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Dutch Tax Authorities Publish Mutual Agreement Procedures Report

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The Dutch tax authorities' 2023 Mutual Agreement Procedures report demonstrates the rising demand for international dispute resolutions but also for more advance certainty as more bilateral and multilateral advance pricing agreements have been resolved, says a KPMG Meijburg & Co practitioner.

Multinationals increasingly find themselves in tax disputes — not only with just one tax authority, but more and more often with tax authorities in several countries. Multinationals frequently have many different (intercompany) transactions, agreements, and contracts among themselves. Although multinationals want to avoid double taxation, when a tax inspector in one country makes a correction to the price for a product or service, the tax inspector in the other country often does not follow this exact correction, and the taxpayer ultimately pays tax on the same profit in two countries.

Transfer pricing cases mainly concern the allocation of profits between affiliated companies or the allocation of profits to permanent establishments and may relate to the solution of a dispute ("dispute resolution") or to the provision of certainty in advance ("dispute prevention") through an appointment in the form of an Advance Pricing Agreement (APA), Bilateral APA (BAPA), or multilateral APA (MAPA) if there is an APA in more than one country involved. The annual Dutch tax authorities report shows the following Dutch statistics.

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Year-ending:	2019	2020	2021	2022	2023
BAPA received	23	23	19	31	28
BAPA resolved	21	13	15	14	29
MAPA received	2	2	0	4	8
MAPA resolved	0	1	0	6	0

Consequently, the demand for international advance certainty is increasing also in the Netherlands, and in addition to the BAPAs, there appears to be gradually more attention being paid to APAs in a multilateral setting. This is also evident from the rising trend in the above table.

Initially, proper compliance (with local tax laws) and prevention is always the best cure. In this context, an APA can be considered. When prevention is no(t) (longer) possible, several options are available to resolve a dispute. A Mutual Agreement Procedure (MAP) is one of those dispute resolution options. Most international procedures, such as a MAP, take place between states as a diplomatic process. The moment a taxpayer enters into such a procedure, the taxpayer may be at the mercy of how those countries set up the MAP procedure, what kind of information they exchange, and the quality of the tax authorities that look at it. In addition, a taxpayer may have little influence on the outcome of a MAP process. If a deal is concluded between two or more countries during the negotiation that a taxpayer was not looking forward to, there may be the option for the taxpayer to reject the MAP outcome altogether.

Also, in a MAP case, the competent authorities of both treaty partners are obligated to negotiate and endeavor to eliminate double tax arising in accordance with the arm’s length principle, as well as other taxation not in accordance with the applicable treaty. Ever more tax treaties include mandatory binding arbitration as a backstop to MAP. For the Netherlands, an increasing number of Dutch tax treaties contain an mandatory arbitration clause. The policy of Dutch tax treaty negotiators has been to include mandatory arbitration procedures in its tax treaties. Another change is since the Multilateral Instrument (MLI) becoming effective for the Netherlands on January 1, 2020, and consequently more mandatory arbitration clauses apply with ever more other countries.

Having said this, a well substantiated MAP request may help the competent authorities in the other state to better defend the position of the taxpayer against the competent authorities in the state where the correction was made. Multinationals may think that these types of MAP procedures resolve all tax disputes. It doesn’t have to be that way. There may be various reasons why a dispute is ultimately not resolved or only partially resolved. So a MAP is not a holy grail, neither in an EU nor in a tax treaty (MLI) context.

Dutch MAP Team

In the Netherlands, the core task area of MAPs was transferred from the Ministry of Finance to the Dutch Tax Authorities as from January 1, 2022. A “MAP team” has been established within the International unit of the Dutch Tax Authorities. In 2023, the MAP team’s annual report was published by the Dutch Ministry of Finance on August 2, 2024 and is shown and discussed below.

Key Dutch Figures 2023

Subcategory	Opening 2023	Received	Dealt with	Closing 2023
Interpretation Cases	409	240	220	429
TP Cases	209	60	79	190
Triangular/Multilateral Cases	10	6	4	12
Tiebreaker Requests	22	14	20	16
Subtotal	650	320	323	647
Protective MAP (request not yet officially submitted but within the applicable period to preserve taxpayer rights)	46	7	14	39
BAPA	91	28	29	90
MAPA	18	8	0	26
Objection	3	6	4	5
Prefiling	11	17	24	4
Totals	819	386	394	811

The increase in the number of MAPs in recent years is evident above from the interpretation cases where the stock of work in progress has shown a steady upward trend in recent years. This increase is both the result of more tax correction and double taxation issues, but also due to ever more taxpayers seeing and using the MAP route.

Year-ending:	2019	2020	2021	2022	2023
TP cases received	80	93	42	86	60
TP cases resolved	77	71	51	51	79

The trend of transfer pricing cases is positive. In 2023, the number of resolved cases has steadily increased and fewer new requests have been received in the Netherlands. The ending stock is therefore lower than the stock at the beginning of 2023 that is also a great achievement of the Dutch MAP team.

