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Global Tax

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Netherlands ■

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Gert-Jan Hop is a Netherlands-based tax lawyer who specialises in international tax structuring, transfer pricing (TP) matters, cross-border investments and business activities. He has a special focus on tax aspects that arise when investing in Germany. He is frequently involved in drafting and assessing TP analyses. He is a member of the Netherlands Association of Tax Advisers (NOB) and the International Fiscal Association (IFA). He also frequently publishes various papers in, among others, the German Tax Journal *Internationales Steuerrecht*.

■ Q. Could you outline some of the key developments relating to corporate tax that you have seen in the Netherlands over the last 12-18 months?

HOP: Recently, we have observed an increase in questions relating to the Anti-Tax Avoidance Directive (ATAD1), which came into effect on 1 January 2019. ATAD1, and later ATAD2, set out a framework and minimum implementation requirements for EU Member States in order to cope with tax avoidance practices that, according to its title, 'directly affect the functioning of the internal market'. We especially observe a strong market demand in respect of questions involving the ATAD1 provisions limiting the deduction of interest. On top of that, we observe an increase in discussions relating to substance and withholding tax. In many holding structures involving investments in operating subsidiaries, we have seen questions at the level of the operational companies, but also at the level of Dutch holding companies, involving the application of the exemption of dividend withholding tax. Questions involve sufficient substance as well as an interaction with the *ECJ Deister* and *Juhler Holding* cases and the more recent ECJ Danish cases. In respect of the ECJ Danish cases relating to beneficial ownership,



the shifted interpretation of ‘abuse of law’ and ‘artificial arrangements’ that relate to withholding taxes are very relevant.

■ Q. To what extent are tax authorities in the Netherlands increasing their monitoring and enforcement activities?

HOP: In cross-border taxation, there has always been a strong emphasis on a cooperative approach by the Dutch tax authorities (DTA) and less on enforcement activities. We have seen an increase in monitoring and enforcement activities in the field of transfer pricing (TP). This is partly a consequence of the increased transparency in respect of cross-border TP documentation. TP discussions are also becoming more frequent.

■ Q. How are tax authorities approaching the issue of transfer pricing? In your experience, do companies tend to underestimate the risks and challenges in this area?

HOP: Observing the base erosion and profit shifting (BEPS) Action Plan, the DTA has placed greater importance on monitoring TP.

We, however, see difficulties with authorities providing feedback to companies in a timely manner, so that timely actions can be taken. As to the risks and challenges that companies tend to expect in terms of TP, most companies in the Netherlands are aware of the need to address the post-BEPS environment. As the number of potential TP discussions increases, companies are starting to realise the importance of maintaining contemporaneous TP policies and documentation.

■ Q. How would you describe tax laws in the Netherlands as they relate to foreign entities? Are there any unique regulatory aspects, whether positive or negative, that need to be considered?

HOP: In 2018, a bill was passed that requires intermediate holding companies to satisfy additional substance requirements: employment costs of at least €100,000 in relation to its intermediary holding functions should be available, employees must have the professional knowledge and capacity to be able to properly perform their duties, and the holding company should have office space at its disposal, for at least 24 months, from which the intermediary



holding functions are being undertaken. Furthermore, the 26 February 2019 *ECJ Danish* cases compel a shifting interpretation of ‘abuse of law’ and ‘artificial arrangements’ in relation to foreign entities. The ECJ judgments are extremely important for the application of the Patent Subsidiary Directive (PSD) and the Interest Royalty Directive (IRD), and more generally, for the interpretation of terms such as ‘beneficial ownership’ and ‘abuse of law’. The cases could have a significant impact on international group structures, particularly for funds flowing from EU subsidiaries to parent companies residing outside the EU. On top of that, since the ATAD1 provisions went into effect, a provision that relates to foreign controlled companies (CFC) is now in operation. In short, CFC rules have the effect of re-attributing the income of a low-taxed controlled subsidiary to its parent company. The legislation determines that income generated by controlled companies established in jurisdictions with a statutory rate of less than 7 percent or established in non-cooperative countries that are blacklisted by the EU, have to be included in the tax base of the parent company of the CFC.

■ **Q. Have you seen an increase in tax disputes in the Netherlands? What lessons can companies learn from recent settlements, prosecutions, penalties and court rulings?**

HOP: We have experienced a cooperative attitude from the DTA in limiting double taxation in TP discussions. In any case, taxpayers are required, without limitations, to follow-up with full disclosure, as well as transparency, and they need to substantiate their tax position in the other tax jurisdiction. The DTA is also looking at double taxation treaties, whether there is a corresponding adjustment in a different country and, if this is not the case, what to do next. The TP position of a company should be substantiated and documented sufficiently, based on TP guidelines and Dutch regulations because, with a sufficiently substantiated TP position, it is hard for tax authorities to argue. We observed this matter in the *Zinc* case and in case law concerning the burden of proof of TP documentation.

■ **Q. What is your advice to a company that finds itself subject to a tax-related audit, investigation or enquiry?**

HOP: We advise companies to respond in a proactive manner. We strongly advise companies to maintain a compliant tax position and contemporaneous TP documentation that reflects all relevant facts and circumstances, so that in the event of a tax audit or investigation, companies have the necessary documentation available. The lessons learned from the *Zinc* case are that in a TP dispute with the DTA, a position



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supported with proper TP documentation is crucial.

■ Q. What steps can companies take to ensure they maintain robust tax compliance processes while maximising tax efficient structures?

HOP: The Netherlands remains a favourable holding jurisdiction. The country’s willingness to implement all necessary measures to tackle BEPS

and tax avoidance makes it a stable jurisdiction, as well as in terms of certainty regarding foreign anti-abuse measures. Innovative companies should consider whether the preferential IP regime – ‘innovatiebox’ – could be applied, should sufficient qualifying IP assets and nexus be available. In addition, we recommend supporting the TP positions, which will also limit exposure to adverse tax consequences and corresponding adjustments. ■

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NovioTax is a Dutch research-based tax consultancy firm. Founded in 2016, quality, service and accessibility are the firm’s core values. Providing tax advisory services which are client centric and focused on mitigating tax risk and minimising cost, its employees have many years of experience and provide services in the field of corporate tax, international tax and transfer pricing. At NovioTax, employees use their experience and in-depth knowledge to provide clients with a transparent, high quality and accessible service.

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