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International Tax Law. Transfer pricing method, application of the arm's length principle and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines).

14 November 2013 no. IFZ 2013/184 M

Directorate-General for Tax and Customs Policy and Legislation, International Tax Policy and Legislation Directorate

The State Secretary for Finance decreed the following.

On cross-border transactions there is consensus amongst the OECD member countries with regard to the so-called arm's length principle as included in Article 9 of the OECD Model Tax Convention. The arm's length principle has been described in more detail in the OECD Commentary to Article 9 of the OECD Model Tax Convention and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines).
In the year 2002 the arm's length principle was codified in the Netherlands by Section 8b of the Dutch Corporation Tax Act 1969 ('CIT Act').
Because the OECD Guidelines provide details of the arm's length principle which are internationally accepted, I consider the OECD Guidelines as a suitable interpretation and clarification of the principle described in Section 8b CIT Act 1969.
This Decree will provide more details to the arm's length principle. It particularly concentrates on aspects where the OECD Guidelines leave scope for domestic details or where there is a lack of clarity.

1. Introduction

1.1 Abbreviations and terms used

OECD Guidelines	Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
OECD	Organisation for Economic Co-operation and Development

Insofar as the term function(s) is used, this will mean: function(s), taking into account the assets used and the risks assumed.

For clarification this Decree refers to corresponding Chapters or paragraphs in the OECD Guidelines to which the text of this Decree relates in parentheses.

1.2 Reason for this Decree

This Decree replaces the Decrees of 30 March 2001, no. IFZ 2001/295M and of 21 August 2004, no. IFZ 2004/680M which related to the arm’s length principle. This Decree also pays attention to recent developments.

Major changes with regard to the two Decrees referred to above, are:

- A more comprehensive description of the application of the arm's length principle (par. 2.1).
- Adjustments as a result of relevant amendments to legislation and regulations or case law (various paragraphs).
- Adjustments as a result of the amendments to the OECD Guidelines (new version in 2010).
- A more limited explanation of the use of various transfer pricing methods as described in the OECD Guidelines (par. 3).
- A clarification with regard to the list of shareholders activities: they are not considered as intra-group services insofar as they do not add any economic or commercial value to the group members and if and insofar as that group member would normally not be prepared to pay for this (par. 6.2).
  This clarification seeks to connect with the findings of the Joint Transfer Pricing Forum with regard to intra-group services in the 'Guidelines on low value adding services' it has published.
- A clarification entailing that costs of corporate governance can also be mixed costs (par. 6.2).
- The replacement of the text about financial services in par. 12 by the text on financing transactions (partly in connection with BNB {Decisions in Tax Cases} 2012/37).

There can be situations where there is an unbusinesslike shift of profit, for which counteraction is appropriate. This Decree indicates the lines along which this is counteracted with regard to several situations:

- Intangible fixed assets (par. 8).
- Intra-group procurement (par. 9).
- Internal reinsurance activities (par. 11).

The following new themes are also included:

- The relationship with the EU Joint Transfer Pricing Forum (par. 1.5).
- Guarantees in loan agreements (par. 10).
- Documentation requirement (par. 14).
- Early consultation (par. 15).

The following themes are no longer included:

- Administrative approaches for avoiding and solving transfer pricing disputes (par. 3 Decree IFZ 2001/295). This is in connection with the publication of Decree IFZ 2008/248.
- Profit allocation to a permanent establishment (par. 10 Decree IFZ 2001/295). This is in connection with the publication of Decree IFZ 2010/457.
- Settlement of withholding tax (par. 6 Decree 2004).

Changes in the texts have also been made compared with the texts of the Decrees of 30 March 2001, no. IFZ 2001/295M and of 21 August 2004, no. IFZ 2004/680M, in order to clarify the content or to make the text easier to read without the intention of amending the content.

1.3 Transfer prices and supervision

In assessing the transfer prices it should be considered, as also provided for in the OECD Guidelines, that determining transfer prices is not an exact science. On this basis it is furthermore indicated that tax administrations are encouraged to be flexible in their approach and not demand that the taxpayer determines his transfer prices with an accuracy that is unrealistic considering all the facts and circumstances. The Dutch tax administration will also observe these principles.

In the area of transfer pricing too, constructive co-operation between the tax administration and the taxpayer is conducive and it is important that both parties understand the position and interests of each other. Lack of clarity can be prevented by making arrangements in advance.

The foregoing does not alter the fact that there can be situations where an unbusinesslike shift of profit takes place, for which counteraction is appropriate. This Decree indicates the lines along which this is counteracted with regard to several situations. In counteracting this, the Transfer Pricing Coordination Group in the tax administration will, if necessary, cooperate with the Tax Havens and Group Financing Coordination Group and the Construction Counteraction Coordination Group.

1.4 Relationship with the OECD Guidelines

On several points the OECD Guidelines leave scope for domestic details. On several other points practice requires clarification of the OECD Guidelines. On these points this Decree provides insight into the Dutch points of view and, where possible, removes ambiguities.

The OECD Guidelines are developing rapidly and are regularly extended and adjusted. In 2010 the OECD Guidelines were amended by an adjustment of Chapters 1 to 3 and the addition of a new Chapter 9. If necessary, this Decree will also be adjusted to new developments.

For clarification this Decree refers to corresponding Chapters or paragraphs in the OECD Guidelines to which the text of this Decree relates in parentheses. This is based on the version published by the OECD in July 2010.

1.5 Relationship with the EU Joint Transfer Pricing Forum

One major task of the EU Joint Transfer Pricing Forum is to remove double taxation and to remove administrative obstacles preventing the efficient application of the transfer pricing rules. The Netherlands follows the recommendations of the EU Joint Transfer Pricing Forum as much as possible, except where the Netherlands makes a reservation.

1.6 Coordination of the implementation

The coordination at the tax administration of the implementation in the area of transfer prices is in the hands of the Dutch Transfer Pricing Coordination Group. In this respect I refer to the Decree of 11 August 2004, no. DGB2004/1339M.

2. The arm’s length principle (Chapter I and III)

2.1 General

Introduction

The arm's length principle was defined in Article 9 of the OECD Model Tax Convention (see also par. 1.6 of the OECD Guidelines).
In the year 2002 the arm's length principle was codified in the Netherlands by Section 8b of the Dutch Corporation Tax Act 1969 ('CIT Act').
The starting point of the arm's length principle is that for tax purposes associated enterprises are assumed to act towards each other as independent companies would act in similar circumstances.
This means that a result must be achieved in which the taxable profit achieved by associated enterprises on their mutual transactions is comparable with the profit which independent enterprises would achieve in similar circumstances with similar transactions.
The OECD Guidelines intend to provide insight into the way in which the arm's length principle must be applied in practice.

