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Abstract

Taxpayer rights in the Netherlands are governed by both national and international rules (treaties and European Community law). These rules form the legal framework within which the rights and obligations of all parties involved in the taxation process are evaluated. The following issues are discussed: the rights and obligations of taxpayers with regard to the provision of information to the tax authorities to assess taxes; the assessment objection and appeal procedures; and, the tax collection process. The main conclusion is that although certain aspects of the procedural laws should be improved, a proper protection of taxpayer rights starts with the simplification of the actual tax law to simplify the entire tax collection procedure.

Keywords

taxpayer rights, Netherlands, tax, tax law

TAXPAYER RIGHTS IN THE NETHERLANDS



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Taxpayer rights in the Netherlands are governed by both national and international rules (treaties and European Community law). These rules form the legal framework within which the rights and obligations of all parties involved in the taxation process are evaluated. The following issues are discussed: the rights and obligations of taxpayers with regard to the provision of information to the tax authorities to assess taxes; the assessment, objection and appeal procedures; and, the tax collection process. The main conclusion is that although certain aspects of the procedural laws should be improved, a proper protection of taxpayer rights starts with the simplification of the actual tax law to simplify the entire tax collection procedure.

1 . INTRODUCTION

Crucial for the possibility to tax is the willingness of people to transfer part of their income to the government: there will be no taxation without solidarity. To accept the necessary phenomenon of taxation and to maintain the needed solidarity, it is essential that taxpayer rights are properly protected.

The protection of taxpayer rights in the Netherlands is evaluated by determining the legal framework within which taxpayers and tax authorities operate. Section 2 commences, therefore, with the

¹ E-mail: Sommerhalder@BEL.FRG.EUR.NL. The opinions in this publication do not necessarily reflect those of my primary employer or the TLPRI. The author acknowledges the assistance and comments of M Feteris and E Pechler. Pechler has contributed to *Taxpayer's Protection*, EFS Brochures 5, which will be published soon by Kluwer Law International and the Foundation for European Fiscal Studies at the Erasmus University Rotterdam.

definition of the legal framework. In the subsequent sections, different aspects of the taxation process are discussed, starting with the rights and obligations with regard to information provided by the taxpayer to assess taxes. This is followed by a discussion of the actual assessment, objection and appeal procedures, which ends with an explanation of the rules concerning the tax collection process. Since the Netherlands is a Member State of the European Union, attention is also given to certain aspects of Community law in relation to the Netherlands domestic law.

2 THE LEGAL FRAMEWORK

The general administration of the tax codes with the associated regulations, decrees, jurisprudence etc, is carried out by the Ministry of Finance. Inspectors of taxes operate in tax districts throughout the country. The general powers of the tax authorities, the evaluation of their approach towards these powers and the rights of taxpayers are determined by the legal framework within which all the parties involved in the taxation process operate. This framework is formed by both national (acts and regulations) and international rules (treaties).

The relevant domestic statutes are:

- a the General Act on Taxation of 1959 (AWR),² which contains provisions on the procedure for objections and appeals against the levying of national taxes;³
- b the Act on Court Procedure in Tax cases of 1956 (WARB),⁴ which regulates procedural law on tax matters and contains provisions on the appeal and appeal in cassation procedure;
- c the Tax Collection Act of 1990 (Inv),⁵ which contains provisions on possible defenses against collection measures, and;

² "Algemene wet inzake rijksbelastingen" as amended on 13 December 1995, *Official Gazette* 662.

³ Local taxes are left out of the discussion, although the significance of local taxes is increasing. The average increase in local taxes was 6% in 1995. For local taxation see: Art 216-219 Municipal Act of 1992 as amended on 9 December 1993, *Official Gazette* 725; Art 220-232 Provincial Act of 1992 as amended on 24 December 1993, *Official Gazette* 691; and the Act to Reform Provincial and Municipal Taxes of 1970, *Official Gazette* 608.

⁴ "Wet administratieve rechtspraak belastingzaken", *Official Gazette* 323.

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- d the General Act on Administrative Law of 1992 (Awb),⁶ which concerns, among other things, objection and appeal procedures.

In the near future, the WARB will probably be included in the AWR to streamline the rules concerning tax procedures and to reduce the inconvenience of the spreading of these rules over different laws. The tax procedural laws will then conform more closely to the other administration laws.

The approach of tax authorities towards the taxation process or, in other words, the way tax authorities administer the tax laws is (in addition to the statutes and regulations) determined by policy rules. Although these rules are not generally binding regulations,⁷ they do bind the tax authorities.⁸ They also form part of the law.⁹ The most important policy rules are the Guidelines Tax Collection Act,¹⁰ the Regulation on Administrative Fines (VAB)¹¹ and the Regulation on the General Act on Administrative Law (Vawb).¹²

Based on Art 93 of the Constitution, under certain circumstances Netherlands taxpayers have direct recourse to treaty provisions which are universally binding. According to Art 94 of the Constitution, treaties take precedence over statutory law. If a statute conflicts with a treaty provision, taxpayers may claim its non-applicability. With regard to taxpayer rights, the most

5 "Invorderingswet 1990" as amended on 13 December 1995, *Official Gazette* 662.

6 "Algemene wet bestuursrecht" of 1992 as amended on 20 December 1995, *Official Gazette* 704.

7 These policy rules are not made on the basis of any kind of legislative authority.

8 These policy rules bind the tax authorities because of general principles of proper administration, in particular the equality principle, the principle of legitimate expectation and the requirement of due care. These principles can take precedence over statutory law, see the decision of the Supreme Court of 12 April 1978, BNB 1978/135-137. BNB is a journal which publishes tax court cases.

9 Policy rules form part of the law within the meaning of Art 99 (1) heading and 2, Judiciary Organization Act (Wet op de Rechterlijke Organisatie (RO)), see the decision of the Supreme Court of 28 March 1990, BNB 1990/194.

