

Summary and conclusions

Dutch taxpayers are affected by tax law in various ways. The most direct forms are taxation, tax collection and, in extreme situations, punishment of violations of tax legislation. There are, however, also indirect forms in which taxpayers are confronted with tax law through control. In all forms of confrontation with tax law and the tax authorities, there is a need for and entitlement to protection of taxpayers' rights.

The Constitution (section 104 Gr) provides an important basis for this legal protection; tax may only be levied pursuant to the law. Substantive tax law has been laid down in various laws, such as the Income Tax Act (*Wet op de Inkomstenbelasting 2001*), the Corporation Tax Act (*Wet op de Vennootschapsbelasting 1969*) and a multitude of implementing regulations.

Procedural tax law follows from the General Administrative Law Act (*Algemene wet bestuursrecht (Awb)*). The Awb codifies rules that apply to administrative law in general. Tax law forms part of this administrative law. The General State Taxes Act (*Algemene wet inzake rijksbelastingen (AWR)*) contains a large number of additional provisions. The AWR sets out the manner in which tax can be levied and provides taxpayers with the means to object to the infringement of their rights. Taxpayers can also invoke policy rules as if they were rules at law. Therefore taxpayers in the Netherlands have a strong foundation for safeguarding their rights.

In this report the following issues are further discussed to give some examples of the practical protection of taxpayers' rights.

The Dutch tax system is familiar with preliminary consultation between the taxpayer and the tax inspector before the tax declaration is filed. This consultation is about the interpretation of facts or the explanation of sections of the law which are not completely clear. The taxpayer may obtain certainty on the tax issue about which he has consulted the tax inspector, because the latter is bound by the posi-

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tion he has taken during the consultation if he assesses the tax declaration. A request for a preliminary consultation is open to everyone, has no prescribed form and no fee is charged for it.

In accordance with a strengthening of companies' internal procedures aimed at compliance with tax regulations, this practice has developed into a new supervision method, so-called horizontal monitoring (HM), which at the moment is mostly practised in the supervision of large companies.

This is regarded as good practice. Communication about unclear sections in tax law and regulation or about the application of tax law can provide certainty and therefore practical protection for the taxpayer before a tax declaration is submitted.

In Dutch law only those holding a spiritual office, notaries, (tax) attorneys, doctors and pharmacists may – at law or otherwise – rely on the circumstance that they are obliged to observe secrecy based on their position, office or profession. They have a so-called “right of non-disclosure”. Over and above that the jurisprudence takes into consideration that taxpayers should be given the opportunity to consult their tax adviser, who has no legal right of non-disclosure, in confidence. This is why a so-called “pseudo or informal right of non-disclosure” has developed, which prevents the confidential advice of a tax adviser to his client being handed over to a tax inspector.

The fact that court hearings in tax cases are held behind closed doors also contributes to the privacy of the taxpayer.

Based on the directives of this report one might have the idea that the Dutch protection of taxpayers' rights during audits lags behind. However, since July 2011 taxpayers' rights in this respect have been extended with the possibility of objecting and appealing against an information decision during the phase of imposition of a tax assessment. There are also new developments regarding the prohibition of self-incrimination in the form of a judicial guarantee in case of coercion to provide information. These developments are a step forward in protecting taxpayers' rights during audits.

A fair trial includes the right to a decision within a reasonable period. Recently, the legislature has introduced a number of successful measures that prevent or compensate for any undue delay.

Tax law originally had its own regulations for the period within which the tax inspector had to decide on a notice of objection. Those were rescinded a few years ago. Instead, the regulations provided for by general administrative law were followed as far as decision-making periods were concerned. This means that a tax inspector has to reach a decision within a period of 6–10 weeks. Moreover, a possibility was created to challenge any failure to reach a decision in due time. In such a situation, the fiction is assumed that the notice of objection was rejected, creating the possibility of applying to the court. A penalty payment was introduced (in 2009) in order to stimulate a decision in due time. Finally, the doctrine of immaterial damages was developed in case law, based on which a court may grant compensation for supposed immaterial damage in the case of any undue delay. This compensation may be owed by the tax inspector or by the state.

Dutch tax law has a closed system of legal remedies. This means that legal remedies are available only against specific decisions referred to in the law and for specific interested parties referred to in the law. This system provides clarity to all

parties involved in the tax assessment and is therefore seen as good practice on both sides. The closed system of legal protection must not be confused with the possibility of the tax authorities or the taxpayer using a civil procedure.

1. Introduction

Dutch taxpayers are affected by tax law in various ways. The most direct forms are taxation, tax collection and, in extreme situations, punishment of violations of tax legislation. There are, however, also indirect forms: taxpayers are confronted with tax law through control and supervision and through the influence of tax legislation. In all these forms of confrontation with tax law and the tax and customs administration (the tax authorities), there is a need for and entitlement to protection of taxpayers' rights.

The position of Dutch taxpayers is protected by various laws. The Constitution provides an important basis for this legal protection. Section 104 of the Constitution provides that tax may only be levied pursuant to the law. Substantive tax law has been laid down in various laws, such as the Income Tax Act, the Corporation Tax Act and a multitude of implementing regulations.

Procedural tax law follows from the Awb. This codifies rules that apply to administrative law in general. The Awb includes many provisions that pertain to the protection of taxpayers' rights. Tax law forms part of this administrative law.¹ The AWR contains a large number of additional provisions. It sets out the manner in which tax can be levied and provides taxpayers with the means to object to the infringement of their rights.

Taxpayers' rights also follow from policy rules, such as the Administrative Fines (Tax and Customs Administration) Decree (*Besluit Bestuurlijke Boetes Belastingdienst*), which contains instructions to the tax authorities concerning the imposition of fines, and the procedural rules of the district court, the Court of Appeal and the Supreme Court of the Netherlands on the implementation of tax proceedings. Taxpayers can invoke a policy as if it were a rule of law.

Besides this, in case law various principles of proper administration are developed, which the tax authorities have to apply and which the taxpayer may invoke. These are for instance the principle of legitimate expectations, the fair play principle, the principle of equality, the principle of due care and the principle of legal certainty. A few of these principles are already incorporated in the Awb.

Finally, taxpayers can invoke the rights derived from human rights conventions if a fine has been imposed on them. Over and above this a taxpayer may refer to the case law of the Court of Justice of the European Union and the Charter of the European Union, in a case in which the law of the European Union is applied or if one of the four freedoms of the European Union is at stake.

A last remark to make is that communication between taxpayers and the tax authorities and judicial bodies is developing in a way that will be more and more digital. At this moment communication about tax declarations is mostly digital.

¹ See also E. Blummenstein, *Cahiers de droit fiscal international*, vol. II. Basel 1939, pp. 90–91.

In the (near) future all communication with the tax authorities and the courts will be digital.²

Dutch law therefore offers taxpayers in the Netherlands a strong foundation for safeguarding their rights.

