relating to Cross-Border Situations p.18

9. State Aid Disputes p.18
9.1 State Aid Disputes Involving Taxes p.18
9.2 Procedures Used to Recover Unlawful/Incompatible Fiscal State Aid p.19
9.3 Challenges by Taxpayers p.19
9.4 Refunds Invoking Extra-Contractual Civil Liability p.19

10. International Tax Arbitration Options and Procedures p.19
10.1 Application of Part VI of the Multilateral Instrument (MLI) to Covered Tax Agreements (CTAs) p.19
10.2 Types of Matters that Can Be Submitted to Arbitration p.19
10.3 Application of the Baseball Arbitration or the Independent Opinion Procedure p.20
10.4 Implementation of the EU Directive on Arbitration p.20
10.5 Existing Use of Recent International and EU Legal Instruments p.20
10.6 New Procedures for New Developments under Pillar One and Two p.20
10.7 Publication of Decisions p.20
10.8 Most Common Legal Instruments to Settle Tax Disputes p.21
10.9 Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes p.21

11. Costs/Fees p.21
11.1 Costs/Fees Relating to Administrative Litigation p.21
11.2 Judicial Court Fees p.21
11.3 Indemnities p.21
11.4 Costs of ADR p.22

12. Statistics p.22
12.1 Pending Tax Court Cases p.22
12.2 Cases Relating to Different Taxes p.22
12.3 Parties Succeeding in Litigation p.22

13. Strategies p.22
13.1 Strategic Guidelines in Tax Controversies p.22

1. TAX CONTROVERSIES

1.1 Tax Controversies in this Jurisdiction

In the Netherlands, tax controversies can arise in various ways. Tax disputes may arise as a result of a tax audit initiated by the Dutch Tax Authorities (DTA), or questions raised by the DTA (for example, after having reviewed a tax return filed by a taxpayer or as a result of a sample by the DTA). It may also occur that the DTA take notice of a transaction in the press, or receive information from foreign tax authorities, which also may result in a tax audit by, or questions from, the DTA.

1.2 Causes of Tax Controversies

Generally, it is difficult to pinpoint which taxes and matters give rise to more tax controversies than others. Tax audits of the DTA can have a broad scope and vary from individuals (personal income tax, inheritance tax), through small-sized business (income tax), to large companies (corporate income tax). Tax audits can also be focused on levies such as value-added tax (VAT), wage taxes or Dutch dividend withholding tax. Recent case law shows that the DTA do not look favourably on cases in which a mismatch is created by the taxpayer (ie, a deduction of a payment, without an inclusion), or where deductible interest expenses are created artificially (for example, to offset against taxable profits), or which are considered abusive from an EU law perspective.

1.3 Avoidance of Tax Controversies

It is up to the DTA whether to initiate a tax audit. Sometimes, with respect to certain sectors, a standard audit policy is applied; for example, to audit taxpayers in that sector once every few years. The risk of a tax audit can be mitigated or reduced by way of pre-consultation (ie, by having pre-empting discussions that would otherwise be conducted after the fact) with the DTA or by applying for an advance tax ruling (ATR) or advance pricing agreement (APA). Under certain circumstances, taxpayers also have the possibility of entering into a "horizontal monitoring" agreement with the DTA (see **6.1 Mechanisms for Tax-Related ADR in this Jurisdiction**). The aim of such an agreement is to have an interactive relationship with the DTA and to inform and discuss transactions with them on a real-time basis (to pre-empt discussions arising after the DTA review the tax return).

1.4 Efforts to Combat Tax Avoidance

At this moment, the exact impact of the Base Erosion and Profit Shifting (BEPS) project of the OECD on the number of tax controversies in the Netherlands is difficult to indicate. It is, however, the expectation that the number of controversies with respect to cross-border transactions and investments will increase in the coming period, since jurisdictions may interpret the BEPS rules in their own manner. In this respect, the exact impact of EU Anti-Tax Avoidance Directives (ATAD) 1 and 2 (implemented respectively by the Netherlands in 2019 and 2020) also needs to be considered.

The same expectation exists with respect to the impact of the EU Mandatory Disclosure Directive (MDD) (also known by its acronym DAC6), under which taxpayers are obliged to report potentially aggressive cross-border tax structures as of 1 January 2021 (in the Netherlands) with retroactive effect to 25 June 2018. The Netherlands implemented this directive in the Act on International Assistance.

1.5 Additional Tax Assessments

If a taxpayer files an appeal against a tax assessment issued by the DTA, then upon request of that taxpayer, in principle, a postponement of payment is granted by the DTA. Depending on the circumstances this may work out differently; for example, in cases where the DTA require

security from the taxpayer to safeguard the payment of the tax assessment in the future. The DTA have the authority to issue – concurrently with the additional tax assessment – a fine to a taxpayer; for example, in the case of a late or incorrect filing of a tax return or not paying tax in due time.

2. TAX AUDITS

2.1 Main Rules Determining Tax Audits

The DTA have discretion over whether to initiate a tax audit or not. In this regard, the DTA have certain areas of focus. For example, within the group of individuals, very high net worth individuals (with assets of more than EUR25 million) are a specific area of attention. When dealing with large companies, combating and preventing tax avoidance is an important area of focus, as well as transfer pricing. The DTA often points out certain themes of focus in the so-called *Jaarplan* (annual plan), such as VAT carrousel fraud in the *Jaarplan 2021*. In the annual plan for 2022 reference is made to VAT carrousel fraud and the possibility of abuse by way of liquidating a company via a simplified procedure ("turbo-liquidations").

2.2 Initiation and Duration of a Tax Audit

The decision of whether to initiate a tax audit is driven by various factors, such as the (tax) attitude and behaviour of the relevant taxpayers, information derived through company interviews and samples, or information from third parties. Based on these factors (amongst others), a risk analysis is made by the DTA to determine whether to carry out a tax audit. In principle, there is no time limit regarding the finalisation of the audit, but of course, the DTA do need to take into consideration the time limits within which a tax assessment should be issued to the taxpayer (see further below).

Regarding the statute of limitations rules, a distinction should be made between taxes that are levied by means of a tax assessment issued by the DTA after a taxpayer has filed a tax return (such as the Dutch corporate income tax and personal income tax) and taxes that are based on a self-assessment (such as VAT and wage tax).

With respect to taxes that are levied by way of a tax assessment, the tax inspector is, in principle, required to issue a (final) assessment within three years after the end of a tax year. Further to that, the DTA have, under certain circumstances, the authority to issue an additional assessment to a taxpayer, which, in principle, needs to be issued within five years after the relevant tax year (under certain circumstances, notably in relation to foreign income, the period of five years is extended to 12). To issue an additional tax assessment, a so-called qualifying new fact must be present. This is not required if the taxpayer has acted in bad faith. There are also specific rules under which the tax inspector may impose, under particular circumstances, an additional assessment to a taxpayer, such as in the case of a so-called recognisable error (*kenbare fout*) in the (final) assessment or in specific situations related to disclosed DAC6 information.