Considering the above I assume that the OECD Guidelines have in principle a direct effect on Dutch legal practice.
In addition, the OECD Guidelines play a major role in an international context in relation to the application of treaties and prevention of double taxation.

Considering the importance of the arm's length principle, some thought will first be given in this paragraph to the general ideas with regard to the application of this principle as it has been worded in the OECD Guidelines.

The application of the arm's length principle

The starting point for the application of the arm's length principle is the transaction as it has been structured between the associated enterprises (par. 1.64 of the OECD Guidelines). The contract forms the starting point unless the actual behaviour of the respective parties differs from it (par. 1.48 and par. 1.53 OECD Guidelines). If a written contract is absent the contractual relationships must be deduced from the conduct of the parties and the economic principles that generally govern relationships between independent enterprises. (par. 1.52 OECD Guidelines).

The starting point of the arm's length test is formed by the comparability analysis; the search for similar transactions in similar circumstances. The functional analysis of the parties involved in the transaction forms the core of this comparability analysis. After all, the reward for the respective parties is determined by the functions performed, the associated risks and the assets used.
The arm's length test of par. 1.6 is applied to the conditions under which the associated enterprises enter into a transaction. They are compared with the conditions which independent parties would have agreed in similar transactions in similar circumstances. In this connection the price is only one of the conditions (par. 1.7 OECD Guidelines). If the conditions between the associated enterprises differ from those which would have been agreed between independent companies, the consequences of this for the taxable profit can be adjusted.

In comparing these conditions there are several principles which play a major role. For instance paragraph 1.34 OECD Guidelines provides that the alternatives realistically available to the respective parties at arm's length must be taken into account and also the fact that independent parties will only enter into a transaction when there is no clearly more attractive alternative available to them. Moreover, paragraph 9.63 of the OECD Guidelines provides that the comparison of the conditions must take place from the perspective of all parties involved in the transaction.
If only the price of the intra-group transaction is different from the price which would have been agreed between independent third parties, for tax purposes a price adjustment has to take place. If conditions other than the price are different and adjustment of the taxable profit by means of a price adjustment is not possible, for tax purposes the consequences of such unbusinesslike conditions can be adjusted or ignored (par. 1.47 - 1.50 OECD Guidelines and par. 9.38 OECD Guidelines). In practice situations can occur where given a certain applied condition, for instance a certain risk allocation, it cannot be made plausible that (and in what way) a similar comparable condition exists in independent relationships. Paragraph 9.36 provides that this in itself is not yet a reason to ignore such a risk allocation. But this could be a reason to examine the economic rationality of such a risk allocation. According to the OECD Guidelines additional factors that play a major role here are the extent of control and the financial capacity to bear the respective risk.
Paragraph 1.11 of the OECD Guidelines acknowledges that associated enterprises enter into transactions which independent companies would not enter into. In such situations a comparison of conditions within the sense of paragraph 1.6 with conditions that are agreed in similar transactions between

third parties is not possible. However, the mere fact that similar transactions between third parties are not found does not mean that the intra-group transaction would therefore not be at arm's length. In such a case it should be examined whether conditions can be found in which it is conceivable that independent parties would still have entered into such a transaction in similar circumstances. Guidelines are also given in the OECD Guidelines for such situations. For instance paragraph 9.173 of the OECD Guidelines defines that a business restructuring can lead to a business model not found between independent parties. That is why paragraph 9.174 OECD Guidelines provides that what is being tested is whether the outcome (the arrangement adopted) accords with what would result from the normal commercial behaviour of independent parties. Subsequently paragraph 9.175 of the OECD Guidelines provides that taking into consideration the realistically available alternatives can be relevant in connection with the question of whether the structure of the transaction chosen by the associated enterprises differs from the one which independent parties acting commercially and rationally would have agreed. If in this way arm's length conditions can be found for the respective transaction, they must be applied and the transaction should be respected as such.
For exceptional cases in which associated enterprises not only enter into a transaction which independent parties acting rationally in similar circumstances would not have entered into but for which in addition - considering the manner in which the transaction has been structured - no arm's length conditions can be found, it is possible for the tax administration to call into question the transaction as such (see par. 1.65 of the OECD Guidelines).
Without the possibility of paragraph 1.65 to call into question the transaction itself, the contractual structure would render the application of the arm's length principle impossible in such a case. In such exceptional cases pursuant to paragraph 1.65 it should first be examined whether the transaction can be re-characterised as a different transaction for which arm's length conditions can indeed be found. If re-characterisation does not lead to an arm's length outcome, it is only possible to completely ignore the consequences of the transaction for the taxable profit. Such complete ignoring will only be up for discussion when - considering the structure of the transaction - it is impossible for the tax administration, even after any re-characterisation, to determine appropriate arm's length conditions. Re-characterising or ignoring takes place for the benefit of the fiscal profit determination.

2.2 Aggregation of transactions (paragraph 3.9 - 3.12)

Pursuant to the OECD Guidelines the arm's length compensation must in principle be determined on a transactional basis. Such a determination on a transactional basis can cause problems in practice. If an assessment per transaction is not properly possible, for instance because there are a large number of similar transactions, in order to determine the arm's length character the transactions can be assessed by their being aggregated. In that situation the taxpayer is expected to substantiate that the transfer price taken into account with regard to the aggregated transactions complies as a whole with the arm's length principle.

2.3 The use of a range (paragraph 3.55 - 3.66)

In some cases an unequivocal transfer price cannot be determined. However, since the determination of transfer prices cannot be considered as an exact science, the application of the transfer pricing method applied will often lead to a range of values within which the transfer price to be applied can be fitted. The range is determined by the highest and the lowest value found. When applying an arm's length range, the question arises, after the range has been determined, with which observations in the range one can compare and in accordance with which observation an adjustment can be made.
In determining the range, a distinction must be made between situations in which the comparables consist of good comparable variables and the situation whereby less accurate comparables are used. When the comparables consist of good comparable variables, the range will be composed of all these variables.

When less accurate comparables are used, it might be necessary to increase the reliability of the comparables on the basis of statistical methods. One example is the interquartile range approach. Such statistical methods narrow the range so that a relevant range remains consisting of more accurate comparables.