This report will discuss the following subjects in more detail:

- preliminary consultation and horizontal monitoring;
- taxpayers' privacy, in particular the (informal) right of non-disclosure and the closed hearing;
- practical legal protection during audits;
- limitation of delay during the course of the proceedings;
- the closed system of legal remedies;
- the cancelled (prior) notification of international exchange of information.

It is believed that these subjects can be qualified as best practice in the protection of Dutch taxpayers' rights.

2. Preliminary consultation and horizontal monitoring

If, in the application of tax laws, it is difficult to interpret sections of the law and to assess tax obligations, taxpayers may initiate consultations with a tax inspector.³ This possibility has existed in the Netherlands for a long time and is open to everyone, also for foreigners who intend to take up residence in the Netherlands. Sometimes, this possibility to consult is already anticipated during the drafting of legislation, because the State Secretary for Finance indicates that consultation with a tax inspector is possible if and where necessary. An example is the implementation of the statutory obligation to retain the records kept. For less essential parts of the records, the legislature has indicated that it is possible to make agreements with the tax authorities.⁴ Moreover, in the case of complicated tax issues, it is not unusual for a tax adviser to request a tax inspector to give his view on tax obligations, for example in case of an intended establishment or reorganisation of a company.

There are a few subjects and situations in which a preliminary consultation at the request of the taxpayer will take place in a coordinated and nationally organised way. This is for instance the case with rulings, advance tax rulings (ATRs) and advance price agreements (APAs).

If sufficient special circumstances of the relevant case have been put forward, the tax inspector will be bound by the position he has taken. To a certain extent the doctrine of legitimate expectations gives taxpayers certainty on the tax treatment of the intended establishment or reorganisation. However, the tax inspector is only bound by the position he has taken if all the relevant information has been pro-

² *Wetsvoorstel Elektronisch Verkeer en Project KEI*.

³ Tax Administrative Law Decree, para. 3.

⁴ Tax Administrative Law Decree, para. 14, ss. 5, 6 and 7.

⁵ Supreme Court 26 September 1979, ECLI:NL:HR:1979:AM4918; Supreme Court 5 October 2007, ECLI:NL:HR:2007:BB4736; Supreme Court 14 August 2009, ECLI:NL:HR:2009:BB5128 and Supreme Court 21 December 2012, ECLI:NL:HR:2012:BY6916.

vided.⁵ Should it, at a later stage, become clear that important information has been withheld for whatever reason, the tax inspector can still deviate from the tax return filed. The taxpayer is responsible for providing relevant information, the tax inspector is responsible for taking a position in accordance with the law, regulations and policy. This form of consultation is called a preliminary consultation. A distinguishing feature is the shared responsibility to correctly assess the tax obligations in the relevant case. In exceptional cases, such as the exploration of tax boundaries, the tax inspector will not take a position. This exception has been laid down in published policy.⁶

The initiative for preliminary consultation can be taken by any taxpayer; there is no obligation to hold preliminary consultations. A request for a preliminary consultation has no prescribed form and no fee is charged for it. For some taxes⁷ it is also possible to request a consultation in the tax return. In the tax return programme, taxpayers can make a request to the tax inspector for a position on a specific position taken in the tax return.

With respect to the phase prior to filing the tax return, it is therefore possible to submit to the tax inspector any issues regarding the interpretation and application of tax law in individual cases. This “preliminary consultation” may also relate to facts that have not yet come into existence. In practice, this possibility of preliminary consultation, which has existed for a long time, prevents many disputes on the interpretation and application of tax rules.

In combination with a strengthening of companies’ internal procedures aimed at compliance with tax regulations, this practice has developed into a new supervision method, so-called HM. Companies that want and are able to set up their administrative organisation and internal control (AO/IC) so as to allow for the detection of possible tax issues are offered the possibility of concluding an HM agreement with the tax authorities. In brief, it is agreed that companies put forward possible tax risks during preliminary consultations and strengthen their administrative control and organisation (tax control framework (TCF)). So HM is roughly based on two principles: strengthening the internal administrative organisation in the area of taxation (the TCF) and the agreement to hold preliminary consultations with the tax inspector on all relevant issues.

The Dutch tax authorities offer the possibility of HM not only to large businesses, but also to small and medium-sized businesses. In this variety, preliminary consultations within the context of HM are generally held through a tax service provider. Where the tax service provider has already performed an audit on his client, the tax authorities will rely on this audit by adjusting their own monitoring to this.

When setting up their monitoring, the tax authorities take account of the internal and external measures of administrative organisation and internal control (TCF) taken by taxpayers. This “form of cooperation” between a tax inspector and a company provides as much certainty as possible with respect to developments regarding possible tax issues, regarding their own positions and mutual responsibilities. If a difference of opinion continues to exist after the preliminary consultation, this

⁶ Tax Administrative Law Decree, para. 4.

⁷ Income tax and corporation tax.

will constitute a situation of “agree to disagree”, and, through the usual legal channels, a court is requested to give its decision.

However, practice shows that the number of conflicts is considerably reduced due to the constructive approach and preliminary consultation. There has been no evaluation on this subject yet, but it is assumed that tax declarations are accepted by the tax authorities, because communication about tax issues is being dealt with before the tax declaration is submitted.

3. Taxpayers’ privacy

3.1. (Informal) right of non-disclosure

Broad obligations to provide information to the tax authorities apply in the Netherlands to (potential) taxpayers⁸ and parties obliged to keep records,⁹ such as businesses and employers. Parties obliged to keep records are also obliged to provide information for the purpose of taxes levied on third parties.¹⁰ Only those holding a spiritual office, notaries, (tax) attorneys, doctors and pharmacists may – at law and otherwise – rely on the circumstance that they are obliged to observe secrecy based on their position, office or profession.¹¹ They have a so-called “right of non-disclosure”. If a tax inspector demands that a doctor or (tax) attorney provides information about a third party, this doctor or attorney may refuse this by invoking section 53a of the AWR. This also applies before a court if he or she as a witness is asked questions about a taxpayer.

In the Netherlands, the profession of a tax adviser is not protected by law. In principle, anyone may call themselves tax adviser. However, several professional organisations have been set up for tax consultancies in order to guarantee the “honour and dignity” of the profession for their members. Nevertheless, due to the absence of statutory regulations of the profession, these members have no statutory right of non-disclosure. In principle, a tax adviser is therefore obliged to provide data and information upon request for the purpose of the taxation of his client, the taxpayer. In itself, the contractual and/or disciplinary obligation of tax advisers to observe confidentiality does not form a legitimate reason to refuse to comply with a tax inspector’s request.

On the other hand, the legislature takes into consideration that taxpayers should be given the opportunity to consult their tax advisers in confidence. That is why the tax and customs administration was instructed not to demand of tax advisers that they give them access to advice given to their clients and to correspondence with them.¹² This regulation has been laid down in policy rules for a long time¹³ and is acknowledged by the Supreme Court.

⁸ S. 47 of the AWR.

