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Session on Cross Border Information

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1. Overview of Information Obligations of Dutch Taxpayers[2]

1.1. In the beginning

In the beginning, the tax inspector is uninformed. Without information about the taxable facts, he cannot levy tax. In order to obtain information, certain competences are granted to him. These competences are granted to the "tax inspector" under the General Tax Act (GTA). Details regarding who is considered a "tax inspector" and who can act on his behalf are further regulated in implementing regulations.[3]

1.2. Obligation to file a tax return

The starting point for the levy of income tax and corporate income tax – the areas to which I restrict myself in this introduction – is the obligation for resident taxpayers to submit a tax return on the worldwide income derived in a certain year.[4]

Article 8, paragraph 1 of the GTA provides as follows:

"Every person who has been requested to submit tax returns is obliged to do so by:

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1 Justice, Court of Appeal Amsterdam.

2 See: L.A. de Blieck, J. de Blieck, E.A.G. van der Ouderaa, R.J. Koopman & J. Wortel, *Algemene Wet inzake Rijksbelastingen (General Tax Act)* (Kluwer Deventer 2015), chapter 4.

3 In the past, there were hundreds of officers appointed by the Crown with a regional competence in a specific area (such as income tax, corporate income tax or value-added-tax). Currently, as a result of a centralization of authority, only a few persons are designated as "the inspector". They have nationwide competence. Thousands of civil servants exercise, in their name, the competences of "the inspector".

4 At the time, mr. N.G. Pierson, as Minister of Finance, defended the desirability of the introduction in 1894 of a system "of the submission of an own tax return" for the property and business tax, with a reference to the "recent experience gained in Prussia, which has shown the excellence of the system over that of ex officio assessments so clearly". G.M. Boissevain, *De jongste Belastinghervorming in Nederland in verband met de geschiedenis van 's Rijks financiën sedert de grondwetswijziging van 1848 (The latest tax reform in the Netherlands in connection with the history of the country's finances since the amendment of the constitution of 1848)* (P.N. van Kampen en Zoon, Amsterdam 1894), at 244.

a. providing the data requested in the request clearly, positively and without reservation by means of filling out, signing and submitting, or sending forms in the manner to be set by ministerial decree, as well as
b. filing or submitting, in the manner to be set by ministerial decree, the documents or other data records or the contents thereof requested in the request [...]".

This obligation presumes that the tax inspector has "requested"[5] the taxpayer to submit a tax return. Entrepreneurs are currently obliged to do so electronically (in digital form), and private individuals will soon be obliged to do so, as well.[6]

If no tax return is submitted or if the facts included in the tax return are not sufficiently accurate, the tax inspector may determine the tax assessment (ex officio) using estimates. If contested, the judge may test this estimate with (on the basis of) the general principles of proper administration (such as the prohibition of arbitrariness).

Moreover, if no tax return is submitted or if the facts included in the tax return are not sufficiently accurate, an increased burden of proof applies. In such case, the taxpayer must show convincingly that the tax assessment determined by means of estimation is too high.

Furthermore, if the failure to submit a tax return or the submission of an incorrect or incomplete return, is caused by the intent of the taxpayer, an administrative penalty may be imposed up to a maximum of 100% of the tax assessment imposed as a result of that offence (under articles 67d and 67e of the GTA).

1.3. Obligation to provide information

Based on article 47 et seq. of the GTA, the tax inspector is authorized to request information from the taxpayer. Article 47, paragraph 1 of the GTA provides as follows:

"If so requested, every person shall:
a. provide the inspector with any data and information which may be of importance to the levying of taxes on that person himself;
b. make available for that purpose the books, records and other data carriers, or the contents thereof – at the choice of the inspector – the examination of which may be of importance to ascertaining such facts as may influence the levying of tax on that person himself [...]".

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5 Although the legal term is literally translated as "to be invited", it actually means "to be obliged".