After the range has been determined, it must be assessed whether the compensation for the transaction to be assessed is within this range. If the compensation is within the range, no adjustment will take place. If the compensation is outside the range and the taxpayer cannot explain the deviation on good grounds, an adjustment will be applied. The OECD Guidelines prescribe that in such a case the adjustment takes place up to the point within the range that corresponds as well as possible with the facts and circumstances of the respective intra-group transaction. If it is plausible that one specific point within the range corresponds best with the conditions of the inter-group transaction, an adjustment can be applied up to that point. If such a specific point cannot be identified, the Netherlands is of the opinion that there will be an adjustment up to the median (the central observation in the range) (see par. 3.62 OECD Guidelines). It is possible that the respective State in which the associated enterprise is established does not accept the adjustment up to the median observation within the range. In those situations the competent authority of the Netherlands will at the request of the taxpayer consult the other State involved in order to reach agreement on a point within the range that is acceptable to both States.

Sometimes there will be a shift within the range because the transfer price originally determined is adjusted downwards or upwards. In that situation the taxpayer must make plausible the changed circumstances on the basis of which an adjustment of the transfer price is justified. If no changed circumstances can be identified which justify an adjustment of the transfer price, the change of the transfer price will generally be for tax reasons. In those situations the tax administration will not agree to a change in the transfer price. Moreover, the condition for accepting such a shift within the range is that the changed pricing is actually laid down in the agreements formed between the parties and is actually charged.

2.4 Use of multiple year data (paragraph 3.75 - 3.79)

When assessing a transaction it might be useful to look at data covering multiple years. The use of multiple year data can prevent adjustments being applied in a certain year while the group receives - when several years are taken into consideration - a compensation that is in line with the arm's length principle. However, application of multiple year data can also lead to insights developed subsequently being used to assess a situation which occurred previously (hindsight). The OECD Guidelines indicate that tax administrations are not allowed to apply such insights developed with hindsight. That is why when multiple year data are used, only data of the respective year and previous years can be used. An elaboration of this is working with a progressing average. This will lead to the following system:

- First it is verified whether the compensation for the transaction to be assessed is within the arm's length range determined for the respective year. If the compensation is within the annual range, no adjustment will be applied.
- If the compensation is outside the annual range, then such verification is repeated on the basis of (progressive) averages over several years. The length of the period included will partly depend on the length of the life cycle of the product. If the average compensation for the transaction to be assessed falls within the multiple year range, no adjustment will be applied.
- If the compensation to be assessed is outside the arm's length annual range as well as outside the arm's length multiple year range, an adjustment will be applied according to what has been described under paragraph 2.3.

2.5 The effect of government policy (paragraph 1.73 - 1.77)

Some government interventions can be considered as market factors in the respective country and must be taken into account as such in the transfer price. Paragraph 1.77 of the OECD Guidelines describes two possible approaches to the situation where a country for instance prevents or blocks the payment of an amount of money. According to Dutch tax law the compensation related to the performance made must be recognised in the result, but it can be in accordance with good business practice to (partly) write down a debt receivable which has arisen in connection with the provision of the performances. In this respect the costs associated with the transaction can be taken into account. When the debt receivable arises an assessment must obviously be made of whether circumstances can be identified which ought to lead to the conclusion that there is no question of a debt receivable but of furnishing capital (see for instance the Supreme Court 27 January 1988, no. 23.919) or that an unbusinesslike loan is involved whereby a write-down cannot be charged to the result (see for instance the Supreme Court 25 November 2011, 08/05323). In addition, it obviously applies that the taxpayer must be able to make a write-down plausible.

2.6 Applications for a reduction in a transfer price adjustment (paragraph 3.13 - 3.17)

In the event of an inspection of the books by the tax administration the taxpayer can submit an application to reduce a proposed adjustment of a transfer price if it is of the opinion that offsetting transactions are not taken into account in the proposed adjustment by the tax administration. According to the OECD Guidelines tax administrations will in that case have a discretionary power whether or not to honour this application. The distinction, as this has been made in the OECD Guidelines, between making a particular setoff plausible upon submission of the tax return and alleging (and making plausible) a particular setoff at the moment that adjustments are proposed in connection with an inspection of the books by a tax administration, is not relevant to Dutch practice. In both cases the taxpayer will retain its legal possibilities for objection and appeal.

3. Transfer pricing methods (Chapter II)

3.1 Introduction

Chapter II of the OECD Guidelines discusses the three so-called traditional transaction methods (comparable uncontrolled price method, resale price method and the cost plus method) and the so-called transactional profit methods (the profit split method and the transactional net margin method or TNMM). Depending on the circumstances, one of these five acceptable methods must be chosen.[1] In this connection the OECD Guidelines state that tax administrations must begin a transfer pricing examination from the perspective of the method selected by the taxpayer (paragraph 4.9 OECD Guidelines). The Dutch tax administration must always begin its examination of the transfer prices according to paragraph 4.9 of the OECD Guidelines from the perspective of the method applied by the taxpayer at the time of the transaction. It follows that the taxpayer is in principle free to choose a transfer pricing method, provided the chosen method leads to an arm's length outcome for the specific transaction. However, for certain situations one method will lead to better outcomes than another. Although when a taxpayer selects a transfer pricing method, he can be expected to take into account the reliability of the method for the respective situation, it is explicitly not the intention that the taxpayer

1 See par. 2.9 OECD Guidelines when this can be deviated from.

assesses all the methods and then substantiates why the method he chose in the given circumstances leads to the best outcome (the so-called 'best method rule'). In some situations a combination of methods can also be used. However, the taxpayer is not obliged to apply multiple methods. But the taxpayer will have to make his choice plausible.

3.2 Points to consider when the cost plus method is applied

Budgeting versus actual costs

Prices will generally be determined in advance on the basis of the budgeted costs. If the actual expenditure associated with the transactions turns out higher than these budgeted costs, it will depend on the cause whether this difference will lead to a price adjustment. In general it can be assumed that higher expenditure as a result of inefficiency will be at the expense of the contracting party providing the performance. After all, it is the contracting party that can influence this expenditure. An independent customer in this situation will not accept a price adjustment.

The condition for an accurate determination of the transfer prices on the basis of budgets is that these budgets are determined in the correct way from a business economical point of view.

Disbursements

Costs in the nature of a 'disbursement' can be left out of the cost base. They include those costs which are in first instance paid by the performing contracting party but generally tend to be charged to the client separately, such as public charges, court costs and costs of service provision. It is true that these costs are related to the functions carried out by the performing contracting party but apart from passing these costs on they do not justify a separate compensation. The question in which cases such costs are involved will generally depend on the question of whether an independent contracting party would not charge a profit margin on passing on such costs. In this respect I refer also to par. 2.93 of the OECD Guidelines.

