

An In-Depth Analysis of Published Anonymized APA and APA Request Summaries Under the Revised Dutch Tax Ruling Practice (Forthcoming: Intertax, vol. 49, 2021, issue 3)

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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 as well as to increase its openness and transparency. In this respect, the Dutch tax authorities (DTA) now publish anonymized summaries of advance pricing agreements and advance pricing agreement (APA) requests.

This month, Intertax will publish a country note that (i) provides an in-depth analysis of all sixty-six anonymized summaries published between 1 July 2019 and 30 June 2020 (the first year after the revised Dutch tax ruling practice was introduced) and (ii) highlights the most significant cases.^[1] The country note 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.

Background

Since the last revision of the Dutch tax ruling practice back in 2001, tax rulings with an international character issued by the DTA have received social and political attention in the Netherlands. The Dutch Parliament has scrutinized and criticized the existing Dutch tax ruling practice, particularly since 2017. The Dutch tax ruling practice was revised on 1 July 2019 because of this and other factors including (1) the EU Code of Conduct Group recommendations for national tax ruling practices, (2) the overall aim of banning letterbox companies from obtaining a tax ruling, and (3) state aid procedures that are related to tax rulings provided by the DTA. The Dutch State Secretary of Finance issued a new Ruling Decree on 19 June 2019 that entered into force on 1 July 2019 that only applies to tax rulings with an international character.

The new Dutch Ruling Decree

Since 1 July 2019, the formal procedure in the Netherlands for granting a tax ruling in a cross-border situation requires a second review, approval, and signature by a newly composed team of specialists within the DTA: the College International Tax Certainty (College ITC). This team, consisting of seven experts in transfer pricing and international tax, could therefore be considered as a second assessment team. Alongside the tightened internal procedure, one of the other most significant changes is the introduction of eligibility requirements for entitlement to prior consultation with the Dutch tax ruling team to obtain a tax ruling with an international character. As a result of these changes, the requirements to be eligible to enter into prior consultation have become stricter and more extensive.

Analysis of published anonymized summaries

During the period from 1 July 2019 to 30 June 2020, the first year after the introduction of the revised Dutch tax ruling practice, the DTA assessed and published sixty-six anonymized summaries of APA requests and granted APAs. After analysing all of them, the most salient conclusions and recommendations are as follows:

1. The anonymized summaries provide valuable insight into which types of cases will and will not be granted certainty by the DTA and therefore contain useful and valuable information for stakeholders such as tax policy makers, non-governmental organizations, academics, transfer pricing practitioners and advisers and, of course, taxpayers who envisage obtaining an APA.
2. All of the summaries have been properly anonymized since they cannot be traced back to the respective individual taxpayer in any way.
3. In the vast majority of the published anonymized APAs, the Transactional Net Margin Method (TNMM) was considered the most appropriate transfer pricing method for the circumstances of the case and, as such, has been approved by the DTA and applied by the taxpayer. The TNMM 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. Under the TNMM, the remuneration agreed in the APA is the median of 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. In order to increase the transparency, the author highly recommends also disclosing 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. In order to deal with the stricter eligibility requirements for preliminary consultation, a potential solution to meet the economic nexus requirement could be 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 party employment agency.
5. It is worth noting that, 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. Only the transactions with the group company in the low-tax or non-cooperative jurisdiction will be excluded from the APA.

You can read the full version of this article in the policy note section of Intertax, vol. 49, 2021, issue 3.

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[1] See K. Bolink, *An In-Depth Analysis of Published Anonymized APA and APA Request Summaries Under the Revised Dutch Tax Ruling Practice*, 49(3) Intertax 278-291 (2021).