⁹ S. 52 of the AWR.

¹⁰ S. 53 of the AWR.

¹¹ S. 53a of the AWR.

¹² Parliamentary Papers II, 1958/59, 4080, no. 7, p. 13.

¹³ Statement by the State Secretary for Finance, no. 10 DGM4 dated 5 January 1994, V-N 1994, p. 456, point 3. This policy rule has been withdrawn, as it was superseded by case law.

This legally enforceable limitation of a tax inspector's authority is also called the "pseudo or informal right of non-disclosure".

In 2005, the Supreme Court delivered an important judgment on the scope of the informal right of non-disclosure, which is still guiding for tax legal practice.¹⁴ In these proceedings, the highest tax court decided on the question of whether a due diligence report should be produced for inspection. The court answered this question in the negative. The principle of fair play – which is part of the general principles of proper administration – opposes the fact that a tax inspector may use his authority to gain insight into reports and other documents of third parties insofar as the purpose is to shed light on the tax position of taxpayers or to advise them. This limitation therefore also applies to tax advice and to parts of tax advice that contain information of a factual or descriptive nature for that purpose. The remaining parts (not relating to this purpose) must – upon request – be provided, for which purpose it may be necessary to split or adjust the document.

Case law on the informal right of non-disclosure has not been crystallised, but is in full swing. For instance, it was ruled in a judgment by the Civil Law Division of the Supreme Court on the (derivative) right of an administrative office or a trust office to refuse to give evidence that the tax authorities should be given the opportunity to test the plausibility of the statement that the relevant information related to a communication between this taxpayer and a holder of confidential information.¹⁵

The doctrine of the informal right of non-disclosure therefore offers taxpayers significant protection of their privacy with respect to confidential tax advice, even though there is no statutory basis for this.

3.2. Closed hearing

Section 121 of the Netherlands Constitution, as well as many sections in international conventions, provides that court hearings are held in public and that court judgments are delivered in public. This basic principle also applies to general administrative law.¹⁶ This general rule does not, however, apply to tax cases. Section 27c of the AWR¹⁷ provides that, except in cases in which an appeal is submitted against a fine, examination in court be held behind closed doors. The court may, however, determine that the examination be held in public, if this does not harm the interests of the parties. In a closed hearing, a taxpayer will experience fewer barriers for arguing his "case" than if he has to take into account the fact that all information provided by him would become public. Therefore, a closed hearing also contributes to the protection of the taxpayer's privacy.

There are many opposing interests regarding the question of whether or not court hearings should be held in public.¹⁸ An argument in favour of public hearings is that the parties have the reassurance that their cases are not settled in a "backroom atmosphere". On the other hand, it is the same parties who have no need

¹⁴ Supreme Court, 23 September 2005, BNB 2006/21, ECLI:NL:HR:2005:AU3140.

¹⁵ Supreme Court, 27 April 2012, Dutch Law Reports (NJ) 2012/408, ECLI:NL:HR:2012:BV3426.

¹⁶ Ss. 8(62) and 8(78) of the Awb.

¹⁷ Entry into force on 1 September 1999, before that included in s. 11a of the Administrative Justice (Taxation Appeals) Act.

¹⁸ Prof. Mr. E. Aardema, *Heffing naar behoren*, Erasmus University Rotterdam 1995, p. 27.

for openness whatsoever in connection with their privacy. What is more, full openness will be a reason for many to refrain from instituting proceedings in connection with their privacy. However, public interest is also involved in openness, even more so if the community is a direct or indirect party to the proceedings such as in criminal law, but, in principle, also in tax law.

Many years ago, the Dutch legislature consciously opted for having tax cases settled, in principle, behind closed doors due to the protection of personal privacy. Dutch taxpayers are traditionally reluctant to provide their financial data. This fits in with the fact that the legislature has imposed a far-reaching obligation on tax inspectors to observe confidentiality with respect to taxpayers' tax files.¹⁹ These files must, however, form the point of departure for any tax proceedings.

The deviating regulations on the closed nature of tax cases were not a subject of discussion for many years. During an evaluation of tax legislation in 2005, it was argued by all the parties involved that no amendment was required. The courts were reluctant to allow public hearings. The public and the media paid no attention to tax cases.

This changed in the next few years. More and more people were in favour of making tax cases public. This would not only benefit taxpayers' tax ethics, but also tax transparency.

This notion caused the legislature to decide to prepare a draft bill in early 2011: the Tax Cases (Public Access) Bill. In summary, the then government believed that, as a rule, the interest of public access to (tax) proceedings should prevail over the interest of privacy. The fact that this consideration is now different from in the past may – apart from the other outcome of the comparisons made – partly be explained by an increasing social demand for transparency and, in addition, a different appreciation of privacy in general.

The draft bill was then offered for internet consultation purposes on the website www.internetconsultatie.nl/openbaarheid for a period of six weeks, from mid April 2011 to the end of May 2011. An internet consultation gives everyone the opportunity to respond to a draft bill. In case of the above draft bill, 41 interested parties took advantage of this possibility.

On 25 April 2014, the State Secretary for Finance informed the Second Chamber of the Dutch Parliament of the outstanding tax motions and commitments. One of the topics was the state of affairs concerning the draft Tax Cases (Public Access) Bill and the report containing the results of the internet consultation was made available. The State Secretary stated that he would not submit the bill to the House of Representatives. The internet consultation showed that 71 per cent of respondents preferred a closed hearing, 27 per cent preferred a public hearing and 2 per cent gave a less unambiguous response. As respondents, tax advisers and attorneys generally preferred a closed hearing, since a public hearing would constitute a high or too high a barrier for taxpayers to apply to court. Preferences varied between private individuals and companies. The responses received to the above draft bill as well as the attention in the media and in trade journals were taken into account in the final assessment on submitting the bill.

Here, the State Secretary considered that the judicial system had already adjusted its policy on publication of judgments, as a result of which the names of

¹⁹ S. 67 of the AWR.

legal persons under public law are now no longer in anonymous form in judgments on tax cases.²⁰ The tax authorities also make an effort to ensure that important judgments are published, thereby satisfying the feeling that the tax authorities have better access to information. Therefore, the bill was cancelled.

It should be noted here that judgments are pronounced in public, although, as a rule, there is hardly any interest in this. All judicial authorities then make a selection of the relevant judgments, which are placed on the internet in a public database in anonymous form,²¹ thereby sufficiently guaranteeing the external openness of the judicial system.

All in all, the reporters believe that the closed nature of tax cases guarantees taxpayers' privacy. Moreover, the procedure provides a good example of how Dutch taxpayers and their legal protectors can exert practical influence on the legislative process.

4. Practical legal protection during audits

4.1. Terms for additional tax assessments in relation to reasonable progress

Dutch tax law does not have terms for performing audits, but there are fixed maximum terms for imposing tax assessments. If these terms have expired, the possibilities for an audit on these years will also be limited.