4. Secondary adjustments (paragraph 4.66 - 4.76)

Paragraphs 4.66 - 4.76 of the OECD Guidelines deal with the consequences of secondary transactions. In many countries the application of a transfer price adjustment is not restricted to an adjustment to the profit but it is also a requirement that it appears from the accounts by applying a secondary transaction how the adjustment has been recognised in the profit and loss account and the balance sheet of the taxpayer. A secondary transaction can for instance be a setoff in current account, a distribution of profit or an informal capital payment. From the Dutch point of view a secondary transaction is always necessary for recognition of the transfer pricing adjustment. A secondary adjustment can arise from a secondary transaction, for instance taking into account interest on the debt receivable that has arisen or a subsequent dividend tax assessment on a profit distribution. Not all the countries take the same system as a starting point. This may lead to the situation that the other State involved is not prepared to setoff for instance the dividend tax levied as secondary adjustment because the fictitious dividend payment is not acknowledged. If the taxpayer makes it plausible that - considering the difference in tax systems between the respective States - the dividend tax cannot be setoff and there is no question of abuse aimed at avoiding dividend tax, the secondary adjustment is omitted.

5. Determination of the arm's-length price when the valuation at the time of the transaction is highly uncertain (paragraph 6.28 - 6.35)

In the event of a transfer of intangible assets such as for instance patents, it can be difficult to determine the value of this at the time of the transfer because there is insufficient insight into the future benefits and risks. For those cases paragraph 6.34 of the OECD Guidelines states that if independent enterprises in comparable circumstances would have demanded a price adjustment clause, a tax administration should be allowed to determine the pricing on the basis of such a clause[2]. An arrangement is meant whereby the compensation is in line with the future benefits generated by the intangible asset. Agreement of a benefit-related compensation contributes to the tax levy being more in harmony with the actual benefits obtained. The Dutch tax administration will under certain circumstances also take the position that it is unbusinesslike to agree a fixed price when the valuation is highly uncertain at the time of the transaction, since independent third parties in a similar situation would not have agreed a fixed price. In such cases an adjustment clause must be included in the agreement between the associated enterprises whereby the price also depends on subsequent revenues. An example of this is the situation whereby a new intangible asset has been developed which is transferred to an associated enterprise at a moment when its success is still insufficiently visible, for instance because the intangible asset has not yet generated any income and major uncertainties are associated with an estimate of future income. In that situation the valuation at the time of the transaction is highly uncertain and the stipulation of a price adjustment clause would be reasonable (see for instance also the Supreme Court 17 August 1998, no. 32.997).

In addition to the foregoing I note the following. In the situation whereby an intangible asset is transferred to a (foreign) intra-group company and subsequently this intangible asset is largely (for instance for more than 50%) licensed to the transferring Dutch company and/or to associated entities of this company established in the Netherlands, a price adjustment clause will be deemed to have been agreed unless the taxpayer makes it plausible that i) there are business motives for the transaction and ii) the valuation at the moment of entering into the agreement can be determined to such an extent that independent enterprises would not have demanded a price adjustment clause.
With regard to other situations it continues to be applicable that it should be assessed in individual cases whether independent enterprises in comparable circumstances would have demanded a price adjustment clause. It is noted perhaps unnecessarily that a price adjustment clause can lead to an upward as well as a downward adjustment of the price originally agreed.

The previous situation includes materially equated situations in which a Dutch group company after transferring an intangible asset to a foreign group company starts to pay a compensation from an economic point of view for the use of the transferred intangible asset. This can be the case if this compensation is taken into account in the price of a product or service.

In this connection the 'to a large extent' review referred to above must be applied in a corresponding manner.

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2 In addition, par. 9.88 of the OECD Guidelines leaves the option of renegotiations open if in the event of different values independent enterprises would also have opened up renegotiations.

6. Intra-group service provision (Chapter VII)

6.1 Introduction

According to the OECD Guidelines an intra-group service exists if an activity is carried out for the benefit of a group member which adds economic or commercial value to it and for which that group member would normally be prepared to pay. This does not involve activities which are carried out in the capacity of shareholder.
In determining the transfer pricing method to be applied a choice can be made of one of the methods discussed above in section 2.1. In practice it often appears that a cost-related compensation is opted for. It would first have to be established on the basis of a functional analysis whether the compensation for the respective intra-group services must be determined in this way. This method will usually only be applied with regard to the more routine services. In applying this method in principle there could only be an arm's length compensation if upon determination of the compensation a suitable profit margin has been taken into account. Only in specific situations as also described in paragraph 7.33 of the OECD Guidelines might there be reasons to refrain from a profit margin.
With regard to passing on intra-group services the OECD Guidelines clearly express a preference for a direct-charge method (paragraph 7.20). However, in practice an indirect-charge method is also much used because the application of the direct-charge method leads to major practical problems. If such practical problems exist the Netherlands will follow the indirect-charge method chosen by the taxpayer. In this respect it obviously also applies that the method should lead to a reliable result whereby the outcomes correspond with the arm's length principle. The proportion between for instance turnover, the number of employees or personnel costs could be relevant as a distribution formula. A distribution formula whereby the consideration to be charged depends on the profit, will not easily lead to an outcome corresponding with the arm's length principle.

6.2 Intra-group services and shareholders activities

Paragraph 6.1 indicates that according to the arm's length principle an intra-group service exists if an activity is carried out for the benefit of a group member which adds economic or commercial value to it and for which that group member would normally be prepared to pay. This does not involve activities which are carried out in the capacity of shareholder.
The activities mentioned in the list of shareholders activities set out below are deemed to have been carried out in the capacity of shareholder and are therefore not considered as intra-group services insofar as they do not add any economic or commercial value for the benefit of group members and if and insofar as that group member would not normally be prepared to pay for it. Therefore the taxpayer should not charge other group companies for that part of the activities. Under each category of activities several examples are mentioned of activities covered by that category.

