

COUNTRY NOTE

An In-Depth Analysis of Published Anonymized APA and APA Request Summaries Under the Revised Dutch Tax Ruling Practice*

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On 1 July 2019, the Dutch tax ruling practice was revised to align it with EU and international standards and recommendations and to increase its openness and transparency. In this respect, the Dutch tax authorities now publish anonymized summaries of Advance Pricing Agreements and Advance Pricing Agreement requests.

The country note provides an in-depth analysis of all sixty-six anonymized summaries published during the first year after the introduction of the revised Dutch tax ruling practice and highlights and analyses the most significant cases. This provides further insight into the practical application of the requirements that taxpayers must fulfil to be eligible for prior consultation to obtain a tax ruling with an international character.

Keywords: The Netherlands, transfer pricing, arm's length principle, advance pricing agreement, APA, ruling, certainty, economic nexus, transparency.

I INTRODUCTION AND HISTORICAL BACKGROUND

After the Second World War, potential foreign investors seeking to invest into the Netherlands attached great importance to being able to obtain certainty in advance on the tax consequences of their envisaged investments before actually investing in the Netherlands. This meant that taxpayers or future taxpayers in the Netherlands could conclude agreements with the Dutch tax authorities (DTA) in which the Dutch tax consequences of envisaged legal acts were decided. This way of working became known as 'the Dutch tax ruling practice'.¹

From 1998 to 1999, the Primarolo Group of the EU Code of Conduct Group reviewed the Dutch tax ruling practice and concluded that it contained harmful

features.² The OECD provided specific recommendations³ in its 1998 OECD Report on harmful tax competition⁴ to align the Dutch tax ruling practice with the OECD Transfer Pricing Guidelines.⁵ As a result, the DTA revised its tax ruling practice in 2001. Due to this revision, as of 1 April 2001, the DTA only grants tax rulings that are tailored to the taxpayer's specific factual situation⁶ and are aligned with tax law, policy, and jurisprudence.⁷ Furthermore, a tax ruling does not lead to a different or more favourable tax outcome than an assessment of the facts by the inspector afterwards.⁸

Despite these revisions, tax rulings with an international character issued by the DTA have received social and political attention in the Netherlands in

Notes

* Any shortcomings, digressions, and leaps of thought inevitably present in this contribution remain the responsibility of the author. Note that the viewpoints in this country note are not necessarily the viewpoint of Houthoff.

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¹ See NL: Working document Internal working group Ministry of Finance/Tax Authorities, *Revision of the Tax Ruling Practice* 9 (30 Aug. 2018).

² See Council of the European Union, *Report of the Code of Conduct Group (Business Taxation)*, no. 4901/99 (23 Nov. 1999), Annex B, at 300, 306 and 309.

³ In particular, recommendation 6 concerning transfer pricing rules: that countries follow the principles set out in the OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Publishing 1995) and thereby refrain from applying or not applying their transfer pricing rules in a way that would constitute harmful tax competition.

⁴ See OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing 1998).

⁵ See OECD *Transfer Pricing Guidelines* (1995), *supra* n. 3.

⁶ See Working document Internal working group Ministry of Finance/Tax Authorities, *supra* n. 1, at 9.

⁷ See NL: Parliamentary Proceedings II, 2017–2018, 25 087, no. 209, answer to question 11, at 15.

⁸ See *ibid.*, answer to question 47, at 11.

recent years.⁹ For several years – in particular from 2017 onwards – various political parties in the Dutch Parliament have scrutinized and criticized the existing Dutch tax ruling practice. Their criticisms and concerns have been expressed in various recurring parliamentary questions. These criticisms mostly related to the lack of openness and transparency in the Dutch tax ruling practice and the possibility that taxpayers with limited economic substance in the Netherlands could still obtain a tax ruling. One of the main reasons for the recurring parliamentary questions in recent years was the message of the Dutch State Secretary of Finance¹⁰ that the DTA was unable to exchange all issued rulings in time under the agreements made at the OECD¹¹ and EU¹² level as the DTA was unable to track and trace all international tax rulings that had to be exchanged.

As a response to these parliamentary questions, and to bring the Dutch tax ruling practice in line with EU and OECD standards and recommendations, the Dutch State Secretary of Finance announced¹³ that he would revise the Dutch tax ruling practice. Other factors that also played a role in this decision were (1) the EU Code of Conduct Group (Business Taxation's) recommendations for national tax ruling practices, (2) the overall aim of banning letterbox companies from obtaining a tax ruling,¹⁴ and (3) state aid procedures by the European Commission, some of which related to tax rulings provided by the DTA and resulted in parliamentary questions.¹⁵

Considering this, the Dutch tax ruling practice was revised on 1 July 2019. The Dutch State Secretary of Finance issued a new Ruling Decree¹⁶ (Dutch Ruling Decree) on 19 June 2019 that entered into force on 1 July 2019 and only applies to tax rulings with an international character.¹⁷ This implies, as has been evidenced,¹⁸ that for purely domestic Dutch situations, the new and more extensive requirements for obtaining a tax ruling do not apply. This may not be considered fully in accordance with EU standards and recommendations as

these do not make a distinction between domestic tax rulings and international tax rulings.

The Dutch Ruling Decree describes measures in the areas of transparency, the procedures for obtaining a tax ruling, and its content.¹⁹

In section two of this country note, the author addresses and outlines the DTA's revised stricter internal procedure for granting a tax ruling with an international character which the author considers to be a major change to the Dutch tax ruling practice.

In section three, the author addresses the stricter and more extensive requirements that Dutch taxpayers must meet to be eligible to enter into prior consultation with the DTA to obtain a tax ruling for a cross-border situation.

In section four, the author specifically addresses the publication of anonymized summaries of Advanced Pricing Arrangements (APAs) and APA requests. The author considers these to be a welcome and helpful feature of the revised Dutch tax ruling practice as it brings the Dutch tax ruling practice more in line with EU and OECD recommendations and standards. Furthermore, these publications give stakeholders valuable insights into the workings of the Dutch tax ruling practice. These stakeholders include tax policy makers, non-governmental organizations (NGOs), academics, transfer pricing practitioners and advisers and, of course, taxpayers who envisage obtaining an APA.

In section five, the author presents his findings based on his analysis of all sixty-six anonymized APA summaries and APA request summaries published between 1 July 2019 and 30 June 2020, the first year after the revised Dutch tax ruling practice was introduced. This section outlines the non-processed, rejected, and withdrawn APA requests and the most striking accepted APA requests. The author provides further insights into the practical application of the newly introduced requirements under the revised Dutch tax ruling practice.

In section six, the author provides his overall conclusion and recommendations.

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⁹ See Working document Internal working group Ministry of Finance/Tax Authorities, *supra* n. 1, at 10.

¹⁰ See NL: Parliamentary Proceedings II, 2016–2017, 34 527, no. 5 and NL: Parliamentary Proceedings II, 2017–2018, 25 087, nos 181 and 187.

¹¹ See the OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5–2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

¹² See Council Directive (EU) 2015/2376 of 8 Dec. 2015 amending Council Directive (EU) 2011/16 OJ L 332/1 (18 Dec. 2015) (also referred to as Directive on Administrative Cooperation (DAC)3). This Directive incorporates the recommendations from BEPS action item five to counter harmful tax practices more effectively by improving transparency in relation to tax rulings.

¹³ See NL: Parliamentary Proceedings II, 2017–2018, 25 087, no. 187, Letter of 18 Feb. 2018 of the State Secretary of Finance (2018).