If the tax inspector after the regular term of three years for imposing a tax assessment of taxes such as income tax, company income tax or inheritance tax finds out a new fact or believes that the taxpayer was in bad faith when he filed his tax declaration, the tax can still be assessed with an additional tax assessment. The term for this is 5 years. If the amount of taxes is related to equity outside the Netherlands, the term is 12 years (section 16(4) of the AWR).

A few years ago the making of tax assessments on the basis of section 16(4) of the AWR was limited due to the introduction of the criterion "reasonable progress". The Supreme Court decided on 26 February 2010²² that a tax inspector should act with "reasonable progress" with the tax assessment regarding foreign equity. In this judgment the Supreme Court decided that the judgment of the Court of Justice of the European Union of 11 June 2009²³ should be interpreted as meaning that a longer term than five years was acceptable if that term was necessary to gather the information that was needed to define the tax in question and to prepare and impose a tax assessment with reasonable progress on the basis of the information that was available for the tax inspector.

On the basis of this decision of the Supreme Court in a number of cases in which the term of 12 years is applicable it is discussed whether the tax inspector acted

²⁰ Removing the reason for the political discussion as a result of parliamentary questions, namely the indignation of an unknown municipality.

²¹ www.rechtspraak.nl.

²² Supreme Court 26 February 2010, BNB 2010/199 and 200.

²³ Court of Justice EU 11 June 2009, C-155/08 and C-157/08 (*X/Passenheim-van Schoot*).

with reasonable progress. In these cases all the facts and circumstances are considered. It is discussed which actions the tax inspector took between the time at which the taxpayer gave information to the tax authorities and the time when the tax assessment was imposed. The Supreme Court decided in a judgment of 12 April 2013²⁴ that a duration of seven months after the announcement of the tax assessment and the actual making of the tax assessment was long enough to need a further explanation from the tax inspector. From the case law may be concluded that the tax inspector is not allowed to “stand still”. The application of the criterion “reasonable progress” is, however, not fully clear in the case law.²⁵

Against all these additional tax assessments it is possible to make objections and to file an appeal. In these procedures not only the application of the term, but also criteria such as a new fact or bad faith may be disputed and will be decided by the judge. The application of the criterion “reasonable progress” is therefore also a better protection of taxpayers’ rights.

4.2. Information decisions

Under Dutch law, (potential) taxpayers must provide the tax authorities with data and information or allow them to inspect books, documents and other data carriers when requested.²⁶ Moreover, those obliged to keep records must keep and store their records so that they clearly show the data that are important for taxation.²⁷ Those obliged to keep reports must, when requested, also provide information and allow the inspection of data for the purpose of taxes levied on third parties.²⁸ Taxpayers who run a business, have an independent profession or employ staff are obliged to keep records; furthermore, all entities are obliged to keep records.²⁹

Apart from the condition that only information needs to be provided which could be important for taxation purposes, the tax authorities are, when requesting information, bound by the general principles of proper administration. For instance, the request may not be disproportionately onerous to the taxpayer or the party obliged to keep records, or the request may not constitute a fishing expedition, and the above-mentioned informal right of non-disclosure must be respected.

Under normal circumstances, the burden of proof lies with the tax authorities in the case of corrections to the tax return which increase the taxable amount and with the taxpayer in the case of corrections which reduce the taxable amount

²⁴ Supreme Court 12 April 2013, ECLI:NL:HR:2013:BZ6799.

²⁵ It is being discussed whether a taxpayer may state, if the extended term of 12 years is not applicable, that the tax inspector should act with reasonable progress as well. If the tax inspector receives information within the term of 5 years (for instance after a year after the first tax assessment) then he would be allowed to stand still for 4 years and could make the additional tax assessment shortly before the end of the term of 5 years. However, if he receives the information after 5 years he is not allowed to stand still due to the criterion of reasonable progress. It could be maintained that the tax inspector always has to act with reasonable progress, based on the general principles of proper behaviour.

²⁶ S. 47 of the AWR.

²⁷ S. 52 of the AWR.

²⁸ S. 53 of the AWR.

²⁹ S.52 of the AWR.

(such as deductible items). Making a plausible case will be sufficient in this respect. Taxpayers who fail to provide information or to allow inspection for the purpose of their own taxation may – unless it concerns the proof of a deductible item – be confronted with a reversal and increase of the burden of proof. In such a situation, taxpayers must prove that the tax assessment imposed by the tax authorities is incorrect and cannot merely make a plausible case, but have to produce conclusive proof.

If a taxpayer refuses to cooperate, because he believes that the tax authorities have exceeded their authority to obtain information, there were, until recently, no legal remedies available. This entailed a taxpayer who believed that the request for information was wrong either having to take the risk of a reversal and increasing the burden of proof, or having to provide the information anyway in order to avoid this risk, because the reversal and increase of the burden of proof automatically took effect if the taxpayer had wrongly refused to provide information. The tax court always assessed in retrospect, within the context of the court proceedings against the tax assessment, whether the refusal was wrong or not.

This lack of legal protection has been removed since 1 July 2011. Since this date, tax inspectors must, before they impose a tax assessment with corrections, issue an information decision, if they want to ensure that the burden of proof is reversed and increased during the objection phase. If they do not issue an information decision, the regular rules on the allocation of the burden of proof will apply.

Taxpayers are given the opportunity to submit an objection against the information decision.³⁰ This notice of objection is assessed by a different tax official from the official who made the request for information. If the objection is not met, the taxpayer may, before the burden of proof is reversed and increased, submit the case to the court. If the court rules that the tax authorities' request for information is incorrect, the taxpayer need not provide the information. If the court rules that the request for information is correct, the taxpayer is given a certain amount of time to comply with the request for information, thereby avoiding a reversal and increase of the burden of proof. Only if, in the opinion of the court, there is a manifestly unreasonable use of procedural law will the court not be obliged to give the taxpayer a new period in order to comply with the request for information.

4.3. Judicial guarantee in case of obligations to provide information

The tax and customs administration has the authority to request information from taxpayers and businesses for the purpose of their taxation. Apart from the duty to impose tax assessments, the tax authorities also have the power to impose fines. The exercise of the power to obtain information for taxation purposes could create a field of tension with respect to the (implementation of the) right to prohibition of self-incrimination (*nemo tenetur* principle). This field of tension becomes most tangible if the tax authorities initiate civil proceedings with the aim of obtaining information under the threat of a penalty payment. The judgment of the Supreme Court on how to deal with this possible tension is detailed below.

A taxpayer or party obliged to keep records who fails to provide information may, in exceptional cases, also be summoned by the tax authorities to appear

³⁰ S. 52a of the AWR.

before the civil court.³¹ This was the case, for example, in a situation in which the tax authorities became aware of the fact that a number of taxpayers held a bank account in a country with banking secrecy which they did not state in their tax return. Those taxpayers who kept refusing to provide information about this bank account were summoned to appear in preliminary relief proceedings. In these proceedings, the tax authorities demanded that the refusing taxpayer or party obliged to keep records be ordered to provide the information requested, subject to a penalty. The civil court would decide on this demand and on the amount of the penalty. If the civil court imposed a penalty payment in its judgment, the taxpayer could submit an appeal and an appeal in cassation.