List of shareholders activities

1. Activities associated with the legal structure of the company itself
1.1. Implementation of requirements in Book 2 of the Dutch Civil Code
- organising, preparing and holding the shareholders meeting
- the activities involved in preparing and adopting the annual accounts and filing them with the Chamber of Commerce
- the activities of the Supervisory Board insofar as they relate to the performance of its legal supervisory duties
- the activities of the Works Council

1.2. Implementation of the Dutch State Taxes Act ('AWR') insofar as this relates to the fiscal obligations of the company itself
- keeping accounts
- compliance with the obligation to retain records
- filing tax returns
- compliance with the obligation to provide information

2. Activities associated with placing/issuing/splitting shares in the company itself or comparable instruments on the capital markets and activities with regard to applying for or retaining a (foreign) stock exchange listing of the company itself
- compliance with the admission requirements of a share market
- the activities associated with a stock exchange listing, for instance the preparation of forms provided to the American SEC in connection with the listing, the provision (free of charge) of the annual accounts, annual report, etc.
- the membership of the associations and other bodies representing the stock exchanges

3. Activities associated with the introduction and enforcement of legal rules with regard to supervision of share transactions
- the introduction and maintenance of a registration system pursuant to the Dutch Financial Supervision Act (*Wet op het financieel toezicht: 'WFT'*)
- personnel of the company reporting share transactions under this legislation

4. Activities associated with the introduction of and compliance with legal rules and regulations and rules of conduct with regard to corporate governance of the company itself or the group as a whole[3]
- introduction of corporate governance supervision prescribed by legislation and regulations, including inclusion of a paragraph on this subject in the annual report
- an account or report on the environmental policy, the social policy and the sustainable management policy conducted and to be conducted.

5. Activities associated with reports to various interested parties with regard to the company itself or the group as a whole
- press conferences and costs of other communication with shareholders and other interested parties, such as financial analysts, insofar as the communication is associated with external reporting, financial performances and future expectations of the company itself or the group as a whole.

The list set out above is not exhaustive. This means that activities not included in this list must each time be assessed individually as to whether intra-group services or activities performed in the capacity of shareholder are involved.

When qualifying activities as intra-group services or shareholders activities it might be that there are 'mixed' activities. Mixed activities means activities carried out by a department or other group of persons operating in the group which qualify partly as intra-group services and partly as shareholders activities. Examples of mixed activities are consolidation activities, activities in the area of mergers and acquisitions (M&A), activities associated with the introduction of and compliance with legal rules and rules of conduct with regard to corporate governance and activities of the Board of Directors. In this connection the qualification of the activities as intra-group services or as shareholders activities can take place on the basis of any method leading to an outcome in accordance with the arm's length principle.

The following examples illustrate situations where activities of a mixed nature

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3 The group as a whole consists of the company itself and its direct and indirect subsidiaries.

take place.

Example A (consolidation activities)

A group applies a management information system incorporating the results of all group companies. This information is used for budget decisions, control and assessment of the respective group companies as well as for the preparation of the quarterly, biannual and annual consolidation figures forming the basis of the annual accounts. With regard to preparing and maintaining the management information system and to processing the information for the control of the group companies, these are intra-group services. With regard to the final preparation of the periodically consolidated figures of the (interim) holding company, on the basis of the information thus obtained, these are activities which are carried out as a shareholder.

Example B (merger and acquisition activities)

A department at the European head office of the group is busy with mergers and acquisitions. The group needs an extra production location in Europe and the department analyses which businesses in the various European countries are eligible for a potential take-over, which will be carried out by the European head office itself. The analysis of the mergers and acquisitions department is an activity carried out in the capacity of shareholder and therefore with regard to this activity no compensation ought to be demanded from the group companies.

Example C (merger and acquisition activities)

The mergers and acquisitions department in the example referred to above analyses which businesses on the continent of X (not in Europe) are eligible for a potential take-over in order to increase the market share in that continent. The analysis leads to a take-over of a business by the regional head office of the continent of X. An intra-group service is provided to the regional head office of the continent of X. With regard to this activity an amount must be charged leading to an arm's length compensation.

Example D (merger and acquisition activities)

A department of the group active in mergers and acquisitions provides assistance to a business taken over in connection with the legal implementation of the take-over (for instance removal of the shares from the stock exchange), with the adjustments to the system and the corporate identity of the group and with the formulation and implementation of the scenario for the staff. Through this assistance economic and/or commercial value is added to the group company taken over for which an independent third party would have been prepared to pay in comparable circumstances. Here an intra-group service is provided to the respective group company. With regard to this activity an amount must be charged leading to an arm's length compensation.

Certainty in advance

If required, certainty can be obtained in advance from the tax inspector regarding the question of whether an activity would qualify either as an intra-group service for the benefit of group companies or as an activity carried out as a shareholder. Such applications are considered as applications to which the Decree of 11 August 2004, no. DGB2004/1339M, Dutch Transfer Pricing Coordination Group Decree (*Instelbesluit Coördinatiegroep Verrekenprijzen*) applies. In the event that the taxpayer wants certainty with regard to the qualification of the activities as well as with regard to the arm’s-length nature of the transfer price, he can apply for an Advance Pricing Agreement (see the Decree, Procedure for dealing with applications for certainty in advance with regard to transfer prices to be applied in cross-border transactions (advance

pricing agreements), of 11 August 2004, no. IFZ 2004/124M).

6.3 'Supporting' services

Paragraph 6.1 of this Decree indicates that in principle there can only be an arm's length compensation for intra-group services provided if, upon determination of the compensation, a suitable profit margin has been taken into account. In practice such an arm's length compensation for intra-group services is often determined according to the cost plus method (that is to say that the margin is a percentage of the costs) with a cost base arrived at by the (predetermined) direct and indirect costs. The margin should be sufficient to cover the overheads and also to earn a suitable profit.
The starting point of applying an arm's length compensation with a suitable profit margin is maintained. On the basis of a cost-benefit analysis according to paragraph 7.37 of the OECD Guidelines, it has been considered for which supporting services the tax administration has in principle determined that no adjustment has to be applied if the taxpayer chooses to charge all relevant actual costs instead of determining an arm's length compensation. The conclusion of this is that services in the area of bookkeeping, legal issues, tax matters and human resources are generally considered as such supporting services. However, an adjustment would indeed be applied if i) activities are involved which are part of or add more than marginal value to the primary business processes of the group or ii) the respective services are also more than occasionally rendered to independent enterprises.
It is conceivable that also in the case of services other than the supporting services referred to above a cost-benefit analysis according to paragraph 7.37 of the OECD Guidelines justifies charging all relevant actual costs instead of determining an arm's length compensation. However, considering the complexity of the organisation of internationally operating enterprises, the different ways in which these enterprises are structured and have organised their business process, it is not possible to make a statement in a general sense about which other services can be considered as such.
Therefore, in addition to the foregoing I approve that according to paragraph 7.37 of the OECD Guidelines the tax administration can also grant its consent to an application in advance from the taxpayer for services other than the supporting services referred to above, that instead of determining an arm's length compensation all relevant actual costs are charged provided the taxpayer makes it plausible that the activities i) are not part of and do not add more than marginal value to the primary business processes of the group and ii) are not rendered more than occasionally to third parties. Such applications are considered as applications to which the Decree of 11 August 2004, no. DGB2004/1339M, Dutch Transfer Pricing Coordination Group Decree (*Instelbesluit Coördinatiegroep Verrekenprijzen*) applies.