¹⁴ See NL: Parliamentary Proceedings II, 2017–2018, 25 087, no. 188, Letter of 23 Feb. 2018 of the State Secretary of Finance (2018).

¹⁵ See NL: Parliamentary Proceedings II, 2017–2018, 25 087, no. 193.

¹⁶ See NL: Decree of 19 June 2019, State Secretary of Finance, no. 2019/13003 (2019).

¹⁷ *Ibid.*, at 1.

¹⁸ See NL: Tax Authorities, Advance Pricing Agreement 20191203 APA 000008.

¹⁹ See NL: Parliamentary Proceedings II, 2018–2019, 25 087, no. 223, Letter of 22 Nov. 2018 of State Secretary of Finance (2018).

2 REVISED AND STRICTER INTERNAL PROCEDURE

The Dutch Ruling Decree stipulates the DTA's revised formal internal procedure for granting a tax ruling in a cross-border situation.²⁰ The formal procedure now requires a second review, approval, and signature by a newly composed team of specialists within the DTA: the College International Tax Certainty²¹ (College ITC). This team could therefore be considered as a second assessment team. The College ITC must co-sign the tax ruling after it has been approved and signed by the local tax inspector and/or the First Assessment Team International Tax Certainty (First Assessment Team) dealing with the tax ruling request.

As a result of the College ITC's additional review, the procedure has become stricter and more extensive.

The local tax inspector is regarded as the first regular assessor of the tax ruling request. He must consult and coordinate with the First Assessment Team and the relevant 'coordination and knowledge groups' within the DTA. In specific situations outlined in the Dutch Ruling Decree,²² the tax inspector must transfer the tax ruling request to the First Assessment Team for their assessment. Figure 1 provides an overview of the most important aspects of the new formal internal procedure for obtaining a legally binding tax ruling.²³

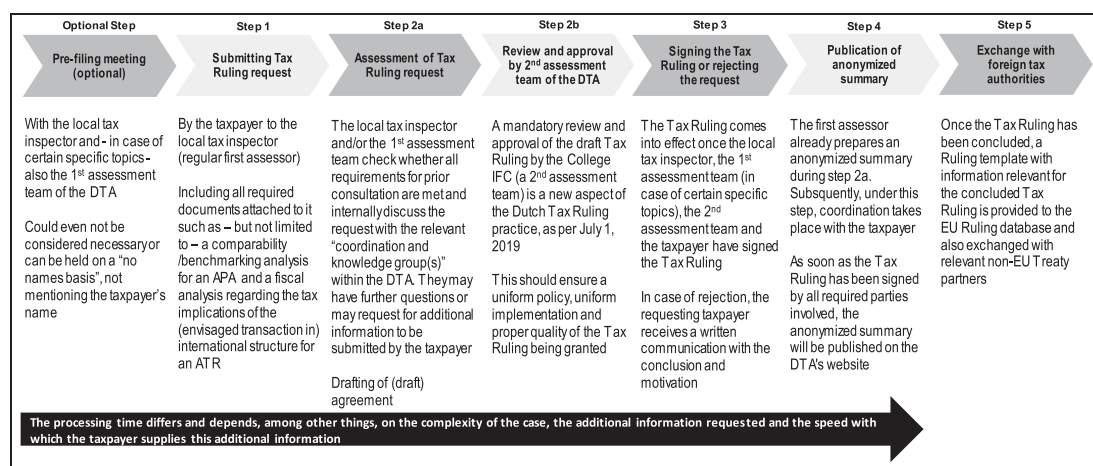
3 ELIGIBILITY FOR PRIOR CONSULTATION

Alongside the tightened internal procedure, one of the other most significant changes to the Dutch tax ruling practice is the introduction of eligibility requirements for prior consultation that are more extensive. These can be categorized as: (1) a newly introduced economic nexus requirement, (2) the requirement that saving Dutch or foreign taxes is not the only or decisive motive for engaging in the legal acts or transaction(s), and (3) the requirement that the requested certainty does not relate to the tax consequences of direct transactions with entities established in countries which are included in the Dutch Decree covering low taxation countries and non-cooperative jurisdictions for tax purposes.²⁴ The Dutch State Secretary of Finance updates this Decree every year.

Since 1 July 2019, it has only been possible to have a prior consultation with the DTA to obtain a tax ruling for a cross-border situation if the taxpayer has an economic nexus with the Netherlands. To show this economic nexus, the requesting taxpayer must meet the following requirements:

1. It is part of a multinational group that performs commercial operating activities in the Netherlands – and, as such, has an economic nexus with the Netherlands;
2. Its commercial operating activities performed in the Netherlands are performed for its own risk and account;

Figure 1 Summary overview of the most important steps in the process to obtaining a tax ruling with an international character



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²⁰ See Decree of 19 June 2019, *supra* n. 16, at 1.

²¹ The College ITC (*College Internationale Fiscale Zekerheid*) consists of seven experts. The college met weekly in the second half of 2019 in the presence of one of the Directors of Large Enterprises. See NL: Tax Authorities, *2019 Annual Report on Rulings with an International Angle*, 11 (2019); 2015 OECD BEPS Report on Action 5, *supra* n. 11.

²² See Decree of 19 June 2019, *supra* n. 16, s. 2.4, at 2–3 (2019).

²³ This summary overview has been based on *2019 Annual Report on Rulings with an International Angle*, *supra* n. 21, s. 3, at 13 and the author's interpretation of this. It is a non-exhaustive overview only providing a summary of the most important steps in the process to obtaining a tax ruling with an international character.

²⁴ See NL: State Secretary of Finance, Decree of 31 Dec. 2018, no. DB 2018/216528 (2018).

3. Its multinational group has sufficient relevant employees in the Netherlands; and
4. Its activities fit its function within the multinational group.²⁵

Four examples have been provided in an attachment to the letter of the Dutch State Secretary of Finance, dated 23 April 2019,²⁶ to clarify the practical application of the economic nexus requirements and to provide guidance on whether a taxpayer is eligible for prior consultation. On 11 February 2020, an additional Q&A document²⁷ was published which provides further information and support for the new Dutch Ruling Decree.

4 PUBLICATION OF ANONYMIZED SUMMARIES

4.1 Publication in the Netherlands

The Dutch State Secretary of Finance identified and considered the following five different options to increase the transparency of the Dutch tax ruling practice while revising it²⁸

1. Continuing the current transparency based on policy decisions;
2. Publishing tax rulings in full, either by the DTA or by the taxpayer;
3. Publishing tax rulings anonymously;
4. Improving the publication of principles for issuing tax rulings; or
5. Publishing an annual report on all rulings with an international character.

The Dutch State Secretary of Finance selected option 3 based on the input of various stakeholders, and announced in paragraph 4 of the Dutch Ruling Decree that an anonymized summary would be published for each tax ruling in a cross-border situation concluded as from 1 July 2019. The DTA considers publishing anonymized summaries to be an essential element of transparency.²⁹

However, the Dutch State Secretary of Finance departed from option 3 by publishing summaries instead of complete

anonymized tax rulings. He considered that a complete anonymized tax ruling could include a variety of information that can be traced back to business confidential data that should be omitted considering the DTA's professional secrecy. As a result, the passages that remain legible say little and will often resemble the examples already published. In addition to this, the Dutch State Secretary of Finance took into consideration the fact that rulings with a very factual character are unsuitable for anonymized publication.³⁰

Each summary has a fixed format.³¹ The tax inspector or First Assessment Team and the requesting taxpayer jointly prepare a draft tax ruling and a draft anonymized summary of the APA or APA request.³² If an agreement is reached, the anonymized summary is published on the DTA's website once the APA has been signed by all required parties. The DTA aims to publish the anonymized summary on their website within three weeks of signing.³³ After monitoring the DTA's website for the purpose of identifying and analysing newly published anonymized APAs and APA requests, the author concludes that the DTA publishes these anonymized summaries well within the three-week target.

