

Transfer Pricing

Contributing editor
Jason M Osborn



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GETTING THE
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Transfer Pricing 2018

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Overview

1 Identify the principal transfer pricing legislation.

Article 8b of the Dutch Corporate Income Tax Act 1969, effective 1 January 2002, codifies the arm's-length principle and includes a general transfer pricing documentation requirement.

Articles 29b-29h of the Dutch Corporate Income Tax Act 1969, effective 1 January 2016, include supplementary transfer pricing documentation requirements in line with OECD BEPS (base erosion and profit shifting) Action 13 (ie, country-by-country reporting and the master file and local file).

The Dutch tax authorities have provided interpretation of various general and specific aspects of transfer pricing regulations in several decrees.

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

The Dutch tax authorities, which are a subpart of the Dutch Ministry of Finance, are tasked with the enforcement of the transfer pricing legislation. The Coordination Group for Transfer Pricing (the Coördinatiegroep Verrekenprijzen) of the Dutch tax authorities office in Rotterdam oversees the most complex Dutch transfer pricing cases.

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

According to the Dutch state secretary of finance, the OECD Transfer Pricing Guidelines are in principle directly applicable to the Dutch practice.

The explanatory memorandum to the Dutch transfer pricing legislation explicitly mentions that the Netherlands aims to implement the principles laid down in article 9 of the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines. As such, the OECD Transfer Pricing Guidelines play a vital role when applying the Dutch transfer pricing legislation.

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

The transfer pricing rules apply to transactions between related parties. Parties are related if a party, directly or indirectly, participates in the management, control or capital of an enterprise of the other state, or if the same person directly or indirectly participates in the management, control or capital of both parties. Transfer pricing rules also apply to the allocation of profits to permanent establishments.

There are no thresholds with respect to the amounts involved with the transactions: in principle, all transactions between entities that are considered related fall within the scope of the Dutch transfer pricing rules.

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

Yes, the Dutch tax authorities adhere to the arm's-length principle as laid down in the OECD Transfer Pricing Guidelines.

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

The Netherlands will generally follow revisions made to the OECD Transfer Pricing Guidelines resulting from the BEPS project. These revisions are generally considered effective.

Pricing methods

7 What transfer pricing methods are acceptable?

The Dutch tax authorities accept all transfer pricing methods outlined in the OECD Transfer Pricing Guidelines. Methods not specifically outlined in the OECD Transfer Pricing Guidelines are in principle allowed, as long as the application thereof results in a transfer price that complies with the arm's-length principle. The appropriate method often depends on the facts and circumstances of the case and the type of transaction.

Tangible property

In line with the guidance provided in the OECD Transfer Pricing Guidelines, marketing and sales activities are often remunerated with reference to the revenue generated based on either a gross margin (resale-price method) or net margin (transactional net margin method). If comparable uncontrolled prices are available these should also be considered. Transfers of semi-finished goods or manufacturing services are often remunerated with reference to the direct costs incurred (cost-plus method) or full costs incurred (transactional net margin method) plus a mark-up based on, for example, these costs or assets employed. Again, if comparable uncontrolled prices are available these should also be considered.

Intangible property

For controlled transactions involving the transfer of intangible property, typically comparable uncontrolled prices are used. However, the use of the profit-split method or the transactional net margin method could be acceptable in cases where no comparable uncontrolled prices can be found. The use of valuation techniques, including discounted cash flow analysis, is generally accepted.

Service transactions

Service transactions are typically remunerated with reference to the direct costs incurred (cost plus method) or full costs incurred (transactional net margin method) plus a mark-up based on these costs. In case comparable uncontrolled prices are available and can be applied reliably, these should be used.

Loans and advances

The pricing for loans and advances is generally based on prices for similar instruments with comparable characteristics.

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

Cost-sharing arrangements (or cost contribution arrangements (CCAs)) are allowed from a Dutch tax perspective if the contribution of each party is at arm's-length. The contribution should be based on the functions performed (and also take into account the risks assumed and

assets used) by each party. A CCA is in line with the arm's-length principle if the pro rata part of the contribution is in accordance with the pro rata part of the expected benefits. Balancing payments between related parties to achieve this result is permitted. New participants can enter into the CCA at a later stage against an (arm's-length) buy-in payment.

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

In accordance with the OECD Transfer Pricing Guidelines, where more than one method can be applied to a transaction, the 'traditional transaction methods' (ie, the comparable uncontrolled price (CUP) method, the resale-price method and the cost-plus method) are preferred to the 'transactional profit methods' (ie, the profit-split method and the transactional net margin method). The CUP method is preferred to all other methods.