With respect to taxes that are based on self-assessment, the taxes are payable shortly after the self-assessment has been made. In those cases, in principle, the tax return is the formal basis for the levy and no separate tax assessment is issued by the tax inspector. In the case of an underpayment of tax, the DTA have the possibility to issue an additional tax assessment to a taxpayer within five years after the year in which the taxable event took place.

In the case of a tax audit, the statute of limitations described above needs to be respected. In practice, the DTA have the authority to issue an

ex officio tax assessment if, during a tax audit, there is a risk of exceeding the terms referred to above.

2.3 Location and Procedure of Tax Audits

Tax audits are generally performed at the premises of a taxpayer. In principle, an audit can be performed based on printed documents or data made available electronically. The DTA may perform the audit by reviewing (hard) copies of documents provided by the taxpayer, or via data derived from software applications used by the taxpayer.

2.4 Areas of Special Attention in Tax Audits

As set out in **2.1 Main Rules Determining Tax Audits**, the DTA focus on combating and preventing tax avoidance as well as transfer pricing when dealing with large companies. In this respect, the DTA hold the view that (international) tax avoidance can be best tackled in co-operation with other jurisdictions, civil society organisations and private parties; for example, by way of bilateral or multilateral tax audits. It is also the expectation of the DTA that the country-by-country report(s) that need(s) to be filed will provide further information for tax audit purposes. This is also true for filings that need to be made as of 1 January 2021 for the purposes of DAC6.

More generally, it is the objective of the DTA that individuals and companies comply with their tax obligations on their own as much as possible ("voluntary compliance"). To achieve this, companies have, under certain circumstances, the possibility of entering into a horizontal monitoring agreement with the DTA, which in essence means that a taxpayer exchanges information regarding its (tax) strategy, tax control framework and transactions that could have a (material) tax impact on a real-time basis. Accordingly, applying horizontal monitoring is expected to result in fewer tax audits for a taxpayer. As of 2020, the horizontal monitoring rules have become stricter (see **6.1 Mechanisms for Tax-Related ADR in this Jurisdiction**).

The DTA published two reports on horizontal supervision in September and December 2021, discussing the outline and further development of the reform, respectively. Both reports provide extensive insight into how to deal with horizontal supervision. Based on the reforms, so-called individual horizontal supervision is only possible for larger organisations and wealthy individuals, whereas horizontal supervision via tax service providers is a form of co-operation between tax service providers and the DTA. The latter is aimed at small and medium-sized companies that do not qualify for an individual horizontal supervision agreement. The objective and thinking behind the horizontal supervision concept did not change.

2.5 Impact of Rules Concerning Cross-Border Exchanges of Information and Mutual Assistance between Tax Authorities on Tax Audits

It is difficult to assess at this moment whether the rules concerning cross-border exchanges of information and mutual assistance between the tax authorities (on tax audits) have led to a marked increase of tax audits in the Netherlands, as official numbers are not available. However, the general sentiment is that international administrative co-operation may lead to an increase of audits inspired by data or queries that are exchanged.

If a foreign tax authority has questions in relation to a Dutch taxpayer, these questions will be asked by the Dutch tax inspector, which assumes that the Dutch and foreign tax inspector are in contact with each other, but it is also possible that the Dutch tax inspector is assisted, in person, by a (foreign) tax inspector.

2.6 Strategic Points for Consideration during Tax Audits

A key point that should be taken into consideration is the scope of the audit. Next to that in importance is asking the DTA to put their questions in writing, which gives the taxpayer the opportunity to properly think through the questions raised by the DTA.

3. ADMINISTRATIVE LITIGATION

3.1 Administrative Claim Phase

If a taxpayer does not agree with a tax assessment issued by the DTA (or would like to lodge an objection against a tax that was levied based on self-assessment by the taxpayer; see **2.2 Initiation and Duration of a Tax Audit**), the taxpayer has the possibility to file an "administrative appeal" against the tax assessment. The appeal needs to be filed within six weeks after the tax assessment has been issued. If a taxpayer does not respect the period of six weeks, the appeal is in principle declared inadmissible. During the administrative appeal phase, a taxpayer has certain rights (such as a hearing and consultation of its tax file). The aim of the administrative appeal is a reconsideration of the tax assessment by tax inspectors that are new to the case. The initiation of an administrative appeal does not trigger costs for the taxpayer. The administrative appeal is finalised with a decision of the DTA, which can be challenged before a court (see **4. Judicial Litigation: First Instance**). Under certain circumstances, the taxpayer and the DTA may agree to skip the administrative appeal, which, however, is not common practice. Finally, filing an administrative appeal should, in principle, not put the taxpayer in a worse position as compared to the tax assessment issued by the DTA.

3.2 Deadline for Administrative Claims

The DTA, in principle, need to decide on the administrative appeal within six weeks. If the DTA fail to decide on the administrative appeal in time, the taxpayer can lodge an appeal (ie, when the term to decide on the appeal has passed, the law assumes that a decision has been taken that can be appealed by the taxpayer).

4. JUDICIAL LITIGATION: FIRST INSTANCE

4.1 Initiation of Judicial Tax Litigation

Once the administrative procedure has been finalised (see **3. Administrative Litigation**), a taxpayer may bring the case before a court. At first instance, the case will be judged by a Lower Court (*Rechtbank*). The procedure at first instance is initiated by filing an appeal against the decision made by the DTA during the administrative appeal procedure. The appeal needs to be filed within six weeks after the decision on the administrative appeal; otherwise the appeal will, in principle, be declared inadmissible. To initiate the appeal, the taxpayer needs to pay a registration fee.

4.2 Procedure of Judicial Tax Litigation

During the appeal, the taxpayer further substantiates the grounds of appeal, whereas the tax inspector is expected to file a statement of opposition. Under certain circumstances, parties are given the opportunity by the court to respond to each other's views in writing. Parties have the right to file documents with the court up to ten days before the date of the court hearing (which in principle is not a public session). It is not required that a lawyer or tax adviser represent the taxpayer during the procedure.

During the court procedure in first instance, the facts of the case will be debated as well as the underlying tax question. In principle, the

court will take a decision within six weeks from the court hearing. This term may however be extended. The decision of the court may be published on an anonymised basis. Finally, the court has the possibility to ask the Dutch Supreme Court (*Hoge Raad*) for a preliminary ruling, which may occur if it concerns a legal (tax) question that stretches beyond the pending case.

4.3 Relevance of Evidence in Judicial Tax Litigation

This depends on the tax question pending. If the case deals particularly with the interpretation of tax law, there is little need to involve witnesses in the case (unless, for example, the opinion of an expert witness may be helpful to convince the court). On the other hand, in very factual cases, witnesses may be helpful to support a case, especially in situations where the burden of proof lies with the taxpayer. In those situations, the taxpayer may work with both written statements from witnesses and formal statements during the court hearing.

4.4 Burden of Proof in Judicial Tax Litigation

This would depend on the case. However, as a general rule, if the taxpayer is the party claiming a deduction or an exemption, the burden of proof lies with the taxpayer and it is up to the Dutch tax authorities to underpin the plausibility of an upward correction. With regard to fines/penalties, the burden of proof is always on the DTA.