Each summary includes:

1. A summary of the facts and circumstances underlying the tax ruling and – if relevant – the most important conclusions from transfer pricing (TP) reports or other documents;
2. An analysis of the requested fiscal certainty in advance on the basis of the relevant legislation and regulations;
3. A conclusion explaining the legal basis/legal reasons for granting a tax ruling.

An anonymized summary will also be published in cases when no tax ruling was agreed upon but certainty in advance has been requested by the taxpayer and there was a prior consultation with the DTA. This summary will also explain why a tax ruling has not been granted.

In the first year (1 July 2019–30 June 2020) after the DTA began publishing anonymized summaries, sixty-six anonymized APA summaries and requests³⁴ were

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²⁵ As an example, a sales entity performing a sales function should employ or hire salespeople.

²⁶ See NL: Parliamentary Proceedings II, 2018–2019, 25 087, no. 237, Letter of 23 Apr. 2019 of State Secretary of Finance, Annex 1 'Voorbeelden wel/geen toegang tot ruling met internationale karakter', Examples 4–8 (2019).

²⁷ See NL: Tax Authorities, *Decree on Rulings with an International Angle – Answers & Questions* (2020), https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/themaoverstijgend/brochures_en_publicaties/besluit-vooroverleg-rulings-met-een-internationaal-karakter-vragen-en-antwoorden (accessed 9 Nov. 2020).

²⁸ See Working document Internal working group Ministry of Finance/Tax Authorities, *supra* n. 1, s. 4.4.2, at 40–43.

²⁹ See 2019 Annual Report on Rulings with an International Angle, *supra* n. 21, at 11.

³⁰ See Working document Internal working group Ministry of Finance/Tax Authorities, *supra* n. 1, s. 4.4.2, at 41.

³¹ Working document Internal working group Ministry of Finance/Tax Authorities, *supra* n. 1, at 10.

³² *Ibid.*, at 13.

³³ *Ibid.*, at 14.

³⁴ The terms APA request and request for prior consultation are interchangeable. In this country note, the term APA request is mostly used.

published. In addition, a significant number of anonymized and summarized advance tax rulings (ATRs), tax rulings relating to the Dutch patent box regime and other types of tax rulings with an international character – including prior consultations – were published.³⁵ All tax rulings granted in 2019 and all tax ruling requests that were assessed by the DTA in 2019 have been further addressed in the DTA's 2019 Annual Report on Rulings with an international character.³⁶

After analysing all sixty-six published anonymized APAs and APA requests, the author finds that these publications provide valuable insight into which types of cases will and will not be granted certainty by the DTA. Before the introduction of the revised Dutch tax ruling practice, this information was, to a more limited extent, also available in an 'appearances note'³⁷ that provided typical cases for which the DTA was willing to grant a tax ruling. However, this note only included eleven types of typical situations for which a tax ruling could be obtained and therefore provided less detailed and less case-specific information than the published anonymized summaries under the revised Dutch tax ruling practice.

4.2 Publication of Tax Rulings in Belgium

As part of the revision of the Dutch tax ruling practice, the Dutch State Secretary of Finance sent an internal working group from the Ministry of Finance and the DTA to visit the Belgian Advance Tax Rulings Commission (BATRC)³⁸ to examine the Belgian tax ruling practice.³⁹

For many years, Belgium's tax legislators have been aware that taxpayers find upfront legal certainty important.⁴⁰ As part of the Belgian corporate tax

reform of December 2002, the Belgian Government revised its tax ruling practice to allow taxpayers to obtain an advance decision on the application of Belgian tax laws to a particular situation or transaction.⁴¹

Section 24 of the Law of 24 December 2002 provides that advance decisions are published anonymously in accordance with the provisions on professional confidentiality. Therefore, the Belgian ruling practice already required official publication⁴² of ruling decisions on an anonymous basis in the form of individual or collective decisions back in 2003.⁴³

As of 2015, all ruling decisions are published individually rather than as collective decisions.⁴⁴ Furthermore, the BATRC has regularly published online newsletters since 2017. It has also published online newsflashes since 2019.⁴⁵

According to the Dutch State Secretary of Finance, the decision to publish summaries of tax rulings as part of the Dutch Ruling Decree is based on the Belgian tax ruling practice.⁴⁶

However, as discussed in paragraph 4.1, the Dutch State Secretary of Finance decided to publish only anonymized summaries of tax rulings. This is contrary to the Belgian tax ruling practice in which complete anonymized tax rulings are published.

4.3 Alignment with EU and OECD Standards

The EU Code of Conduct Group⁴⁷ (the Group) monitors compliance with the European Code of Conduct.⁴⁸ Over the past few years, the Group has increasingly focused on the area of coordinated tax policies, such as a common tax ruling policy.⁴⁹ In 2016, the Group agreed on a set of guidelines on the conditions and rules for the issuance of tax rulings by Member

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³⁵ Tax Ruling summaries, including Tax Ruling request summaries, are available at, NL: Tax Authorities, *Brochures and Publications*, https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/themaoverstijgend/brochures_en_publicaties/brochures_en_publicaties_ondernemer (accessed 9 Nov. 2020).

³⁶ See 2019 Annual Report on Rulings with an International Angle, *supra* n. 21.

³⁷ See Letter of 23 Apr. 2019 of the State Secretary of Finance, *supra* n. 26.

³⁸ The Advance Tax Ruling Commission (*Belgische Dienst Voorafgaande beslissingen*) is the Belgian authority responsible for ATR and APA requests.

³⁹ See Letter of 22 Nov. 2018 of the State Secretary of Finance, *supra* n. 19, at 1–2.

⁴⁰ See R. Willems, *Guide to Tax Rulings in Belgium*, foreword and, para. 6.1 (IBFD 2012).

⁴¹ See H. Vanhulle, *The Belgian Advance Ruling Procedure: Recent Experience and Greater Efficiency and Flexibility from 2005*, 45(3) Eur. Tax'n 117–121, 117 (2005).

⁴² Tax Ruling summaries, are available at, BE: Ministry of Finance, *Fisconetplus*, <https://eservices.minfin.fgov.be/myminfweb/pages/fisconet#!/navigation/098e3428-66e6-4607-8053-41220fad356f,aa198ee9-44e7-45f6-bb27-2666adc3641f,582e7fa4-625f-44f0-ab0d-aa61c30f76ac,94f19832-3ba5-47c2-bb13-4766e822774f> (accessed 9 Nov. 2020).

⁴³ See BE: Federal Public Service of Finance, 2019 Annual Report on the Advance Tax Ruling Commission, at 15–16 (2019).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ See Letter of 22 Nov. 2018 of the State Secretary of Finance, *supra* n. 19, at 3.

⁴⁷ The Code of Conduct Group (Business Taxation) was set up by Ecofin on 9 Mar. 1998. It mainly deals with assessing the tax measures which fall within the scope of the code of conduct (adopted in Dec. 1997) for business taxation and overseeing the provision of information on those measures.

