

ANNUAL REVIEW

Transfer pricing

REPRINTED FROM
ONLINE CONTENT
OCTOBER 2018

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PREPARED ON BEHALF OF

NovioTax

FINANCIER
WORLDWIDE corporatefinanceintelligence



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Patrick T.F. Schrievers is a tax lawyer and a member of the Dutch Association of Tax Advisers (NOB) and the International Fiscal Association (IFA). Mr Schrievers concentrates his practice in the area of tax advisory for transnational business operations, with emphasis on intercompany transactions.

He represents companies in matters involving the Dutch Tax Administration (DTA) and counsels corporate clients on transfer pricing issues and worldwide reorganisations. He advises foreign private clients on structuring investments in the Netherlands. In addition, he acts as interim in-house tax and finance adviser for multinational groups.

■ Q. What do you consider to be the most significant transfer pricing changes or developments to have taken place in the Netherlands over the past 12 months or so?

SCHRIEVERS: The most significant transfer pricing (TP) development is the increasing awareness for companies to comply with TP regulations due to more transparency and exchange of information – a result of the base erosion and profit shifting (BEPS) project. Compliance requirements in a post-BEPS environment are more demanding than ever before. In addition, we have recently seen an interesting court decision in the Netherlands – the Zinc case – that will have a significant impact on all taxpayers involved in drafting TP documentation. This summer we have also seen the long anticipated *South Dakota v. Wayfair* decision of the US Supreme Court. This decision will likely have a large impact on all European businesses doing business in the US and is very interesting given the current debate on the taxation of the digital economy.



■ **Q. In your opinion, do companies pay enough attention to the challenges and complexities of maintaining compliant transfer pricing policies?**

SCHRIEVERS: Observing international dynamics, which are export oriented, most companies in the Netherlands are aware of the need to address the post-BEPS environment. That said, it is currently still difficult for most companies to deliver output. Medium-sized companies often have limited TP policies implemented. As the number of potential TP discussions increases, companies are starting to understand the importance of maintaining compliant TP policies and documentation.

■ **Q. To what extent have tax authorities in the Netherlands placed greater importance on the issue of transfer pricing in recent years, and increased their monitoring and enforcement activities?**

SCHRIEVERS: Observing the BEPS Action Plan, Dutch tax authorities have placed greater importance on monitoring TP. We, however, see difficulties with authorities providing feedback to companies in a timely manner so that actions can

be delivered quickly. In addition, we note that a lower Dutch court recently made an important TP decision regarding necessary supporting documentation in relation to the burden of proof. The court's decision was named the 'Zinc case' and has gained international attention, because the decision clarifies obligations pertaining to the Dutch Tax Administration (DTA) and the taxpayer. The court underlined the importance of maintaining a compliant TP report that reflects relevant facts and circumstances. Especially disputes concerning TP revolve more around the substantiation of the TP report and the cohesive burden of proof, whereas reasonable refutation of the taxpayer's TP documentation is a difficult position for any tax authority if the drafted TP documentation satisfies generally applied quality standards. We think the court's decision will also result in the DTA increasing its monitoring and enforcement activities in future. Hence, the importance of proper TP documentation will increase. Taxpayers may also benefit from increased, in terms of quality, TP documentation in determining their TP positions.



■ **Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in the Netherlands?**

SCHRIEVERS: We have observed an increase in TP disputes. In terms of the recent increase in the attention being paid to TP documentation, a number of companies concluded that existing TP documentation did not satisfy the revised or strengthened requirements of the post-BEPS era. Ultimately, those companies paid an incorrect excess amount of corporate income tax (CIT) in the countries involved. This resulted in a number of TP disputes. In most cases where companies had insufficient TP documentation, tax authorities were willing to amend internal transactions for recent and future financial years.

■ **Q. How should companies respond if they become the subject of a tax audit or investigation? What documentation needs to be made available in this event?**

SCHRIEVERS: We suggest companies respond in a proactive manner. The lessons learned from the ruling in the Zinc case are that in a TP dispute with the DTA, the preferred approach would be to adopt the position of the company's TP report and not maintain any position that is not supported with proper TP documentation.

We strongly advise companies to maintain a compliant TP report that reflects all relevant facts and circumstances, so that in the event of a tax audit or investigation, companies have the necessary documentation available. For completeness sake, we note that the aforementioned Zinc case is a lower-court ruling to which the tax inspector has made an appeal. Although the court's ruling appears to be in line with parliamentary history and the TP policy in the Netherlands, it is difficult to estimate whether the higher court will follow the ruling of the lower court.

■ **Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?**

SCHRIEVERS: Consistent supporting documentation ultimately strengthens companies' legal position in the event of a challenge by the DTA. We observe that benchmark analysis often consists of poor comparables, which is compounded by the use of more poor data. This may result in output that does not satisfy the arm's length principle, or at best is vulnerable. In such cases, we focus on the storytelling of the functional analysis, which in turn is an essential supporting



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document and focuses on the economic nature of the activities conducted and risks assumed. Parties should conduct a sanity check to double-check the outcome of their findings. Often, a two-sided analysis or a multi-sided analysis of the contributions of more than two associated enterprises, where necessary, is conducted.

■ **Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?**

SCHRIEVERS: Dutch tax authorities tend to have an economic approach to TP. However, we often go through TP reports that are not in line with actual facts and circumstances. We strongly recommend companies revise legally-oriented TP policies and apply revised post-BEPS standards. In addition, TP documents should typically integrate checks based on a two-sided approach. When conducting this approach it is important to itemise all internal transactions, using an economic approach instead of a legal approach and check whether the outcome is comparable with the findings of the original TP method applied. ■

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NovioTax is a Dutch research-based tax consultancy firm. Quality, service and accessibility are the core values of the firm. NovioTax provides 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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