The tax administration will review the business operations as to whether primary business processes of the group are involved whereby the following elements play a role:

- What is the nature of the activities?

In general the following activities are considered primary business processes: production, procurement, sales, marketing, product development and research & development.

- What is the relative extent of the activities within the group?

The relative extent of the activities is assessed on the basis of the total extent of similar activities and activities which are directly in line with the respective activities carried out in the group as a whole. In this connection consideration is given to the number of members of staff involved, the costs related to the activity, the investment required for the activity (equity capital and borrowed capital) or a combination of these factors.

- What is the added value of the activities?

Relevant actual costs

The relevant actual costs to be charged include the direct costs and indirect costs associated with the respective supporting services as well as the overheads. Therefore the relevant costs also include financing costs and non-operating expenses (such as redundancy costs, reorganisation costs and wages in kind). Which costs are relevant ensues from the functional analysis forming the basis of the transfer pricing system of the taxpayer.

Separate legal entity

The foregoing applies regardless of which legal entity in the group renders the supporting services. This means that no adjustment will be imposed in cases where all relevant costs are charged for supporting services rendered in an entity in which other activities are also carried out as well as in cases where the supporting services are rendered by a separate legal entity (in that case this might be a so-called shared service centre for instance).

The following examples illustrate the foregoing.

Examples

Example E

A group is active in the area of providing legal services to third parties. An employee of one of the companies of the group gives advice about local legal aspects to a foreign group company involved in advising a client on an international transaction. For this activity an amount has to be charged that must lead to an arm's length compensation because activities are involved which form part of the primary business processes of the group. In addition, the respective services are also more than occasionally provided to independent enterprises.

Example F

A legal department of a bank is intensively involved in the structure of a banking product that another group company wants to offer. The activity of the legal department is an activity adding more than marginal value to the primary business processes of the group. For this reason an arm's length compensation will have to be determined and be charged to the other group company. It will not be sufficient to charge all relevant actual costs.

Example G

A help desk department is exclusively active answering questions from employees of various group companies about the operation of the computer system, the software used and remedying minor user problems. The taxpayer makes it plausible on the basis of the nature of the activities, the relative extent of the activities in the group and the added value of the activities that this is not at all a primary business process of the group and he also makes it plausible that the activities do not add more than marginal value to the primary business processes of the group. On the application of the taxpayer the tax administration can approve that instead of determining an arm's length compensation all relevant actual costs are charged.

Example H

A group operates an international hotel chain. A department is busy setting up

and maintaining a computer application in the group by which the reservation system, the invoicing and the stock system are computerised. The activities of this department probably do not form part of the primary business processes of the group but in any event add more than marginal value to the primary business processes of the group. With regard to this activity the taxpayer must charge an amount that leads to an arm's length compensation.

Example I

A company is busy producing semi-finished products under the control and at the risk of another group company ('contract manufacturer'). Such production activities are by their nature generally part of the primary business processes of the group. In addition, these activities, together with similar activities or those that are in line with these (such as for instance the production activities of the client) generally form absolutely or relatively a relevant part of the total activities of the group. That the added value of this activity in itself can be marginal is therefore not sufficient to consider the activity as a supporting activity. With regard to this activity the taxpayer must charge an amount that leads to an arm's length compensation.

6.4 Contract research

In certain situations in which a group company A (contractor) enters into an agreement with a group company B (principal) and contractually develops intangible fixed assets at the expense and risk of this group company B ('contract research'), a compensation on the basis of the cost plus method can be considered as an arm's length compensation. This is the case if the group company A carries out the contract research activities and the group company B controls the research activities, bears the costs and the risks and becomes the economic owner of the assets developed. Each case must be assessed on the basis of the facts and circumstances.
The following elements play a role in answering the question of who controls the research activities: the decision-making process, planning, budgeting, measuring performances, rewarding, adjusting/redefining work areas, determining the commercially valuable areas and assessing the chance of (un)successful research. In answering the question who bears the risks, in principle the contractual conditions will be followed unless the risks are not divided in line with the functions performed (for instance the principal lacks the expertise to manage by way of his control the risks contractually allocated to him or the principal has insufficient equity capital to bear the financial risk contractually allocated to him) or it appears that the contractual conditions do not correspond with the functions actually performed. The compensation of the company must in each individual case be determined on the basis of the functions performed with due observance of the risks assumed and the assets used. In this connection attention should for instance be paid to the question of whether the principal is financially able to bear the risks and has the expertise to manage these risks adequately. The following examples serve as illustrations.

Examples

Example J

A group has its head office in country X. The group is active in the production and sale of consumer products. In order to retain and where possible to improve their market position continuous research is conducted into any possible improvement of existing products and into the development of new products. To this end the group has established two R&D centres placed in a separate company, in country X (R&D X, as part of the head office) and in the Netherlands respectively (R&D NL). After the strategic decision has been taken by the group management, the research programmes for the group as a whole

are formulated by R&D X. On the basis of separate contracts R&D NL is subsequently deployed to carry out a part of this research programme. R&D NL has to submit to R&D X the detailed project plans formulated in execution of that part of the research programme allocated to it. R&D X approves these project plans and the associated budgets. Even if R&D NL has suggestions with regard to adjustment of the research programme and/or the project plans already submitted, these suggestions must explicitly be submitted to R&D X. R&D NL reports regularly to R&D X on the progress of the research and the depletion of the budgets. When the budgets are exceeded R&D NL has to apply to R&D X for additional financial resources. Not all the research activities will be successful. The contractual conditions between R&D X and R&D NL provide that all risks associated with the development by R&D NL are at the expense and risk of R&D X. R&D X becomes the owner of all legal and economic rights arising from the research. R&D X has sufficient equity capital to be able to bear the financial risks associated with the research. R&D X pays a compensation to R&D NL calculated on the basis of the cost plus method.