⁴⁸ See Conclusions of the Ecofin Council Meeting of 1 Dec. 1997 concerning taxation policy, OJ C 2/1(6 Jan. 1998).

⁴⁹ See M. F. Nouwen, *The European Code of Conduct Group Becomes Increasingly Important in the Fight Against Tax Avoidance: More Openness and Transparency Is Necessary*, 45(2) Intertax 138–149, 141 (2017).

States.⁵⁰ These conditions, which are partly based on the OECD Base Erosion and Profit Shifting (BEPS) Action 5, do not deal with the substance of tax rulings but with procedural aspects.⁵¹ These include a publication requirement. According to the guidelines, when a tax ruling has horizontal application to the affairs of other taxpayers in similar situations, it should be published and made easily accessible to other tax administrations and other taxpayers. If confidentiality requirements prevent publication, the administration should ensure that the conclusions reached in the tax rulings are published in the form of either updated guidance or more general conclusions.⁵² This publication requirement, therefore, may have a major impact on Member States' tax ruling practices.⁵³ According to the Group's reports of November 2019 and June 2020, it is currently monitoring to what extent Member States comply with this guidance.⁵⁴ If these guidelines are not sufficiently effective in the form of soft law, the European Commission may be encouraged to introduce hard law solutions.⁵⁵

In March 2018, the Dutch Secretary of Finance answered questions about the openness and transparency of the Dutch tax ruling practice.⁵⁶ The Dutch Secretary of Finance discussed the guidance mentioned above and concluded that the Dutch tax ruling practice already complied with these guidelines as the DTA published rulings in the form of policy decisions containing overall guidance and frequently occurring examples.

The author believes that the 2019 revised Dutch tax ruling practice has greatly improved compliance with the Group's guidelines regarding the issuance of tax rulings by Member States.

5 ANALYSIS OF PUBLISHED ANONYMIZED SUMMARIES

During the period 1 July 2019–30 June 2020, the first year after the introduction of the revised Dutch tax ruling practice, the DTA assessed and published a total of sixty-six anonymized summaries of APA requests and granted APAs⁵⁷ of which twenty-eight⁵⁸ summaries were published in 2019.

These sixty-six published summaries can be categorized as follows, as also depicted in Table 1:

1. Twelve APA requests⁵⁹ were not further processed, not fully processed, or were rejected by the DTA and therefore did not result in an APA. The most interesting cases are further analysed and discussed in paragraph 5.2;
2. Sixteen APA requests⁶⁰ were ultimately withdrawn by the requesting taxpayers and, therefore, did not result in an APA. The most interesting cases are further analysed and discussed in paragraph 5.3;
3. Thirty-eight⁶¹ accepted APA requests resulted in an APA being granted. The most interesting cases are further analysed and discussed in paragraph 5.4.

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⁵⁰ See Council of the European Union, *Report of the Code of Conduct Group*, no. 14750/16 (28 Nov. 2016), at 6 and Annex I. See also Council of the European Union, *Agreed Guidance by the Code of Conduct Group 1998–2019*, no. 5814/5/18 (16 Oct. 2019), at 80–83.

⁵¹ See M. F. Nouwen et al., *European Tax Law: Volume 1 – General Topics and Direct Taxation* 940 (7th ed., Wolters Kluwer 2018).

⁵² See Report of the Code of Conduct Group of 28 Nov. 2016, *supra* n. 50, at 18. See also the 2019 updated compilation of *Agreed Guidance by the Code of Conduct Group 1998–2019*, *supra* n. 50, at 83.

⁵³ See Nouwen et al., *supra* n. 51, at 940.

⁵⁴ See Council of the European Union, *Report of the Code of Conduct Group*, no. 14114/19 (25 Nov. 2019), at 5. See also Council of the European Union, *Report of the Code of Conduct Group*, no. 8374/20 (5 June 2020), at 7.

⁵⁵ See Nouwen et al., *supra* n. 51, at 940–941.

⁵⁶ See NL: Parliamentary Proceedings II, 2017–2018, no. 1419, at 1–2 (2018), Appendix to the Proceedings of 13 Mar. 2018.

⁵⁷ Tax Ruling summaries, including Tax Ruling request summaries, are available at, Tax Authorities, *Brochures and publications*, *supra* n. 35.

⁵⁸ See 2019 *Annual Report on Rulings with an International Angle*, *supra* n. 21, at 5.

⁵⁹ See the published anonymized summaries, NL: Tax Authorities, Advance Pricing Agreement 20191018 APA 0000015, NL: Tax Authorities, Advance Pricing Agreement 20191203 APA 000008, NL: Tax Authorities, Advance Pricing Agreement 20191206 APA 000003, NL: Tax Authorities, Advance Pricing Agreement 20191209 APA 000004, NL: Tax Authorities, Advance Pricing Agreement 20191217 APA 000005, NL: Tax Authorities, Advance Pricing Agreement 20200124 APA 000014, NL: Tax Authorities, Advance Pricing Agreement 20200128 APA 000011, NL: Tax Authorities, Advance Pricing Agreement 20200131 APA 000001, NL: Tax Authorities, Advance Pricing Agreement 20200207 APA 000010, NL: Tax Authorities, Advance Pricing Agreement 20200212 APA 000008, NL: Tax Authorities, Advance Pricing Agreement 20200213 APA 00001 and NL: Tax Authorities, Advance Pricing Agreement 20200505 APA 000005.

⁶⁰ See the published anonymized summaries NL: Tax Authorities, Advance Pricing Agreement 20191016 APA 000001, NL: Tax Authorities, Advance Pricing Agreement 20191105 APA 000008, NL: Tax Authorities, Advance Pricing Agreement 20191112 APA 000001, NL: Tax Authorities, Advance Pricing Agreement 20191118 APA 000014, NL: Tax Authorities, Advance Pricing Agreement 20191210 APA 000001, NL: Tax Authorities, Advance Pricing Agreement 20191217 APA 000008, NL: Tax Authorities, Advance Pricing Agreement 20191217 APA 000009, NL: Tax Authorities, Advance Pricing Agreement 20191218 APA 000003, NL: Tax Authorities, Advance Pricing Agreement 20200303 APA 000007, NL: Tax Authorities, Advance Pricing Agreement 20200317 APA 000007, NL: Tax Authorities, Advance Pricing Agreement 20200324 APA 000014, NL: Tax Authorities, Advance Pricing Agreement 20200324 APA 000020, NL: Tax Authorities, Advance Pricing Agreement 20200331 APA 000006, NL: Tax Authorities, Advance Pricing Agreement 20200421 APA 000004, NL: Tax Authorities, Advance Pricing Agreement 20200519 APA 000001, NL: Tax Authorities, Advance Pricing Agreement 20200526 APA 000001.

⁶¹ See all remaining published anonymized summaries not included under . 59 and . 60.

Table 1 Categorization of APA and APA Request Summaries

Published Anonymized APA and APA Request Summaries			
1 July 2019–30 June 2020			
DTA Treatment:	Not processed or rejected	Withdrawn	Accepted
# of requests	12	16	38
Percentage ⁶²	18%	24%	58%

Based on these numbers, from 1 July 2019 to 30 June 2020, approximately 58% of the APA requests ultimately resulted in a granted APA.

5.1 Applied Transfer Pricing Method

In the vast majority of the published anonymized APAs, the Transactional Net Margin Method (TNMM) was considered the most appropriate TP method for the circumstances of the case and, as such, has been approved by the DTA and applied by the taxpayer.

