

Overview

Borgen Tax

Borgen Tax is a tax advisory firm based in Amsterdam offering a full range of tax services focusing on Multinational enterprises ("MNEs") and private equity.

Borgen Tax' 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 Borgen Tax covers preparing benchmark studies and transfer pricing documentation, from full-fledged to tailor made. Borgen Tax can assist on global or local filings and putting your numbers into context. Furthermore, Borgen Tax can assist with Country-by-Country ("CbC") reporting.
- ❖ With analysis, planning and strategy Borgen Tax covers transfer pricing model design, value chain optimization, business restructuring, full-service assistance in setting up the transfer pricing model strategy and policy or just a sanity check or second review and sustainability analysis.
- ❖ With disputes and controversy, Borgen Tax covers assistance in transfer pricing audits, Mutual Agreements Procedures ("MAP"), arbitration and preventing or resolving tax disputes by concluding unilateral, bilateral or multilateral Advance Pricing Agreements ("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"). MNEs with a consolidated revenue exceeding EUR 50 million in the preceding year should prepare more elaborate transfer pricing documentation in the form of a master file and local file in line with article 29b CITA and following.

MNEs with a consolidated revenue exceeding EUR 750 million in the preceding year should also comply with the CbC reporting rules as laid down in article 29b CITA and following. 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 most important change in the TP Decree is the inclusion of 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 internationally accepted guidance providing clarification on the application of the arm's length principle. In line with the OECD Guidelines, the Dutch tax authorities ("DTA") must begin a transfer pricing examination from the perspective of the method selected by the taxpayer. If

the taxpayer does not have the documentation available the taxpayer must be given the opportunity to substantiate the applicability of the chosen method based on the facts and circumstances.

Although not explicitly mentioned, the Comparable Uncontrolled Price ("CUP") method is generally considered the preferred method by the DTA. However, comparable uncontrolled transactions are difficult to find. In practice, the Transactional Net Margin Method ("TNMM") 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 the arm's length nature of all intercompany transactions. As no threshold applies, this obligation 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 situations.

In accordance with article 29b CITA and following, Dutch law requires MNEs that meet the threshold of EUR 50 million of consolidated group revenue in the preceding year to maintain a master file and a local file in accordance with Base Erosion and Profit Shifting ("BEPS") Action 13. The master file and local file must 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 must be updated annually. In principle, every Dutch entity (or permanent establishment) must prepare a separate, entity specific local file. However, for Dutch entities joint in the same fiscal unity for CITA purposes it is generally accepted to prepare one local file covering all entities part of the same fiscal unity.

MNEs that meet the EUR 750 million annual revenue threshold (in the preceding year) must also comply with the CbC reporting rules as mentioned in article 29b - 29e CITA. Dutch taxpayers must file a CbC report if the ultimate parent entity or the surrogate parent entity is tax resident in the Netherlands. The report must be filed within 12 months exceeding the reporting year. All Dutch taxpayers that are part of a MNE that meets the EUR 750 million threshold and where the CbC report is filed outside the Netherlands must submit a CbC notification before year end of the respective reporting year.

Local Jurisdiction Benchmarks

Depending on the applied transfer pricing method benchmarking studies can support the arm's length nature of intercompany transactions. The DTA accept pan-European benchmark studies and allow all profit level indicators as

described in the OECD Guidelines. Benchmark studies must meet specific comparable search strategy standards as set by the DTA.

The DTA generally refer to multiple year data. In addition, the results of a benchmark study are generally expressed as an interquartile range. The DTA take the position that in principle the median should be applied. This may be deviated from if supported by economic reasoning. In line with the OECD Guidelines, a benchmark study must be prepared every three years. Although not obligated a financial update of the benchmark study data is preferred in the two years in between.

A benchmark study can be used to set or support royalty percentages as a remuneration for the use of intellectual property. However, in practice, these benchmark studies are highly scrutinized by the DTA. Instead, a Value Chain Analysis ("VCA") can be performed which is preferred by the DTA.