The Dutch tax authorities can not only impose assessments, but they also have the statutory power to impose fines, among other things because a tax return (whether or not intentionally) was filed incorrectly. Information which could be important for taxation and which, as explained above, must be provided by a taxpayer, could also be important for the purpose of imposing the fine. However, taxpayers who are confronted with the tax authorities' intention to impose a fine have the right to remain silent, which includes the right to refuse to cooperate in their own conviction. The latter concerns the so-called *nemo tenetur* principle, which follows from section 6 of the ECHR.³²

The question is how the obligation to provide information for taxation purposes and the right to remain silent which applies as soon as a taxpayer reasonably expects that a fine will be imposed on him, relate to each other. The Supreme Court gave a judgment concerning this question in 2013.³³ The Supreme Court ruled that the circumstance that the information requested for taxation purposes may also be important for a fine does not mean that the taxpayer's obligation to provide information is cancelled.³⁴ Under certain circumstances, however, the authorities may guarantee that the information obtained is only used for the purpose of taxation. As long as the Netherlands has no statutory regulations covering this, the court will have to provide this guarantee.³⁵ This guarantee requirement only applies if two conditions are met. First, coercion must have been applied in order to obtain the information. One can speak of coercion, for example, if a taxpayer, as explained above, is forced by a civil court to provide information, subject to a penalty payment. Secondly, the information requested should concern information that is dependent on the will of the suspect (in this case the taxpayer).³⁶ The Supreme Court based this condition on the decision by the ECHR in the *Saunders* judgment, that the *nemo tenetur* principle does not include material that is independent of

³¹ The tax and customs administration may use private-law (civil) authorities in order to fulfil its public duties, if the relevant public law regulations do not provide for this, unless such use interferes with the public law regulations in an unacceptable manner; Supreme Court 26 January 1990; ECLI:NL:HR:1990:AC0965 (*State/Windmill*). Explicitly for demands for information under s. 52a(4) of the AWR.

³² ECHR 25 February 1993 (*Funke v. France*).

³³ Supreme Court , 12 July 2013; ECLI:NL:HR:2013:BZ3640.

³⁴ Ground 3.5.

³⁵ Ground 3.7.

³⁶ Ground 3.6.

the will of the suspect.³⁷ In the *Saunders* judgement it was stated that documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing, should be considered to be independent of the will of the suspect.

The question, however, is what is to be understood by material independent of the will. Although in the underlying case, the material consisted of existing documents, it was not possible to inspect these documents without the taxpayer's cooperation. Prior to the judgment, the Advocate General concluded that ECtHR case law showed that these documents constituted material dependent of the will, because the taxpayer's cooperation was necessary in order to inspect these documents.³⁸ However, the Supreme Court did not follow the Advocate General's conclusion in this regard and considered the documents to be material independent of the will, without stating what was to be understood by this.³⁹

5. Limitation of delay in the process of legal protection

The right to a fair trial also includes the right to a decision within a reasonable period. Over the past period, the legislature has introduced a number of successful measures that prevent or compensate for any undue delay.

First, tax law originally had its own regulations for the period within which the tax inspector had to decide on a notice of objection. These separate regulations were cancelled a few years ago. Instead, the regulations provided for by general administrative law were followed as far as the decision-making periods were concerned. These regulations provide that a tax inspector has to reach a decision within a period of around 6–10 weeks. Moreover, a possibility was created to challenge any failure to reach a decision. In such a situation, it is assumed by means of a fiction that the notice of objection was rejected, creating the possibility to apply to the court (see section 5.1).

Secondly, two regulations were included in 2009 in order to encourage the tax inspector, by means of a penalty, to reach a decision (section 5.2).

Finally, the doctrine of immaterial damages was developed in case law, based on which the court may grant compensation for supposed immaterial damage in case of any undue delay. This compensation may be owed by the tax inspector or by the state (section 5.3).

Because measures to speed up tax proceedings have only fairly recently been introduced, the effectiveness of the measures has not been scientifically researched. However, the impression of the reporters is that the measures are effective. The tax authorities have implemented measures to prevent incurring penalty payments.

These three themes are detailed and summarised below.

³⁷ ECHR 17 December 1996 (*Saunders v. United Kingdom*).

³⁸ Opinion of Advocate-General Wattel, 1 March 2013; ECLI:NL:PHR:2013:BZ3640.

³⁹ Ground 3.10.

5.1. Decision-making periods

Until 1 January 2008, tax law had its own period for reaching decisions on objections.⁴⁰ The period initially was one year, to be extended by one year with the approval of the Minister of Finance.⁴¹ This decision-making period was cancelled on 1 January 2008 when the Tax Law Enforcement (Further Measures) Act and the Miscellaneous Tax Measures Act 2008 (*Wet versterking fiscale handhaving en de Wet overige fiscale maatregelen 2008*) entered into force. Instead, the regulations provided for by general administrative law were followed as far as the decision-making periods were concerned. Section 7(10) of the Awb provides that a tax inspector must reach a decision within six weeks counting from the day after the day on which the period for submitting a notice of objection has expired.⁴² So in fact, the tax inspector has a period varying from 6 weeks if the notice of objection was submitted on the last day of the period, to almost 12 weeks if the notice of objection was submitted on the first day.⁴³ The tax inspector may postpone the decision-making period by a maximum of 6 weeks. A further postponement of the decision is only possible if this is necessary for compliance with a statutory provision or if the person submitting the notice of objection agree(s) to this. In case of a postponement or agreement to a longer decision-making period, the tax inspector will notify the taxpayer in writing.

In its annual reports, the tax and customs administration reports on the extent to which it has, in practice, successfully processed objections within the decision-making period.

It is possible to appeal against a decision on the notice of objection to the court.⁴⁴ A decision is considered to be equal to a written refusal of the tax inspector to reach a decision.⁴⁵ So an acting tax inspector is involved both in the case of a written refusal and in the case of a decision. If, however, the tax inspector fails to respond (in time), it is also possible to appeal against the omission to reach a decision in time.⁴⁶ This possibility gives an interested party an indirect means to stimulate the tax inspector to make progress. The submission of such an appeal is not bound by a certain period (unless it is unreasonably late). Prior to the appeal, the interested party must give the tax inspector written notice of default. The appeal can be submitted within two weeks after the notice of default. The regulations on the appeal phase in the Awb have a separate part containing provisions on the omission to act in time.

⁴⁰ Tax Law Enforcement (Further Measures) Act, Bulletin of Acts and Decrees 2007, 376 and Miscellaneous Tax Measures Act 2008, Bulletin of Acts and Decrees 2008, 563.

⁴¹ S. 25(1) and (2) of the old AWR.