The TNMM is a TP method that examines the net profit relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction or set of transactions that are appropriate to aggregate.⁶³ It is often applied to sales/distribution activities, manufacturing activities, and providing intra-group services. Under the TNMM, a net profit indicator⁶⁴ of net profit divided by sales or net profit margin is frequently used to determine the arm's length price of purchases from an associated enterprise for resale to independent customers.⁶⁵

A TNMM is unlikely to be reliable if each party to a transaction makes unique and valuable contributions.⁶⁶

When the TNMM is applied by the taxpayer and found appropriate by the DTA, the DTA generally takes the view that the median⁶⁷ or a value close to it should be applied to arrive at an arm's length remuneration to be reported by the taxpayer. This approach seems

to be based on experience and common practice as neither the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations⁶⁸ (OECD TP Guidelines) nor the Dutch Transfer Pricing Decree⁶⁹ require the application of the median value in an APA. When the range of benchmarking study results comprises results of relatively equal and high reliability, it could be argued that any point in the range of benchmarking study results satisfies the arm's length principle.⁷⁰

In the majority of the APAs published during the first year after the revised Dutch tax ruling practice was introduced, the TNMM was selected and applied as the most appropriate TP method to arrive at an arm's length remuneration. In almost all of these cases, the median or a value close to it has been agreed upon in the APA.

Despite the median or a value close to it being agreed in most of the granted APAs, the published summaries only disclose the lower quartile and the upper quartile⁷¹ of the conducted benchmarking study results. The median is not disclosed in any of the anonymized summaries published in 2019 and is only disclosed in a very limited number of anonymized summaries published in 2020. The author has not found any publications that include the DTA's reasoning for not disclosing the median in its published anonymized summaries. The DTA may use its discretion in this respect⁷² although guidance in the EU Code of Conduct⁷³ provides that such discretionary power should be exercised with caution in the context of tax rulings. The author can also imagine that the median is mostly not disclosed because this could lead to precedent action since taxpayers with a comparable although dissimilar fact pattern as in the published anonymized summary may require the median to be applied to their case.

As such, in the author's opinion, it would be reasonable to also disclose the median in the published anonymized summaries as this is the value that the taxpayer must report during the term of the APA. Disclosing the median would improve transparency for taxpayers, practitioners,

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⁶² Rounded percentages have been provided.

⁶³ See OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, para. 2.64 (OECD, Publishing 2017).

⁶⁴ See *ibid.*, Glossary, at 28: "The ratio of net profit to an appropriate base (e.g. costs, sales, assets). The transactional net margin method relies on a comparison of an appropriate net profit indicator for the controlled transaction with the same net profit indicator in comparable uncontrolled transactions".

⁶⁵ See OECD *Transfer Pricing Guidelines* (2017), *supra* n. 63, para. 2.96.

⁶⁶ *Ibid.*, para. 2.65.

⁶⁷ The median is the middle number in a sorted, ascending, or descending list of numbers and can be considered more descriptive of that data set than the average.

⁶⁸ See OECD *Transfer Pricing Guidelines* (2017), *supra* n. 63.

⁶⁹ See NL: Decree of 22 Apr. 2018, State Secretary of Finance, no. 2018/6865 (2018).

⁷⁰ See OECD *Transfer Pricing Guidelines* (2017), *supra* n. 63, para. 3.62.

⁷¹ A quartile divides data into three points – a lower quartile, median, and upper quartile – to form four groups of the dataset. The lower quartile, or first quartile, is denoted as Q1 and is the middle number that falls between the smallest value of the dataset and the median. The second quartile, Q2, is also the median. The upper or third quartile, denoted as Q3, is the central point that lies between the median and the highest number of the distribution.

⁷² Based on NL: General Administrative Law Act (4 June 1992), Art. 4.81.

⁷³ See Report of the Code of Conduct Group of 28 Nov. 2016, *supra* n. 50, Annex I, s. A Process of granting a ruling, sub b, at 16.

foreign tax authorities and other stakeholders in the tax avoidance debate without jeopardizing the anonymity of the APA that is being granted.

As indicated before, in the vast majority of the published anonymized APA summaries, the TNMM has been applied. In some cases, another TP method has initially or ultimately been applied. In one case,⁷⁴ the profit split method (the Profit Split Method) was initially applied by the taxpayer, however, this was translated into a TNMM for practical reasons, as agreed in the APA.

The Profit Split Method is a transactional profit method that identifies the combined profit to be split for the associated enterprises from a controlled transaction (or controlled transactions that are appropriate to aggregate). Subsequently, it splits those profits between the associated enterprises based upon an economically valid basis that approximates the division of profits that would have been anticipated and reflected in an agreement made at arm's length.⁷⁵

The Profit Split Method's main strength is that it can offer a solution for highly integrated operations for which a one-sided method – such as the TNMM – would not be appropriate.⁷⁶ The Profit Split Method may also be found to be the most appropriate method in cases when both parties to a transaction make unique and valuable contributions (e.g. contribute unique intangibles) to the transaction because, in such cases, independent parties might wish to share the profits of the transaction in proportion to their respective contributions and a two-sided method might be more appropriate in these circumstances than a one-sided method. In addition, reliable comparable information might be insufficient for applying another method in the presence of unique and valuable contributions. However, a Profit Split Method would not ordinarily be used in cases when one party to the transaction performs only simple functions and does not make any significant unique contribution (e.g. contract manufacturing or contract service activities in relevant circumstances).⁷⁷

In another APA,⁷⁸ agreement was reached on the application and arm's length nature of a Cost Contribution Arrangement (CCA). A CCA is a contractual arrangement

among business enterprises to share the contributions and risks involved in jointly developing, producing, or obtaining of intangibles, tangible assets, or services with the understanding that these intangibles, tangible assets, or services are expected to create benefits for the individual businesses of each of the participants.⁷⁹

5.2 Submitted Requests Not Further Processed or Rejected

In total, twelve⁸⁰ submitted requests were not further processed or rejected. In this respect, the DTA did not further process eleven⁸¹ submitted APA requests and rejected⁸² one request that is detailed below.

With respect to the eleven submitted requests that were not further processed, this mostly happened because the requesting taxpayer was unwilling to provide the DTA with additional requested information. In one of these non-processed cases,⁸³ the DTA did not further process the APA request because there were no longer any cross-border transactions. Furthermore, based on the information in another published anonymized APA request,⁸⁴ the APA request was not processed because the DTA took the position that the intercompany transaction (renting tangible fixed assets to a Dutch group entity) did not take place at arm's length terms and conditions and was motivated by shareholder concerns.

5.2.1 Rejected Due to Lack of Economic Nexus

In this case, X, a tax resident in the Netherlands, is part of a multinational group active in the services sector. X is involved in financing activities within the multinational group. X issued two loans to a group entity Y based in country Z in the European Union. The loans are long-term and interest-bearing. The loan agreements provide the option to repay the loans prematurely. Y intends to pay off the two loans prematurely.⁸⁵

The taxpayer employs two directors and three part-time financial employees. At the time of the APA request, the multinational group that X was part of did not yet have

Notes

⁷⁴ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200310 APA 000002.

⁷⁵ See *OECD Transfer Pricing Guidelines* (2017), *supra* n. 63, Glossary, at 29.

⁷⁶ *Ibid.*, para. 2.115, at 133.

⁷⁷ *Ibid.*, at 134.

⁷⁸ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200303 APA 000004.

⁷⁹ See *OECD Transfer Pricing Guidelines* (2017), *supra* n. 63, Glossary, at 25.