Advance Pricing Agreement / Bilateral Advance Pricing Agreement Overview

Since 1 July 2019, a revised Decree on international tax rulings entered into force in the Netherlands. This Decree contains, among others, regulations for APAs and Bilateral Advance Pricing Agreements ("BAPAs") (and even Multilateral APA's). The requirements for both APAs and BAPAs 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 whom transactions are concluded is on the EU list of non-cooperative jurisdictions or on the Dutch blacklist.

The DTA endeavor 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 such as the classification and remuneration of intercompany transactions and/or the profit allocation for permanent establishments. 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 DTA can perform audits at random. Transfer pricing 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 DTA do not conduct audits on periodical basis. However, following the introduction of the 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.

The Burden of Proof in Dutch Transfer Pricing: Theory vs. Practice

In the Dutch tax system, the allocation of the burden of proof is pivotal in determining the outcome of disputes. In the Netherlands, the burden of proof in transfer pricing matters is, in principle, straightforward: the DTA bear the responsibility of demonstrating that the prices set by a taxpayer are not at arm's length. If a taxpayer fails to meet certain documentation obligations, the burden of proof may shift to the taxpayer under statutory provisions. Dutch law prescribes that taxpayers must maintain sufficient documentation to substantiate their transfer prices, as outlined in article 8b(3) CITA, as well as in articles 29b CITA and beyond. The reversal of the burden of proof should only occur in cases of significant non-compliance, where the absence of key documentation constitutes a fundamental breach of administrative obligations.

In practice, however, the distribution of the burden of proof does not always align with this legal framework. Rather than providing substantive evidence, the DTA often rely on assertions and positions, shifting the practical burden of proof onto the taxpayer. Recent case law suggests that courts seem to follow this approach, requiring taxpayers to provide extensive justification of their pricing, even when the tax authorities have not adequately demonstrated that the prices used deviate from the arm's-length principle. This development means that, in disputes, taxpayers frequently find themselves in a defensive position, despite the legal principle that the inspector should bear the initial burden of proof.

Given this trend, Dutch taxpayers must ensure that their transfer pricing documentation is both robust and comprehensive. This includes not only fulfilling the documentation requirements of article 8b(3) but also complying with the master file and local file obligations under articles 29b and beyond. While the OECD Guidelines emphasize reasonableness and caution in making transfer pricing adjustments, the practical reality in the Netherlands increasingly revolves around whether a taxpayer can sufficiently substantiate its pricing, rather than whether the tax authorities have adequately proven their case. As a result, high-quality documentation is not just a compliance requirement—it is a strategic necessity to minimize the risk of an unfavorable shift in the burden of proof.

Transfer Pricing Penalties

Fines up to a maximum of EUR 1,030,000 can be imposed on the taxpayer for non-compliance with notification and filing obligations for CbC reporting. A tax inspector must consult the technical coordinator of formal law before imposing a fine. In practice, Borgen Tax has not encountered any fines that were imposed in this respect.



Local Hot Topics and Recent Updates

Transfer pricing 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 MNEs) has increased focus for financial intercompany transactions. The DTA have gained more experience on financial transactions for which reason these transactions are increasingly challenged. Focus is put on the analysis of the parties involved in the financial transactions, cash pools (remuneration of cash pool leader and participants/ reclassification of cash pool positions) and financial guarantees. Also, the functions performed and risks managed are becoming increasingly relevant. 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 no functions are performed and no, or limited risks are run a remuneration related to costs is felt more appropriate instead of allocating the interest margin to the borrower in full.

Value Chain Analysis: The VCA is becoming a more common approach to substantiate 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 by the DTA. 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 MNEs services are performed between, or on behalf of affiliates. As the arm's length nature of these services is often not well substantiated, they are considered an easy target for the DTA to challenge. Items to take into consideration for services are cost allocations, benefit analysis as well as the mark up to be applied.

NETHERLANDS



Documentation threshold

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| 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

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| 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

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| 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 1,030,000 can be imposed on the taxpayer for non-compliance with notification and filing obligations for CbCR reporting. |



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