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It takes two to tango: international exchange of information on tax matters and the protection of tax payers' rights

Introduction

Over the last few years, there has been growing interest in the international exchange of information on tax matters. During political conferences on both an international and a European level, there have been signs that the exchange of information to prevent tax fraud, avoidance and evasion is high on the political agenda. While writing this article, a huge leak of documents occurred at law firm Mossack Fonseca in Panama. The documents contain information about their clients, who are being accused of using offshore companies to hide their wealth. The so-called 'Panama Papers' have been a trending topic ever since.

This article gives a short inventory of the recent developments at the international, European and Dutch levels. In addition, the tax agreement between Panama and the Netherlands will be examined, specifically with regard to the possibilities of the exchange information between these countries. Finally, the (lack of) protection of taxpayer's rights in the Netherlands will be discussed.

Recent developments

In the United States, the Foreign Account Tax Compliance Act (FATCA) came into effect on 1 January 2013. According to this law, all financial institutions (worldwide) should provide information on US taxpayers, beginning in 2014, to US tax authorities. The US clearly wants to fight tax fraud. The Netherlands have joined with a number of other European Union Member States in a pilot project to battle tax evasion and promote fiscal transparency, signing the FATCA agreement with the US on 18 December 2013. The European Commission has already indicated that the FATCA model should also be applied within the EU. According to the 'Common Reporting Standard', Dutch financial institutions had to begin identifying their customers from 1 January 2016 in addition to verifying where their customers reside.

We have also seen changes at a national level. The most important of these are the amendments, which went into effect on 1 January 2013, on the International Assistance (Levying of Taxes) Act (*Wet op de internationale bijstandverlening bij de heffing van belastingen*; the 'WIB'). The modified Act reinforced the existing rules on automatic information exchange. As of 1 January 2015, data on labour income, management fees, life insurance, pensions and ownership of and income from immovable property will be exchanged automatically.

Further, on 30 May 2013, the State Secretary of Finance announced that the procedures required prior to the international exchange of data then in place would be cancelled. This procedure, which emphasised 'notification beforehand', was in place for interested parties to enable the suspension of the exchange of information. The notification was, unless for compelling reasons, sent regarding the exchange of information on request and spontaneously, but only with respect to direct taxes. By abolishing the notification requirement, the Netherlands is attempting to follow the other EU Member States, most of which no longer have notification procedures in place. The Minister of Finance also indicated, on 30 August 2013:

> 'The Netherlands will greatly enhance fiscal transparency and update tax treaties with low-income countries and low-middle income countries. Thus, tax treaties with Zambia

and 22 other poor countries revised to add that desired anti-abuse provisions. That is written by the Minister for Foreign Trade and Development and the Minister of Finance in a letter to the House in which they include responding to inquiries from the Economic Research Foundation (SEO) and the International Bureau of Fiscal Documentation (IBFD). The government is taking the following measures: the Netherlands will inform its treaty partners spontaneously when, in retrospect, a company turns out not to meet the substantial activity requirements. Thanks to this improved information exchange with the source country, that country will be in a position to deny the treaty benefits to a company.'

Since the exchange of international data is so high on the agenda, banking secrecy and tax havens in foreign countries are increasingly under pressure. Therefore, over the last few years, an enormous number of Tax Information Exchange Agreements (TIEAs) were signed with countries that have banking secrecy laws or are considered 'tax havens'. On 15 March 2015, the European Commission introduced a proposal to adjust the directive on administration cooperation. After the adjustment the Member States shall also automatic exchange tax rulings. This proposal is accepted by all Member States. The automatic exchange of tax rulings will have effect in 2017.

Given these recent developments, the exchange of tax information will become more intensive all over the world. The Netherlands' Government seems especially eager to cooperate since the Netherlands has repeatedly been qualified as a tax haven. It goes beyond the scope of this article, however, to discuss the validity of this qualification.

Exchange of information between Panama and the Netherlands

In the case of the 'Panama Papers', the competent authority did not exchange the information but, rather, journalists used the leak to obtain all the documents. Under ordinary circumstances the governments of Panama and the Netherlands can exchange fiscal information. On 6 October 2010, Panama and the Netherlands signed a tax treaty, which came into force on 1 December 2011. The section on the exchange of information in this treaty is in accordance with the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention. Remarkably, there is no section in the treaty with regard to actual assistance with the *collection* of taxes. The section about the exchange of information provides the opportunity for the Netherlands and Panama to exchange that information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning income tax as specified by national law for both parties. The information will only be exchanged on request, not automatically or spontaneously.

In paragraph two, it is also noted that the information must be dealt with in strict confidentiality and may only be disclosed to limited persons and bodies for limited purposes. This provision in other treaties has led to court cases in the Netherlands when interested parties have tried to prevent (part of) the exchange of information on the basis of the WIB. In such procedures, the tax inspector generally claims that the documents regarding the exchange of information, such as any correspondence and the request itself, should remain undisclosed to the interested party. There is enough room for a discussion on whether taxpayers' rights can be actually protected when a request for an exchange of information is sent.

Protection of taxpayers' rights

The point of departure for Dutch taxation law is the duty of confidentiality as codified in section 67 of the State Taxes Act (*Algemene wet inzake rijksbelastingen*). This section forbids anyone who performs any work within the context of taxation to disclose information about taxpayers further than necessary for the implementation of the tax law or for the collection of taxes. In principle, the international exchange of information without express statutory legitimacy is therefore not allowed.

