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Dutch Tax Rulings: 2023 Insights and Developments

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KPMG Meijburg & Co. practitioners analyze the Dutch State Secretary for Finance's 2023 annual report to Parliament on their ruling practice and discuss trends in ruling requests and the shift from unilateral to bilateral and multilateral APAs.

This article delves into the 2023 key changes in Dutch tax rulings, analyzes the trends in ruling requests, and highlights the shift from unilateral to bilateral and multilateral Advance Pricing Agreements (APAs).

There is a (rather new) policy in the Netherlands which includes strict requirements for concluding international rulings by July 1, 2019. The policy sets out the parameters in which a Dutch ruling will not be able to be decided that includes the following:

- There is insufficient economic nexus (substance) in the Netherlands;
- The sole or decisive reason for the transaction is to save Dutch or foreign tax;
- The transaction takes place with an entity established in a country appearing on the Dutch list of low-taxed and non-cooperative jurisdictions; and/or
- The applicant(s), the directors of the applicant(s), and the ultimate beneficial owners or any intermediaries with an (in)direct interest in the applicant(s) of greater than or equal to 5% appear on the EU sanctions list.

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The Dutch State Secretary for Finance provided the Parliament with the 2023 annual report on the ruling practice on May 28, 2024. A similar 2022 annual report was published in May 2023. The 2023 report, discussed below, sheds light on the changes and developments in international tax rulings during 2023.

Key Changes in Dutch Tax Rulings in 2023

Changes were encapsulated in the amendment of the Decree on international tax rulings, effective from December 19, 2023. The key adjustments include:

- **Application of the Minimum Tax Rate Act 2024:** Rulings are possible (none yet during 2023) regarding the application of the Minimum Tax Rate Act 2024 and is aligned with the OECD Pillar 2.
- **Dismantling Tax Avoidance Structures:** Under strict conditions, rulings may proceed, provided there is a complete dismantling of the tax avoidance structure even if certain ruling conditions are not met.
- **Transactions with Low-Tax or Non-Cooperative Jurisdictions:** The condition of no ruling in case of direct transactions with entities in low-tax or non-cooperative jurisdictions does not apply, provided the transactions in scope of the ruling pertain to third-party transactions involving the application of the innovation box, tonnage tax regime, or the fiscal consequences of third-party transactions.
- **Incorporating Critical Assumptions in Bilateral and Multilateral APAs:** Bilateral and multilateral APAs, in cases of triangular transactions involving multiple countries, may now include (a) critical assumption(s) that account for transfer pricing adjustments from non-ruling involved countries.

Trends in Ruling Requests

The total number of Dutch ruling requests has slightly increased in 2023 to 586, compared to 559 in 2022. Similarly, the number of requests processed also slightly increased to 596, compared to 544 in 2022. These increases show a growing reliance on the Dutch tax ruling system by international businesses seeking tax certainty.

The increase in the number of rulings primarily relate to the following top five categories of issues:

- **Advance Tax Rulings:** There were 276 ATR requests, with 212 being (partially) granted, two being denied, and 35 were either withdrawn or not completed, or were not an international tax ruling.
- **APAs:** 61 APA requests were received, with 49 (partially) granted, four being denied, and 19 were either withdrawn, not completed, or were not an international tax ruling.
- **Bilateral and Multilateral APAs:** 35 requests, with 21 (partially) granted, one being denied, and six were not completed or were not an international tax ruling.
- **Innovation Box Rulings:** 182 requests, with 147 (partially) granted, none being denied, and 63 were either withdrawn or not completed, or were not an international tax ruling.
- **Other rulings:** 32 requests, with 15 (partially) granted, one being denied, and 21 were either withdrawn or not completed, or were not an international tax ruling.

The data underscores an increase in the number of processed requests compared to received ones, along with a higher rate of granted requests, in comparison with 2022. Also, APAs have been granted with respect to financial transactions.

Shift from Unilateral to Bi- and Multilateral APAs

One of the trends that continued in 2023 is the shift from unilateral to bi- and multilateral APAs. Unilateral APAs, rulings between one single taxpayer and the tax authority of one country, have seen a sharp decrease. Conversely, there has been an increase in bilateral and multilateral APAs, involving agreements between multiple tax jurisdictions. This can be attributed to two key factors:

- Since the overhaul of the Dutch ruling practice from July 2019 and the much stricter requirements and robust process for unilateral APA's ever since 2019, the number of unilateral APAs has been decreasing. The APA processing time also increased from 2-3 months in 2019 to over 1 year (actually, on average 14 months in 2023). In case an APA cannot be granted because of the strict Dutch ruling policy and if the taxpayer has arm's length pricing, a smooth transition of the file to the local tax inspector may be possible to grant certainty for past years to avoid double tax.
- MNEs are seeking to obtain more comprehensive ruling agreements that provide certainty across multiple jurisdictions and consequently avoid double tax under bi- and/or multilateral agreements. The ruling processing time is over three years (actually, 40 months in 2023) for bilateral APAs.

Duration of Ruling Processes

The duration of the ruling process is a critical factor for businesses and is summarized below:

- **ATR:** The average duration for ATR requests decreased from 8 months in 2022 to 7 months in 2023.
- **APA:** The average duration for APA requests increased from 13 months in 2022 to 14 months in 2023.
- **Bilateral and Multilateral APAs:** The average duration for bilateral and multilateral APA requests increased from 35 months in 2022 to 40 months in 2023. Having said this, it "takes two to tango" and delays are typically not created by the Netherlands.
- **Innovation Box:** The average duration for innovation box requests increased from 17 months in 2022 to 18 months in 2023.
- **Other Tax Rulings:** The average duration for other rulings increased from seven months in 2022 to nine months in 2023.

Overall, the trend suggests that the processing time for ATR requests decreased slightly, while the processing time for unilateral, bilateral and multilateral APAs, innovation box, and other rulings increased slightly.

Conclusion

The 2023 annual report on Dutch tax rulings reveals significant changes and developments in the ruling practice. APAs are again possible with respect to financial transactions. The number of ruling requests increased, with a higher rate of granted requests in ATR, bilateral and multilateral APAs, and innovation box rulings. There is a shift towards more bilateral and multilateral APAs. The processing time for ATR requests improved slightly, while it increased slightly for all other rulings. Finally, a failed unilateral APA process may become a ruling for past years. This all demonstrates the Netherlands' commitment to providing tax certainty and adapting to the evolving tax landscape.

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