⁴² S. 7(10) in conjunction with s. 6(7) of the Awb.

⁴³ If the notice of objection does not meet the requirements set, for example there is no substantiation, the period will be suspended from the moment the tax inspector gives the person submitting the notice of objection the opportunity to correct the omission (s. 7(10)(2) of the Awb).

⁴⁴ S. 8(1) of the Awb.

⁴⁵ S. 6(2)(a) of the Awb.

⁴⁶ S. 62(b) of the Awb.

5.2. Penalty payment to be imposed on the tax authorities

The above-described possibility to appeal against the omission to reach a decision does not yet provide a targeted means to induce the tax inspector to actually decide. The Penalty Payments (Failure to Give Timely Decisions) Act⁴⁷ (*Wet dwangsom en beroep bij niet tijdig beslissen*) introduces two regulations in order to supplement legal protection in this regard, namely (a) a penalty payment to be paid by the tax authorities and (b) a special court procedure. These regulations are briefly discussed below:

- (a) The Awb provides for a penalty payment in case of failure to reach a decision in time.⁴⁸ If the tax inspector failed to reach a timely decision on a notice of objection⁴⁹ and the interested party gave the tax inspector written notice of default, the regulation provides for a penalty payment if the tax inspector failed to reach a decision within two weeks after receipt of the notice of default. The tax authorities will incur a penalty payment for each day the tax inspector is in default. The maximum term of the penalty payment is 42 days. The penalty payment amounts to 20 euro per day for the first two weeks, 30 euro per day for the next two weeks and 40 euro per day for the other days. The maximum penalty payment is therefore 1260 euro. The tax inspector determines the total amount of the penalty payment owed by means of a decision. It is possible to submit an appeal against this decision to the court.
- (b) If the tax inspector failed to make a decision in time and the interested party has given him written notice of default, it is possible to initiate accelerated court proceedings against the failure to reach a decision. In principle, the court will handle the appeal without a hearing and within 8 weeks on the basis of this regulation. If the appeal is justified, the court will decide that the tax inspector has to reach a decision within two weeks. The court will impose a new penalty payment to be incurred by the tax authorities if he does not decide within the period stated.⁵⁰

5.3. Immaterial damages due to undue delay

The Awb contains a few articles about a compensation of damages (section 8(73) of the Awb), compensation of the court registry fee (section 8(74) of the Awb) and a compensation of procedural costs (section 8(75) of the Awb).

To start with these last articles to give an impression of the compensation possibilities. In the past a taxpayer was compensated with a substantial part of the procedural costs. With the entry into force of the Legal Costs (Administrative Law) Decree (*Besluit Proceeskosten Bestuursrecht*) these costs were based on flat rates. This leads in practice to a situation where only a small amount of the procedural costs of a taxpayer are compensated if he engages a tax adviser or a tax attorney at

⁴⁷ Act of 28 August 2009, Bulletin of Acts and Decrees 2009, 383.

⁴⁸ Part 4.1.3.2 of the Awb.

⁴⁹ S. 4(17) of the Awb; the regulation is open to more late decisions.

⁵⁰ S. 8(55)(2) of the Awb. In principle, there is no maximum penalty.

law. In some cases there are advisers who start class actions and this might lead to more substantial compensation per case. The court registry fee was and is compensated to the taxpayer if he “wins” the procedure, although there is much discussion going on in the Dutch Parliament about raising the fees to substantial amounts which might lead to a limitation of the access to judicial bodies. This is not really best practice for the protection of taxpayers’ rights.

It is different for the compensation of damages. In the past a request for or the compensation of damages was rarely seen. This has changed since 2011 and gives the tax authorities and the judicial bodies a stimulus to deal with tax cases within a reasonable time.

On 10 June 2011, the Supreme Court rendered three judgments⁵¹ on the granting of immaterial damages in case of tax disputes⁵² in connection with the long duration of the handling of objections and appeals.

In these judgments, the Supreme Court ruled that legal certainty is a generally accepted legal principle, which is partly based on section 6 of the ECHR.⁵³ This principle of legal certainty likewise applies within the domestic legal system and likewise separately from section 6 of the ECHR. Its aim is to guarantee that tax disputes are settled within a reasonable period. With analogous application of section 8(73) of the Awb, the tax authorities may be ordered to compensate for this damage. The delay due to the court handling may result in the state being ordered to compensate for immaterial damage.

If this reasonable period is exceeded, tension and frustration are assumed to arise, which constitutes a ground for compensation of immaterial damage. Here, the Supreme Court is guided by existing case law on section 6 of the ECHR.⁵⁴

The duration of the reasonable period is set at two years, counting from the moment when the tax inspector receives the notice of objection until the moment when the court delivers a judgment.⁵⁵

The immaterial damages if this period is exceeded have been set by the court at a fixed amount of 500 euro per six months, rounded up.⁵⁶

6. Closed or open system

This subject can be explained in various ways and offers from more points of view advantages for the taxpayer. A few themes will be discussed. First, the closed

⁵¹ Supreme Court 10 June 2011; ECLI:NL:HR:B05046; Supreme Court 10 June 2011; ECLI:NL:HR:B05080 and Supreme Court 10 June 2011; ECLI:NL:HR:B05087.

⁵² In the case of proceedings regarding a fine, established case law shows that, under certain circumstances, unreasonably long proceedings imply a mitigation due to undue delay. Supreme Court 22 April 2005, ECLI:NL:HR:2005:AT4468.

⁵³ S. 6 of the ECHR does not pertain to pure tax disputes. See e.g. ECtHR 12 July 2001 (*Ferrazini v. Italy*).

⁵⁴ E.g. the judgment of 29 March 2006 (*Riccardi Pizzati v. Italy*).

⁵⁵ As a rule, a division of the period in tax matters implies that the objection phase has lasted unreasonably long if its duration exceeds 6 months. The appeal phase has lasted unreasonably long if it takes more than 18 months.

⁵⁶ Here, no distinction is made between natural and legal persons.

system of legal decisions which can be appealed. Secondly, the report will elaborate that it is despite the first section possible to ask the tax inspector to decide *ex officio* that an irrevocable decision can be reduced.

6.1. The closed system of legal protection

Dutch general administrative law has an open system of legal remedies (objection and appeal) for taxpayers.⁵⁷ This means that, in principle, legal remedies are available for any interested party against any decision or any written decision by an administrative body on a public law act. Legal remedies are only not available against a number of decisions specifically referred to in the law.⁵⁸ So it is possible to submit an objection or appeal against a decision, unless the law dictates otherwise.

Although Dutch tax law forms part of administrative law, it has a closed system of legal remedies. This means that legal remedies are available only against specific decisions referred to in the law and for specific interested parties referred to in the law. So it is not possible to submit an objection or appeal against a decision, unless the law dictates otherwise.