10 "Leidraad Invorderingswet 1990" as amended on 21 December 1995, *Official Gazette* 252.

11 "Voorschrift administratieve boeten 1993", *Official Gazette* 1992/193.

12 "Voorschrift Algemene Wet Bestuursrecht 1993", *Official Gazette* 209.

important treaties are the EC Treaty, the ECHR (the European Convention for Human Rights) and the International Covenant on Civil and Political Rights.

3 GENERAL INFORMATION GATHERING TO ASSESS TAX

In the Netherlands, taxpayers are only obliged to file a tax return if the tax inspector has *invited* the taxpayer to do so (AWR Art 6). The tax inspector will request a taxpayer to file a return if it is expected that the taxpayer is liable to tax or is liable to withhold tax. Under certain circumstances taxpayers are, however, obliged to request an invitation to file.¹³

Tax returns which concern taxes levied on a tax assessment basis¹⁴ must be filed by the date set by the tax inspector (AWR Art 9 (1)). The filing date may never be less than one month after the date on which the return was sent to the taxpayer. The inspector may, on application, extend the filing date originally fixed (AWR Art 9 (2)).¹⁵ If the return has not been filed before the prescribed date, the inspector will send a reminder and request to file within 10 days. If this request is not complied with, the inspector will order the taxpayer to file the return by a prescribed date. The setting of this date is within the inspector's discretion. If the taxpayer fails to meet this final deadline, then the inspector may estimate the taxpayer's income and prepare an assessment on the basis of any information held. The amount of the estimated tax due will be increased by a penalty of 5% of the estimated tax due. This penalty, however, cannot be less than 5 Dfl or more than 1,000 Dfl (AWR 9 (3)).

¹³ For instance, if taxpayers subject to tax which is levied by way of assessment are obliged to request a tax return within six months and two weeks after the origination of their tax liability. Art 2 General Act on Taxation 1994 Regulation, *Official Gazette* 251.

¹⁴ For example, corporate income tax, individual income tax and net wealth tax.

¹⁵ It is also within the inspector's discretion to grant such an extension under specific conditions (AWR Art 9 (2)). For example, the most commonly imposed condition is that information must be supplied before a certain date to enable the preparation of a provisional assessment. Since such assessments are based on information from the preceding year, this condition is most often imposed when a company is in its first year. Extension of filing dates is usually granted, without condition, to professional advisers who are employed in preparing tax returns.

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Tax returns concerning taxes which are levied on a tax return basis¹⁶ must be filed with the inspector who is mentioned in the request to file the return (AWR Art 10 (1)). If the tax return concerns the determination of the tax due in a certain time period (a quarter of a year or a month), the return must be filed within a date set by the inspector, which is at least one month after the end of the time period (AWR Art 10 (2)). If the tax return does not concern a time period, the inspector fixes a date of at least a month within which the return has to be filed. Extension of the filing date may be requested (AWR Art 10 (3)).

The questions posed in the tax return are determined by Ministerial regulations (AWR Art 7 (3)). In this way, the questions can be adjusted quite easily to amendments in the tax laws. Information on the return to be filed includes not only the answers to questions asked in the form itself, but also copies of the documents which may be relevant for the determination of the tax liability (AWR Art 7 (2)). For individuals running a business and for corporations the main documents required are the balance sheet and the profit and loss statement prepared for tax purposes. In practice, companies must also file, at the inspector's request, the commercial balance sheet and the profit and loss statement prepared for their annual report, along with explanatory notes to enable the inspector to compare the commercial and tax statements. The commercial accounts are relevant for determining certain facts. Also, the Tax Courts place importance on facts stated in the commercial accounts.¹⁷

The copies of documents accompanying the tax return are considered to be a part of the tax return: they will not be sent back to the taxpayer. These documents are not the original documents (eg, invoices, legal instruments, policies) and may be used for the determination of the tax liability for third parties (AWR Art 7 (2)).

¹⁶ Taxes paid on a tax return basis are, for example, VAT, withholding tax on wages, dividends and capital duty.

¹⁷ In the Netherlands, commercial accounts are subject to much broader and more liberal accounting rules than are tax accounts (eg, greater latitude in the choice of depreciation methods). The maintenance of proper accounting records for tax purposes is very important, since many tax advantages are conditional on the keeping of proper records, eg, the option of using a financial year that differs from the calendar year. If proper records are not kept, an inspector may reject the return and exercise the power to estimate taxable income. If the taxpayer rejects this assessment, it is up to the taxpayer to prove that the estimate is incorrect.

The tax inspector may demand the taxpayer to grant leave to inspect such documents (AWR Art 48(1)). The taxpayer must allow the tax inspector to make copies of the original documents (AWR Art 49).

Individuals running a business, companies and those individuals/legal entities who are obliged to withhold tax from wages are obliged to keep records (AWR Art 52 (2)) and to keep them for at least 10 years (AWR Art 52 (4)). The obligation to keep records means, in broad terms, all the records which give insight into the equity of the company, receivables, debts and other data which are relevant to the tax liability of the taxpayer (AWR Art 52 (1)) or third parties (AWR Art 53).¹⁸

On request of the tax inspector, the taxpayer is obliged to provide data, information, accounting records and documents which may be relevant in arriving at a tax assessment. (AWR Art 47).

AWR Art 47a, effective from 21 March 1991, imposes on resident companies and certain other entities the obligation to provide information to tax authorities on non-resident individuals or entities which, whether alone or together with related persons or entities, control a Dutch entity. With respect to resident companies, the criterion which determines control is generally a shareholder's interest in excess of 50%. With respect to other entities, the criterion is whether there is decisive influence over the management. Under this provision, a resident company, at the request of the Dutch tax inspector, is obliged to submit the accounting records of the non-resident parent company and of the parent company's non-resident subsidiaries (ie, companies in which it has a participation exceeding 50%) provided there is a fiscal interest. Furthermore, documents which may be relevant to the determination of the Dutch tax liability may be requested; copies or abridged records are not allowed. To the extent that a non-resident parent company or its non-resident subsidiaries are resident either in an EU Member State,¹⁹ or in a state with which the Netherlands has concluded a tax treaty containing an adequate exchange of information provision, the Dutch entity is, in principle, relieved from this obligation. However, if the Dutch tax authorities are not able to obtain the requested information through application of the EC provision or

¹⁸ A tax audit of all companies and unincorporated businesses is made periodically by the audit department of the local tax office. Although these audits are planned to occur every few years, longer intervals have resulted because of a shortage of tax auditors.