4.5 Strategic Options in Judicial Tax Litigation

Strategic options depend on a case-by-case analysis and are not easily described in general terms.

4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation

Dutch (tax) case law has determined that the OECD Commentary is a relevant factor that should be taken into consideration when deciding on a case. The (tax) court(s) also take the jurisprudence of the ECJ and ECHR into account when deciding on cases. The Dutch (tax) court also may defer a case to the ECJ if it deems it relevant. In addition, the Dutch Supreme Court (and certain other courts) may defer preliminary questions to the ECHR.

5. JUDICIAL LITIGATION: APPEALS

5.1 System for Appealing Judicial Tax Litigation

A taxpayer (as well as the DTA) has the right to file an appeal against the decision by the Lower Court. The appeal should be filed within six weeks after the decision of the Lower Court (a one-time opportunity). In appeal, the case will be handled by a Court of Appeal (*Gerechtshof*).

If a taxpayer or the DTA (or both) do not agree with the decision of the Court of Appeal, the parties have the possibility to lodge an appeal with the Dutch Supreme Court (*Hoge Raad*). In this cassation procedure before the Supreme Court, parties no longer have the possibility to discuss the facts of the case. The Supreme Court (in short) will only test whether there has been a breach of law, or whether the decision has been inadequately motivated (or is incomprehensible).

5.2 Stages in the Tax Appeal Procedure

The procedure before the Court of Appeal is similar to the procedure before the Lower Court (referred to in **4.2 Procedure of Judicial Tax Litigation**).

The procedure in cassation starts with the filing of an appeal within six weeks after the decision of the Court of Appeal. The other party in the procedure will be entitled to file a statement of opposition followed by a reply and a rejoinder. In important cases, an advocate-general often takes an (independent) conclusion to give their view on the case. Generally, it is not common that a hearing takes place in person or in writing, including pleadings. In its ruling, the Dutch Supreme Court has the authority to declare the appeal unfounded or founded. In the latter case, the Dutch Supreme Court may itself give a final judgment or refer the case to another Court of Appeal.

5.3 Judges and Decisions in Tax Appeals

At first instance and appeal, the tax case is decided by one or three judges, depending on the type and complexity of the case. Cases before the Dutch Supreme Court are decided by three or, in more difficult cases, five judges. Judges are appointed by way of a royal decree. It is up to the court to determine the composition of the judges who will decide on a case.

6. ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS

6.1 Mechanisms for Tax-Related ADR in this Jurisdiction

There are several ADR mechanisms in the Netherlands to resolve tax disputes between taxpayers and the DTA. The Dutch ruling practice, which to some extent may be considered an ADR mechanism, is covered first. Horizontal monitoring, which serves the purpose of avoiding (future) tax disputes and disagreements, is discussed next. Subsequently, mediation is elaborated upon as a way to resolve tax disputes between the DTA and the taxpayers.

Dutch Ruling Practice

The Dutch tax ruling practice allows taxpayers to obtain certainty in advance from the DTA on certain transactions in the form of an APA or an ATR. An APA provides certainty in advance on the Dutch transfer pricing treatment of certain intragroup dealings of the taxpayer. It is also possible to conclude a multilateral APA with other jurisdictions involved. An ATR provides certainty in advance on a variety of Dutch tax topics in relation to particular transactions.

The Dutch tax ruling practice essentially brings forward any disagreement or dispute between the DTA 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 with tax specialists of the DTA the relevant facts and circumstances of the case at hand, as well as the correct Dutch tax treatment thereof, prior to entering into such transactions. If parties come to an agreement, the DTA and the relevant taxpayer enter into an APA/ATR settlement agreement.

However, the conclusion of an APA/ATR settlement agreement does not preclude the DTA from conducting tax audits. Especially in respect of APA settlement agreements, taxpayers may expect regular tax audits from the DTA to check whether the transfer prices that are being used are in accordance with the APA settlement agreement.

The Dutch tax ruling practice for international tax rulings has been revised as of 1 July 2019. Under the revised rules, taxpayers must meet stricter measures to obtain a Dutch international tax ruling:

- the relevant taxpayer needs to have sufficient "economic nexus" with the Netherlands;

- the sole or decisive motive of the relevant structure must not be to avoid Dutch or foreign taxes; and
- the relevant transaction or structure is not carried out with a country that is mentioned on the Dutch list of so-called "low-tax jurisdictions" and/or the EU list of non-cooperative jurisdictions.

Procedural aspects of the Dutch ruling practice

A request for an APA/ATR ruling is generally filed with the competent tax inspector of the taxpayer. The request should in any case include:

- a detailed description of the relevant facts and circumstances;
- factual information on the relevant companies; and
- a list of the other jurisdictions concerned.

APA/ATR requests generally have an international angle (eg, cross-border investments, foreign shareholders), in which case the competent tax inspector will involve the "International Fiscal Affairs Team" (*Behandelteam IFZ*) of the DTA. To the extent necessary, the DTA will ask follow-up questions and/or request further information from the taxpayer on, inter alia, the relevant facts and transactions set out in the request. In the course of the Dutch tax ruling process, a taxpayer may thus be communicating directly with the tax specialists of the DTA. The DTA aims to process an APA/ATR request within six to eight weeks.

Under the revised rules for international tax rulings, the "College of International Fiscal Affairs" (*College IFZ*), must sign-off all tax rulings with an international character. This aims to ensure uniformity and quality of international tax rulings. In addition, an anonymised summary of each international tax ruling is published on the DTA's webpage. The same holds true for a withdrawn or denied ruling request.

Horizontal Monitoring

Rather than being subject to "vertical monitoring", which is based on auditing the taxpayer's affairs retrospectively, taxpayers can also be subject to horizontal monitoring. In horizontal monitoring, the DTA and the taxpayer formally commit to build and have a relationship based on mutual trust, understanding and transparency. This essentially means that the DTA will rely on the willingness of the taxpayers to file correct tax returns. The taxpayer that is subject to horizontal monitoring is generally obliged to submit its view on all relevant matters to the DTA as soon as practically possible, so that any possible differences of opinion between the DTA and the taxpayer are resolved before the tax return is filed. Hence, horizontal monitoring may also be considered a form of ADR.

Procedural aspects of horizontal monitoring

Horizontal monitoring originally focused on large and medium-sized corporate taxpayers being "in control" of their tax affairs. If the DTA and the taxpayer agree to horizontal monitoring, they enter into a horizontal monitoring agreement (*handhavingscovenant*), which lays down the fundamentals and underlying principles forming the basis of their relationship to achieve an effective and efficient mode of operation. It should however be noted that a horizontal monitoring agreement does not preclude the DTA from conducting tax audits.

