



The Netherlands releases draft law implementing new transfer pricing documentation requirements in line with BEPS Action 13

Executive summary

On 15 September 2015, the Dutch State Secretary of Finance released a draft law containing modifications to the Dutch Corporate Income Tax Act 1969 (CITA 1969). The proposed modifications include supplementary transfer pricing documentation requirements in line with the three-tiered approach of Action 13 of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) project.¹ Under the draft law, the Country-by-Country (CbC) report, the master file and local file requirements will be applicable for fiscal years starting on or after 1 January 2016.

This Alert summarizes the new Dutch transfer pricing documentation requirements.

Detailed discussion

Implementation of the OECD documentation standards

The OECD's BEPS Action Plan 13 describes a standardized three-tiered approach for transfer pricing documentation consisting of the CbC report, the master file, and the local file. The draft law, to be codified in articles 29b - 29h CITA 1969, confirms that The Netherlands will implement the OECD's three-tiered approach. Accordingly, supplementary transfer pricing documentation requirements are to be introduced in The Netherlands.

The CbC report is applicable to Dutch tax resident entities, members of a multinational enterprise (MNE) group, with a consolidated group turnover exceeding €750 million in the fiscal year preceding the fiscal year to which the CbC report applies. The CbC report should be provided to the Dutch tax inspector in certain circumstances as outlined below.

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Dutch tax resident entities of an MNE group, also will have to prepare a master file and local file. This requirement will apply to Dutch tax resident entities of an MNE group that has a consolidated group turnover exceeding €50 million in the fiscal year preceding the year for which the tax return applies. For smaller groups, the current Dutch transfer pricing documentation requirements will remain applicable in order to avoid imposing burdensome administrative requirements for small and medium-sized enterprises.

The qualifying MNE group entity should have a master file and local file available at the level of the Dutch entity at the moment of filing the tax return. The Dutch tax administration can request these files from the local Dutch entity.

CbC reporting

The CbC reporting requirements are generally aligned with the OECD draft guidance from the implementation package.² If the ultimate parent company of an MNE group with a consolidated group turnover exceeding €750 million, is a Dutch tax resident, this entity is obliged to provide a CbC report to the tax inspector within 12 months after the last day of the fiscal year. The filed CbC report will subsequently be exchanged automatically with states the MNE is operating in with whom the Netherlands has concluded an information exchange agreement. In the following situations, a Dutch tax resident entity, not being the ultimate parent company of a

qualifying multinational enterprise, would need to file a CbC report in the Netherlands:

- ▶ The country in which the ultimate parent entity is a tax resident has not established CbC reporting obligations
- ▶ The country in which the ultimate parent entity is a tax resident does not have a signed agreement in place regarding automatic exchange of information with the Netherlands on CbC reports (at the latest 12 months after the last day of the fiscal year)
- ▶ The inspector has informed the group entity that the country in which the ultimate parent company is a tax resident has systematically failed to comply

If the MNE group has multiple Dutch resident group entities, and one or more of the above conditions are met, the MNE group can designate one of these group entities to fulfill the requirement to provide the CbC report.

A group entity is not required to provide the tax inspector with a CbC report within 12 months after the last day of the fiscal year of the MNE group if a “surrogate parent entity”³ provides the CbC report to the tax administration of the country in which it is tax resident.

Furthermore, the draft law requires a Dutch tax resident entity to notify the tax inspector which group entity will file the CbC report if the Dutch tax resident entity is not the ultimate parent entity or surrogate parent entity, at the latest on the last day of the reporting period.

With respect to the content of the CbC report, the draft law requires the following items to be included for each state in which the MNE group is active:

- ▶ Revenues
- ▶ Earnings before income tax
- ▶ Income tax paid
- ▶ Income tax according to statutory accounts
- ▶ Paid-in capital
- ▶ Accumulated earnings
- ▶ Number of employees
- ▶ Tangible assets (other than cash and cash equivalents)
- ▶ A description of each group entity of the MNE group noting the state of which the group entity is a tax resident, and in case of deviation, the state under whose laws the group entity has been incorporated, as well as the nature of the main business activity or business activities of the group entity

Further guidance regarding the form and content of the CbC report will be provided through detailed implementation rules. The CbC report should be prepared in the Dutch or English language.

