

Transfer Pricing Country Summary The Netherlands

June 2018

Legislation

Existence of Transfer Pricing Laws/Guidelines

On 11 May 2018 the Dutch Ministry of Finance published a new transfer pricing decree that incorporates provisions from the OECD's base erosion and profit shifting (BEPS) action plans (2015) and from the OECD's Transfer Pricing Guidelines (2017). This new Dutch transfer pricing decree (nr. 2018-6865, dated 22 April 2018) replaces a decree from 2013 (IFZ 2013/184M, 14 November 2013). The new Dutch transfer pricing decree refers to the arm's length principle which was codified in the Netherlands in 2002, as section 8b of the Dutch Corporation Tax Act 1969 and provides insight into the interpretation of the arm's length principle, and in particular, focuses on aspects for which the 2017 OECD Transfer Pricing Guidelines leave scope for domestic interpretation. Article 29g Dutch CITA, which was introduced in 2016, applies to multinational enterprises that generate consolidated revenues of EUR 50 million or more in the prior fiscal year.

Definition of Related Party

According to Article 8b of the Dutch Corporate Tax Act 1969, a related party is defined as a company that directly or indirectly takes part in management, control or capital of the other, or if both companies are under common control, which provides the first entity with sufficient control to influence relationships that may give rise to non-arm's-length arrangements.

Or if one and the same person, directly or indirectly, participates in the management of, or in the supervision of, or in the capital of two entities, the two entities are related parties. Two companies are deemed to be associated if one has influence or control on pricing matters of the other or vice versa.

Transfer Pricing Scrutiny

In general, the Dutch tax authorities have significant experience in transfer pricing and have performed transfer pricing audits for many years. The degree of the tax audit depends on facts and circumstances. Upon request, a company is obliged to disclose required and/or intercompany transaction documents.

Transfer pricing tax audit is carried out with the main purpose of verifying the reliability of the company's accounting system and the filing of the tax return. This process may lead to adjustments to transfer prices. Disputes, if any, resulting from adjustments, should be settled during the audit period. Otherwise, an appeal can be filed with the District Court.

The transfer pricing examination is carried out if a company fails to disclose required and/or related-party transaction documents or does not meet the requirement for transfer pricing filing to the tax authority. Special attention is given to transactions regarding carried-forward losses, business restructuring or transactions without sufficient economic substance.

Transfer Pricing Penalties

The Master file and Local file need to be included in the administration of the taxpayer. Not including the Master file and Local file in the administration within the term, may be punished with (i) imprisonment of up to six months or (ii) a fine of up to EUR 820,000. The fine will be reduced by 50% in case the Master file and Local file obligations have intentionally not been met and by 75% in case of gross negligence. Since the Master file and Local file do not need to be filed with the tax authorities, no penalty is imposed in case of non-timely, incomplete, incorrect or no filing.

Advance Pricing Agreement (APA)

Depending on the facts and circumstances, the taxpayer must provide the tax authorities with requested information to apply for an APA. The details are described in section 6 of the Decree DBG 2014/3098.

The taxpayer is required to specify for what period he wishes to obtain prior assurance through an APA. APA applications can be made for future transactions on unilateral, bilateral or multilateral basis usually for a period of 5 years. After the term has expired it will be considered whether a new APA can be concluded under the same conditions. Specific unilateral APA options are available for Dutch financial services companies. The APA process is efficient, and includes an option for a pre-filing meeting, as well as a development of a plan with the APA team to agree on steps and timing.

According to the Decree of 26 June 2014 on Financial Intermediaries, related before, bodies with financial services activities within a group of companies without real economic substance or which do not assume real risks in the Netherlands are not entitled to advance certainty. A financial intermediary whose activities consists of receiving and paying interest is considered to be at real risk if the equity that is necessary to carry the risks is at least equal to 1% of the amount of the outstanding loan, or an amount of € 2,000,000, whichever is lower.

The duration to conclude a unilateral APA is 8 to 12 weeks; for a bilateral APA, the duration is 18 to 20 weeks from the date of filing the request.

There is no fee charged on APA applications.

Implementation of BEPS-related documentation requirements

Dutch transfer pricing regulation, in general, follow the OECD Guidelines. The Netherlands has implemented the Country-by-Country reporting obligation in line with BEPS, as well as Master file and Local File requirements (threshold applies).

Documentation and Disclosure Requirements

Tax Return Disclosures

Dutch corporate income taxpayers are required to indicate in the corporate income tax return whether they have been involved in related party transactions during the fiscal year.

Level of Documentation

Documentation should be part of the taxpayer's general books and records.

Country-by-Country reporting obligation:

The Netherlands has adopted the CbC reporting standards in the local legislation since 1 January 2016.

Content of the transfer pricing documentation:

The documentation requirements in the Netherlands are similar to the OECD BEPS recommendations as described in detail in action 13. The brief outline is below:

The Master file must include information regarding:

- Organizational structure;
- Description of MNE's business(es);
- MNE's intangibles;
- MNE's intercompany financial activities;
- MNE's financial and tax position.

The Local file must include information regarding:

- The local entity;
- Controlled transactions;
- Financial information.

Record Keeping

Documentation must be kept for a period of at least 7 years following the end of the financial year to which the documentation relates.

Language for Documentation

Documents must be in Dutch or English; otherwise a translation can be required by the tax authorities.

Small and Medium Sized Enterprises (SMEs)

Transfer pricing rules specifically for SMEs are not defined in the Corporate Income Tax Act itself. The arm's length principle in Article 8b of the Corporate Income Tax Act has to be applied. Certain facilities or support may be rendered by the tax administration.

Deadline to Prepare Documentation

There is no formal deadline for preparation. The documentation is recommended to be established at the moment the transaction is entered into. The official deadline for preparation is by the due date of the tax return for the same financial year the TP documentation is prepared.

Deadline to Submit Documentation

The Master file and Local file have to be available upon request. In practice a period of 1 to 3 months will be granted. The CbC reporting should be filed with the DTA within a period of 12 months after the end of the reporting year.

Statute Of Limitations

For assessments of transfer pricing adjustment, the statute of limitations is 3 years as from the end of the tax year. Additional tax assessment can be extended for duration of 5 years from the end of the tax year. In case the income coming from outside the Dutch territory, additional tax assessment can be extended up to 12 years.

Transfer Pricing Methods

The following methods are accepted:

- Comparable uncontrolled price (CUP) method;
- Resale price method;
- Cost plus method;
- Profit split method;
- Transactional net margin (TNMM) method.

The choice of transfer pricing method depends on the facts and circumstances, but generally should be the most appropriate method. Taxpayers can apply more than one method and are expected to consider the reliability of the method chosen for the respective situation. However, in the case where there is a possibility of application of both the CUP method and any other method, the CUP shall be applied.

Comparables

The Netherlands has its own database of comparable information. European comparables are also accepted by the tax authorities.

Mutual Agreement Procedure

The MAP is not adopted in the local legislation but is included in all tax treaties concluded by the Netherlands.

The Dutch State Secretary issued a Decree on 29 September 2008, no. IFZ2008/ 248M, Stcrt. no. 188 stating how and when a taxpayer can invoke the MAP and how the procedure works.

No MAP can be initiated in the Netherlands if the subject period of time is elapsed, this period depends on the tax treaty.