Having adequate information available is a condition for taxation, however. That is why, on 24 May 1986, the WIB was introduced. The WIB includes 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 prevents, on the one hand, taxes levied on gains resulting from international transactions neither abroad nor in the Netherlands and, on the other hand, double taxation.

Under the WIB, it is possible to provide information falling under the national 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 scope of the WIB. Turnover taxes, excise duties and import and export duties, however, do not. These levies fall into the direct scope of European regulations. Since the agreement between the Netherlands and Panama (only) addresses income taxes, the WIB is applicable.

In the WIB, the provision of information must be based on an international or inter-regional regulation, which is applicable to the relationship between the Netherlands and the state requesting or providing the information, such as section 24 of the treaty between the Netherlands and Panama. A distinction can be drawn between various forms of exchange. Information can be exchanged at the request of a foreign authority, for example, and can also be exchanged automatically, which constitutes the 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.

Until 31 December 2013, according to these rules, which were amended on 1 January 2014, the procedure was as follows. Before the information was provided to the foreign authorities spontaneously or upon request, the party holding the information was informed of the decision to provide the information to the foreign authorities. It was then possible to submit an objection against this decision to the Tax and Customs Administration, after which an appeal could be submitted to the court. Following the initial notification, the information was not to be provided to the foreign authorities for ten days. Under section 6:16 of the Netherlands' General Administrative Law Act (*Algemene wet bestuursrecht*, the 'AWB'), lodging an objection or an appeal has no suspensive effect. During the 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, a party could suspend the exchange of information until the time when a decision was made on the objection and appeal. If the information was exchanged automatically and concerned large groups of persons, however, no individual notification was given, but a general notification was published in the form of a message in the Government Gazette.

Parliamentary history shows that the ten-day period was prescribed with a view to protecting the interests of the persons concerned. However, legislators have since considered this rationale to be no longer valid. Moreover, some pressure was exerted on an international level for the purpose of a revision of the Dutch procedure for the international exchange of information. In 2011, the Netherlands received a peer review from the Global Forum on Transparency and Exchange of Information on Tax Matters (the 'Global Forum'), which reports to the G20. In line with the recommendations of the peer review and the new EU assistance directive, the Netherlands reconsidered the above-described procedural rules.

The notification procedure was eventually cancelled from 1 January 2014. Here, the Netherlands emphasised that there were sufficient guarantees in all countries with which information was exchanged to ensure the confidentiality of the shared data. Moreover, the EU Assistance Directive and the information exchange section in the Dutch bilateral and multilateral conventions pertaining to information exchange – which are based on the OECD Model Tax Convention – 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 being, or will be, tested in the Global Forum peer review process for compliance at this level. The most important exchange partners with the Netherlands are affiliated with the Global Forum. Given the purpose of the relevant guidelines and conventions, the data provided may only be used for the levy of taxes and, where necessary, for any other detailed government purpose, such as determining and collecting social security contributions or in court proceedings on the violation of a tax law. Finally, legal remedies are available for taxpayers against the relevant (foreign) assessment for which the requested information has been used.

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

Although 'prior notification' has been effectively cancelled, it is still possible to object to the exchange of information, even though the information will most likely already have been sent abroad. According to Dutch case law, such a procedure will only be successful if the interested party makes a reasonable claim that damage has resulted from the process of decision making about the requested information or the exchange itself. If the only reason for an appeal procedure is to delay or stop a principal decision on the exchange of information, the appeal will be declared inadmissible, however.

If one becomes aware of a request from either the Panamanian or the Dutch tax authorities, it is advisable to ask for the assistance of a tax attorney at law or a tax adviser in both countries. In the Netherlands, it is possible to ask the Dutch tax inspector for a copy of the request for information. In this way, a taxpayer can check whether the request meets the requirements described above. If the request is flawed or includes inaccuracies, these can be identified at an early stage. On this basis, the appropriate action can be taken, such as, for example, informing the Panamanian authorities of such procedural violations or errors.

However, as explained earlier, the Dutch tax inspector will not easily fulfil such a request. If the tax authorities will not provide access to a case file, there are some options that might be explored, such as a civil law suit or a procedure on the basis of privacy protection law. However, these options have not yet been crystallised.

Conclusion

Internationally, in Europe and at a national level, eyes are focused on tax fraud, tax avoidance and tax evasion. One of the priorities in the fight against tax evasion is the easing of regulations for data exchange. Spontaneous and automatic exchange of information is the motto, but the more we talk about data, the less attention we pay to legal protections.

The Netherlands is doing its part by eliminating prior notification and using a restricted definition of the secrecy clause during a WIB procedure. This makes it even more relevant for taxpayers to seek assistance in the Netherlands and in Panama if a request for the exchange of information is sent. This might prevent damage with respect to privacy or business secrets, especially when certain formal obligations have not been met.

Despite increasing regulations on data exchange, the agreement between Panama and the Netherlands is not yet adjusted in a way that will lead to increased exchange of information on different sorts of taxes. As a result, legal protection against uncontrolled data is, in both countries, still fully applicable.

This leads to the conclusion that it takes two to tango: the two tax authorities have to find a balance between the exchange of information and the personal privacy or business secrecy of the taxpayer, who might be wise to contact tax advisers or tax attorneys-at-law in two or more countries to fully protect his rights.