⁸⁰ See *supra* n. 59.

⁸¹ See also *2019 Annual Report on Rulings with an International Angle*, *supra* n. 21, at 33 for the not further processed APA requests during 2019.

⁸² See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200128 APA 000011.

⁸³ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20191203 APA 000008.

⁸⁴ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200213 APA 000001.

⁸⁵ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200128 APA 000011.

any commercial operating activities in the Netherlands. The tax ruling request sought to obtain advance certainty about the TP consequences of Y's plans to repay the two loans early.

The DTA did not accept the APA request and provided the following reason:

There is no relevant functionality in the Netherlands with regard to the transaction for which certainty is requested in advance. Therefore, the above-mentioned condition (the so-called economic nexus) is not met, and therefore no prior consultation can be held. A substantive analysis of the request has not been conducted as the conditions for conducting prior consultation have not been met.

This rejected APA request also clearly demonstrates once again⁸⁶ that an entity that does not employ any personnel itself and does not use any personnel in the Netherlands from an unrelated payroll entity or a related group entity within the multinational group of which it is part has no chance of being granted an APA.

5.3 Withdrawn Requests

In sixteen cases,⁸⁷ taxpayers who submitted an APA request ultimately withdrew their request.

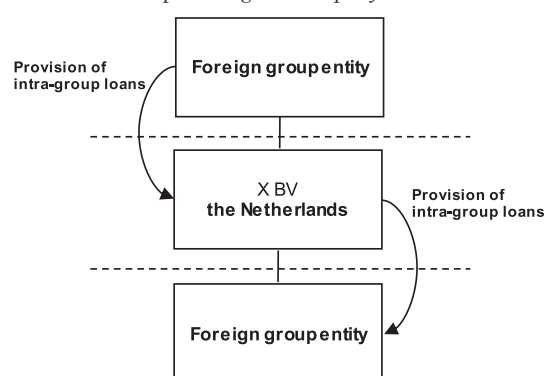
In most cases, the reason for withdrawal can be identified from the anonymized summary. Withdrawal occurred for the following reasons: (1) the envisaged transaction did not take place,⁸⁸ (2) the economic nexus requirement was not met,⁸⁹ (3) The DTA was unwilling to provide certainty on a particular topic,⁹⁰ (4) the requested certainty related to direct transactions with a group entity in a country that would be on the list of low taxation countries and non-cooperative jurisdictions as per 1 January 2019,⁹¹ (5) the provided information was insufficient for the DTA to come to a conclusion,⁹² (6) the more extensive procedure to obtain a tax ruling took too much time according to the taxpayer,⁹³ or (7) because of the uncertainty of the

taxpayer's future financial results that they expect will be negatively impacted by the consequences of the Coronavirus diseases 2019 (COVID-19) pandemic.⁹⁴

Below, the author has highlighted some of the withdrawn cases for which the DTA indicated the requirements for prior consultation were not met or that it was not willing to provide certainty on the case. This provides a more in-depth understanding of how the strengthened requirements are applied in practice by the DTA.

5.3.1 Intercompany Financing Activities

Figure 2 Dutch tax resident company involved in obtaining and providing intercompany loans



As depicted in Figure 2, the summary of this withdrawn APA request⁹⁵ outlines that X BV, a Dutch limited liability company that is tax resident in the Netherlands, was involved in obtaining and providing intercompany loans, but it did not employ any personnel. Staff were hired from Netherlands-based unrelated service providers. In this case, the DTA took the position that *'in view of the fact that X BV hires all its staff from unrelated service providers, the condition that there is sufficient relevant staff in the Netherlands at Group level is not met'*. As such, the taxpayer X BV was not eligible for prior consultation.

Notes

⁸⁶ See also the published anonymized summaries NL: Tax Authorities, Advance Pricing Agreement 20191112 APA 000001, NL: Tax Authorities, Advance Pricing Agreement 20191210 APA 000001 and NL: Tax Authorities, Advance Pricing Agreement 20200331 APA 000006 which were withdrawn as the DTA took the view that the economic nexus requirement was not fulfilled.

⁸⁷ See *supra* n. 60.

⁸⁸ See the published anonymized summaries NL: Tax Authorities, Advance Pricing Agreement 20191105 APA 000008, NL: Tax Authorities, Advance Pricing Agreement 20191217 APA 000008, NL: Tax Authorities, Advance Pricing Agreement 20200324 APA 000014 and NL: Tax Authorities, Advance Pricing Agreement 20200324 APA 000020.

⁸⁹ See the published anonymized summaries NL: Tax Authorities, Advance Pricing Agreement 20191112 APA 000001, NL: Tax Authorities, Advance Pricing Agreement 20191210 APA 000001 and NL: Tax Authorities, Advance Pricing Agreement 20200331 APA 000006.

⁹⁰ See the published anonymized summaries NL: Tax Authorities, Advance Pricing Agreement 20191118 APA 000014 and NL: Tax Authorities, Advance Pricing Agreement 20200303 APA 000007.

⁹¹ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20191218 APA 000003.

⁹² See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200519 APA 000001.

⁹³ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200317 APA 000007.

⁹⁴ See the published anonymized summaries NL: Tax Authorities, Advance Pricing Agreement 20200421 APA 000004 and NL: Tax Authorities, Advance Pricing Agreement 20200526 APA 000001.

⁹⁵ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20191112 APA 000001.

The DTA rejected X BV's case for prior consultation because the multinational group it was a part of did not have enough relevant employees in the Netherlands. The author would have expected the case to be rejected by the DTA because the intercompany financing activities did not qualify as commercial operating activities. Taking into account the specific reason for rejection, the author believes that a taxpayer performing mere intercompany financing activities that is part of a multinational group with sufficient relevant employees in the Netherlands could be considered eligible for prior consultation, provided all other requirements as stipulated in section three of this country note have been fulfilled.

This raises the question of whether X BV could have been eligible for prior consultation under a slightly different fact pattern, provided all other requirements have been fulfilled. Examples five and seven in the list of examples attached to the Dutch Ruling Decree may provide more guidance and clarity regarding this question.

In example five, the requesting entity also does not employ any personnel itself. All personnel necessary to perform the activities of the requesting entity are employed by a related party, a Dutch group entity acting as 'payroll company' which passes on the payroll expenses to the respective Dutch group entities making use of its personnel.

In example seven, distribution activities are performed in the Netherlands by fifty full time equivalents (FTEs) of which only five FTEs are employed by the Dutch requesting entity. The other forty-five FTEs are hired from an unrelated employment agency.

In both examples, the DTA indicates that the taxpayer had a sufficient economic nexus to the Netherlands to be eligible for prior consultation.

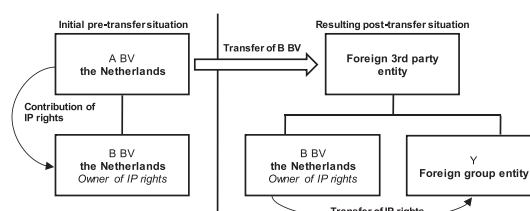
The author understands that only obtaining and providing intra-group loans does not typically necessitate employing multiple employees. Furthermore, in cases of intercompany financing activities, the number of employees in the Netherlands is not the only decisive factor to be entitled to prior consultation. Besides a certain (undefined) number of employees being required, entitlement to prior consultation also depends on the functionality of the relevant staff members present in the Netherlands and the size of the financial flows.⁹⁶

However, the author sees an opportunity for the taxpayer to be eligible for prior consultation if (1) it hired an employee from a related payroll entity or (2) the taxpayer itself or the multinational group to which it belongs employed an employee in the Netherlands even if other employees were hired from an unrelated employment agency. By hiring or employing one or more employees

in the Netherlands, the additional costs incurred – which are more than strictly necessary to perform the taxpayer's daily activities – could be considered as the price a Dutch taxpayer has to pay to obtain certainty in advance through an APA.