¹⁹ In which case the mutual assistance Directive of 19 December 1977, 77/799/EC, applies.

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treaty provisions, the Dutch Minister of Finance may declare that this exemption is no longer available.

If the taxpayer in all of the above circumstances fails to provide the information or refuses to cooperate, the burden of proof in related tax proceedings may be reversed (AWR Art 25 (3) in conjunction with Art 29 (1))²⁰ and that person may be subject to criminal proceedings (AWR Art 68).

Priests, notaries, lawyers, solicitors, attorneys, doctors and pharmacists are granted relief from the obligation to provide information with regard to third parties (AWR Art 53a). Tax consultants are not granted this relief, but it is common policy of the Dutch tax authorities not to inspect personal correspondence between the consultant and the client and the opinions given by the consultant with regard to the tax affairs of the client. On the other hand, Ministers and public institutions are obliged to provide information requested by the tax inspector with regard to the administration of the tax laws (AWR Art 55).

Banks have, with regard to their clients, a specific obligation to inform the tax inspector. This is dealt with in the *Rules of Conduct for Tax Authorities - Banks*.²¹ The obligation of banks is comparable to the general information obligations of taxpayers with regard to their own tax liability and that of third parties given certain circumstances: to provide data and information and to allow the inspection of records and other relevant documents. Before the inspector requests the bank to provide information, he or she is obliged to ask the taxpayer for the relevant information and to give the taxpayer the opportunity to get the information from the bank. The inspector may, however, contact the bank, without involvement of the taxpayer, if such an approach is necessary given the importance of the case. Whether or not the importance of the case allows immediate contact with the bank is within the inspector's discretion.

²⁰ The following general rules apply. The burden of proof for income items is with the inspector. The burden of proof for deduction items already lies with the taxpayer, which means that it is sufficient for the inspector to presume the amounts provided are correct. However, a reversal means that the taxpayer must actually prove the correctness of the amounts provided.

²¹ "Gedragscode fiscus-banken" of 9 October 1992, nr AFZ92/6700, *Official Gazette* 202, as amended on 7 March 1995, nr AFZ95/588M, *Official Gazette* 50.

The obligation to provide information, as formulated in AWR Art 47 and 47a, must be regarded as substantial. Information which *may be relevant* is a broad term which, however, gives a tax inspector the necessary scope to do her or his job. The Supreme Court decided that the relevance of information must be determined by looking at the request of the inspector separately: it is not relevant if the tax inspector could have found out the same information without inspecting records.²² With regard to AWR Art 47a, Parliamentary Minutes show that the tax authorities cannot, for instance, request to be informed about the whole corporate structure of a multinational if they do not specify the issue under investigation.²³ The possibilities for investigation by the tax inspector are limited by the general principles of proper administration.²⁴ A conflict with these principles occurs if, for instance, the tax inspector demands information from non-resident taxpayers which make them violate laws in the country of their residence, where there is another avenue available to the tax inspector to get that information.²⁵

Finally, the relationship between the Dutch rules and jurisprudence and the jurisprudence on self-incrimination of the European Court of Human Rights deserves attention. Based on the ECHR Art 6, the EC Court decided that information obligations based on French tax laws were a violation of the right to remain silent and the right to privilege against self incrimination.²⁶ The Dutch Supreme Court recognises these principles. However, the Supreme Court only applies the right to remain silent as far as it concerns a criminal charge.²⁷ In practice, it is difficult to determine when or which part of the tax issue under dispute concerns the criminal charge and which part does not.

4 THE ASSESSMENT

The tax assessment of taxes which are levied on an assessment basis is an administrative decision, according to Awb Art 1:3 (2), which

²² Decision of the Supreme Court of 8 January 1986, BNB 1986/128.

²³ Parliamentary Minutes, 1990/91 I, 21 034, nr 27 at 1.

²⁴ See sub-heading 2 above, "The legal framework".

²⁵ See the conclusion of the Advocate General with regard to the decision of the Supreme Court of 8 January 1986, BNB 1986/128. See also the decision of the Supreme Court of 4 July 1989, BNB 1989/258.

²⁶ Decision of the Court of Human Rights of 25 February 1993 (*Funke* case), BNB 1993/350.

²⁷ Decision of the Supreme Court of 23 November 1994, BNB 1995/25.

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has the following consequences. First, the codified general principles of proper administration are applicable.²⁸ Second, the tax inspector is not obliged to hear the taxpayer (Awb Art 4:12). However, in practice the tax authorities usually contact the taxpayer in cases where the inspector intends to assess the taxpayer in a way that differs from the tax return filed (Vawb Art 5.5.3). Third, the assessment must be based on good reasons (Awb Art 4:16).

The assessment must be made within three years after the tax liability has arisen (AWR Art 11 (3)). If the tax liability concerns a particular time period, the three-year period commences at the moment the time period ends (AWR Art 11 (4)). The three-year period is extended if the inspector grants an extension of the time period within which the taxpayer has to file a tax return (AWR Art 11 (3)). There is a decision of a lower court in the Netherlands²⁹ which held that the tax inspector is obliged to make an assessment if it is in the interest of the taxpayer. The Supreme Court did not take a position in this respect. If the tax inspector decides not to make an assessment (which is an administrative decision as well), this decision cannot be reversed within three years (AWR Art 12). If the tax inspector did not make an administrative decision not to assess, but has made it unambiguously clear that he or she will not do so, then he or she is bound by that decision.³⁰ The position of the inspector does not necessarily have to be in writing. However, the tax inspector can nevertheless make an additional supplementary assessment (AWR Art 16)³¹ where:

- a there is a new fact;
- b the taxpayer has acted in bad faith; or
- c there is neither a new fact nor bad faith.