10 Can a taxpayer make transfer pricing adjustments?

In the Netherlands, the tax system in principle operates autonomously (ie, the tax return may differ from the figures in the annual accounts of the relevant company). A taxpayer can make transfer pricing adjustments after the books are closed, by taking a position in the tax return that differs from the figures in the annual accounts. In fact, such transfer pricing adjustments are required from a Dutch tax perspective where transactions in the annual accounts are not at arm's-length. However, such adjustments are not required based on hindsight. The taxpayer is allowed to make transfer pricing adjustments until the term for filing an objection against the relevant tax assessment has expired.

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

No safe harbour applies under Dutch tax rules for certain types of related-party transactions.

Disclosures and documentation

12 Does the tax authority require taxpayers to submit transfer pricing documentation? What are the consequences for failing to submit documentation?

Dutch taxpayers are not required to submit transfer pricing documentation on file. However, it is required to have transfer pricing documentation on file.

If transfer pricing documentation from which the at arm's-length price can be derived (ie, the obligation under article 8b of the Dutch Corporate Income Tax Act 1969) is not present upon a tax audit by the Dutch tax authorities, the taxpayer is given a reasonable term to prepare the transfer pricing documentation (with a minimum of four weeks, which can be extended by the tax inspector to a maximum of three months in case of complex transactions).

Furthermore, if the taxpayer is obliged to prepare a master file and local file (ie, the obligation under article 29g of the Dutch Corporate Income Tax Act 1969), it should have such documentation on file within the term that is set for submitting its respective corporate income tax return.

When not complying with the documentation requirements of article 8b and article 29g of the Dutch Corporate Income Tax Act 1969, the burden of proof of the arm's-length character of the relevant transaction is typically shifted to the taxpayer.

13 Other than complying with mandatory documentation requirements, describe any additional benefits of preparing transfer pricing documentation.

Complying with the mandatory documentation requirements prevents that the burden of proof of the arm's-length character of a transaction is shifted to the taxpayer. Furthermore, penalties may be imposed and tax interest may be charged if the Dutch tax authorities issue a tax assessment that differs from the tax return that has been filed. The position of the taxpayer in a tax dispute regarding such assessment becomes stronger if complied with the mandatory documentation requirements.

14 When must a taxpayer prepare and submit transfer pricing documentation to comply with mandatory documentation requirements or obtain additional benefits?

The taxpayer must prepare transfer pricing documentation and should have this on file (ie, no obligation exists to submit transfer pricing documentation, reference is made to question 12).

15 What content must be included in the transfer pricing documentation? Are a separate 'master file' and 'local file' required? What are the acceptable languages for the transfer pricing documentation?

Dutch tax law includes a general transfer pricing documentation obligation, for which obligation the exact contents are not described by law. Based on the guidance provided through decrees, the contents should align with the OECD guidance on transfer pricing documentation.

Effective 1 January 2016, Dutch tax law include supplementary transfer pricing documentation requirements in line with OECD BEPS Action 13. Dutch companies that are part of a multinational group with a consolidated turnover of at least €50 million in the fiscal year preceding the fiscal year for which the tax return should be filed, are obliged to prepare a local and master file.

Transfer pricing documentation should be prepared in Dutch or English languages.

16 Has the tax authority proposed or adopted country-by-country reporting? What, if any, are the differences between the local rules adopting country-by-country reporting and the consensus framework of BEPS Action 13?

The Dutch tax authorities have adopted country-by-country reporting. It is effective for tax years that begin on or after 1 January 2016. Implementation took place in line with BEPS Action 13.

Adjustments and settlement

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

The Dutch tax authorities must issue a tax assessment within three years after the last day of the relevant tax year. This term is extended by the period for which extension is granted to the taxpayer to file its tax return.

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

The taxpayer may dispute the adjustment by filing an objection against the relevant tax assessment. If the objection procedure fails, it is possible to challenge the tax assessment in a court litigation. Furthermore, under circumstances, it is possible to initiate a mutual agreement procedure between the competent authority of the Netherlands and the relevant other state in order to resolve the transfer pricing dispute.

Relief from double taxation

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

The Netherlands is well known for its comprehensive income tax treaty network. All Dutch tax treaties contain mutual agreement procedure (MAP) articles. The Netherlands also tries to include arbitration provisions in all of its new treaties to improve legal protection for taxpayers.

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

Where a person considers that the action of one or both of the tax treaty states will result in taxation not in accordance with the provisions of the treaty, a request in writing may be submitted to the Dutch tax authorities. There is no dictated form, but the request should be signed and should in general contain information on the taxpayer, the intercompany transaction, the other country or countries that are likely to be affected, etc. Procedures are published in a specific decree.

Update and trends

The most notable development relating to transfer pricing in the Netherlands following the OECD's project on BEPS, is probably that transfer pricing now receives consistent attention from the Dutch tax authorities. Many multinationals are still in the process of implementing the reporting and documentation requirements following from the OECD projects and analysing the full impact of the changed guidance on their transfer pricing and tax structure.