As of 2020, the DTA distinguish between three types of companies for the purposes of horizontal monitoring. The first group contains small and medium-sized companies. They can only opt for horizontal monitoring through a tax service provider. The second group consists of large-sized companies. They can enter into individual agreements with the DTA for horizontal monitor-

ing. This has been subject to stricter supervision rules since 2020. The third group covers the 100 largest and most complex companies. Individual plans are drawn up for companies in this group, which are reassessed every year. The exact treatment and development of this new form of horizontal monitoring is still unclear. However, two reports by the DTA on horizontal monitoring were published in September and December 2021, discussing the outline and further development of the reform, respectively. One of the reports, among other things, foresee a transitional arrangement for small and medium-sized companies that can no longer enter into individual agreements with the DTA for horizontal monitoring.

Mediation

In 2005 the DTA introduced a pilot programme for mediation to resolve tax disputes/disagreements with taxpayers. Since then, mediation has taken a modest step forward; it is, however, still not commonly used to resolve tax disputes/disagreements with taxpayers.

At any stage of the tax dispute it is possible to initiate mediation. This can be at the request of the DTA, or the Dutch taxpayer and, in some cases, through referral by a Dutch tax court. Not all disputes are suitable for mediation. Mediation is in principle generally only suitable for disputes that go beyond the mere interpretation of law. Tax disputes resolved through mediation generally also have a "personal element" to them; a taxpayer may, for instance, be upset about the way in which they were approached or treated by the DTA during a tax audit. During the mediation, the regular administrative or judicial procedure between the DTA and the taxpayer is put on hold. The procedure only resumes if the dispute is not, or only partially, resolved through mediation. If mediation has partially resolved the dispute, the regular administrative or judicial procedure resumes only in respect of the unresolved items.

Procedural aspects of mediation

For mediation, the DTA usually works with independent mediators who are registered with the Dutch federation of mediators (MFN). The mediator should adhere (and is subject) to the mediation regulations and professional conduct standards of the MFN. The mediator first meets with the taxpayer and the relevant tax inspector to explain their approach to them. A taxpayer may bring their tax adviser/lawyer to provide assistance (this may be helpful if there are technical legal aspects to the dispute). Both parties then enter into a mediation agreement, which sets out the general terms of the mediation procedure and their procedural rights and duties. Confidentiality plays a pivotal role in mediation. All that is said and done during mediation is in principle strictly confidential and cannot be used by either party in any context other than the mediation. The costs of mediation are generally lower than the costs of a regular administrative and judicial procedure. Generally, if a Dutch tax court initiates meditation through referral, the parties have to split the costs of the mediation.

6.2 Settlement of Tax Disputes by Means of ADR

Under the existing and above-mentioned ADR mechanisms in the Netherlands, tax disputes and disagreements between the DTA and taxpayers are in principle resolved by means of entering into a settlement agreement. The settlement agreement is a Dutch civil law agreement governed by the general principles and provisions of the Dutch Civil Code. In principle, a settlement agreement is binding on both parties. Settlement agreements generally include provisions pursuant to which parties agree and acknowledge to refrain from (continuing) any further administrative or judicial proceedings.

Based on the published policy of the Dutch State Secretary of Finance, the DTA are prohibited from concluding settlement agreements that are in clear violation of Dutch (tax) law (certain other restrictions are imposed on the DTA as well). In addition, the DTA must at all times abide by general Dutch public law principles (eg, the general principles of equality, due care, fair play and protection of legitimate expectations) in its dealings with taxpayers. With respect to settlement agreements, in some cases this might lead to situations in which parties entered into a valid settlement agreement according to Dutch civil law standards, but the settlement agreement cannot be binding on the taxpayer, because the DTA did not abide by the general public law principles. An example could be a situation in which the taxpayer was not given sufficient time to review and comment on the settlement agreement proposed by the DTA.

6.3 Agreements to Reduce Tax Assessments, Interest or Penalties

If parties resolve their tax dispute through mediation, they generally enter into a settlement agreement. It is established case law that settlement agreements may also be concluded to resolve disputes or disagreements on the amount of tax due or the applicable interest and/or administrative penalties. However, based on the policy of the Dutch State Secretary of Finance, the DTA are prohibited from settling any dispute or disagreement on applicable interest, administrative penalties and/or legal costs if, in combination therewith, a trade-off took place between the DTA and the taxpayer on certain other elements regarding the levy and/or collection of taxes.

6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests

During the term of an APA/ATR settlement agreement (generally five years), the DTA may in principle not impose tax assessments that deviate from what is agreed in the APA/ATR settlement agreement, provided that in the meantime there are no major changes in tax law or the underlying facts and circumstances (and in certain cases – as per July 2019 – a change in jurisprudence or policy of the DTA). Similarly, the taxpayer can in principle not lodge an objection against a tax assessment that is imposed in accordance with what is agreed in the APA/ATR. In view of the foregoing, the Dutch tax ruling practice is an effective way for taxpayers to obtain certainty in advance and to mitigate tax disputes with the DTA.

6.5 Further Particulars Concerning Tax ADR Mechanisms

The DTA and the taxpayer may, at any time, try to resolve a (future) dispute or disagreement through bilateral negotiations and bilateral settlement without the involvement of a court or mediator. Bilateral settlements between the DTA and the taxpayer do not have a prescribed form or procedure. It is nonetheless relevant to mention that in its (legal) relationship with the taxpayer the DTA are bound by general public law principles (eg, the general principles of equality, due care, fair play and protection of legitimate expectations). This also applies if the DTA and the taxpayer are in negotiations to resolve their tax dispute.

Under certain double tax treaties, taxpayers with a cross-border footprint that are confronted, or are likely to be confronted, with double taxation may apply for a mutual agreement procedure (MAP) to eliminate double taxation emanating from their cross-border activities. In the EU, the EU Arbitration Convention and the EU Tax Dispute Resolution Mechanisms Directive, which was adopted on 10 October 2017 by the European Council and implemented by the Netherlands in the Tax Arbitration Law provide taxpayers with the possibility of initiating a MAP and, if necessary, under certain circumstances,

a tax arbitration procedure to eliminate double taxation. In addition, the Multilateral Convention regarding tax treaty-related measures to prevent BEPS (MLI) also has an (optional) mandatory binding treaty arbitration provision. The Netherlands has opted to apply this arbitration provision. See **10. International Tax Arbitration Options and Procedures** for more information on the possibilities of arbitration. The MAP and tax arbitration procedures strictly speaking, do not directly involve the taxpayer; the taxpayer is only an interested party to a procedure between two jurisdictions. In view of this, there will be no further elaboration on these procedures in this section on ADR mechanisms.

6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax

See **6.1 Mechanisms for Tax-Related ADR in this Jurisdiction**.

7. ADMINISTRATIVE AND CRIMINAL TAX OFFENCES

7.1 Interaction of Tax Assessments with Tax Infringements

If a taxpayer is confronted with an additional tax assessment, the additional assessment can be increased with interest on unpaid taxes (*belastingrente*) or interest on overdue taxes (*invorderingsrente*) and tax penalties. In some cases, the upfront payment of taxes mitigates the risk of interest on tax being imposed.