There is a new fact if the tax inspector was aware of, or could not reasonably have known, a certain fact or facts. This issue concerns the accuracy of the tax inspector in making the original assessment. The starting point is the unwritten rule that society may demand that the tax inspector assesses the taxes as correctly as possible. Ultimate precision is, however, not required, given the words

²⁸ It should be noted that not all these principles are codified in the Awb. It is beyond the scope of this article to discuss this issue in greater detail.

²⁹ Decision of the Lower Tax Court of 's-Hertogenbosch of 23 September 1981, BNB 1982/292.

³⁰ Decision of the Supreme Court of 31 May 1972, BNB 1972/164; decision of the Supreme Court of 8 March 1978, BNB 1978/85.

³¹ The Dutch term is "navorderingsaanslag".

reasonably...known in AWR Art 16.³² The inspector may rely on the correctness of the facts as presented in the tax return,³³ especially when the presentation of the facts in the tax return is well organised.³⁴ For instance, estimates made by the taxpayer may be allowed by the tax inspector, unless the inspector should have been aware of possible deviations from these estimates. To the extent that the inspector could not have reasonably expected these differences, he or she can make an additional supplementary assessment.³⁵ The tax inspector is only obliged to commence further investigations if he or she has doubts, or should have doubts, about the correctness of the presented data.³⁶

Case law has set aside the criterion of a new fact in certain circumstances under which it was unambiguously clear that the tax inspector made a mistake.³⁷ No new fact is needed (i) in the case of obvious typing or writing errors, (ii) when it is clear (eg, from correspondence between the taxpayer and the tax inspector) that the inspector would assess in conformity with the tax return but he or she did not, or, (iii) where by mistake the assessment resulted in a lower tax liability than according to the so-called fiscal compromise (which will be discussed later) between the tax inspector and the taxpayer.

No new fact is needed when the taxpayer has acted in bad faith. Unfortunately, the definition of bad faith has not been codified, which means that it must be determined by case law. There is, as yet, no published case law of the Supreme Court concerning bad faith and the additional supplementary assessment.³⁸ Generally, in the Dutch literature, it is agreed that a taxpayer, who has intentionally filed a tax return with incorrect data, has acted in bad

³² Decision of the Supreme Court of 3 January 1923, B.3205. "B" is an abbreviation of the journal which published court decisions until 1953.

³³ Decision of the Supreme Court of 27 April 1955, BNB 1955/214; decision of the Supreme Court of 5 November 1986, BNB 1987/19.

³⁴ Decision of the Supreme Court of 15 June 1977, BNB 1977/198.

³⁵ Decision of the Supreme Court of 30 November 1927, B.4162; decision of the Supreme Court of 25 February 1953, BNB 1953/106.

³⁶ Decision of the Supreme Court of 28 April 1982, BNB 1982/267.

³⁷ Decision of the Supreme Court of 6 June 1973, BNB 1973/161; decision of the Supreme Court of 24 January 1990, BNB 1990/133; decision of the Supreme Court of 17 October 1990, BNB 1991/118; decision of the Supreme Court of 4 December 1991, BNB 1992/61.

³⁸ The bad faith rule was only introduced in 1994. This might explain why there is no case law as yet.

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faith. If the tax inspector follows the tax return, he or she can always make an additional supplementary assessment within five years.³⁹

Where there is no new fact or bad faith, a tax inspector can always make an additional supplementary assessment within five years, if the original assessment was too low, because (AWR Art 16 (2)):

- a a provisional assessment, preliminary tax or a provisional refund was credited incorrectly with the final tax due;
- b certain income (eg, unearned income) was mistakenly taken into consideration by the taxpayer or his spouse; or
- c the wrong tax-free threshold was taken into consideration.⁴⁰

These cases concern taxes which are paid on a tax assessment basis. As discussed above, in the Netherlands there are also certain taxes paid on a tax return basis. If in these cases the tax paid is too low, because an exemption, reduction or refund has been granted by mistake, the original assessment may be corrected by an additional supplementary assessment within five years (AWR Art 20).

5 CAPITA SELECTA

This section discusses a number of aspects which characterise the relationship between taxpayers and tax authorities in the Netherlands:

- the limits governing tax inspectors;
- the principle of legitimate expectation; and,
- fiscal compromise and private tax rulings.

³⁹ The time period within which an additional supplementary assessment can be made is five years for most cases discussed in this section (AWR Art 16 (3) in conjunction with Art 20 (3)). The tax inspector informs the taxpayer of the grounds for an additional supplementary assessment, unless the taxpayer makes it clear that the inspector's motivation is not appreciated (AWR Art 17).

⁴⁰ For example, under the income tax rules a single earner may apply a personal allowance which is twice the allowance for two earners and single individuals.

The limits governing the tax inspector

The tax inspector has to operate within the scope of the tax law, jurisprudence and regulations. Laws are published in the *Official Gazette*. Regulations, decisions of both the Supreme Court and lower courts and administration policy are published in professional tax journals. As indicated above, the actions of the tax inspector also have to conform with the general principles of proper administration.

Case law of both the Supreme Court and the lower courts is not retroactive. Case law has legal consequences from the moment the decision is given to the parties involved.⁴¹ For third parties the decision has legal consequences from the moment the decision has been published. According to a regulation of 1991, however, tax inspectors must make an *ex officio* adjustment with regard to assessments made from the day of the decision, if the decision is in favour of the taxpayer.⁴² The decision may also influence the eventual tax liability with regard to assessments made before that date, if appeal is still possible. In this sense, the regulation has made decisions of the Supreme Court retroactive.