In the 2016 corporate income tax return, a notification needs to be made if payments have been made to related parties outside the Netherlands for the use of (intangible) assets during 2016. Furthermore, also in case a local entity has been involved in or is affected by business restructurings or intangibles transfers during 2016, and this is reflected in the local file, this should be notified in the 2016 corporate income tax return.

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

Based on article 25 of the OECD Model Tax Convention, as soon as the taxpayer believes that the actions of one or both of the contracting states will result in taxation not in accordance with the provisions of the treaty, the taxpayer may request a MAP. Article 25 of the OECD Model Tax Convention provides that requests for a MAP must be presented within three years from the first notification of the action resulting in international double taxation (ie, international economic or juridical double taxation). According to the Dutch tax authorities, the taxpayer's MAP request is submitted in a timely manner if it is received within three years of the date of the assessment (including the adjustment), or within three years of the date on which the tax authorities explained the reasons for the adjustment to the taxpayer (if this date is later).

A request for a MAP can run simultaneously with other procedures before the Dutch court. A taxpayer is in principle not obliged to wait until the disputed tax return is final before requesting a MAP nor is the taxpayer obliged to wait until a court decision has been made. In practice, however, the Dutch tax authorities are only willing to start a MAP if the taxpayer agrees to withdraw the case from the Dutch court.

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

The intention of the Dutch tax authorities is to start, as early as possible, a MAP to relieve the taxpayer from taxation that is in conflict with the provisions of a tax treaty. There are no limitations to this intention.

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

Based on the OECD MAP statistics, the Netherlands had initiated 128 cases in 2015 and had 259 cases in inventory by the end of 2015 (against 198 by the end of 2014).

Advance pricing agreements

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

The Netherlands has an extensive APA programme. The Dutch tax administration in principle prefers to conclude a bilateral APA instead of a unilateral APA.

Where a taxpayer wishes to obtain advance certainty in three or more countries a multilateral APA can be requested. The Dutch tax authorities will, in principle, cooperate with the request for a multilateral APA. Should one or more states object to a multilateral APA procedure, the request would be regarded as a request for the conclusion of various separate bilateral APAs. The applicant will be informed by the APA/ATR team of the Tax Authorities/Large Enterprises (Rotterdam office) on the division of the request into various separate requests for bilateral APAs.

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

A request for an APA should be addressed to the competent tax inspector and simultaneously to the APA/ATR team of the Tax Authorities/Large Enterprises (Rotterdam office).

There is no prescribed legal form for the request of an APA. For bilateral or multilateral APAs, however, the Netherlands recommends to use a form prescribed by the respective other country. Depending on the facts and circumstances in each case, the taxpayer will have to submit certain information, such as a description of the transactions, products, business, or arrangements that will be covered by the request, information about the enterprises and permanent establishments involved in the transactions or arrangements, the names of the other state or states to which the request relates, etc. The Netherlands do not charge any fees for an APA request.

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

The APA/ATR team of the Tax Authorities/Large Enterprises (Rotterdam office) will establish a case-management plan setting forth the procedure for obtaining the APA. In this document, the expected term for agreeing upon the APA will be set. Typically, obtaining a unilateral APA takes approximately six weeks, but obtaining a bilateral or multilateral APA also depends on consultation with other countries and may therefore take substantially longer.

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

The duration of the APA is established in the agreement with the Dutch tax authorities and depends, among other things, on the type of activities covered by the APA and the term for which the underlying facts and circumstances remain to be relevant. In principle, the duration of the arrangement will be set to a maximum of four or five years. Under certain circumstances, a longer term may apply (eg in case of long-term contracts). At the expiry of the agreed period, the taxpayer may request the Dutch tax authorities to conclude a new APA under the same conditions.

Although an APA normally applies to future transactions, the transaction or transactions to which a request relates may already have taken place before an agreement is reached on the APA request. If this is the case, an APA may apply to the transactions already concluded if the taxpayer has requested retroactive effect and certain conditions are satisfied.

In principle, a requirement for the retroactive effect of an APA is that the relevant facts and circumstances in the relevant period are comparable to the facts and circumstances that are the basis for the APA request. Should there be material differences in the relevant facts and circumstances, the APA request can still be accepted if the applicant is able to demonstrate that accurate adjustments can be made to eliminate these material differences.

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

An APA may include all related-party transactions or transfer pricing issues related to a taxpayer. The taxpayer has a certain amount of flexibility to limit the request to specific related entities or transactions.

29 Is the APA programme widely used?

The APA programme is widely used in the Netherlands. Between 2014 and 2016, the Dutch tax authorities have agreed on 630 APAs, 103 APA requests have been rejected and 63 requests have been withdrawn.