This Dutch MAP team is responsible for mutual agreement procedures and consults with foreign competent authorities to eliminate double taxation or incorrect treaty application. In addition, the MAP team is responsible for international negotiations for BAPAs or MAPAs.Interpretation cases concern all other cases of double taxation or taxation that conflicts with a bilateral treaty. These cases often concern private individuals with, for example, issues regarding income tax or payroll tax when working cross-border, persons living abroad who receive income from Dutch sources (such as pensions, dividends and real estate), or vice versa. Interpretation cases in which companies are involved often relate to whether or not withholding taxes on dividends or interest or royalties are rightly withheld and whether or not there is a permanent establishment in the Netherlands or abroad.

The Dutch MAP team has been designated as the competent authority for mutual agreement procedures under bilateral tax treaties, the Arbitration Convention, and the Fiscal Arbitration Act. The MAP team acts on a different mandate than the Dutch tax inspector. Based on this mandate, the MAP team independently determines its position where appropriate.

2022 MAPs

In the first year of its existence (hence in 2022), the Dutch MAP team saw a sharp increase in the number of new MAP requests received, more than in previous years. 2022 was a transition year with the recruitment process for the new MAP team still underway. The build-up of the new team coincided with the takeover of the existing stock of mutual agreement procedures and the handling of newly arrived cases. The MAP team started with a basic workforce of 8 full-time employees (FTEs). Over the course of 2022 and 2023, the Dutch MAP team has been expanded to a workforce of 23 FTEs.

2023 MAPs

The reporting year 2023 is the first year in which the MAP team was fully operational. In 2023, the number of new MAP requests received remained approximately the same as the number of MAP requests received in 2022. The receipt of new MAP requests is a variable that largely depends on events in the Netherlands and its treaty countries, over which the MAP team has little or no influence. This could include actions - such as corrections imposed by a treaty country - that lead to (threatening) double taxation or requests for bilateral or multilateral certainty in advance.
The Dutch MAP team's approach is aimed at ensuring that taxpayers obtain tax certainty within a reasonable period. As per the OECD BEPS action 14 minimum standard, ideally that period would be 24 months. The Dutch MAP typically seeks to remain within this timeframe. However, it takes two to tango and the Dutch MAP team is always dependent on the timing and MAP process of other countries.

At the end of 2023, it was announced during the OECD's annual Tax Certainty Day that the Dutch MAP team had won two OECD awards for the starting year 2022. These awards were presented in five categories and the MAP team won two out of the five awards, namely for "Best Average Time, Transfer Pricing Cases," and "Most Improved Jurisdiction". For the first year (2022) of the team's existence, this was indeed a big achievement.

2024 and Future Years

The number of cases in progress at the end of 2023 has remained the same or, in fact, even slightly lower than the opening stock of 2023. The Dutch MAP team hopes to continue this trend in 2024 and later years and not have a MAP stock annually increasing.

MAP Procedure

The Dutch MAP aim is to handle cases expeditiously within the internationally agreed deadlines and to inform stakeholders as adequately as possible about the process. However, no information is shared with taxpayers about the substantive exchange of views with other countries, as this exchange between treaty partners is considered confidential. The exchange of views between countries initially takes place in writing and for less complex matters, a written exchange can sometimes suffice. More generally, however, most cases are resolved during joint discussions ('competent authority (CA) meetings') with treaty partners. The MAP team therefore urges the treaty partners to regularly hold CA meetings.

Since the pandemic, it has become common to maintain contact via video calling in order for the parties to speak to each other regularly to build relationships and mutual trust. Treaty partners should invest in mutual understanding and also meet and speak to each other regularly. Within the MAP team, an efficient and effective mix of digital and physical meetings is strived for, whereby the team is, of course, also dependent on the available resources (both in personnel capacity and financial budget) of the treaty partners. In 2023, 34 CA meetings took place, 16 of which were in person. For this purpose, a CA meeting is defined as a meeting between competent authorities where at least two matters are discussed. In addition, various discussions took place in which an individual complex case was the subject of discussion.

Alternative Dispute Resolution

There are alternative procedures, such as mediation or so-called ‘investor-state arbitration’ based on investment protection agreements (IPAs). IPAs aim to endorse investments by foreign companies in a country by protecting these investments. Such IPAs state, for example, that a foreign investor must be treated fairly and no worse than a local investor. These are treaties between different countries that may also cover some tax aspects and disputes. These IPA procedures are expensive and complicated, but a state can be ordered to pay damages by arbitrators (experts) if a company is treated in an unfair manner. It is a way to resolve a conflict without involving the tax court and where ‘justice’ takes place by arbitrators in specially designated investment tribunals. In some IPAs, tax disputes are excluded from arbitration, and it is important to look carefully at any applicable treaty in every situation.
Also, one can use this non-tax arbitration option of IPAs when one has submitted a MAP request in a country and there is no response from abroad. States are not eager to be involved in such IPAs that are public in nature. It is an alternative method that can also be used in addition to a MAP to put pressure on the boiler and by some it is called a ‘turbo-MAP’ for this reason.