The legal status of decisions of the lower courts and the courts of the European Community is more complicated. The decisions of the lower courts do not have national legal consequences, unless they are not be appealed against to the Supreme Court. The decisions of the European courts have direct legal consequences if a party goes directly to the court.⁴³ On the other hand, it is not unusual for a Dutch court to decide on an issue concerning European law and subsequently to request the European court for a preliminary ruling. In that case, the ruling of the European court does not have direct legal consequences although the domestic court is bound by the ruling. The decision of the Dutch court that takes into account the preliminary ruling of the European court establishes the legal consequences.

Another limit on a tax inspector's actions is the regulations. Two kinds of regulations may be distinguished. First, there are regulations which contain policy with regard to the administration of the tax law. These regulations may be overruled by case law. Second, based on grounds of (for instance) fairness, regulations may

⁴¹ Decision of the Supreme Court of 18 April 1990, BNB 1990/195.

⁴² Regulation of 25 March 1991, BNB 1991/142.

⁴³ See also sub-heading 8 below, "The European Court".

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contain a more favourable treatment than that based on the tax law. A regulation may also be less favourable than the law, but it will be either overruled or confirmed by case law. Such regulations are usually made to provoke a court case. Under certain circumstances, it is questionable whether this is a correct procedure, as the courts become the legislator. Nevertheless, tax inspectors are bound by these regulations. Based on the principle of legitimate expectation,⁴⁴ taxpayers may expect that the inspector will act in accordance with these regulations.⁴⁵

The principle of legitimate expectation

In most decisions of the tax authorities, the principle of legitimate expectation and other principles of proper administration do not play any role.⁴⁶ Most decisions are administrative decisions the content of which is prescribed by the code. A problem arises when there are inconsistencies. Inequalities occur, for instance, if a tax inspector does not follow the regulations of the Deputy Minister of Finance, which are more favourable for the taxpayer than the strict administration of the law. Initially, the Supreme Court decided that the application of the law overruled the principles of proper administration.⁴⁷ The application of these principles was limited to situations where the law provided administrators with scope for policymaking. The taxpayer could, however, claim an indemnification based on civil tort law. In 1978, the Supreme Court changed its opinion. Now, even in cases where there is no scope for policymaking, the taxpayer has recourse to the principles of proper administration, despite the fact that the decision of the inspector may not conflict with the strict administration of the law.⁴⁸ The Supreme Court also made clear that a tax inspector's argument that the regulation conflicted with the law could not outweigh the principle of legitimate expectation.

In addition to administrative decisions, tax authorities provide information, give undertakings and approvals. Tax authorities are

⁴⁴ The Dutch term is "vertrouwensbeginsel", which is the fourth aspect of the legal framework together with the other principles of proper administration.

⁴⁵ Decision of the Supreme Court of 28 March 1990/194; decision of the Supreme Court of 11 December 1991, BNB 1992/98.

⁴⁶ See above n 8.

⁴⁷ Decision of the Supreme Court of 14 October 1970, BNB 1971/13; decision of the Supreme Court of 4 February 1976, BNB 1976/87.

⁴⁸ Decisions of the Supreme Court of 12 April 1978, BNB 1978/135-137.

not bound by all information given to taxpayers.⁴⁹ The taxpayer bears the risk for the correctness of the information.

The taxpayer has a higher degree of protection with regard to the explanation brochure attached to the tax return. The tax authorities are bound if the taxpayer:⁵⁰

- a could not or should not have realised that the explanation was incorrect, because the explanation was not clearly in conflict with the correct application of the law; and
- b is disadvantaged through following the instruction given in the explanation; and
- c there is no available case law that defines what is meant by "disadvantage".

A tax inspector is bound by undertakings given to a taxpayer if:⁵¹

- a the required information provided by the taxpayer to the tax inspector was correct; and
- b the taxpayer could reasonably have relied on the given undertaking, because the undertaking was not clearly in conflict with a correct application of the law.

A tax inspector is bound by her or his own approvals, if it is unambiguously clear that he or she wants to be bound without reservation, provided there is no change of circumstances.⁵² The tax inspector cannot just cancel the given undertaking.

Fiscal compromise and private tax rulings

Taxpayers and tax inspectors may reach a compromise concerning facts which determine the tax treatment of components of income or total income. The compromise may concern future events.⁵³ According to case law, a compromise which conflicts with the law, but does not evidently do so, binds the parties.⁵⁴

⁴⁹ Decision of the Supreme Court of 26 September 1979, BNB 1979/311.

⁵⁰ Decision of the Supreme Court of 9 March 1988, BNB 1988/148.

⁵¹ Decision of the Supreme Court of 26 September 1979, BNB 1979/331.

⁵² Decision of the Supreme Court of 16 September 1981, BNB 1981/308.

⁵³ Decision of the Supreme Court of 1 December 1971, BNB 1972/171.

⁵⁴ Decision of the Supreme Court of 3 June 1981, BNB 1981/230; decision of the Supreme Court of 14 January 1987, BNB 1987/158; decision of

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A compromise should be distinguished from a private tax ruling. Such rulings are only applicable to international enterprises. The competence to issue rulings is reserved to a division of one inspectorate,⁵⁵ the Department for Large Enterprises of the Inspectorate Rotterdam (the ruling team). The ruling system dates from 1986 and is based on a letter from the Deputy Minister of Finance to Parliament in December of that year. There are no formal rules for obtaining a private ruling; the only stated requirements are that the taxpayer must present a real, accurate and fair picture of the current situation and allow authorities to draw a conclusion as to the tax consequences of the situation based on the information presented.

Until recently, there were five basic rulings issued: holding, finance, royalty, pe/finance and cost-plus rulings.⁵⁶ In an ongoing effort to improve the investment climate in the Netherlands, the Deputy Minister of Finance announced, on 17 February 1995, that the ruling team has been authorized to issue rulings in respect of any topic that requires interpretation of the law.