In Dutch tax law, three types of tax penalties can be distinguished (two types of administrative penalties and one category of criminal penalties). The legal basis for this is found in the General Dutch State Taxes Act (GSTA), which is the source of administrative law on Dutch taxation/tax laws and, inter alia, sets out the manner in which the DTA can levy Dutch taxes, provides taxpayers with the means to object to infringements of their rights, and provides for the legal basis for the DTA to impose administrative tax fines/penalties on Dutch taxpayers in certain situations.

The two types of administrative tax penalties that can be imposed by the DTA on taxpayers are as follows: (i) for minor omissions such as late filing or payment (punishable with minor administrative tax penalties) (*verzuimboetes*); and (ii) for tax offences (both acts and omissions) involving wilful misconduct or gross negligence (punishable with administrative tax penalties) that, for instance, deal with the failure to pay taxes in a timely fashion or file tax returns correctly (*vergrijpboetes*).

The GSTA also provides for criminal penalties. Criminal tax offences are imposed on taxpayers by a Dutch court following a public prosecution by the public prosecutor's office. In addition, the Dutch Criminal Code also provides for a legal basis to penalise criminal offences in relation to taxes (eg, forgery of documents or participation in a criminal organisation with the purpose of committing crimes).

Penalties for tax offences (*vergrijpboetes*) and criminal penalties may also be imposed on aiders and abettors, which, for the avoidance of doubt, can include a tax advisor. In addition, penalties for tax offences imposed on advisors in respect of aiding or abetting in relation to tax avoidance or fraud in respect of allowances may be made public on the website of the DTA as of 1 January 2020.

7.2 Relationship between Administrative and Criminal Processes

Administrative tax cases or tax audits may trigger criminal investigations into a taxpayer's affairs. Embedded in Dutch law is the una via principle, pursuant to which taxpayers are generally protected from double sanctioning. In other words,

a taxpayer's tax offence should be handled by the DTA by means of an administrative procedure or by the public prosecutor by means of criminal procedure. In addition, notwithstanding the fact that administrative penalties are not criminal penalties, they are – due to their punitive character – for certain purposes characterised as so-called criminal charges. This entails that the structure and level of administrative legal protection must meet international human rights standards that apply to criminal tax charges.

In addition, the DTA can request that taxpayers furnish them with information for the purpose of, or in connection with, imposing correct tax assessments. The DTA and the prosecutor's office also have the power to impose tax penalties on, or commence tax criminal proceedings against, taxpayers. Tension exists between these powers in light of the nemo tenetur principle (ie, taxpayers have the right to remain silent and not incriminate themselves). In so far as it concerns evidentiary material whose existence is dependent on the will of the taxpayer (will-dependent material), the principle is that the surrender of such material may be coerced for the purposes of levying tax. However, if a taxpayer is, or will be, subject to punitive charges, the DTA or the prosecutor's office are prohibited from resorting to such will-dependent evidence obtained through methods of coercion or oppression. If the DTA cannot exclude the possibility that will-dependent material may also be used in connection with a "criminal charge" against taxpayers (ie, punitive charges), the DTA must provide safeguards to the taxpayers, so they can effectively exercise their right not to incriminate themselves. In the event that such will-dependent material is coerced for the purposes of levying tax and subsequently used for the purpose of imposing punitive tax penalties, it will be for the Dutch courts to decide what consequences it attaches to the use thereof; the evidence could potentially be excluded. The taxpayer's privilege against self-incrimination does not extend to the use of materials that exist independent of the will of the taxpayer and that are obtained from the taxpayer through recourse to compulsory powers.

7.3 Initiation of Administrative Processes and Criminal Cases

It is not uncommon that tax crimes are discovered during a tax audit or administrative proceedings. It is also not uncommon for the public prosecutor's office to commence general criminal law proceedings against taxpayers following, or simultaneously with, the administrative proceeding against the relevant taxpayers. This does not necessarily contravene the una via principle if the taxpayer faces two materially different charges. In view of this, there would be no need to suspend punitive criminal or administrative proceedings while a tax court verifies the amount of taxes due.

7.4 Stages of Administrative Processes and Criminal Cases

First instance criminal proceedings comprise of two phases. They start with the pre-trial criminal investigations performed under the supervision of, and directed by, the prosecutor's office. Subsequently, the investigating judge starts the preliminary judicial investigation. On the basis of these phases the prosecutor's office eventually has to determine whether to drop the case, settle the case out of court or prosecute the taxpayer.

A case is generally dropped if the prosecutor's office feels it has insufficient material to prove the charges. If the prosecutor's office decides to prosecute the taxpayer, the trial stage starts, during which the taxpayer has the right to be heard. Criminal tax offences are dealt with by the Dutch criminal courts. Court hearings are held in public (certain exceptions apply).

7.5 Possibility of Fine Reductions

Upfront payment of tax assessments may, in certain situations, help to mitigate interest and penalties being charged (notably interest and penalties imposed on taxpayers for late payment). Penalties due because of tax offences involving gross negligence or intention may generally not be mitigated by upfront payment.

7.6 Possibility of Agreements to Prevent Trial

The prosecutor's office may opt to settle a tax criminal case by means of a transaction, whereby the taxpayer generally has to pay a sum of money to the Dutch treasury and/or fulfil one or more (financial) conditions. A transaction can be offered if the crime carries a statutory prison sentence of less than six years. Guidelines on the offering of transactions exist in an effort to mitigate arbitrariness and create uniformity with respect to the cases that are settled through transactions.

7.7 Appeals against Criminal Tax Decisions

If a taxpayer or the prosecutor's office wants to appeal a judgment of the district court, it can file for appeal with the competent Court of Appeal (*Gerechtshof*). Subsequently, parties may bring their case before the Dutch Supreme Court.

7.8 Rules Challenging Transactions and Operations in this Jurisdiction

It is not uncommon for criminal tax cases to commence following, or simultaneously with, regular tax proceedings. However, it generally requires more than transactions that are merely challenged on the basis of tax concepts such as general anti-avoidance rules (GAAR) or transfer pricing rules. An example in the Netherlands that has led to criminal tax proceedings deals with VAT carousel fraud, which generally requires more than one participant. Hence, in the Netherlands taxpayers involved in VAT carousel fraud have been subject to administrative proceedings (eg, failure to file correct tax returns and/or pay the correct amount of VAT, including penalties) and general criminal proceedings; eg, participation in a criminal organisation for the purpose of committing crimes.

With reference to Dutch case law, we furthermore note that, in cases where a GAAR is applied (for the first time), it may be challenging for the DTA to issue a fine because, based on for example available tax literature and parliamentary history, the taxpayer may have a defensible position (*pleitbaar standpunt*).

8. CROSS-BORDER TAX DISPUTES

8.1 Mechanisms to Deal with Double Taxation

Economic double taxation generally occurs between associated enterprises of different states as a result of an upward transfer pricing adjustment by one of the states. Judicial double taxation refers to a taxpayer being subject to tax on the same income in more than one jurisdiction; for instance, because the taxpayer is considered a resident of two jurisdictions and as such is potentially subject to full taxation in both jurisdictions.

