

Permanent Representative of  
the Kingdom of the Netherlands  
to the European Union

Brussels, 8 June 2015

I have the honour to enclose a letter from Mr. Eric Wiebes, State Secretary for Finance of the Kingdom of the Netherlands, with reference AFP/2015/459, which was received today 8<sup>th</sup> of June.

Please accept honourable Member of Parliament, the assurances of my highest consideration.

Pieter de Gooijer

Mr Alain Lamassoure  
Member of the European  
Parliament  
Chair of the TAXE Committee  
ASP, 13E105  
Rue Wiertz 60  
1047 Brussels

European Parliament  
TAXE Committee  
Mr Lamassoure  
rue Wiertz 60  
B-1047 Brussels  
Belgium

Date

Subject: Reply to request for information

Dear Mr Lamassoure,

First of all, many thanks for the agreeable discussion that we had when your TAXE Committee visited the Netherlands on Friday, 29 May 2015, as part of your committee's investigation into fiscal rulings and other similar measures or measures with similar effects. I hope and trust that the presentation given by Tax Department staff concerning the APA/ATR practice and the subsequent exchange of views with your committee served to clarify various aspects of the practices adhered to in the Netherlands. You stressed that your investigation was not an investigation into practices in a limited number of Member States but was concerned with all 28 Member States. In view of the limited time available, however, I was unable to answer all your (technical) questions. Below, I shall answer the questions which remain open, as I promised to do on Friday, 29 May. First, however, I shall respond to your letter of 23 April 2015 containing the request for information. Please also find enclosed additional documents, some of which should help you to establish as complete a picture as possible of the APA/ATR practice in the Netherlands.

In your letter you said that you would appreciate receiving further information about initiatives at national level in the field of transparency and measures against tax avoidance. In addition, you said that you would like to receive overviews of rulings which have been issued, information exchanged with other Member States, a black list and international tax conventions. You will find my reply, subject by subject, below.

#### **National initiatives to increase transparency**

The Netherlands aims to play a pioneering role in increasing transparency in connection with efforts to tackle tax avoidance by businesses. The Netherlands accordingly supports the improvements which have been made in the field of country by country reporting in the OECD. At present, the Netherlands Government is working on incorporating the OECD's recommendations into national legislation. This legislation will enter into force on 1 January 2016. As a result of this legislation, international undertakings with a turnover of € 750 million or more will be required to provide a breakdown of their worldwide profits and of the tax paid in a country by country report. The tax authorities of the country where the head office is located will forward this information to the countries where the undertakings have branches.

In addition, the Netherlands is already cooperating fully in information exchanges upon request. The Netherlands also supports the European Commission's initiative to introduce automatic exchanges of information about rulings. The Netherlands agrees with the

Commission that the directive should moreover require Member States to exchange information automatically concerning similar agreements with businesses which they do not formally call rulings. It is also important that the ultimate directive should be efficient and readily applicable by tax authorities.

An excellent example of the pioneering role that the Netherlands aims to perform in increasing transparency is the agreement with Germany (memorandum of understanding) concerning exchanges of information on rulings. This MoU will shortly be signed by the two countries.

The Netherlands also unilaterally and spontaneously exchanges information on companies with low levels of substance whose operations mainly comprise receiving interest or royalties with countries where the companies have invoked the tax convention, an arrangement comparable to a convention with the Netherlands or the Directive on interest and royalties (Article 3a of the Implementing Decree on international assistance in levying taxes).

### **National initiatives to limit BEPS**

Dutch legislation contains various provisions to help prevent base erosion and profit-shifting. Without aspiring to supply a complete list, I should like to mention the following:

- Allied entities are required to apply realistic transfer prices in relation to one another. Under the arm's length principle, corrections may be made to unrealistic transfer prices (Article 8b of the Corporation Tax Law 1969).
- No offsetting of taxation at source with Dutch corporation tax where the entity based in the Netherlands receives and passes on interest and royalties within a group without any real risks being run on balance (Article 8c of the Corporation Tax Law 1969).
- No deduction of interest on a loan which effectively functions as equity capital (Article 10(1)(d) of the Corporation Tax Law 1969).
- The provision against syphoning off profits by means of artificially created interest deductions where the interest is payable to an allied person or entity (Article 10a of the Corporation Tax Law 1969).
- The provision against international mismatches involving long-term low-interest or interest-free loans between allied entities (Article 10b of the Corporation Tax Law 1969).
- No participation exemption for revenue from low-taxed passive forms of participation (Article 13(8) of the Corporation Tax Law 1969).
- The compulsory annual revaluation of a low-taxed passive form of participation which represents an interest of at least 25 % (Article 13a of the Corporation Tax Law 1969).
- The limit on the deduction of excessive interest associated with the financing of a participation (Article 13(l) of the Corporation Tax Law 1969).
- The limit on the deduction of interest in the case of excessive takeover debts (Article 15(a)(d) of the Corporation Tax Law 1969).
- Liability to taxation for foreign entities which have an interest of at least 5 % in a Dutch company with the aim of evading income or dividend tax in another (Article 17(3)(b) of the Corporation Tax Law 1969).
- Exclusion of the offsetability of losses from holding and financing operations against income from other operations of an entity (Article 20(4) of the Corporation Tax Law 1969).
- Additional substance measures laid down in various policy decisions<sup>1</sup>.