5.3.2 No Personnel Employed

Figure 3 No entitlement to prior consultation since not meeting the economic nexus requirement



As depicted in figure 3, in this case,⁹⁷ A BV, a tax resident in the Netherlands, contributed Intellectual Property (IP) rights to its subsidiary B BV, also a tax resident in the Netherlands. From its inception, B BV never employed any personnel. Subsequently, A BV transferred B BV – including the ownership of the IP rights – to a foreign third-party company.

After this transfer, the acquiring third party company decided to transfer B BV's IP rights to Y, a foreign group entity. Y employed relevant personnel to further develop this IP for its own risk and account. In this case, the DTA decided that the requesting taxpayer, B BV, was not entitled to prior consultation since it did not perform commercial operating activities for its own risk and account and therefore did not meet the economic nexus requirement.

This rejected APA request clearly demonstrates that an entity that (1) does not employ any personnel itself and (2) does not use any personnel of an unrelated payroll entity or a related group entity within the multinational group of which it is part in the Netherlands has no chance of being granted an APA.

5.3.3 Interest Rate

In the case at hand,⁹⁸ X BV, a Dutch limited liability company that was tax resident in the Netherlands, requested a prior consultation to obtain certainty on an arm's length interest rate on the intra-group loan obtained from a foreign group entity. After submitting its APA request, the DTA informed X BV that, at that moment,⁹⁹

Notes

⁹⁶ See Decree on Rulings with an International Angle – Answers & Questions, *supra* n. 27.

⁹⁷ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20191210 APA 000001.

⁹⁸ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20191118 APA 000014.

⁹⁹ As of 18 Nov. 2019, the publication date of the anonymized summary of the APA request.

it was not yet possible to obtain certainty in advance on the arm's length nature of the interest rate on an inter-company loan.

The Dutch Ruling Decree and its examples do not state that obtaining certainty with respect to this subject matter is not possible. As such, this decision may have come as a surprise to X BV. The anonymized summary does not provide further details about why certainty in advance cannot be provided with respect to the arm's length nature of the interest rate or whether obtaining advance certainty in this respect would become possible in the future.

X BV withdrew its APA request in response to the DTA's position. It would have been helpful if the DTA had provided some further reasoning and background in the anonymized summary or otherwise would provide clarification in a Q&A document.

5.3.4 Perceived Additional Administrative Burden

X, a tax resident in the Netherlands, was engaged in production and R&D activities. X submitted an APA request for certainty in advance before 1 July 2019. With effect from 1 July 2019, the revised Dutch tax ruling practice applied with more tightened procedures and strengthened requirements to increase transparency. As a result of this change, X made an estimate of the possible additional administrative burden it would incur to come to an APA. Based on this consideration, in the light of the time and resources it would have to spend, X chose to withdraw its APA request.¹⁰⁰

5.4 Selection of Accepted Requests that Resulted in an APA

5.4.1 Rejected Benchmarking Study

In this case,¹⁰¹ the DTA rejected a benchmarking study conducted by the requesting taxpayer for the production entities within the Group while the benchmarking study conducted for the sales entities within the Group was considered to be appropriate and was part of the concluded APA. Taking this into account, the author concludes that the DTA performed a detailed assessment of the benchmarking studies provided by the taxpayer and often conducted by its adviser, comparing

the functionality of the tested party with the functionality of the comparables identified in the benchmarking study.

5.4.2 Transactions with Low Taxation Countries

In this case,¹⁰² X BV, a tax resident in the Netherlands, was a centralized enterprise with centrally organized management and support functions. It is responsible for defining its overall corporate strategy, defining the long-term business plan, and preparing and taking important management decisions. In addition, it is also involved in product development, decision making on significant divestments and investments. Furthermore, it owned intangibles within the multinational group and assumed important business risks.

In order to operate its business, X BV was supported by foreign related contract manufacturers and foreign related sales agents. The contract manufacturers manufactured products for X BV under X BV's direction while the sales agents offered the products to clients based on standard prices set by X BV. The sales agents were allowed to deviate from these standard prices as long as the sales prices remained within an established range. Contracts with customers were signed by X BV.

On the basis of their functional profile, the related contract manufacturers and the related sales agents were considered the tested parties for which an arm's length remuneration could be established on the basis of the TNMM.

X BV was involved in a direct intercompany transaction with a group entity – either one of the contract manufacturers or one of the sales agents – in a country that is included in the Dutch Decree covering low taxation countries and non-cooperative jurisdictions for tax purposes.¹⁰³ The remuneration for this intercompany transaction was excluded from the unilateral APA while all other intercompany transactions between X BV and its affiliates in other countries are covered by the APA. Based on this, it seems that having direct transactions with an affiliate in a low taxation country or non-cooperative jurisdiction does not preclude a taxpayer from eligibility for prior consultation. Only the direct intercompany transactions with affiliates in low taxation countries or non-cooperative jurisdictions and the arm's length nature of these are not covered in the APA.

Notes

¹⁰⁰ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200317 APA 000007.

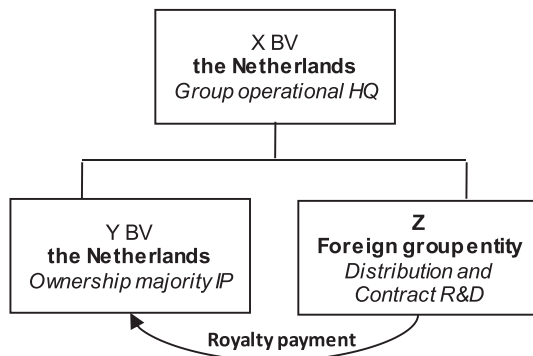
¹⁰¹ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200421 APA 000010.

¹⁰² See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20191122 APA 000007.

¹⁰³ See Decree of 31 Dec. 2018, *supra* n. 24.

5.4.3 Contract Research

Figure 4 Group entity performing both distribution and contract research activities



As depicted in Figure 4, In this case,¹⁰⁴ X BV, which is tax resident in the Netherlands, is the operational headquarters of the multinational group. Y BV, also a tax resident in the Netherlands, owns the majority of the Group's intangible assets. A foreign group entity (Z), performs both distribution and contract research activities under the direction of X and Y. As such, Z is considered the least complex party in relation to the intercompany activities.

Z performs two types of functions, a distribution function and a contract research function that are different by nature. Although Z performs these two different type of functions, it receives one type of remuneration for both functions, namely, an Operating Profit Margin (OPM), also referred to as return on sales, consisting of the median between a 2.5% lower quartile and a 4% upper quartile. From an international perspective, a return on sales, also referred to as a net profit margin, is a typical and frequently used net profit indicator to remunerate sales and distribution activities¹⁰⁵ whereas contract research typically uses a cost plus method¹⁰⁶ which is, in practice, a TNMM with mark-up on total costs. Paragraph 6.4 of the Dutch Transfer Pricing Decree¹⁰⁷ also addresses the situation of contract research. Paragraph 6.4 states that:

In certain situations where group company A (executor) concludes an agreement with group company B (principal) and contractually develops intangible fixed assets for the account and risk of group company B (contract research), a cost-related remuneration may be deemed to be arm's length.