The Netherlands has an extensive network of double taxation treaties, the majority of which include a provision allowing taxpayers to request a mutual agreement procedure to eliminate double taxation. Taxpayers, in cases of both economic and legal double taxation, can invoke this mechanism. As a result, the component authorities are obliged to *endeavour* to resolve such cases. The MLI mutual agreement procedure provision introduces or amends this provision in covered tax agreements of the Netherlands. In 2020, 218 mutual agreement procedures were

started in the Netherlands. Traditionally, double taxation treaties have generally not imposed a binding obligation on both contracting states to eliminate the double taxation of a taxpayer. However, a shift has occurred in recent years. In treaty negotiations, the Netherlands now generally pushes for a provision for binding arbitration and has also opted for the MLI arbitration provision to apply. Within the EU, the EU Arbitration Convention and EU Tax Dispute Resolution Mechanisms Directive (implemented by way of the Tax Arbitration Law) provide for the elimination of double taxation by agreement between the member states. For further analysis on arbitration, see **10. International Tax Arbitration Options and Procedures**.

In addition, most Dutch double tax treaties contain a provision that allows for the elimination of double economic taxation arising from transfer pricing disparities. This provision obliges a contracting state, whether after a mutual agreement procedure or not, to make a corresponding downward adjustment, if the other contracting state makes an upward transfer pricing adjustment.

Double taxation can also be combated at national level by filing an appeal against the Dutch tax assessment. The advantage of a domestic procedure over a mutual agreement procedure is that the domestic procedure can in certain cases lead to a faster resolution of the case. The disadvantage is that an (often) two-sided problem of double taxation, is reviewed from only one side. Different treaties and conventions have different rules on whether or not arbitration proceedings can be initiated after domestic proceedings. Therefore, which procedure (ie, domestic appeal or request for a mutual agreement procedure) is preferable will depend on the specific case.

8.2 Application of GAAR/SAAR to Cross-Border Situations

Dutch GAAR

Dutch tax law includes the unwritten doctrine of abuse of law (fraus legis). Under the fraus legis doctrine, a tax inspector may substitute a fact pattern that does not lead to taxation with a fact pattern that does if:

- the taxpayer has created a situation in which tax cannot be imposed, but which approximates one in which tax could be imposed;
- tax avoidance is the taxpayer's predominant motive; and
- the purpose and intent of the tax law would be frustrated if the non-taxable fact pattern is not treated as a taxable fact pattern.

Furthermore, amendments have been made to Dutch law to implement the GAAR included in the EU Parent-Subsidiary Directive, which is designed as a common minimum anti-abuse rule within the EU, aimed at preventing misuses of the Directive through arrangements or series of arrangements that are not genuine and do not reflect economic reality. The implementation of the GAAR has been limited to modifications of two existing anti-abuse rules: (i) the corporate income tax anti-abuse rules for foreign shareholders with a shareholding of 5% or more (ie, a substantial interest) in a Dutch resident company; and (ii) the dividend withholding tax anti-abuse rules for co-operatives.

The GAAR included in the ATAD consists of three requirements that need to be met for an arrangement or a series of arrangements, for the purposes of calculating the tax liability, to be ignored:

- the main purpose or one of the main purposes is obtaining a tax advantage ("subjective criterion");

- that defeats the object or purpose of the applicable tax law ("objective criterion"); and
- that is/are not genuine having regard to all relevant facts and circumstances.

The Dutch government is of the opinion that there is no need for the Netherlands to implement the ATAD GAAR, as these cases should be covered under fraus legis.

Application of GAAR to Cross-Border Situations

The DTA uses the above-discussed anti-abuse test in the Dividend Withholding Tax Act and the Corporate Income Tax Act to tackle specific situations of cross-border BEPS. The DTA have found it difficult to apply the Dutch doctrine of abuse of law (fraus legis) in cross-border situations but have done so in specific cases to challenge the deductibility of interest in intra-group situations. The Supreme Court has also shown willingness to apply the abuse of law concept (fraus legis) in very specific cases (see **8.5 Litigation Relating to Cross-Border Situations**). In this regard it should be noted that the Dutch Supreme Court has ruled that even if the DTA successfully argues fraus legis, the taxpayer may still have a reasonably arguable position, which prevents a penalty for a tax offence (*vergrijpboete*) as set out in **7.1 Interaction of Tax Assessments with Tax Infringements**.

In principle, a treaty provision can restrict the national taxing right, even if this taxation results from invoking the GAAR. This can frustrate the DTA in combatting BEPS in cross border situations. Fraus conventionis is a doctrine with respect to the application of double taxation treaties under which a (non-taxable) fact pattern may be ignored and substituted by a taxable fact pattern under the relevant double taxation treaty to the extent that the former would frustrate the object and purpose of the double taxation treaty. The Dutch Supreme Court has generally not applied this doctrine in cross-border situations and in some cases has even ruled against it. It should however be noted that these cases were decided based upon the "old" OECD commentary, making it unclear whether today this is still the view of the Dutch Supreme Court. One should be aware that last-minute tax planning to obtain treaty benefits may in some specific cases be vulnerable to a "substance over form" approach. Some authors believe that because of the "Danish cases" which the ECJ ruled on 26 February 2019, treaty benefits may no longer be claimed in situations where the DTA invokes the EU law abuse concept. However, it is still unclear whether the DTA and courts will follow such a view.

Impact of the MLI

The Netherlands signed the MLI in double taxation treaty situations. The MLI entered into force with regard to the Netherlands on 1 July 2019. As a result, tax treaties concluded by the Netherlands might be affected by the MLI as of 1 January 2020. Under the MLI, the relevant measures will amend the double taxation treaties concluded by the Netherlands (the timing thereof depends on the ratification process of its treaty partners). Important changes that will affect all the submitted Dutch covered double taxation treaties relate to the introduction of a principal purpose test (PPT) and the amendment of the preamble to the extent that double taxation treaties are not intended to create double non-taxation or reduced taxation. The former might make it easier for the DTA to combat BEPS in cross-border situations as it provides ground to prevent the granting of treaty benefits in cross-border situations found to be inappropriate.

8.3 Challenges to International Transfer Pricing Adjustments

In recent years, there has been an increase in MAP proceedings. Furthermore, taking into account the implementation of the Tax Dispute

Resolution Mechanisms Directive, it is expected that more taxpayers will challenge transfer pricing adjustments.

8.4 Unilateral/Bilateral Advance Pricing Agreements

The conclusion of APAs is a common mechanism in the Netherlands to mitigate transfer pricing litigation in the Netherlands. The common features and procedural aspects have been set out in **6.1 Mechanisms for Tax-Related ADR in this Jurisdiction**.

8.5 Litigation Relating to Cross-Border Situations

A fair share of litigation in respect of cross-border situations comes from transfer pricing issues. Further, it is expected that the share of withholding tax issues will increase in the coming years, prompted by EU case law from the ECJ regarding the concept of beneficial ownership and tax avoidance, such as the "Danish cases" in which the ECJ ruled on 26 February 2019. All in all, an increase of tax litigation in cross-border situations is expected; on the one hand, because of the BEPS project and the implementation of the EU regulations countering tax avoidance that should give the DTA new instruments to tackle tax avoidance and contest the tax positions of taxpayers, and on the other hand, because of the BEPS and EU initiatives that should provide better protection to taxpayers who are faced with double taxation due to their cross-border footprint.

