



## Overview

### Taxand Netherlands

Taxand Netherlands is a tax advisory firm based in Amsterdam and offering a full range of tax services focusing on multinationals and private equity.

Taxand Netherlands' team can assist in every aspect of transfer pricing services ranging from (1) compliance and reporting to (2) analysis, planning and strategy and (3) disputes and controversy:

- ❖ With compliance and reporting we cover preparing benchmarks and transfer pricing master file and local file documentation, from full-fledged to tailor made. We can assist on global or local filings and putting your numbers into context. Furthermore, we can assist with Country-by-Country reporting.
- ❖ With analysis, planning and strategy we cover TP model design, value chain optimization, business restructuring, full-service assistance in setting up the TP strategy and policy or just a sanity check or second review and sustainability analysis.
- ❖ With disputes and controversy, we cover assistance in transfer pricing audits, Mutual Agreements Procedures, arbitration and preventing or resolving tax disputes by concluding unilateral, bilateral or multilateral APAs.

### General : Transfer Pricing Framework

The arm's-length principle and the general documentation requirements are laid down in article 8b of the Corporate Income Tax Act ("CITA"). Multinational enterprises ("MNE's") with a consolidated revenue exceeding EUR 50 million in the preceding year should prepare more elaborate TP documentation in the form of a master file and local file in line with article 29b CITA.

MNE's with a consolidated revenue exceeding EUR 750 million in the preceding year should also comply with the country-by-country reporting rules as laid down in article 29b CITA. Following the update of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD Guidelines") in January 2022, an update of the Dutch Transfer Pricing Decree ("TP Decree") was published on 1 July 2022. The biggest changes in the TP Decree are the guidance on financial transactions as per Chapter X of the OECD Guidelines. The Dutch transfer pricing rules and arm's length principle are generally in line with the OECD Guidelines.

### Accepted Transfer Pricing Methodologies

The OECD Guidelines are not incorporated in Dutch legislation, however based on the TP Decree, the OECD Guidelines are considered as internationally accepted guidance providing explanation and clarification of the (application of the) arm's length principle. In line with the OECD Guidelines, the Dutch tax authorities (hereafter: "DTA") must begin a transfer pricing examination from the perspective of the method selected by the taxpayer. The taxpayer, however, must be able to

substantiate why the chosen method is appropriate in view of the relevant facts and circumstances.

Although not explicitly mentioned, the CUP method is generally the preferred method by the DTA but because comparable uncontrolled transactions are difficult to find, in practice, TNMM method is the most used transfer pricing method.

The taxpayer is allowed to apply any other method as long as it can be demonstrated that it leads to an arm's length outcome.

### Transfer Pricing Documentation Requirements

Article 8b paragraph 3 of the CITA requires taxpayers to document and substantiate all intercompany transactions to support the arm's length nature. As no threshold applies to this obligation, this also applies to small and medium sized companies. The provision requires Dutch taxpayers to document the transactions entered into with "related entities" which includes both cross-border and domestic transactions.

In accordance with Article 29g CITA, Dutch law requires MNE's that meet or exceed the threshold of EUR 50 million of consolidated group revenues in the preceding year, to prepare a master file and a local file in accordance with BEPS Action 13. The master file and local file documentation needs to be available in the Dutch taxpayer's administration at the due date of filing of the corporate income tax ("CIT") return for the respective year. The master file and local file need to be updated annually. Every local Dutch entity (or permanent establishment) needs to prepare a entity specific local file. For Dutch entities joint in the same fiscal unity for CIT purposes it is generally accepted to prepare one local file covering all entities part of the same fiscal unity.

MNE's that meet or exceed the EUR 750 million annual revenue (in the preceding year) threshold also need to comply with the country-by-country ("CbC") reporting rules as mentioned in article 29c - 29e CITA. Dutch taxpayers therefore need to file a country-by-country report if the ultimate parent entity or the surrogate parent entity is tax-resident in the Netherlands. The report needs to be filed within 12 months exceeding the reporting year. All Dutch taxpayers part of a MNE that meets or exceeds the EUR 750 million threshold and where the CbC report is filed outside the Netherlands need to submit a CbC notification before year end of the respective reporting year.

### Local Jurisdiction Benchmarks

Depending on the applied TP method benchmarking studies can support the arm's length nature of an intercompany transaction. The DTA accepts pan-European benchmark studies and allows all profit level indicators as described in the OECD guidelines. Benchmark studies need to meet specific comparable search strategy standards as set by the DTA.