Cost-related remuneration is possible if contract research activities are carried out by group company A and group company B manages the research activities, bears the costs and risks and becomes the economic owner of the assets developed. Group Company B must also exercise control over the risks involved and have the financial capacity to be able to bear the consequences of the risks involved.

Although the Dutch Transfer Pricing Decree does not prescribe or necessarily require the application of a cost-related remuneration for contract research, it is indicated that it may be deemed to be at arm's length. The application of a sales-based remuneration is not mentioned in this respect and may also be impossible or impractical to apply since a typical contract research entity does not receive any sales revenues from third party customers.

DTA approval for applying a sales-based remuneration for both the distribution and contract research activities may be practically motivated since the entity performing both the distribution and contract research functions is one and the same. By approving one type of remuneration, it is not necessary to apply separate types of remuneration for each activity. This is also more practical for the taxpayer itself as it does not have to segregate its financials to calculate separate types of remuneration for each function.

In a rather comparable case,¹⁰⁸ the requesting taxpayer and tested party also performed both a distribution and a contract research function, however, two separate types of remunerations were agreed. For the distribution function performed by the tested party, a sales-based remuneration – TNMM with OPM – was considered appropriate whereas, for the contract research function performed by the tested party, a cost-based remuneration – TNMM with Net Cost Plus (NCP) – was considered appropriate. Although detailed facts of both cases, such as the relative number of FTEs involved in distribution activities and contract research activities, were not provided, the type of remuneration in the latter case¹⁰⁹ seems to be more in accordance with the OECD TP Guidelines and the Dutch Transfer Pricing Decree.

5.4.4 Disclosure of the Median

In this case,¹¹⁰ X BV, a tax resident in the Netherlands, performed supporting activities for its foreign principal Y. The supporting activities included performing and maintaining the accounts, customer service, sales and

Notes

¹⁰⁴ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20191125 APA 000001.

¹⁰⁵ See OECD *Transfer Pricing Guidelines* (2017), *supra* n. 63, para. 2.96.

¹⁰⁶ *Ibid.*, para. 2.61.

¹⁰⁷ See Decree of 22 Apr. 2018, *supra* n. 69.

¹⁰⁸ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20191204 APA 000009.

¹⁰⁹ *Ibid.*

¹¹⁰ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200115 APA 000014.

marketing support, and coordination activities. For the controlled transaction(s), X BV's functions were considered as supportive in nature. As such, X BV was regarded as the least complex party to the controlled transaction(s) and, therefore, the tested party.

It was agreed in the APA that for the supportive activities X BV performed for Y, the application of the TNMM expressed as a percentage of X BV's operating costs could be considered at arm's length. The percentage that was included in the APA fell within an interquartile range of which the median amounts to 9.07% and the upper quartile amounts to 12.69%. It was agreed that a percentage 'within' the upper quartile best reflected the terms of the transaction. This was laid down in the APA with a term from January 2019 to 31 December 2021. The term is three years given the rapid growth of the company and the related possible changes of functions performed by X BV.

This APA has two notable characteristics (1) in contrast to all other published anonymized summaries the median was published and (2) the term of three years is relatively short compared to the usually agreed term of five years.

5.4.5 Deviation from the Median

X BV, a tax resident in the Netherlands, and Y, a non-Dutch resident, are both involved in producing and distributing industrial products.¹¹¹ Each of them supplies its own customers and manufactures most of the products that they supply. In this respect, both X BV and Y can be characterized as entrepreneurs. In addition, they sell each other's products to their own customers and therefore are also involved in intercompany sales, i.e. each party selling products it has manufactured to the other party. With respect to the intercompany sales, X BV and Y are regarded as tested parties for which an arm's length remuneration could be established on the basis of the TNMM with an OPM as net profit indicator.

The notable characteristic of this APA is that a 10% upward or downward deviation from the median OPM – although most probably still within the interquartile range – was specifically allowed. In other words, an OPM which does not deviate more than 10% upwards or downwards from the median can still be considered as an arm's length remuneration for the mutual intercompany product sales by X BV and Y.

In other published anonymized summaries in 2020, certainty was also provided either for:

1. A value above the median of a benchmarking study conducted because of the more extensive functionality¹¹² of the tested party in relation to the comparables identified; or
2. A value below the median of benchmarking study conducted because of the more limited functionality¹¹³ of the tested party in relation to the comparables that were identified.

5.4.6 DTA Conduct a Benchmarking Study

In this case,¹¹⁴ the requesting taxpayer used the option to have the DTA conduct a benchmarking study. To reduce the administrative workload associated with an APA request, the DTA can support smaller companies in obtaining comparable figures from independent market parties by conducting a benchmarking study itself. This measure has been taken in view of those situations when the administrative burden associated with providing TP substantiation is disproportionate to the size of the business. In principle, taxpayers who qualify as small businesses within the meaning of Article 2:396 of the Dutch Civil Code are eligible for this support. Support for smaller companies can only be provided in cases when the DTA has public sources of information with comparable figures from third parties.¹¹⁵

6 CONCLUSION AND RECOMMENDATIONS

During the period 1 July 2019–30 June 2020, a total of sixty-six anonymized APA requests were published. On the basis of the OECD TP Guidelines, the Dutch Transfer Pricing Decree and practical experience gained in obtaining APAs, the author has analysed all of them and highlighted the most significant cases. Based on this analysis, the most salient conclusions and recommendations are as follows:

1. The anonymized summaries provide much useful and valuable information for tax policy makers, NGOs, academics, TP practitioners, taxpayers, and their advisers who envisage advising on or seeking to obtain an APA. It provides them better insight into the practical application of the newly introduced eligibility requirements for prior consultation with the DTA to obtain an APA;

Notes

¹¹¹ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200121 APA 000017.

¹¹² See the published anonymized summaries NL: Tax Authorities, Advance Pricing Agreement 20200311 APA 000006, NL: Tax Authorities, Advance Pricing Agreement 20200519 APA 000006, NL: Tax Authorities, Advance Pricing Agreement 20200602 APA 000002.

¹¹³ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200623 APA 000002.

¹¹⁴ See the published anonymized summary NL: Tax Authorities, Advance Pricing Agreement 20200421 APA 000011.

¹¹⁵ See Decree of 19 June 2019, *supra* n. 16.

2. All of the summaries have been properly anonymized. They cannot be traced back to the respective individual taxpayer in any way;
3. Most often, under the TNMM, the remuneration agreed upon in the APA is the median or a value close to it of a benchmarking study that is conducted and provided to the DTA. However, almost all of the anonymized summaries only provide the lower quartile and upper quartile of the conducted TNMM benchmarking study while the median value is not disclosed. For transparency, it would be worthwhile to also disclose the median in the anonymized summaries as this is the remuneration for which an agreement has most often been reached between the taxpayer and the DTA;
4. When no employees are employed or can be employed in the Netherlands by the requesting taxpayer itself or the multinational group of which it is part, hiring staff from a group payroll company or having a limited number of employees employed by a Dutch group company and hiring the rest from a third employment agency could be a solution to meet the economic nexus requirement; and
5. If there are transactions with a group company in a low-tax country or non-cooperative jurisdiction, an APA can still be obtained for the remuneration of the group companies in the 'other' countries which are not on the list. Only the transactions with the group company in the low-tax or non-cooperative jurisdiction are excluded from the APA.