Currently, various cases on private equity structures with foreign investors are pending or have been ruled on by the Dutch Supreme Court. In these cases, foreign investors finance a Dutch takeover, resulting in a large interest deduction in the Netherlands. In each case, the question is whether the DTA can invoke the interest deduction limitation provision of Article 10a of the Dutch Corporate Income Tax Act or, alternatively, fraus legis to limit the deduction of interest in the Netherlands. Illustrative is the case of the Dutch Supreme Court of The Hague of 16 July 2021 (ECLI:NL:HR:2021:1152) where the Supreme Court ruled in favour of the DTA and stated that the deduction of interest was limited due to fraus legis.

9. STATE AID DISPUTES

9.1 State Aid Disputes Involving Taxes

In recent years, several state aid disputes involving taxes have been pending, indeed some are still pending. In these cases, Dutch taxpayers had obtained certainty in advance from the DTA on certain transactions in the form of an APA. In each case, these APAs have been tested by the European Commission in connection with possible state aid. Illustrative are the Starbucks Case, the Inter Ikea Case and the Nike Case.

In the Starbucks Case, the European Commission concluded in 2015 that unlawful state aid was provided as a result of the APA with the DTA. The Dutch government lodged an appeal against the decision of the European Commission on 23 December 2015, where the General Court of the European Union annulled the state aid decision of the European Commission. The European commission decided to not appeal the case.

In the Inter Ikea Case, the European Commission started a formal state aid investigation in 2017 into two APAs between the DTA and Ikea. In 2020, the European Commission extended this investigation by way of also reviewing the tax assessments imposed on Ikea in further detail. To date (May 2022), the European Commission has not yet taken a final position.

Lastly, the European Commission opened a formal state aid investigation into five rulings

between the DTA and Nike in 2019, whose investigation is still pending.

9.2 Procedures Used to Recover Unlawful/Incompatible Fiscal State Aid

If the European Commission determines that unlawful state aid has been provided, member states are obliged to recover the state aid from the beneficiary. With respect to fiscal state aid, recovery will take place by means of the usual tax instruments (ie, by way of issuing additional tax assessments). As mentioned in **2.2 Initiation and Duration of a Tax Audit**, certain conditions would in principle need to be met to impose an additional tax assessments on a tax payer, such as a new fact and the statute of limitation period not having passed. These conditions are, however, not applicable with respect to the recovery of state aid.

9.3 Challenges by Taxpayers

The beneficiary of state aid has, in principle, the usual rights to challenge a tax assessment. Hence, a beneficiary can lodge an objection or file an appeal with a tax court.

State aid recovery involves not only the interests of the beneficiary but arguably also those of third parties. Competitors of the beneficiary may also have an interest in this regard. Based on case law of the Court of Justice of the European Union, third parties may challenge a non-recovery action of the European Commission before the Court of Justice of the European Union.

9.4 Refunds Invoking Extra-Contractual Civil Liability

In principle, unlawful state aid could result in extra-contractual civil liability for the beneficiary if the requirements of a so-called wrongful act (*onrechtmatige daad*) are met in respect of a competitor. The authors are not, however, aware of specific (Dutch tax) cases in which this position was taken by a third party.

10. INTERNATIONAL TAX ARBITRATION OPTIONS AND PROCEDURES

10.1 Application of Part VI of the Multilateral Instrument (MLI) to Covered Tax Agreements (CTAs)

Signatory states to the MLI have the right, but not the obligation, to apply Part VI to the CTA's. The Netherlands has opted to apply these mandatory binding arbitration provisions of the MLI. Few states have made this choice, as such, the arbitration provisions will be introduced in (only) 13 DTTs through the MLI. The Netherlands however already included an arbitration clause in a number of existing DTTs. Three of these existing arbitration provisions will be amended because of the MLI.

10.2 Types of Matters that Can Be Submitted to Arbitration

Arbitration is the final stage of the MAP. In principle, arbitration is available for all types of disputes on the interpretation and application of the relevant treaty. Contracting states may however agree to limit the scope to certain topics; an arbitration clause may contain a negative list of subjects, which are not open to arbitration, or a positive list with an exhaustive list of subjects that are open to arbitration.

The Netherlands does not insist on certain restrictions in arbitration provisions when negotiating treaties. The Netherlands also opted for unlimited arbitration in the MLI. However, because many other states do use restrictions, most arbitration provisions in Dutch tax treaties contain a negative list of subjects which are not open to arbitration.

10.3 Application of the Baseball Arbitration or the Independent Opinion Procedure

In baseball arbitration, both competent authorities make a proposal to the arbitration commission for the resolution of the dispute. The arbitration commission then chooses one of these solutions (without substantiation). In independent opinion arbitration, the arbitration commission makes a reasoned award based on the facts and the applicable law.

Under the MLI arbitration provision, baseball arbitration is the "default" option. States may however opt for independent opinion arbitration. However, states may also make a reservation against the use of the independent opinion procedure in the arbitration provision. The Netherlands has, in order to achieve as many matches as possible with other contracting parties, opted for baseball arbitration under the MLI, and has not made a reservation against the use of the independent opinion procedure.

Furthermore, aside from the MLI, the type of procedure employed differs per treaty and instrument. For example, the Tax Arbitration Law and the EU Arbitration Convention both work with independent opinion procedures.

10.4 Implementation of the EU Directive on Arbitration

The EU Directive on Arbitration is implemented in the Tax Arbitration Law. In intra-Community treaty disputes, a taxpayer may request the Netherlands to enter into a MAP and, if necessary, subsequently an arbitration procedure. The scope of this law includes both transfer pricing cases and interpretation cases. The Tax Arbitration Law applies to disputes arising in financial years beginning on or after 1 January 2018 for which the complaint is filed on or after 1 July 2019 (unless agreed otherwise by the states).

10.5 Existing Use of Recent International and EU Legal Instruments

The Dutch State Secretary of Finance provided information on the use of arbitration to settle tax disputes by the Netherlands on 21 September 2020. This information provides that no arbitration proceedings have ever been initiated between the Netherlands and another treaty country. A dispute is usually settled in the MAP prior to arbitration. There are, however, a number of long-running MAPs (under the EU Arbitration Convention and under DTTs that provide for arbitration), in which the Netherlands is, in principle, open to setting up an arbitration panel to reach a solution for the taxpayer(s) concerned as quickly as possible.

10.6 New Procedures for New Developments under Pillar One and Two

The Pillar One blueprint includes innovative dispute resolution mechanisms (including arbitration and mediation) with respect to disputes that may occur as a result of applying the new allocation rules (including the so-called Amount A). The new procedures under Pillar One are still pending and are subject to political consensus among countries. If the rules are implemented it remains to be seen whether they will result in interpretative differences between various jurisdictions, potentially resulting in more arbitration cases.