Internationally too, the Netherlands seeks to prevent base erosion and profit-shifting, for instance by including anti-abuse measures in conventions. For example, the Netherlands has taken the initiative of proposing to 23 developing countries that anti-abuse provisions be

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<sup>1</sup> Decree on service providers and assurance ex ante DGB 2014/3101 and Decree on the treatment of requests for assurance ex ante in the form of an advance tax ruling DGB 2014/3099.

inserted in conventions.

### **Overview of rulings issued**

Please find enclosed (Annex 1) an overview of the number of rulings issued per annum, distinguishing between applications approved (per type of ATR), rejected and withdrawn/consideration of which has been cancelled. The breakdown between those rejected, withdrawn and cancelled differs from that provided in the annex to the letter to the House of Representatives concerning the provision of information about rulings (see supplementary information). However, the totals for these categories correspond.

### **Overview of information exchanged with other Member States**

Please also find enclosed (Annex 2) an overview of information exchanged, distinguishing between Member States and indicating whether the exchange was spontaneous or automatic.

### **Black list**

In the Netherlands, no black list is used. However, the Netherlands does for example refuse to apply the participation exemption for income from a passive mode of participation in an entity in a low-tax jurisdiction. In that case only holding compensation applies. The level of taxation in a jurisdiction can thus affect the application of the participation exemption. This rule is related not to a particular country but to the specific situation of the undertaking and the rate of taxation in the country where it operates.

### **Tax conventions**

The Netherlands does not conclude tax conventions which have the effect of reducing corporation tax rates. Bilateral tax conventions assign rights to levy tax so as to avoid double taxation. Tax conventions also constitute a basis for exchanging information.

### **Questions which remain open**

During the discussion on 29 May 2015, certain technical questions remained unanswered, for lack of time. I have done my best to treat them abstractly, without reference to individual cases. That is because I cannot discuss the specific circumstances of a taxpayer. A member of your committee asked what happens if it emerges that the transfer price agreed between taxpayers differs from the transfer prices agreed in the APA. In that case the taxpayer does not comply with the agreement, with the result that the APA lapses.

Another member of your committee asked a question about our innovation box<sup>1</sup>, wishing to know how it operates in the case of software which has been developed 80 % in India and 20 % in the Netherlands. Such cases are treated in accordance with the OECD transfer pricing guidelines, ascertaining what would be realistic remuneration for the work performed in each of the two countries. In the case of development 80 % in India and 20 % in the Netherlands, with similar roles being performed in both countries, the vast majority of the profit would be attributed to India. The Netherlands can levy tax on realistic remuneration for the contribution to development made in the Netherlands. The innovation box cannot be applied to this realistic remuneration, because the Dutch entity is insufficiently involved in the development of the asset. As a result, the conditions of the innovation box are not met, because there will not be a self-developed intangible asset.

However, there may also be cases in which the distribution of labour is less extreme and where important R&D tasks have been carried out in the Netherlands and more routine

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<sup>1</sup> Cf. Decree of 1 September 2014, no BLKB2014/1054M. This decree follows up the innovation box of Article 12b of the Corporation Tax Law 1969.

work in India. In that case, the centre of the R&D would be located in the Netherlands. Under the OECD transfer pricing guidelines, India could levy tax on realistic remuneration for the work performed in India in that situation. The Netherlands could levy tax on the remaining profits generated from the asset. In such cases the innovation box could be applied in the Netherlands, provided that all requirements of the innovation box were met, including the requirement that the asset constituted a self-developed intangible asset. This would only be the case if the taxpayer had the power of decision and was functionally capable of directing the R&D work. One of the requirements for this is that the taxpayer must possess sufficient technical knowledge.

Lastly, during our discussion a number of questions were also asked about the substance requirements which apply in the Netherlands. In the answers it was stated that few countries apply stringent substance requirements in the same way as the Netherlands to companies which are resident and which request ex ante assurance for international transactions. An international comparative study, to which reference was made then, can be found in a publication by PricewaterhouseCoopers from 2009. It is '*Substance, aligning international tax planning with today's business realities*' by Axel Smits and Isabel Verlinden (ISBN 9789081207324).

### **Further information**

Please find enclosed as annexes (Annexes 3-8) to this letter a report by the Netherlands Court of Audit, which has conducted a survey of tax avoidance, a letter to the House of Representatives concerning the provision of information on rulings, the government's response to a report by the independent researcher SEO concerning special financial institutions and the shadow banking system, the letter to Commissioner Hill on the impact assessment in connection with country by country reporting, the PowerPoint presentation on Dutch practice with regard to rulings and a list of countries with which the Netherlands has a full tax convention.

Yours sincerely,  
the State Secretary for Finance,

Eric Wiebes