6 Unless the Upper House were to bring about a change in a bill to that effect.

Because a resident taxpayer in the Netherlands is subject to tax on his worldwide income, this information may also relate to items of income from abroad. A condition in this regard is that the information requested by the tax inspector may be relevant for the imposition of tax on the taxpayer. This criterion grants the inspector significant leeway. Nevertheless, at all times the inspector must have a concrete indication that justifies the request for information in a given case.

An example: if the inspector has a reasonable presumption that a taxpayer has a foreign bank account which is not reported in the tax return (or had such account in the past), a question relating to that bank account may be relevant for the determination of the tax claim. Therefore, in this case it cannot be held that the inspector lacks authorization to request the provision of information.[7]

If the *existence* of requested information is contested, the inspector must prove (make plausible) the existence of such information.[8]

If the information requested by the inspector is in the possession of a third person, such as an external service provider, that third person is obliged to make this information available for examination (under article 48, paragraph 1 of the GTA).[9] Article 48, paragraph 1 of the GTA provides as follows:

> "The obligation referred to in Section 47, Paragraph 1, Subsection b shall apply without prejudice to any third party at whose premises are located data records of the person who is obliged to make these data carriers, or the contents thereof, available to the inspector for his examination [...]".

I presume that this obligation does not apply to third persons who are not resident in the Netherlands.

If a third person located abroad – for example a Luxembourg bank – has information that *may* be of interest for the levy of tax in the Netherlands, it may be expected that the (Dutch) taxpayer concerned will endeavour to make that information available. If he fails do so, this

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7 *Compare* SC, 1 Nov. 2013, BNB 2013/254 and 255.

8 This applies in particular with regard to the proof of the *existence* of evidence which is independent of the will of the taxpayer, as for example follows from SC, 24 Apr. 2015, ECLI:NL:HR:2015:1137.

9 If that third person does not provide the data, this does not result in a (reversal and) aggravation of the burden of proof for the taxpayer.

may have adverse consequences for him as regards legal proof.

It is not clear whether the tax inspector can oblige a Dutch company as a holding of a foreign subsidiary to provide information that actually is in the possession of that subsidiary and may be relevant for the taxation of the Dutch (parent) company. The State Secretary of Finance takes the position that this is possible, but various authors are of another opinion.

Regarding the submission of information which actually is in the possession of a foreign parent or sister company, from 21 March 1991 a specific and – in its application – quite complicated provision has entered into force (article 47a of the GTA).[10] However, I am not aware of any procedures before the courts concerning this provision.

Furthermore, from 1 July 2011, the inspector *may* determine the fact – to be stated by him – that a taxpayer has not met his information obligation by means of an order. This (separate) order is subject to objection and appeal by the taxpayer.[11] Since that date in 2011, it therefore is possible in the Netherlands to invoke legal remedies to distinct tax control measures of the inspector. A requirement here is that the tax inspector issues an 'information order'. This is of importance for the tax inspector, because in cases where the taxpayer has failed to meet the information obligations under article 47 of the GTA, the specific sanction of reversal and aggravation of the burden of proof (article 27e GTA) applies only if the information order has been irrevocably issued.

If the taxpayer fails to meet the obligation to submit information to the inspector and the inspector did not state this failure by means of an 'information order, the inspector (probably) *may* also determine the assessment based on an estimates. What could he do otherwise, if his questions concerning a possible undeclared item of income have not been answered? With regard to such an estimate as well, the tax inspector must not lose sight of reasonability.

1.4. Obligation to keep proper accounting records and to retain the data carriers belonging thereto

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10 Law of 7 March 1991, Official Gazette 1991, 191.

11 Law of 27 May 2011, Official Gazette 2011, 265.

Entrepreneurs are subject to the obligation to administer the rights and obligations of the company and of all other data which are relevant for the levy of tax. Furthermore, all those data must be retained for a period of at least 7 years. This obligation, of course, also applies for a permanent establishment of a foreign company established in the Netherlands. If this obligation is not met, the same sanction as mentioned before regarding reversal and aggravation of the burden of proof, applies.