Before elaborating this theme further it should be noted that the closed system of legal protection is not to be confused with the possibilities of the taxpayer to defend himself on the basis of a civil procedure if the closed system of legal protection in tax law does not provide a legal remedy. Or with the option for the tax inspector to force a taxpayer to provide information during a civil law suit with a penalty payment.⁵⁹ Lastly it should be noted that the tax collector has an open system with regard to the collection of taxes (the tax collector is in principle allowed to use administrative and civil options).

Under tax law, it is possible to submit an objection and appeal against the following decisions:⁶⁰

- tax assessments (provisional assessments, final assessments and additional assessments);
- refund decisions; and
- decisions open to objection, or decisions against which legal remedies are available under tax law (for example a decision on the formation of a tax group).

Moreover, the payment or self-assessment of a tax amount is considered equal to a decision that is open to objection. The same applies to the withholding of a tax on behalf of a taxpayer. This pertains to, for example, the situation in which an employer deducted and paid wage tax on behalf of an employee. Due to the fact

⁵⁷ S. 8(1) in conjunction with s. 7(1) of the Awb.

⁵⁸ S. 8(3) to s. 8(5) of the Awb.

⁵⁹ This is also possible for information that is relevant for multiple taxpayers, for instance Court of Appeal 's-Hertogenbosch 19 August 2014, ECLI:NL:GHSHE:2014:2803. In this case the tax authorities requested the transactions regarding parking from SMSParking. SMSParking is an organization in the Netherlands which offers payment of parking taxes via sms, internet or smartphone. The request of the tax authorities was not limited to certain taxpayers nor was it limited to certain taxes. The Court of Appeal decided that this request for information was not a violation of the privacy of taxpayers.

⁶⁰ S. 26 of the AWR.

that this withholding and payment is considered equal to a decision that is open to objection, a taxpayer may submit to the tax inspector an objection against the withholding or payment of wage tax by his employer.

Over the past few years, the decisions against which legal remedies are available have been extended.

For instance, regarding tax assessments, the possibility of submitting an objection against provisional assessments has been laid down in the law. This possibility was changed, though, a few years ago.⁶¹ There are no direct legal remedies available any longer against these assessments. Instead, provisional income tax or corporation tax assessments can be reviewed at the request of the interested party. If this request is wholly or partly rejected, then this is done by means of a decision that is open to objection.

Moreover, regarding decisions that are open to objection, legal remedies have for example been made available against a decision on an *ex officio* reduction in income tax.⁶² If a notice of objection was filed outside the statutory period, the tax inspector will always proceed to an *ex officio* examination of this objection. A few years ago, a decision made by the tax inspector following this *ex officio* examination became a decision that is open to objection through a statutory provision.

Moreover, legal remedies have been made available against an information decision.⁶³ If, for example, a taxpayer refuses to provide information, the burden lying with the tax inspector to prove the tax corrections may be shifted to this taxpayer. In that case, the taxpayer must prove that the tax corrections were made incorrectly. In order to shift the burden of proof, the tax inspector must, before imposing the tax assessment with the tax corrections, issue an information decision. Legal remedies are available against this information decision.

Under Dutch tax law, the circle of interested parties who can submit an objection and appeal is also limited. Legal remedies against the aforementioned decisions are available for the following interested parties:⁶⁴

- the interested party on whom the tax assessment was imposed;
- the interested party who paid the tax amount on the basis of self-assessment or in respect of whom the tax amount was deducted;
- the interested party to whom the decision open to objection is addressed; and
- the interested party whose income components or assets are included in the object of taxation to which the tax assessment or decision open to objection relates.

The last-mentioned interested parties have been included in the law following a judgment of the tax division of the Supreme Court.⁶⁵

The above-mentioned closed system was formed through history and has grown since then. The decisions that are open to objection and appeal and the circle of interested parties who can submit an objection and appeal have expanded over the years, as explained above. The legislature has taken the initiative for this. Sometimes, the legislature is incited to do so as a result of case law in which a legal

⁶¹ S. 9(5) of the Income Tax Act and s. 27 of the Corporation Tax Act respectively.

⁶² S. 9(6) of the Income Tax Act.

⁶³ S. 52a of the AWR.

⁶⁴ S. 26a of the AWR.

⁶⁵ Supreme Court, 27 September 1989; ECLI:NL:HR:1989:ZC4110.

remedy deficiency has been detected and may already have been repaired. A disadvantage of this course of affairs is that a legal remedy deficiency may arise and it may take some time before this legal remedy deficiency is actually lifted by the legislature or case law.

However, the State Secretary for Finance has stated that he wants to keep the closed system as a basic principle under Dutch tax law, as it functions properly.⁶⁶

An advantage of the closed system is that the number of objection and appeal procedures can remain limited. This applies to tax inspectors, the judiciary and taxpayers.

Another advantage of the closed system is its clarity. The current closed system only has a limited number of decisions against which an interested party has to submit an objection in order to secure his rights. The relevant decisions are clear to both the tax inspector and the taxpayer. Moreover, tax law has specific provisions based on which the objection and appeal submitted against a tax assessment are deemed to also be submitted against the fine and interest decisions referred to in the notice of assessment.⁶⁷ The tax division of the Supreme Court has expanded this regulation to include decisions determining a loss for the year to which the tax assessment relates.⁶⁸

In the closed system, an interested party can, in most cases, also express his complaints against decisions that are not open to objection and appeal. These complaints can be put forward in the objection against a decision that is open to objection and appeal, insofar as this decision is based on the decisions that are not open to objection and appeal.

In the open system, on the other hand, both tax inspectors and interested parties always have to ask themselves whether a decision is a decision that is open to objection and appeal. The uncertainty about this is borne by the interested parties. An objection can be submitted against any decision that is open to objection and appeal only once. If a decision appears to be a decision against which legal remedies were available and the interested party did not submit an objection during the period for submitting an objection, the relevant decision will have become final. In that case, the decision will have obtained legal effect.

In the open system, a taxpayer therefore runs the risk, for each decision possibly open to objection, of forfeiting his rights by not submitting an objection.

The adverse effects of this need not be limited to this one decision. If the decision that has obtained legal force forms the basis for another decision, the objection submitted against the other decision may only be effective if it is not based on the decision that has already obtained legal force. The reverse also applies. If a decision against which an objection has been submitted forms the basis for another decision against which no objection has been submitted, the objection against the first decision may no longer be effective.

A practical example will clarify this. This example forms an exception to the existing closed system. In an open system, the problems put forward in this example would be the rule rather than the exception.

⁶⁶ Parliamentary Papers II, 2006/07, 30322, no. 13, p. 2.

⁶⁷ S. 24a(2) and (3) and s. 27h(2) of the AWR.

⁶⁸ Supreme Court, 16 December 2005; ECLI:NL:HR:2005:AU8171.

Certain companies may apply for a tax group for corporation tax purposes. With a tax group, these companies can file a tax return as a single taxpayer. The formation of a tax group is allowed by means of a decision that is open to objection and appeal.