The DTA generally refers to multiple year data and the interquartile range in terms of benchmarking. In line with the OECD Guidelines, a benchmark study needs to be prepared every three years. Although not obligated a financial update of the benchmark study data is preferred in the two years in between.

To set or support royalty percentages as a payments for the use of intellectual property a benchmark study can be performed however, in practice these studies are not accepted or highly scrutinized by the DTA. Instead, a Value Chain Analysis ("VCA") can be performed and is preferred by the DTA.

## Advance Pricing Agreement "APA"/Bilateral Advance Pricing Agreement "BAPA" Overview

Since 1 July 2019, a revised Decree on international tax rulings entered into force in the Netherlands. This Decree also contains regulations for APAs and BAPAs (and even Multilateral APAs). The requirements for both are the same, namely, a ruling will no longer be granted if:

- ❖ there is no 'economic nexus' in the Netherlands;
- ❖ the main purpose of the transactions is to avoid taxes in the Netherlands or abroad; or
- ❖ the party or an (in)direct shareholder with which transactions take place is on the EU list of non-cooperative jurisdictions or on the Dutch blacklist.

The Dutch tax authority endeavors to complete BAPA cases within two years, which is in line with the minimum standard as described in BEPS Action 14.

An APA under the Dutch ruling practice can cover for instance the topics of the classification and remuneration of (intercompany) transactions and/or the profit allocation for permanent establishments can be established. Depending on the complexity of the case an APA can be concluded within 2-6 months. As more strict requirements have been implemented and different departments of the DTA need to be involved for the (B)APA procedure the lead time can take longer.

No application fees are in order.

## Transfer Pricing Audits

The Dutch tax authorities can perform audits at random. TP audits are at the top of the list of the DTA. They define matters of interest on an annual or regular basis, which are used in the selection process. The Dutch tax authorities do not conduct audits on periodical basis. However, following the introduction of the new TP Decree in 2022, tax inspectors are highly likely to audit taxpayers and apply the rules set forth in the TP Decree. There seems to be more attention for financial transactions.

## Transfer Pricing Penalties

Fines up to a maximum of EUR 900,000 can be imposed on the taxpayer for non-compliance with notification and filing obligations for country-by-country reporting. A tax inspector must consult the technical coordinator of formal law before imposing a fine. In practice, we have not encountered any fines that were imposed in this respect.

## Local Hot Topics and Recent Updates

TP is at the top of the list of the DTA for inspections/audits. Hot topics in this respect are financial transactions, VCA and Service charges.

Financial transactions: As new guidance has been published on financial transactions the market (DTA as well as MNE's) has put more focus on these intercompany transactions. The DTA has gained more experience on these transactions and therefore they are challenged more and more. Focus is put on more support and more extensive analysis of parties involved in the financial transactions, cash pools (remuneration of cash pool leader and participants / reclassification of cash pool positions) and guarantees. Functions performed and risks taken are more relevant. With this the DTA are stepping away from the safe harbor rule (equity at risk 1% loan volume or 2 million) albeit this rule is not officially abolished. If not functions are performed and no or limited risks are run a rumination related to costs instead of interest margin is felt more appropriate.

Value Chain Analysis: The VCA is becoming a more common approach to substantiate and/or to support the arm's length nature of more complex transactions/business/TP models or individual transactions involving license fee payments for which a benchmark study is generally not accepted in the Netherlands. The VCA provides tax authorities with a more in-depth view of the company as well as the value that should be attributed to parts of the tax payers business. By applying the VCA tax authorities get a two or more-sided approach which is nowadays a must.

Intercompany service: Within many MNE's services are performed between or on behalf of affiliates. As these services are often not well supported, they are considered an easy target for the DTA. Items to take into consideration for services are cost allocations, benefit analysis as well as the mark up to be applied.

# NETHERLANDS



## Documentation threshold

Master file	Consolidated group turnover EUR 50 million
Local file	Consolidated group turnover EUR 50 million
CbCR	Consolidated group turnover EUR 750 million

## Submission deadline

Master file	Should be available in the taxpayer's administration upon due date filing corporate income tax.
Local file	Should be available in the taxpayer's administration upon due date filing corporate income tax.
CbCR report	Submission within 12 months after end of reporting year.
CbCR notification	Before year end of the reporting year.

## Penalty Provisions

Documentation – late filing provision	Administrative fines up to a maximum of EUR 5,514 can be imposed.
Tax return disclosure – late/incomplete/no filing	Administrative fines up to a maximum of EUR 5,514 can be imposed.
CbCR – late/incomplete/no filing	Fines up to a maximum of EUR 900,000 can be imposed on the taxpayer for non-compliance with notification and filing obligations for CbCR reporting.



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