Article 8b, paragraph 3 of the Corporate Income Tax Law contains a specific provision under which –briefly said – companies are obliged to enter into the accounts the data that are indicative of the manner in which transfer prices are determined and whether such prices are determined in line with arm's length conditions.

1.5. No administrative penalty

Regarding the failure to meet the above-mentioned information obligations in the Netherlands as such, the tax inspector has no authority to impose an administrative penalty.

2. Restrictions on the Exercise of Authority by Tax Inspectors

As will be the case in most countries the exercise of authority by the tax inspector is not unlimited. It is of course not intended that a tax inspector goes beyond the borders of his authority. In this context, the following guarantees apply.

2.1. The text of the legal provision concerned and the possibility of a judicial opinion concerning the interpretation and application of the provision

The question as to whether the information requested by the tax inspector *might* be relevant, can be tested by a judge – marginally – as regards (on the basis of) compatibility with general principles of proper administration. However, it is not the intention that the judge should thereby step into the shoes of the tax inspector. This implies, amongst other things, that in assessing the exercise of authority, there will be a certain objectification, asking whether the tax inspector could reasonably exercise his authority as he did.

2.2. General principles of proper administration

The notion that the authority of an administrator must be restricted, specifically as regards the manner in which the administrator exercises its tasks, is already very old. For example this notion can be found in paragraph 31, regarding the capacities that the Cellarer[12] must possess, according to the sixth century Originating Rule for the monks of Saint Benedict.

The attachment, under Dutch tax law, to the principles of proper administration in the exercise of information authority was explicitly recognized by the Supreme Court in 1986.[13] Above, the "reasonability" to be observed by the inspector has already been pointed out. In addition, I mention the prohibition of "*détournement de pouvoir*" and the motivation principle. The subsidiarity principle, here, most likely, does not apply as peremptory norm. In this context, the introduction of the principle of "fair play" is a recent one.[14]

2.3. General principles of procedural law

The GTA does not set a limit on the procedural scope of the information authority of the tax inspector. In order to guarantee the procedural equality of parties in a procedure before a tax judge with regard to the exercise of the information authority, the Supreme Court has drawn a sharp line at this point: as soon as the taxpayer has appealed a decision of the tax inspector before a judge, the particular inspector may – for the dispute which is before the court – no longer use his information authority with respect to this taxpayer.[15]

2.4. Administrative penalties

If the exercise of authority also concerns the imposition of a penalty to be imposed by the tax inspector, the assessment framework is also determined by article 6 of the European

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12 See: htttp://www.osb.org/rb/text/rbemjo1.html#31. It is not difficult to recognize in this text at least three norms, which at present have found their application in administrative law as general principles of administrative law.

13 SC, 8 Jan. 1986, BNB 1986/128.

14 This arose in a procedure where the inspector had requested that he be able to inspect a taxpayer's "due diligence" report, which report was (also) intended to reveal (or to advise on) the position of the taxpayer. In thi case, the Supreme Court (in an ancillary consideration) concluded that it is incompatible with the principle of fair play for the inspector to use his information authority to ascertain the contents of such a report, SC, 23 Sep 2005, BNB 2006/21.

15 SC, 10 Feb. 1988, BNB 1988/160.

Convention on Human Rights (ECHR) and article 14 of the International Covenant on Civil and Political Rights. In retrospect, it was surprisingly long before the imposition of administrative tax penalties (such as when, with intent, no tax return is filed or the tax return reflects a tax liability that is too low), given the nature of the offense and the character of the sanction, was recognized as prosecution under article 6 of the ECHR.[16]

Article 6 of the ECHR contains various guarantees for the purpose of a fair trial. Among these, the right to remain silent, in particular, raises the question as to how this right relates to the obligation to submit information to the tax inspector. The starting point is that article 6 applies to prosecution (including the imposition of fines), but not to the levy of taxes as such. Consequently, in cases where both the imposition of a fine and the levy of taxation is at stake, the Supreme Court has ruled that article 6 does not include restrictions with regard to the exercise of information authority by the inspector (in this respect there is no right to remain silent).[17]