It is conceivable that the tax inspector decides not to allow the formation of a tax group. This will constitute a decision that is open to objection and appeal, against which the interested companies can submit an objection. Assume that the interested parties submitted an objection against the decision of the tax inspector not to allow the formation, but filed tax returns as individual taxpayers pending this objection. If the tax inspector imposed the tax assessments in accordance with these tax returns and the interested parties failed to submit an objection against these assessments, the assessments would have obtained legal force. In that case, a continuation of the objection against the tax group would no longer be effective for those years relating to the assessments that had obtained legal force. By not submitting an objection against the most recent decisions, the assessments, the taxpayers would therefore have forfeited their rights also as regards the formation of a tax group.

6.2. Official or *ex officio* reduction

Section 6.1 explained that the Netherlands uses a closed system regarding legal protection. The closed system clarifies the decisions that can be challenged. If the period for submitting an objection or appeal has expired, the decision will obtain formal legal force. If a decision has formal legal force, it will no longer be possible to challenge it under administrative law and the civil court will consider the contents and the making of the decision to be lawful.

A particularity in the Dutch tax system is that even if a decision has formal legal force, it is possible to submit a request for an *ex officio* reduction. This is done as a rule in case of an untimely objection against a decision. In this case one could imagine a situation where a taxpayer finds, when he has been on a world trip, a tax assessment of which the term to object has expired. There are also a number of taxpayers who forget to deduct costs in their tax declaration, such as the deduction of mortgage interest or medical expenses. The tax and customs administration will, in that case, still assess the contents of the decision.⁶⁹ The official reduction has a statutory basis.⁷⁰ A decision on a request for an official reduction of an income tax assessment or decision is open to objection and appeal and can therefore be submitted to the court for assessment. The possibility of an official reduction or refund mitigates the consequences of formal legal force.

7. Notification of international exchange of information

The point of departure of Dutch taxation is the duty of confidentiality as codified in section 67 of the AWR. This section forbids anyone who performs any work within

⁶⁹ See Decree on Official Reductions or Refunds, 16 December 2010, DGB2010/6799M, Bulletin of Acts and Decrees 2010, 20999. No account is taken of case law or policy published at a later point in time; para. 5 of the Decree on Official Reductions or Refunds.

⁷⁰ S. 65 of the AWR.

the context of taxation to disclose information about taxpayers any further than necessary for the implementation of tax law or for the collection of taxes.⁷¹ In principle, international exchange of information without express statutory legitimacy is therefore not allowed.

That is why on 24 May 1986, the International Assistance (Levy of Taxes) Act was introduced (WIB).⁷² The WIB contains a statutory basis for the international exchange of information and administrative assistance in the levying of taxes. During the parliamentary debate, it was stated that having proper information available in all countries would prevent on the one hand tax being levied on gains resulting from international transactions neither abroad nor in the Netherlands and, on the other hand, would also prevent double taxation.⁷³ Having adequate information available is a condition for taxation that is as correct as possible.

Under the WIB, it is possible to provide information falling under the duty of tax secrecy to the tax authorities of another state, under certain conditions. Taxes levied by central governments as well as local governments fall under the WIB. Turnover tax, excise duties and import and export duties, however, do not fall under the WIB. These levies fall under the direct scope of European regulations.⁷⁴

The information provision must be based on an international or interregional regulation, which is applicable to the relationship between the Netherlands and the state requesting or providing information. In the exchange of information, a distinction can be drawn between various forms of exchange. Information can be exchanged at the request of a foreign authority. Information can also be exchanged automatically, which constitutes a regular provision of information to a foreign authority on certain groups of persons. Finally, information can be exchanged with foreign countries spontaneously. The procedural rules included in the WIB apply to all procedures.

These procedural rules were amended with effect from 1 January 2014. Until 31 December 2013, the procedure was as follows. Before information was provided to foreign authorities spontaneously or upon request, the party the information came from was informed of the decision to provide the information. Subsequently, it was possible to submit an objection against this to the tax and customs administration, after which an appeal could be submitted to the judiciary. After this notification, the information was not provided to the foreign authorities for ten days. Under section 6(16) of the Awb, lodging an objection and appeal has no suspensive effect in the Netherlands. During the above-mentioned ten-day period, however, it was possible to request preliminary relief from the court under section 8(81) of the Awb. By means of this preliminary relief, it was possible to suspend the exchange of information until the time when a decision was made on the objection and appeal.

If information was exchanged automatically, no individual notification was given as it concerned large groups of persons. However, a general notification was published in the form of a message in the Government Gazette.

⁷¹ S. 67 of the Collection of State Taxes Act includes a comparable confidentiality provision with respect to work within the context of the Collection of State Taxes Act.

⁷² Bulletin of Acts and Decrees 1986, 249.

⁷³ Parliamentary Papers II 1984/85, 18,852, no. 3, p. 7.

⁷⁴ See, for example, Regulation (EEC) 218/92.

Parliamentary history shows that the above notification was prescribed with a view to protection of the interests of the persons concerned.⁷⁵ However, the legislature considered these arguments to be not or no longer valid in order to maintain the notification level as well for the purpose of a revision to the Dutch procedure for the international exchange of information. In 2011, the Netherlands received a peer review⁷⁶ from the Global Forum on Transparency and Exchange of Information on Tax Matters which reports to the G20. In line with the recommendations of the peer review and the new EU Assistance Directive, the above-described procedural rules were reconsidered by the Netherlands.

The notification procedure was eventually cancelled with effect from 1 January 2014.⁷⁷ Here, the Netherlands emphasised that there were sufficient guarantees in all countries with which information was exchanged to ensure the confidentiality of the data.⁷⁸ Moreover, the EU Assistance Directive and the information exchange section – based on the OECD model tax convention – in the Dutch bilateral and multilateral conventions pertaining to information exchange assume the same level of data protection by the affiliated parties. The regulations and practices of all 120 countries affiliated with the Global Forum are or will be tested in the Global Forum peer review process for compliance with this level. The most important exchange partners of the Netherlands are affiliated with the Global Forum. Due to the purpose of the relevant guidelines and conventions, the data provided may only be used for the levy of taxes and, where necessary, any other detailed government purposes, such as determining and collecting social security contributions, or in court proceedings due to a violation of tax law. Finally, legal remedies are available for taxpayers against the relevant (foreign) assessment for which the relevant information has been used.

However, this does not alter the fact that Dutch interested parties whose data have been provided to foreign countries for the purpose of taxation of other parties no longer have a guarantee which ensures confidentiality of the information abroad and prevents data from being provided or used unlawfully or copied or shown incorrectly. That is why tax literature urges that “prior notification” should be reintroduced.

⁷⁵ Parliamentary Papers 1984/85, 18,852, no. 3.

⁷⁶ Peer review Global Forum 26 October 2011.

⁷⁷ Bulletin of Acts and Decrees 2013, 566.

⁷⁸ Parliamentary Papers II 2013/14, 33,753, no. 3, p. 10.