The purpose of the CbC report is for the tax inspector to be able to assess substantial transfer pricing risks and other risks for the Netherlands related to base erosion and profit shifting. In addition, the CbC report could serve to assess the risk of whether MNE group members are not adhering to the applicable transfer pricing rules

and where needed for conducting economic and statistical analyses. Finally, the draft law prescribes that a transfer pricing adjustment by the tax inspector may not be based on the CbC report.

Transfer pricing documentation: master file and local file

The draft law also provides that a group entity taxable in the Netherlands and part of a qualifying MNE group⁴ should include, within the term set for submitting its corporate income tax return, a master file and a local file regarding the year to which the tax return applies in the records of the taxpayer. The goal of these files is to support the transfer prices applied. Similar to the CbC report, both the master file and the local file can be prepared in the Dutch or in the English language. The Dutch group entity should provide the transfer pricing documentation to the tax inspector upon request.

The master file should provide an overview of the MNE group business, including the nature of the business activities, its general transfer pricing policy and its global allocation of income and economic activities. Specifically, the master file should include the following information:

- ▶ Organizational structure
- ▶ A description of business activities
- ▶ Intangibles
- ▶ Financial activities within the group
- ▶ The financial and tax position of the MNE group
- ▶ Lists of important agreements, intangibles, and transactions

The local file should include information relevant for the transfer pricing analysis regarding inter-company transactions with Dutch entities and which helps to substantiate the arm's length nature of the transactions as well as information supporting the arm's length allocation of profits to a permanent establishment. The local file should include the following information:

- ▶ Relevant financial information regarding specific transactions
- ▶ A comparability analysis
- ▶ The selection and application of the most appropriate transfer pricing method

Under the draft law, profit allocation to permanent establishments will have to be included in the local file, which seems to be broader than the OECD guidance.

Further guidance regarding the form and content of both the master file and the local file will be set forth in detailed implementation rules in line with Annex I and Annex II of Chapter V of the September 2014 OECD report *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*.

Specific penalties for non-compliance with the CbC reporting requirements

The Dutch Government proposes that not satisfying the requirements to submit the CbC report will be regarded as a criminal offense. Non-compliance will lead to a monetary fine of the third category, as provided in article 23, paragraph 4 of the criminal code (as of 1 January 2014: €8,100) or custody of six months at the most for the party

involved. In case non-compliance occurs intentionally, then a fine of the fourth category, as provided in article 23, paragraph 4 of the criminal code applies in addition to an imprisonment of four years at the most. The authority to levy an administrative penalty will expire five years after the end of the calendar year in which the requirement originated.

The Dutch Government notes that criminal prosecution will generally be reserved for the most serious cases.

The proposed penalties for non-compliance with the CbC report requirements do not apply to the master file and the local file. These files are considered to be part of the records of the taxpayer. The Netherlands has a penalty regime with respect to not meeting the requirements regarding tax administration. Accordingly, this existing regime is also applicable to the master file and the local file.

Implications

When the draft law is enacted, supplementary transfer pricing documentation requirements will be implemented in The Netherlands in line with the "standardized 3-tier" approach under Action 13 of the OECD BEPS project. The CbC report, the master file and local file requirements will be applicable for fiscal years starting on or after 1 January 2016. MNE groups with a presence in The Netherlands should evaluate whether the new transfer pricing documentation requirements are applicable to them and if so should take actions to meet these requirements.

Endnotes

1. See the OECD BEPS Action 13 report *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, dated 16 September 2014. Refer also to EY Global Tax Alert, [OECD releases report under BEPS Action 13 on Transfer Pricing Documentation and Country-by-Country Reporting](#), dated 23 September 2014.
2. See the OECD BEPS Action 13 report *Action 13: Country-by-Country Reporting: Implementation Package*, dated 8 June 2015. Refer also to EY Global Tax Alert, [OECD issues implementation package for country-by-country reporting under BEPS Action 13](#), dated 23 June 2015.
3. A group entity of an MNE group that has been designated by the MNE group as the substitute for the ultimate parent entity to file the CbC report on behalf of the MNE group in the country in which it is tax resident.
4. The consolidated turnover of the MNE group should exceed €50 million in the fiscal year preceding the reporting fiscal year.

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EYG No. CM5764

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