10.7 Publication of Decisions

The Tax Arbitration Law requires that arbitration cases will have to be published. Under double tax treaties, the rules differ as to whether or not to publish arbitration outcomes. The confidentiality of the proceedings is, however, generally considered paramount, therefore an interested party can often indicate that it wants the arbitration decision to be anonymous. As a result, an anonymised summary instead of the entire final decision may be published.

10.8 Most Common Legal Instruments to Settle Tax Disputes

As indicated in **10.2 Types of Matters that Can Be Submitted to Arbitration**, no arbitration case has yet been submitted. Disputes are generally settled in the MAP prior to arbitration.

10.9 Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes

The exact details of the arbitration procedure, deadlines, selection of arbitrators, allocation of costs, award and so on will depend on the instrument under which arbitration is applied. In general, the rules prescribe that the taxpayer requests the establishment of an arbitration panel and that the states appoint an arbitrator and a representative.

11. COSTS/FEES

11.1 Costs/Fees Relating to Administrative Litigation

The administrative appeal procedure is initiated by lodging an objection against a tax assessment or against any other decision of the DTA to which an objection can be lodged. The DTA does not charge costs for handling the objection of the taxpayer. A taxpayer can request a reimbursement for costs incurred in relation to its administrative appeal, which request is granted only if certain conditions are met; eg, the DTA makes a culpable mistake and revisits its earlier decision. The reimbursement of costs is generally around EUR269 (2022) but may be higher depending on the complexity of the case at hand.

11.2 Judicial Court Fees

If the DTA rules against the taxpayer in the administrative appeal, the taxpayer may decide to file for appeal. If so, the taxpayer has to pay court registry fees at the start of the proceedings, the amount of which varies depending, inter alia, on whether the taxpayer is an individual or a legal entity and the characteristics of the case.

For individuals, the court registry fee for district court tax ligation in first instance amounts to EUR184 (2022) if the appeal relates to dividend withholding tax, VAT, excise duties, taxation of passenger cars and motorcycles, consumption tax on non-alcoholic beverages, environmental taxes or customs law. In all other cases, the court registry fee for individuals amounts to EUR50 (2022). For legal entities, the court registry fee for district court tax litigation in first instance amounts to EUR365 (2022) irrespective of the taxes to which the case relates.

At the court of appeal for tax litigation, the court registry fee for individuals amounts to EUR274 (2022) if the appeal relates to dividend withholding tax, VAT, excise duties, taxation of passenger cars and motorcycles, consumption tax on non-alcoholic beverages, environmental taxes and customs law. In all other cases, the court registry fee amounts to EUR136 (2022). For legal entities, the court registry fee for tax litigation at the court of appeal amounts to EUR548 (2022) irrespective of the taxes to which the case relates.

The court registry fees at the Dutch Supreme Court are the same as the court registry fees for tax litigation at the court of appeal (see above). All court registry fees have to be paid up front.

11.3 Indemnities

If the court rules against the DTA or the Dutch State Secretary of the Ministry of Finance in tax litigation before the Dutch Supreme Court, they have to repay the amount of the court registry fee to the taxpayer. The court may also order the DTA (or the State Secretary) to reimburse the taxpayer's legal costs. In addition, in certain specific situations – and only if the taxpayer files a claim to that extent – a court may order the DTA

to pay damages to the taxpayer, which could, for instance, be the case if the taxpayer suffers damages as a result of a wrongful act, omission or decision of the DTA.

11.4 Costs of ADR

Mediation may be an efficient option (including in terms of cost) for taxpayers to resolve their tax disputes with the DTA (depending also on whether the taxpayer engages legal advisers, etc). The costs for mediation mainly comprise of the fees of the mediator, the amount of which typically depends on the time spent.

Apart from the legal fees a taxpayer may incur in the process of negotiating a settlement with the DTA or obtaining advance clearance from the DTA in the form of an APA/ATR settlement agreement, there are no costs associated with these two ways of resolving tax disputes or disagreements with the DTA.

12. STATISTICS

12.1 Pending Tax Court Cases

Each year approximately 27,500 tax cases are brought before the Court of First Appeal. In 2021 there was a minor decrease in tax cases compared to 2020. In the 2021 numbers, an 83% increase in the number of cases brought before the Court of Appeal compared to 2020 stands out. This increase is partly due to a large increase in the number of cases that were filed regarding the Dutch Private Motor Vehicle and Motorcycle Tax Act 1992.

The expectation is that the number of tax cases will begin to increase in the coming years due to the changed international tax environment following the BEPS project and the implementation of the EU initiatives against tax avoidance. These developments will likely prompt more active enforcement by the DTA.

12.2 Cases Relating to Different Taxes

No such data is available.

12.3 Parties Succeeding in Litigation

No such data is available.

13. STRATEGIES

13.1 Strategic Guidelines in Tax Controversies

The BEPS project and the implementation of the EU regulations countering tax avoidance give the DTA new instruments to tackle tax avoidance and contest the tax positions of taxpayers. In addition, under the principal purpose test of the MLI, taxpayers may be denied treaty benefits. Furthermore, tax authorities around the world are increasingly sharing more and more information on taxpayers. In addition, taxpayers and their intermediaries active in the EU are now subject to a mandatory disclosure obligation in respect of potentially aggressive cross-border tax-planning arrangements based on DAC6, which was adopted on 25 May 2018 and came into effect (in the Netherlands) on 1 January 2021. The mandatory disclosure rules in principle apply to intermediaries. In certain specific cases, however, the mandatory disclosure rules apply to, or shift to, the relevant taxpayer. This may for instance be the case when there is attorney-client privilege or when there is no intermediary involved with respect to the cross-border potentially aggressive tax planning arrangement(s). Tax authorities within the EU will share the information received on the basis of the directive.

Taxpayers should consider 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 DTA. Taxpayers without a comprehensive and sound approach on detecting potential tax risks and

the management thereof are likely to be more vulnerable to the scrutiny of the tax authorities.

It nevertheless may be inevitable that tax disputes and disagreements with the DTA arise. As a result of the changing global tax environment, taxpayers are likely to be confronted with tax audits and tax disputes by the DTA more frequently. In these cases, it generally helps if the taxpayer already has a good understanding of the various mechanisms available to the taxpayer to resolve the tax dispute/disagreement and of the pros and cons thereof (eg, mediation and litigation).

In addition, it generally helps if the taxpayer has historically had, and continues to have, an open and good relationship with the DTA. This increases the taxpayer's chances of settling the tax dispute/disagreement in the early stages.

Stibbe handles complex legal challenges both locally and cross-border from its main offices in Amsterdam, Brussels and Luxembourg, together with its branch offices in London and New York. By understanding the commercial objectives of clients, their position in the market and their sector or industry, Stibbe can render suitable and effective advice. From an international perspective, it works closely with other top-tier firms on cross-border matters in various jurisdictions. These relationships are non-exclusive, enabling Stibbe to assemble tailor-made integrated teams of lawyers with the best expertise and contacts for each specific project. This guarantees efficient co-ordination on cross-border transactions throughout a multitude of legal areas, irrespective of their nature or complexity. The authors would like to thank Tirza Cramwinckel for her assistance with the article.

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