However, to the extent that the exercise of the information authority (also) involves an administrative penalty, following the decision of the European Court of Human Rights of 17 December 1996 (Saunders),[18] article 6 of the ECHR implies a restriction on the exercise of information authority regarding evidence obtained under pressure, if it concerns material that is dependent on the will of the suspect/taxpayer. The restriction refers to the character of the evidence, specifically the question as to whether the evidence, in a physical sense, exists independent of the will of the taxpayer.[19]

2.5. Concurrent obligations

But what should a taxpayer do who is confronted with the urgent request from a tax inspector to respond to a certain question, for example an adjusted tax return based on data obtained by the inspector from a foreign bank. If the taxpayer complies with this request, he will assist in

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16 ECHR, 12 Feb. 1984, *Ozturk*, Publications de la Cour Europeenne des Droits de l'Homme, Serie A, vol. 73; SC, 19 June 1985, BNB 1986/29.

17 SC, 11 Dec. 1991, BNB 1992/243.

18 ECHR, BNB 1997/254 (para. 69). *See also* ECHR 3 May 2001, *J.B. v. Switzerland*, BNB 2002/26, pt. 64.

19 SC, 24 Apr. 2015, ECLI:NL:HR:2015: 1130.

his own conviction. However, if he relies on his right to remain silent[20], he risks a reversal and aggravation of the burden of proof as a sanction for not complying with the information obligation under article 47 of the GTA.

This dilemma has found a solution in the case law of the Dutch Supreme Court by means of exclusion of evidence. Essentially, this approach still obliges the taxpayer to respond to a question of the tax inspector. However, such response may not be used as evidence for the penalty to be imposed. If a penalty is based on material which is dependent on the will of the taxpayer (ECRM Saunders), it is for the judge who decides on this penalty to determine which consequences should be attached to that specific circumstances.[21]
Both issues are usually included in a single procedure, such that the judge rules on both the penalty and the assessment. Needless to say that the exclusion of evidence-approach imposes certain demands on the ability of the judge not to be (subconsciously) influenced in his judgement concerning the penalty, by his judgement concerning the assessment.

2.6. Restrictions on the use by tax inspectors of unlawful criminal evidence

Another situation in which exclusion of evidence can arise is seen where an inspector wants to prove the correctness of a tax assessment by means of evidence against the taxpayer which is obtained unlawfully in criminal sense. In such a case, the exclusion of evidence can arise only if the evidence is obtained, according to the Supreme Court, "in a manner which so contravenes what can be expected from a decent acting government that this use is inadmissible in all circumstances".[22] From this, it follows that the threshold for the exclusion of evidence which is unlawfully obtained against the taxpayer is very high.

Another complication arises if evidence is obtained from abroad. This was the case, for example, with respect to data (microfiche) concerning Dutch holders of accounts with a bank in Luxembourg which the Dutch tax administration (spontaneously) obtained from the Belgian tax administration in 2000. The obtaining of this information by the Belgian tax administration was preceded by a theft or embezzlement in Luxembourg. If it could already

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20 Since 1 July 2009, included in article 5:10a, paragraph 1 of the General Administrative Law.

21 SC, 24 Apr. 2015, ECLI:NL:HR:2015:1130, para. 3.4.6.

22 SC, 1 July 1992, BNB 1992/306, confirmed in SC, 20 March 2015, ECLI:NL:HR:2015:643.

be concluded that the microfiches were obtained unlawfully in a criminal sense, this does not plainly mean that those data were to be regarded as having been obtained by the Dutch tax administration in a manner which so contravenes what can be expected from a decent acting government, that the use of those data must be held inadmissible. In the procedure before a Dutch court, it was held to be of importance that there was not a single indication that the Belgian tax administration played a role in the theft of the microfiche, and that otherwise there was no reason for the Dutch tax administration to presume that, by the obtaining of the data, such a fundamental right of the persons mentioned in the microfiche was infringed that the commencement of an investigation into the fiscal relevance of those data must be held inadmissible.[23]

As a consequence, the use of data which emanate from a tipster abroad is, in principle, allowed.

