HOUTHOFF

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Transfer pricing

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in transfer pricing.

Netherlands

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Rezan Ökten is transfer pricing counsel at Houthoff in the Netherlands. He has in-depth transfer pricing knowledge and experience in the technology and telecommunications industry and has previously worked both as an adviser and in-house specialist. He is a lecturer at the University of Amsterdam, where he teaches transfer pricing in the Advanced LL.M. programme in International Taxation. He has written a number of articles, with a focus on the transfer pricing aspects of intangibles and cost contribution arrangements and he is the author and co-author of two transfer pricing books.

Q. What do you consider to be the most significant transfer pricing changes or developments to have taken place in the Netherlands over the past 12 months or so?

ÖKTEN: We consider the following two developments to be the most significant for the Netherlands. First, the introduction of the revised Dutch Tax Ruling Practice from 1 July 2019. Since the decree came into force, it has only been possible to have a prior consultation with the Dutch Tax Authorities (DTA) to obtain a Dutch international tax ruling if the taxpayer has sufficient economic nexus with the Netherlands, if saving Dutch or foreign taxes is not the sole or decisive motivation for engaging in legal acts or transactions, and the requested certainty does not relate to the tax consequences of direct transactions with entities established in low-tax countries and non-cooperative jurisdictions. Although the requirements have been strengthened, there are still many companies that have successfully obtained a tax ruling after the decree came into effect. Second, the introduction of the mandatory disclosure rules which initially applied as of 1 July 2020. Under the mandatory disclosure rules, which are the result of the Dutch implementation of the European Union (EU) rules on mandatory disclosure and exchange of cross-

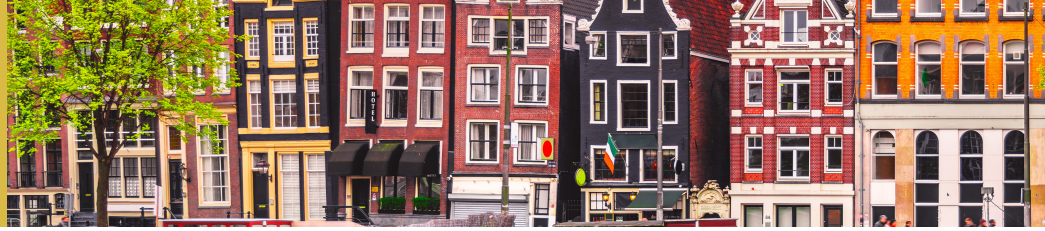
border tax arrangements (DAC6), intermediaries, and under conditions, taxpayers themselves, may be obliged to disclose certain cross-border arrangements to their local tax authorities if the arrangement meets at least one of the hallmarks, such as an indication of a potential tax avoidance risk. The State Secretary confirmed by decree on 26 June 2020 that the Netherlands deferred the filing and amended deadlines by six months due to the COVID-19 outbreak.

Q. In your opinion, do companies pay enough attention to the challenges and complexities of maintaining compliant transfer pricing policies?

ÖKTEN: Large multinational enterprises (MNEs) generally pay sufficient attention to establishing and documenting robust and globally consistent transfer pricing (TP) policies. One area which is rather complex but receives less attention from many taxpayers, including MNEs, is 'operational TP', which involves the proper execution of TP policies, such as price setting, price monitoring and price or profit testing. Furthermore, some foreign enterprises with recently established operations in the Netherlands do not always pay sufficient attention to establishing an appropriate TP policy for their Dutch entity as from the date of establishment.

Q. To what extent have the tax authorities in the Netherlands placed greater importance on the issue of transfer pricing in recent years, and increased their monitoring and enforcement activities?

ÖKTEN: A few developments have demonstrated that the DTA has been placing greater importance on TP in recent years. Firstly, the Dutch State Secretary of Finance has updated its TP guidance twice in the last 10 years. With these updates, the DTA closely followed the developments at the same level as the OECD and sometimes reacted more proactively by providing additional detailed guidance to Dutch taxpayers. Secondly, the DTA set up a special task force of around 10 professionals consisting of technologists and tax and TP specialists following the implementation of country-by-country reporting (CbCR) in the Netherlands and DAC6 data. This special task force can more efficiently analyse the amount of data received and focus on the relevant taxpayers. Thirdly, the DTA has been proactively reorganising its teams internally and rethought its tax control framework, of which TP is a part.



Fourthly, the DTA representatives give regular updates to taxpayers through internal and external seminars, which encourages them to remain in dialogue with the DTA.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in the Netherlands?

ÖKTEN: As a result of the increase in personnel resources within the Coordination Group Transfer Prices Unit, there has been an increase in the number of challenges of TP policies by Dutch taxpayers. This sometimes results in TP disputes being brought before the court when no settlement can be reached between the DTA and the taxpayer. Recently, the Dutch Court of Appeal dealt with a remarkable TP dispute about the business restructuring of a multinational group in the *Zinc* case. The outcome of this case illustrates the DTA's willingness to cooperate with taxpayers. However, this also implies that the taxpayer could have avoided lengthy legal wrangling if it had consulted with the DTA before the business restructuring. In recent years, we have also seen that various cases in relation to intercompany financing activities, such as cross-guarantees, write-offs on loans and so on, have reached the courts. This shows the increased focus of the DTA on this area.

Q. How should companies respond if they become the subject of a tax audit or investigation? What documentation needs to be made available in this event?

ÖKTEN: TP audits often start with the DTA requesting the taxpayer submit its legally required TP documentation. This documentation could be either a group master file, together with a Dutch local file if the consolidated group revenues amount to at least €50m, or a local Dutch TP documentation report if the consolidated revenue threshold is not met. In both cases, the Dutch taxpayer is required to have the relevant TP documentation in its administration and provide it to the DTA in due course. After analysing the TP documentation, the DTA often requests additional information from the taxpayer. In this case, we recommend first analysing whether the taxpayer is required to provide this additional information and if so, not to provide more information then specifically requested.

Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?

ÖKTEN: For both tangible and intangible assets, it is often a challenge to identify internal and external comparable uncontrolled transactions, such as comparable transactions taking place between third parties. For intangibles, due to their unique nature, it is even more difficult to find such comparable transactions. When no comparable uncontrolled transactions can be identified, a profit split or a valuation exercise can be conducted to determine an arm's length transfer price for the transfer of the intangible or tangible asset. In this respect, the availability, reliability and accuracy of the information provided by the MNE's management and financial forecasts used as input variables for a valuation often pose a challenge. Forecasts used, which are rather optimistic, can often result in unreasonably high transfer prices. This may then need to be adjusted at a later stage.

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Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

ÖKTEN: When reviewing their TP policies and structure, we would recommend companies have a closer look to see if the following objectives have been met. When dealing with the DTA, an open and transparent dialogue, formally through the horizontal monitoring programme or informally through ad hoc meetings, should work in the taxpayers' favour in the long term. Profits and losses reported by the various group entities, as a result of the adopted TP policy, should be in line with the respective group companies' value creation. When service charges are paid to group entities, the paying entity should ensure that it receives a benefit and can substantiate or document this benefit in order to report the service charges as a deductible expense. When royalties or other types of payments for the use of intangibles are paid by a Dutch group entity to another group entity, the paying group entity should make sure that the royalty recipient group entity performs the intangibles related functions in terms of development, enhancement, maintenance, protection and exploitation (DEMPE) with respect to the intangible asset provided. ■

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