



International Association of Tax Judges

1. THE IMPACT OF SOFT LAW AT THE NATIONAL LEVEL (THE NETHERLANDS)

Mr. E. FAASE

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1-A: GUIDANCE OF THE TAX AUTHORITIES

- Administrative policy rules
- 'Breakthrough' rulings (HR 12/4/1978, BNB 1978/135-137)
- Guideline ruling (HR 28/3/1990, BNB 1990/194)
- Codification in 1994, art. 4:84 General Act on Administrative Law
- Extensive, supplementary case law Hoge Raad

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Administrative policy rules

- not based on delegated legislative powers
- interpretation and enforcement of statutory provisions
- 'consenting': favorable positions of tax administration
- not binding for taxpayer and courts

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'Breakthrough' rulings (HR 12/4/1978, BNB 1978/135-137)

- binding for tax administration
- 'legitimate expectations'
- even when contra legem
- Hoge Raad: no interpretation of policy rules

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Guideline ruling (HR 28/3/1990, BNB 1990/194)

- “law” (grounds for cassation)
- even when contra legem
- ‘legitimate expectations’ if:
 - ✓ within scope of executive powers
 - ✓ duly published
 - ✓ suitable to be applied as legal norms
- ambulatory effect
- Hoge Raad: interprets policy rule, but not ex officio

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Codification in 1994, art. 4:84 General Act on Administrative Law:

- *The administrative authority shall act in accordance with the administrative policy rule unless, due to special circumstances, the consequences for one or more interested parties would be out of proportion to the purposes of the policy rule.*

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Extensive, supplementary case law Hoge Raad

- Non-published policy rules and tax practices
- General information or communications issued by tax administration
- Commitments and opinions of the tax inspector in a specific case

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Extensive, supplementary case law Hoge Raad

- Non-published policy rules and tax practices, if consistently followed by the tax administration (HR 27/4/2012, BNB 2012/217)
 - ✓ binding for the tax administration
 - ✓ taxpayer has to prove existence of policy rule

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Extensive, supplementary case law Hoge Raad

- General information or communications issued by tax administration may put aside mandatory legal rules (HR 26/9/1979, BNB 1979/311; HR 9/3/1988, BNB 1988/148):
 - ✓ taxpayer has acted accordingly
 - ✓ taxpayer would suffer damages or loss
 - ✓ not so obviously contra legem that taxpayer should have realized

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Extensive, supplementary case law Hoge Raad

- Commitments and opinions of the tax inspector in a specific case may equally put aside mandatory legal rules (HR 26/9/1979, BNB 1979/311):
 - ✓ taxpayer has provided the correct factual information
 - ✓ not so obviously contra legem that taxpayer could not reasonably count on fulfilment

Taxpayer: impression that tax administration has taken a 'conscious position' on the question (HR 13/12/1989, BNB 1990/119)

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1-B: RULINGS AND APA'S

- Arrangements or agreements in the specific taxpayer's case
- April 2001
- June 2014

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Arrangements or agreements in the specific taxpayer's case

- operating within law
- based on formulas of model rulings
- advance certainty and equal treatment
- legally binding for tax administration
- in theory not binding for taxpayer

Also applicable without advance ruling (HR 3/7/1991, BNB 1991/255)

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April 2001, reorganization and formalization of advance ruling practice

- into APA/ATR practice “meticulously following the OECD guidelines”
- transitional regime for rulings issued (valid through 2005)

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June 2014, most recent policy rules (nr. DGB2014/3098, APA-resolution)

- no more standard advance tax rulings, only tailor-made agreements
- due regard taken to good faith towards treaty partners and internationally accepted principles

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International Association of Tax Judges

2. THE IMPACT OF THE OECD COMMENTARIES ON DTT'S (THE NETHERLANDS)

Mr. E. FAASE

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OECD Commentaries

- when treaty terms are not defined or (sufficiently) clear
- to clarify intention of parties / interpretation of treaty provision
- no binding effect for taxpayers and Courts
- taxpayers may rely on (favorable) interpretation according to OECD Commentary?

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Hoge Raad

- Commentaries “of great significance”, not just providing “some guidance” (HR 2/9/1992, BNB 1992/379, on extra-territorial taxation of dividends)
- Case law remained unchanged (e.g. HR 14/7/17, BNB 2017/188, on ‘presence’ in the state of employment)

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Hoge Raad

- Presumably no ambulatory effect
 - HR 9/2/2007, BNB 2007/142-144 (on athletes’ income from personal activities), HR does not refer to later Commentary, although the advocate-general did so
 - HR 29/11/13, ECLI: 2013:1364, BNB 2014/9 (on Dutch thin cap rules and the a.l.p.), HR refers to the applicable 1992 Commentary and adds that they have remained unchanged

Later Commentaries used to justify independent interpretation to be compatible with Commentary (HR 21/02/2003, BNB 2003/177)

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3. THE IMPACT OF THE OECD TRANSFER PRICING GUIDELINES (THE NETHERLANDS)

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Transfer pricing

- Art. 8b of the Corporate Income Tax Act
- No detailed transfer pricing rules
- Tax administration applies the OECD Guidelines
- Hoge Raad

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Transfer pricing

- Art. 8b, paras 1 and 2, Corporate Income Tax Act

Where an entity, directly or indirectly, participates in the management, control or capital of another entity and conditions have been agreed upon or imposed between them in their legal relations (transfer prices) which differ from conditions that would have been agreed upon by independent parties in their commercial relations, the profits of these entities is determined as if the latter conditions would have been agreed upon.

The same applies accordingly, where the same person, directly or indirectly, participates in the management, control or capital of both entities.

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Transfer pricing

- No detailed transfer pricing rules / rules of a more general character

- Legislative history of art. 8b

- ✓ legal basis for a.l.p. at national level
- ✓ interpretation a.l.p. according to OECD Guidelines should have impact in national law
- ✓ Courts expected to take OECD Guidelines into consideration
- ✓ OECD Guidelines comparable to opinions (prestigious writers) and conclusions (advocates-general Hoge Raad)

→ OECD Guidelines are meant to remain soft law

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Transfer pricing

- Tax administration applies the OECD Guidelines (Res. 14/11/2013, nr. IFZ2013/184M, updated by Res. 22/4/2018, 2018-6865, Stcrt. 2018, 26874)

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Transfer pricing

- Hoge Raad
 - has not ruled that OECD Guidelines are also of “great significance” for interpretation of DTT’s
 - applies a.i.p. when examining related party transactions, but following own course, hardly ever directly referring to OECD Guidelines

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Transfer pricing

- Hoge Raad

- One exception: HR 28/6/2002, BNB 2002/343 (on the import of Japanese cars in 1986-1987)
 - a.i.p. was included in DTT with Japan and in national law
 - no legal rules to establish right t.p.
 - OECD Guidelines allow all t.p. methods, ranging from functional analysis to single transaction price, excluding only global formulary apportionment
 - depends on circumstances which method in a specific case leads to the most acceptable outcome

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