2.7. Non-disclosure right of tax inspectors

One of the unique aspects of Dutch formal tax law is the non-disclosure obligation under article 67 of the GTA, paragraph 1 of which provides as follows:[24]

> "It is forbidden for any person to disclose, to any further degree than is necessary for the enforcement of the Tax Legislation or for the levying or collection of any national tax, anything which, in the course of any activity for the enforcement of the Tax Legislation, or in connection therewith, comes to light or is divulged to him about the person or the business of another person [...]".

In a controversial case (which – and this calls for restraint – is still pending before the court) concerning a (presumed) holder of an account with a foreign bank, the taxpayer tried to obtain the name of the tipster.[25] The taxpayer has seeked to provide proof for the thesis that the data provided by the tipster are obtained by the Dutch tax administration in manner which so contravenes what can be expected from a decent acting government that the use of those data must be held inadmissible (see the norm mentioned under section 2.6., second paragraph). One of the issues in this case concerns whether article 67 GTA implies a general right of non-disclosure for the tax inspector in situations where the inspector is called as a witness in a tax

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23 SC, 21 Mar. 2008, BNB 2008/159, para. 3.4.1. to 3.4.3.

24 Article 67, paragraph 2 of the GTA contains exceptions to the first paragraph.

25 Court of Appeal of Arnhem-Leeuwarden, 3 Feb. 2015, ECLI:NL:GHARL:2015:645.

procedure.

Furthermore, it is at issue in this context whether (and that has not yet been determined) the tax inspector's right of non-disclosure is not absolute, but relative, such that its application of this right concretely requires a balancing of interests: does the interest of the state in combating fraud justify that the name of the tipster in a particular case is kept secret and the taxpayer is impeded in his right of defence, to the extent that he is deprived of the possibility to call the tipster as a witness?

3. At the end: another witness issue

In 2008, the Court of Appeal of Amsterdam approached the Court of First Instance of Antwerp in a case involving the liability for tax debts concerning the hiring of Polish employees, to hear a certain individual based on the application of Regulation (EC) No. 1206/2001, OJ L 1741/1 on the cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.[26] The judge of the Court of Appeal of Amsterdam concluded his request with the following remark: "If, at your side, doubt exists with respect to the scope of Regulation 1206/2001, I request that you follow the procedure determined therein in this case for practical reasons". The judge of the Antwerp Court answered in the negative: "The request does not come within the scope of this Regulation". Regulation 1206/2001 concerns "civil and commercial matters", but not disputes between a taxpayer and the tax inspector or tax administration. The Amsterdam judge agreed with this opinion.

Based on this observation, the possibility to hear a witness who resides abroad and who does not cooperate to testify there under the legal procedural rules of the country where the lawsuit is being heard, seems to have been exhausted in disputes between a tax inspector and a taxpayer. I am not aware of any regulation, comparable to regulation 1206/2001, which in such a situation would provide for cooperation between the courts of two different states. Although there may not be a very frequent need for such a regulation in tax disputes, where such a regulation exists for civil and commercial matters and in criminal cases specific treaties provide for mutual legal assistance, it is difficult to understand why a regulation

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26 Court of Appeal of Amsterdam, 19 Nov. 2009, 07/00248 ECLI:NL:GHAMS:2009:BK8478.

which provides for cooperation between judges of different states could not be adopted also for tax cases.

Moreover it is very well possible that the intensifying of international exchanges of information for the levy of taxes will increase the need for a regulation like Regulation (EC) No. 1206/2001. If at this point a gap indeed exists, I close this presentation with the question as to whether the IATJ could bring this to the attention of the relevant bodies.