A ruling is also bound by the legal framework discussed before. The ruling is an opinion issued in advance by the tax inspector within the scope of tax law, jurisprudence and regulations. This means that rulings are not meant to expand tax law, but simply to confirm the tax consequences in a particular situation.

The basis for the validity of private rulings is fundamentally different from that in common law countries.⁵⁷ By way of contrast to common law countries, in the Netherlands private rulings are *prima facie* given effect to by the courts, on the basis of the general principles of proper administration. As indicated before, the Supreme Court decided that these principles take precedence over the provisions of the law itself.⁵⁸ The ruling is only effective if the taxpayer commences activities to which the ruling relates within nine months after the ruling has been issued. It remains valid for

the Supreme Court of 19 September 1990, BNB 1990/309. All the decisions were in favour of the taxpayer.

⁵⁵ Tax inspectors operate in tax districts throughout the Netherlands.

⁵⁶ See for a detailed discussion, Chang J, Krever R, Sommerhalder R et al, "Private Income Tax Rulings: A Comparative Study" (1995) 10 Tax Notes International 738. This article was possibly the world's first E-mail tax law article.

⁵⁷ Although the practical implications of the differences may not be great.

⁵⁸ Decisions of the Supreme Court of 22 June 1977 and 4 March 1987, BNB 1977/284 and 1987/135.

four years and may be extended for another four years. The ruling is binding, even in the face of changes in the legislation or judicial interpretation of the tax law. The tax inspector is also bound by a tax return filed in accordance with the published standard rulings,⁵⁹ provided the taxpayer submits its tax return to the ruling team.

If the tax inspector refuses to issue a ruling, it is unclear whether the taxpayer has any avenue of appeal. The problem is that the General Act on Administrative Law of 1992 does not explicitly classify a ruling as an administrative decision that can be appealed like a tax assessment. Nevertheless, that law defines an administrative decision as a decision that does not have a general application. It includes the denial of a request to take action, for example a refusal to rule. This interpretation has, however, been disputed by the Deputy Minister of Finance, who has suggested that a tax ruling and the refusal are not administrative decisions, but rather are preliminary actions for an eventual assessment. Thus, the Deputy Minister argues, until an assessment is made, there is no decision to be appealed.

6 DOMESTIC OBJECTION AND APPEAL PROCEDURES

Within six weeks of the date of assessment a taxpayer may file with the inspector a notice of objection (AWR 23). According to a ruling from the Ministry of Finance,⁶⁰ a notice of objection automatically implies a request for extension of time for payment by the taxpayer. The inspector must make a decision on the objection within one year after the date of the objection (AWR Art 25 (1) in conjunction with AWB Art 6:7). Nevertheless, the tax authorities endeavour to take a decision within three months in normal cases (Vawb Art 9). The inspector may, on the other hand, adjourn the decision for one year with the assent in writing of the Minister of Finance. The adjournment will only be given in extraordinary circumstances (Vawb Art 9).

The taxpayer has the right to be heard before a decision is made (AWR Art 25 (4)). He or she will only be heard if he or she so requests (Awb Art 7:2 (1)). In principle, the taxpayer will be heard by an inspector who did not deal with the case.

⁵⁹ Decision of the Supreme Court of 3 July 1991, BNB 1991/225.

⁶⁰ Ruling of the Ministry of Finance of 4 March 1992.

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The taxpayer may appeal against the decision of the tax inspector. The notice of appeal must be filed with the tax court within six weeks after the date specified on the letter or receipt which contains the inspector's decision (AWR Art 26). The notice of appeal must state all the taxpayer's objections to the decision of the inspector and provide any information necessary to the determination of the amount of tax due as claimed by the taxpayer (AWR Art 28 (2)).

A copy of the notice of appeal is sent to the inspector by the clerk of court (WARB Art 8(1)). Subsequently, the inspector may prepare and file an answer to the taxpayer's objection (WARB Art 8 (3)). The court will then designate the date and time of a hearing at which the arguments can be explained and expanded orally (WARB Art 11).

Both the taxpayer and the tax inspector may appeal to the Supreme Court against the decision of the lower court (WARB Art 19). The appeal to the Supreme Court must be within six weeks after a copy of the lower court's decision is mailed or handed over to the taxpayer (WARB Art 20). The notice of appeal must state the grounds of the appeal. The clerk of the Supreme Court must send a copy of the notice of appeal to the respondent, after receipt of the complete file from the lower court (WARB Art 24). Although an oral hearing is unusual, the case may then be set for oral hearing (WARB Art 23). The Advocate General has the right to state his opinion on the case (WARB Art 24). The Supreme Court can either reject the appeal or reverse the decision of the lower court. If the decision is reversed, the Supreme Court may decide the case on legal principles or send the case back to the lower court for new findings of fact (WARB Art 25). This is based on the rule that the Supreme Court can only consider the law, never the facts. However, it is possible for the Supreme Court to consider the facts via a "backdoor". For example, a decision of the lower court may be reversed if the facts determined by the lower court and the subsequent decision on those facts are contradictory.

Unlike the tax inspector in the objection stage, the courts are not obliged to give a decision within a specified time period. In the near future, it is expected that a time period of three months will be introduced.

7 OTHER DOMESTIC APPEAL AND COMPLAINT FACILITIES

The Civil Court

Disputes about the collection of taxes are generally brought before the civil courts.⁶¹ The Tax Collection Act⁶² enumerates which possible acts of collection may brought before the civil courts (district courts):⁶³ Appeal to the civil courts is possible against:

- a the refusal of a request for a deferral of payment or of a remission independent from the fact that an objection has been made (Inv Art 25);
- b the carrying out of a writ of execution (Inv Art 17);
- c a claim with respect to a third party (Inv Art 19);
- d an attachment of property found on the premises (Inv Art 22);
- e the written refusal of the tax collector to agree to transfer of a receivable or the establishment of a pledge (Inv Art 24 (5)); and
- f the refusal of request for a deferral of payment or of remission (Inv Art 25), whether or not an objection has been made.