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

A request for an APA should be addressed to the competent tax inspector and simultaneously to the APA/ATR team of the Tax Authorities/Large Enterprises (Rotterdam office). The local tax inspector will always submit the request to the APA/ATR team of the Tax Office in Rotterdam for binding advice. The APA/ATR team of the Tax Office in Rotterdam will consult with the Coordination Group on Transfer

Pricing with respect to any policy-related aspects related to the request that have not been published to ensure that the policy is consistent in both principle and practice. One of the members of the APA/ATR team of the Tax Office in Rotterdam is also a member of the Coordination Group on Transfer Pricing in order to guarantee coordination.

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

Rather than have discussions with the Dutch tax authority or the respective tax authorities of other states regarding the taxpayer's transfer pricing practices, it may be preferable to obtain a (unilateral, bilateral or multilateral) APA. On the other hand, in order to apply for an APA, the Dutch tax authorities require that the Dutch taxpayers comply with Dutch substance requirements. The disadvantage of this is, however, limited, as it is generally recommended from an international tax point of view to satisfy the Dutch substance requirements also in cases where no APA is required.

Special topics

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

The Dutch tax authorities are generally not required to respect the form of related-party transactions as actually structured. In principle, the form of related-party transactions is the starting point for application of the transfer pricing principles in the Netherlands. Under Dutch tax principles however, when choosing between the written contract and the conduct of the parties the actual conduct of the parties during the transaction prevails (also known as the 'substance over form' principle). In case of absence of a written agreement, the contractual conditions of the transaction should be derived from the conduct of parties and the economic principles underlying their relation.

Related-party transactions could be disregarded in the case of the application of the general anti-abuse provision *fraus legis*. This applies where an artificial construction is used to obtain a tax benefit, whereby that transaction is in breach of the objective and context of Dutch tax law.

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

Factors that are important in view of the Dutch tax authorities in selecting and evaluating comparables (beside risks, assets and functions) are:

- industry;
- size;
- risks;
- assets;
- functions;
- number of employees; and
- market position.

Comparables from countries that are up to the Dutch economic standard are generally accepted as long as the market of these countries is comparable to the Dutch market (ie, generally, comparables from Western European countries are accepted). However, a set of tested parties located in the Netherlands is preferred above a set of pan-European comparables.

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

The Dutch State Secretary of Finance confirmed that the Dutch tax authorities will not use secret comparables to establish a transfer pricing correction.

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

The Netherlands currently applies secondary adjustments. For example, a secondary adjustment that is treated as a hidden profit distribution can result in the levy of dividend tax (which may be reduced or exempt pursuant to application of a tax treaty or the EU Parent-Subsidiary Directive). Under circumstances, the other involved country may not apply the secondary adjustment and may therefore not recognise a deemed dividend distribution. Where the taxpayer can show that the dividend tax cannot be credited against the tax liability in the other involved state, and that there is no abuse of law with the



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intention to avoid dividend tax, the Netherlands will omit the application of the secondary adjustment

36 Are any categories of intercompany payments non-deductible?

Costs incurred for services that are rendered by a related party in its capacity as shareholder (eg, services in connection with the legal structure of the company, the issuance of shares, the compliance with corporate governance or services for reporting purposes) are non-deductible. The Netherlands does not have thin capitalisation rules in place that prevent the deduction of interest payments. There are, however, other rules under Dutch tax law that result in the non-deductibility of interest under specific circumstances.

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

The Dutch transfer pricing guidelines do not specifically address the matter of location savings. Under the OECD Transfer Pricing Guidelines, it is emphasised that local comparables should be used for determining the transfer price. Where local comparables can be identified, specific adjustments for location savings should not be required, as such transactions are carried out under the same market conditions as the controlled transaction.

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

No profits are attributed to a branch if the branch does not constitute a PE. Profits are attributed to a PE on the basis of the Authorized OECD

Approach (AOA). Under the AOA, profits are allocated to the PE as if the PE is a functional separate enterprise and the arm's-length principle is applied accordingly.

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

Dutch corporate income tax is levied if a Dutch taxpayer restructures its business by moving its effective management to another jurisdiction or moving its assets outside the Netherlands. Corporate income tax due is calculated on the basis of any hidden reserves of the relevant assets and liabilities of the company, any unrecorded goodwill and unrealised tax reserves. It is possible to defer the payment of corporate income tax for restructurings that take place within the EU/EEA (however, interest is charged and the Dutch tax authorities demand security for the tax liability).

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

No specific exemptions or rate reductions are applied by local development boards. More in general, a reduced corporate income tax rate of 5 per cent applies (instead of 20 per cent or 25 per cent) to profits realised in connection with innovative activities if certain strict conditions are satisfied. Under strict conditions, a zero per cent corporate income tax rate applies for investment institutions.

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