Conclusion: the functions of R&D NL are limited to carrying out the R&D activities. They are carried out on the instruction and under the management (including supervision and decisions to be made) of R&D X. The risks associated with the R&D activities are at the expense of R&D X. Financially and with regard to expertise R&D X is able to bear and manage the risks at its expense. The activities of R&D NL are rightly considered as contract research. In this case the application of the cost plus method leads to an arm's length compensation.

Example K

A group has its head office in country X. The group is active in the production and sale of consumer products. In order to retain, and where possible to improve, their market position continuous research is conducted into any possible improvement of existing products and into the development of new products. The R&D activities with regard to product line A are carried out in the Netherlands and are placed in a Dutch company (R&D NL). The European head office and sales activities are also placed in this Dutch company. R&D NL operates completely independently within the frameworks of the strategic decisions taken by the group management.
Company Y is also a member of the group. Company Y is established in country Y. Company Y employs 2 persons both with an administrative and financial background.
R&D NL and company Y have entered into an agreement for an indefinite period of time with regard to the R&D activities of R&D NL. Not all these research activities will be successful. The contractual conditions between company Y and R&D NL provide that all the risks associated with the development by R&D NL are at the expense and risk of company Y. Company Y becomes the owner of all legal and economic rights arising from the research. Company Y has sufficient equity capital to be able to bear the financial risks associated with the research. Company Y pays a compensation to R&D NL calculated on the basis of the cost plus method.

Conclusion: the functions of R&D NL encompass the whole R&D activity (ranging from the decisions regarding the nature of the research to be carried out up to the implementation itself). Therefore R&D NL controls the R&D activities independently. The contractual conditions provide that the risks associated with this R&D activity are at the expense of company Y. However, company Y does not have the required expertise to manage the risk at its expense. In actual fact the risk is managed by R&D NL, so that the risk should also be allocated to R&D NL. On the basis of the actual situation therefore no contract research activity is carried out by R&D NL with the result that in this situation the application of the cost plus method to determine the reward for R&D NL does not lead to an arm's length compensation.

7. Contributions to a CCA (Cost Contribution Arrangement) (Chapter VIII)

For CCAs a connection should be sought with the arm's length principle as detailed in the OECD Guidelines and in particular with Chapter 8 of the OECD Guidelines. On the basis of the arm's length principle the compensation must be related to the functions performed (with due observance of the risks assumed and the assets used). This means that the amount of the compensation of the participants in a CCA should not differ (materially) from the compensation which the respective enterprises would receive if they would cooperate outside a CCA.
The OECD Guidelines prescribe in Chapter 8 that the relative share of each participant in the contributions to the CCA corresponds with the relative share of that participant in the total benefits expected. Whether this is the case must be assessed in practice on a case-by-case basis. According to the Netherlands the arm's length principle involves that the relative share of each participant in the contributions to the CCA as well as the relative share of that participant in the total benefits expected is determined on the basis of the value in the open market. However, if it is plausible that the average relative added value of the individual performances contributed by the various participants to the CCA is approximately equal, it will be in accordance with the arm's length principle to take the cost price of the contributions as a starting point when determining whether every party's share in the total benefits expected corresponds with every party's share in the contributions. In this respect please refer to example P below. If interested parties opt for a division of the expected benefits on the basis of the cost price of the contribution, this would require substantiation from which the equality of the average relative added value of the participants' contribution becomes plausible.
Some countries do not accept that a profit margin can be charged, whereas they do accept a compensation being charged for the capital required for the activities. Both methods can lead to the same outcome. With a view to the acceptability of the amounts charged in certain countries the chosen method can be followed for Dutch taxation, provided that the result is in accordance with the OECD Guidelines.
By way of illustration of the principles set out above some examples of CCAs with regard to R&D activities can be found below.[4]

Examples

Example L

The head office of continent A and the head office of continent B are placed in group company A and group company B respectively. Both are active in the production and sale of group products. Both have an R&D centre. The group decides to research the development of a new product. The market prospects for the product are good but major research has to be carried out before the product is ready for production and sales. The product has market potential in continents A and B.
Group companies A and B decide to enter into a cost contribution agreement for carrying out the required research. A provides the research capacity and the initial development results and B provides the knowledge, know-how and researchers. A and B agree several moments at which the group companies A

4 For the sake of simplicity a difference in timing of the contribution by each of the parties is not taken into account in the examples. Upon determination of the value of the contribution in business relationships such differences would indeed be taken into account, insofar as is relevant for the value of the contribution, so that in practice attention should be paid to this when determining the arm's length consideration in the event that a CCA is agreed between associated enterprises.

and B jointly decide on the next phase of the project. The ratio between the market value of A's contribution and that of B amounts to 1:1. The total expected value of the development result of the product is as large in continent A as in continent B. A and B agree that each of the participants will bear the costs of their own contribution. In addition, it is determined that group company A will become the legal as well as the economic owner of the development result as far as continent A is concerned and group company B will become the legal and economic owner of the development result as far as continent B is concerned. The strategic project planning and management (including supervision and decisions to be taken with regard to the project) takes place in an equal manner.

Conclusion: the cost contribution agreement leads to an arm's length result. A as well as B can be considered as a participant in the CCA, because both participants acquire for their contributions a part of the right being developed, which right they moreover can operate/use independently (see paragraph 8.10 OECD Guidelines). Lastly, the relative share of both participants in the contributions corresponds with the relative share in the total benefits expected (that is to say the right that the participants acquire).

Example M

Group company A is active in the development, production and sale of consumer products in continent A. Group company A has carried out initial research into the feasibility of the development of a new product. The conclusion is that the product can probably be developed successfully. The market prospects for the product are good. The product is also very suitable for the market in continents B and C. Group companies B and C are active in the development, production and sale of similar products for the markets in continents B and C.
Group companies A, B and C decide to enter into a so-called cost contribution agreement for the necessary research to be carried out to develop the new product. In order to reach a successful development the following arrangements are made:
- Equal contribution by all: formulation of a research programme and the decisions to be taken for each progress phase of the project identified in the research programme (strategic project planning and management, including supervision and decisions to be taken, with regard to the project).
- Contribution by A: results of the initial research. Costs incurred for the development: €1 million. Value in the open market of the research result: €2 million.
- Contribution by B: development capacity (personnel + fixed assets). The expected costs associated with this development capacity are €1.8 million. If this development capacity would have to be hired on a contract research basis from third parties, €2 million would have to be paid for this (= value in the open market).
- Contribution by C: liquid assets amounting to 2 million for the expected additional costs (procurement of materials from third parties and hiring third parties).
The participants agree that each of the participants will bear the costs of their own contribution. The total expected value of the development result in continents A, B and C respectively is expected to be equal, so that the value of the right to be developed is expected to be equal for all the continents. The group companies agree that group companies A, B and C become the legal and economic owners of the development result insofar as this relates to continents A, B and C respectively.