The Administration Law Section

A taxpayer can turn to the administrative law section of the district court if the tax authorities refuse to give the taxpayer access to certain information:⁶⁴ the Awb procedures are applicable.

Commissions for petitions

Based on Art 5 of the Dutch Constitution,⁶⁵ a taxpayer may lodge a complaint about the tax administration with the Parliament. Both the Lower and Upper Chamber of Parliament have special commissions for this purpose. There is no time limit for making a

⁶¹ The main rule is, however, that the competence of an administrative court excludes that of a civil court. The civil court provides additional legal protection.

⁶² See sub-heading 9 below, "Collection and refund procedures".

⁶³ Only in a limited number of cases is the Court of Appeal competent.

⁶⁴ Government Information Public Access Act. Until 1 January 1994, the Council of State was the competent body for these cases.

⁶⁵ The right of petition.

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petition. The commissions report to the Parliament, after gathering the necessary information from the parties. Subsequently, an advisory opinion is sent to the responsible Minister, who may follow or ignore the advisory opinion.

The National Ombudsman

The taxpayer can file a complaint with the National Ombudsman (the "ombudsman"), who can investigate whether the conduct of the tax authorities has been correct (Wno Art 26).⁶⁶ The complaint of the taxpayer must be in writing and must be made within one year of the act giving rise to the complaint (Wno Art 12). The ombudsman may also initiate an investigation (Wno Art 15). The results of the investigation are made public.⁶⁷

The ombudsman may not investigate general government policy or generally binding regulations. The ombudsman is not competent if there is a legally regulated administrative remedy pending (Wno Art 13 in conjunction with Art 16 (d)), or if such a remedy were available (Wno Art 16 (f)). The last criterion applies only to tax cases.

8 THE EUROPEAN COURT

The Netherlands is a Member State of the European Union. All Member States have transferred legislative powers to the European Union. Community law takes precedence over domestic law.⁶⁸ A Dutch citizen may, therefore, make a direct appeal to Community law before the Dutch courts. The Dutch lower court may, and the Supreme Court must, request a preliminary ruling from the EC Court of Justice in cases where there are doubts about the interpretation of Community law (EC Treaty Art 177). The decision of the EC Court is binding. The Dutch court will take the decision of the EC Court into account when settling the dispute. In addition, to appeal to the EC Court through domestic courts, under certain circumstances the taxpayer may go directly to the EC Court:

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- ⁶⁶ Wno is "Wet Nationale Ombudsman", the code dealing with the competence of the ombudsman.
 - ⁶⁷ The ombudsman reports on her or his activities on a regular basis to the Parliament, which appoints the ombudsman (Wno Art 28).
 - ⁶⁸ See also sub-heading 2 above, "The legal framework".

- a in the case of an administrative decision which was addressed to the taxpayer as an individual, or such a decision which was not addressed to the taxpayer but which affected her or him directly and individually (appeal; EC Treaty Art 173); and
- b in the case where a Community institution has neglected to perform certain actions (objection; EC Treaty Art 175).

Another interesting feature of the court system in the Netherlands is the approach to the decisions of the European Court of Human Rights (ECHR). The Dutch Supreme Court considers the case law of the ECHR as binding, even if the decisions have been given in respect of other countries. If the taxpayer claims to be a victim of an infringement by the state of rights granted by the European Convention on Human Rights, the procedure starts by the taxpayer filing a complaint with the European Commission for Human Rights. The Commission can examine the complaint only if national remedies have been exhausted. The complaint must be filed within six months after the final national decision (ECHR Art 26). The Commission makes a report in which an opinion is given as to whether there has been an infringement of the European Convention on Human Rights. Subsequently, the case can be brought before the ECHR. However, it is common practice to attempt to settle the matter amicably out of court.

9 COLLECTION PROCEDURES

Tax collectors, like tax inspectors, operate in tax districts throughout the country. The collector prepares a notice of assessment which is sent to the taxpayer. In general, taxes are collectable two months after the date of assessment. Additional supplementary assessments of corporate income tax, individual income tax and net wealth tax are collectable one month from the date of assessment. Additional supplementary assessments for VAT and other taxes on a tax return basis⁶⁹ are payable within 14 days from the date of the assessment (Inv Art 9). In unusual cases, such as the bankruptcy of the taxpayer, the tax is collected immediately. As indicated,⁷⁰ the filing of a notice of objection or an appeal of an assessment leads usually to the suspension of the obligation to pay the amount due. However,

⁶⁹ See sub-heading 3 above, "General information gathering to assess tax".

⁷⁰ See sub-heading 7 above, "Other domestic appeal and complaint facilities".

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interest is due on the part of the assessment for which payment is suspended and which remains to be paid after the final decision.

The statute of limitations is five years from the date that the tax is payable (Inv Art 27). Any action on the part of the tax collector to collect the tax will cause this five-year period to start again. Extended payment arrangements also extend the five-year period.

10 SANCTIONS

In certain circumstances the tax inspector can increase the assessment. An administrative penalty of 100% is given if an additional assessment is necessary due to the intent or gross negligence of the taxpayer (AWR Art 18).⁷¹ The inspector, however, may remit all or any part of this penalty at her or his discretion (VAB Par 18). Unless severe fraud is involved, the actual fine is usually reduced to 50% or lower.

The taxpayer may be punished by criminal sanctions for filing a return irregularly, too late or not at all, for furnishing the tax administration with incorrect or incomplete information, for providing the tax administration with false or falsified books and other records, for not keeping proper books and other records while obliged to do so, or for failing to preserve these books and records for a period of 10 years (AWR Art 68 (1)).

The penalties that may be imposed have a maximum of four years in prison and a fine of 25,000 Dfl (AWR Art 68 (2)). In the case of a legal person the maximum fine may be 100,000 Dfl (Penal Code Art 23 (7)). However, if the amount of tax evaded is higher than the maximum fine, that amount becomes the maximum fine that can be imposed. Whatever the criminal court decides, any additional tax imposed in an additional supplementary assessment must be refunded under the double jeopardy principle.⁷²

If an administrative penalty and a criminal conviction are concurrent, the administrative penalty is nullified (AWR Art 18 (3) in conjunction with Art 21 (2)).

⁷¹ See sub-heading 3 above, regarding fines where the taxpayer fails to file a return.

⁷² *Ne bis in idem* principle.

Finally, three bills before Parliament focus on bringing the rules governing Dutch sanctions more in conformity with the case law of the ECHR.⁷³

11 COMMENTARY

A tax inspector cannot perform efficiently and effectively without the power to force taxpayers to provide the information necessary to determine the final tax due. It is unavoidable that the authorities must have the legal rights to make taxpayers comply. This applies to tax returns, assessments and objections. During an appeal the parties become equals. In court, the judges take on a passive role. It would be useful to investigate the effect of the judges taking a more active role.

In an economic sense, compliance costs incurred by taxpayers are an additional tax. As there is no legal basis for this tax, both from an economic and fairness perspective compliance costs should be reduced to a minimum. Currently, the government investigates the possibilities to reduce those costs. A reduction of compliance costs can be achieved by tax simplification.

Tax simplification consists of two interrelated aspects:⁷⁴ simplicity in tax administration and simplicity of the tax law. Simplicity in tax administration may be further divided into simplicity for the taxpayer, simplicity for the withholder of the tax and simplicity for the tax authorities. Simplicity for taxpayers occurs if they can know and determine their tax liability clearly and simply. It concerns the time frame and manner in which taxpayers must fulfil their substantive tax obligations. They must be aware of the administrative powers of the tax authorities and their own formal and accessory duties. If taxpayers do not know how to fulfil their obligations, their reaction may range from hiring an adviser to comply fully with tax obligations to evading or simply not complying with such obligations. As for the taxpayer, simplicity for the withholder of tax means easy and unambiguous determination of one's obligations. For the tax authorities, simplification means a reduction of the complexity of their tax assessment task. Simplicity of the tax law means that the law must clearly, simply and

⁷³ The bills concerning administrative fines of 3 July 1996.

⁷⁴ Sommerhalder RA, *Comparing Individual Income Tax Reforms: A Dutch Perspective* (1996 IBFD) 22-24.

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unambiguously stipulate the elements for determining the amount of tax.

In the Netherlands, the bottle-neck is not in the procedural law. High compliance costs are the result of highly complex tax laws which necessitate complicated tax returns and substantial administration and filing obligations. For individual income tax, for instance, the results of empirical research show that 30% of tax returns filed in the Netherlands lead to assessments that deviate from the return. For 70% of taxpayers the non-compliance is unintentional.⁷⁵ The positive effects of simplification of the tax law are obvious. It will be easier to comply and taxpayers will have a better understanding of their liabilities. This will increase the notion of contribution to public means, which in turn will have a positive impact on tax morality. Simplification increases the efficiency of the tax authorities through, for example:

- a more efficient use of resources;
- b a reduction in operational costs; and
- c easier application of automated mechanisms for assessing tax obligations and in the notification process, thus increasing the speed and effectiveness of administrative procedures.

A major simplification, especially of the individual income tax, seems to be the key to success. However, the most recent tax reform in the Netherlands (1990) had a disappointing result in this respect, even though simplification for the taxpayer was the main objective of the reform. The current policy of the Deputy Minister of Finance is to introduce all kinds of investment provisions and facilities for environmental protection through income tax, accompanied by numerous substantiation requirements. These developments make the individual income tax and, thus, the entire collection process more complex.

More specifically on procedural law, a question mark arises about objection procedures. Although an objection is dealt with by an inspector who is not involved in the case under dispute, it remains within the same body: there is a degree of objectivity, but the issue is not dealt with by an impartial body.

⁷⁵ Elffers H, *Income Tax Evasion: Theory and Measurement* (1991 Kluwer) 70.

Some tax scholars suggest the introduction of a special independent administrative body within the tax administration which has to deal with objection procedure. Such an institution does not, however, fit into the Netherlands judicial system. In my view, it would be preferable to introduce an appeal to the district courts, instead of trying to create some kind of arbitration body within the tax administration. Since the Supreme Court cannot judge facts and only makes decisions concerning legal qualification and classification issues, two so-called fact-courts (respectively the district and the lower court) would be an improvement. Currently in the Netherlands there is discussion concerning a reorganisation of the court system. One of the proposals is to introduce appeal to the district court in tax cases.

Courts should be required to make a decision within a specified time. The fact that courts are not obliged to do so is undesirable and conflicts with the principle of legal certainty. There is a proposal to introduce a time period of three months, which should be fully supported.

The bodies involved in the objection and appeal procedures have the required expertise. Tax inspectors are tax law graduates and the tax chamber of the lower courts is almost completely composed of judges with a tax background. The tax chamber of the Supreme Court, however, is not merely composed of tax lawyers but also civil and criminal lawyers. Currently, several specialists in civil law are members of the tax chamber of the Supreme Court.

Although appeal to the European Courts is available, there is no harmonisation of procedural tax law within the European Union. According to the EC Treaty there is no obligation to harmonise tax procedures. Procedural law is on the European agenda, but more in the sense of improvement of the process of exchange of information between Member States.

The intended changes to Dutch legislation to bring the legislation on sanctions more into conformity with the ECHR is an improvement and a logical step, given that under the Dutch Constitution treaties take precedence over statutes.

The inclusion of the WARB in the AWR is necessary to reduce the complexity of spreading the rules concerning tax procedures over more than one statute.

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In conclusion, although certain aspects of the procedural laws should be improved and certain recent legislative proposals may be seen as a development in the right direction, a proper protection of taxpayer rights starts with the simplification of the actual tax law to simplify the entire tax collection process.