Conclusion: the cost contribution agreement has resulted in an arm's length result. A, B and C can be considered as participants in the CCA because for their contribution the participants obtain a part of the right being developed,

which right they can moreover operate/use independently (see paragraph 8.10 OECD Guidelines). Finally, the relative share of the participants in the contributions corresponds with the relative share in the total benefits expected (in other words the right that the participants acquire).

Example N

Group company A, group company B and group company C are active in the production and sale of similar consumer products in continent A, continent B and continent C respectively. Group company A has an R&D centre. Group companies B and C employ several product experts who also have knowledge of product development, but they do not have their own R&D centre. Group company A carried out initial research into the development of a new product. The market prospects for the product for continents B and C are good, but major research has to be carried out before the product is ready for production and sales. The expected total value of the development result in continents B and C is expected to be equal. The product does not appear to be interesting for continent A.
Group companies A, B and C decide to enter into a cost contribution agreement with the following conditions:
- Jointly and with equal contributions B and C formulate a research programme for the (continued) development of the product. In addition, they provide equal capacity to manage the project (strategic project planning and management, including supervision and decisions to be taken with regard to the project).
- Contribution by A: results of the initial research. Costs incurred for the development: €1 million. Value in the open market of the research result: €2 million.
- Contribution by A: development capacity (personnel + fixed assets): The R&D department of A elaborates on the project plan and submits the details to B and C. Subsequently the R&D department of A undertakes the implementation of the research. In this connection the R&D department of A regularly renders account to B and C with regard to the course of events. The expected costs associated with this development capacity are €1.8 million. The value in the open market of the development capacity if carried out under an assignment: €2 million.
- Contribution by B and C: they each make a payment to A amounting to €2 million as a compensation for the contribution by A. In addition, each will bear half of the additional costs paid to third parties (procurement of materials, hiring third parties) amounting to €2 million.
- The participants each bear the costs of their own contribution.
- B and C acquire the legal and economic ownership of the development result for continent B and continent C respectively.

Conclusion: A is not a participant in the cost contribution agreement because A itself cannot derive any benefit from the development result (see paragraph 8.10 OECD Guidelines). A in actual fact sells the initial development result to B and C in combination with the performance of contract research activities for B and C. B and C can indeed both be considered as participants in the CCA because for their contribution (money and management) they acquire a part of the right being developed, which right they can moreover operate/use independently (see paragraph 8.10 OECD Guidelines). A provides development capacity and the initial development result with a value in the open market of €4 million in total and as a compensation it receives an amount of money of €4 million. Such a compensation is at arm's length. The contribution of both participants in the CCA (B and C) and the benefit to be expected (the right that they acquire) correspond with each other. Although the contract can therefore not be considered as a CCA for A, the compensation arising from this contract can be considered as at arm's length for all participants.

Example O

Group company A is active in the development, production and sale of consumer products. Group company B employs 2 persons with a financial and administrative background. Group company A carried out initial research into the development of a new product. The market prospects for the product for continent A and continent B are good, but additional research has to be carried out before the product is ready for production and sales. The expected total value of the development result for continents A and B is expected to be equal. Group companies A and B decide to enter into a cost contribution agreement on the following conditions:

- Contribution by A: initial development results and development capacity. The total costs in this respect are: €5 million. The total value in the open market : €10 million.
- B pays A €5 million and 50% of the costs insofar as they exceed the projected costs of €5 million.
- A and B respectively become the economic owners of the development result insofar as this relates to continent A and continent B respectively.
- A becomes the legal owner.

In addition to the contract it appears that A takes care of the overall management of the project (including the supervision and decisions to be taken).

Conclusion: the functions of A encompass the whole R&D activity (ranging from the decisions regarding the nature of the research to be carried out up to the implementation itself). In doing so A manages the R&D activities completely independently. The contractual provisions stipulate that 50% of the risks associated with this R&D activity will be borne by B (B pays €5 million and 50% of the costs insofar as they exceed the projected costs and becomes the economic owner of the right developed). However, B does not have the required functional expertise to manage the risk at its expense associated with the R&D activity. In actual fact the whole risk is managed by A so that the whole risk must therefore be allocated to A.
The compensation to be received by A must be in line with the functions it performs and the associated risks. In connection with the compensation agreed on the basis of the agreement with B, A is, wrongly, only remunerated for its development activities insofar as they do not relate to the management and the risk allocated to it. Therefore the conditions of the contract entered into between A and B are not at arm's length.

Example P

Group company A and group company B are active in the development, production and sale of similar consumer products in continent A and continent B respectively. A and B decide to develop jointly a new product. Their development departments are comparable, that is to say the qualitative level (know-how and experience) and the cost structure are comparable. The costs associated with the contributions during the entire development process have a ratio of 1:1. The expected value of the development result in continent A and continent B respectively also have a ratio of 1:1. A and B decide to enter into a cost contribution agreement with the following conditions:

- Jointly and with equal contributions A and B formulate a research programme for the (continued) development of the product. In addition, they provide equal capacity to manage the project (strategic project planning and management, including supervision and decisions to be taken with regard to the project).
- The participants each bear the costs of their own contribution.
- A and B acquire the legal and economic ownership of the development result for continent A and continent B respectively.

Conclusion: A and B can be considered as participants in the CCA because for

their contribution they obtain a part of the right being developed, which right they can moreover operate/use independently (see paragraph 8.10 OECD Guidelines).
Furthermore, the participants made it plausible that the average relative added value of the performances contributed by them is comparable. In determining the ratio between each party's share in the total expected benefits A and B can take the cost price of these contributions as a starting point.
If the average relative added value of the performances contributed by A and B would not have been comparable, for instance because the knowledge and experience of the employees of A and B are highly different, the determination of the ratio of the total expected benefits cannot be based on the cost price of the contributions, but should be based on the value in the open market of the contributions.

The examples given above are based on a stylised representation of the reality. In practice it will be difficult to determine the exact value in the open market of the contributions of the participants in the CCA and to determine the exact value in the open market of the benefits arising from the CCA. Also with regard to the question whether the ratio in the total expected benefits from the CCA can be related to the costs that can be allocated to the contributions of the participants instead of to the value in the open market of these contributions, it will be difficult in practice to determine whether the contribution provided by both participants has a comparable average relative added value. That is why particularly in assessing CCAs the tax administration must take into account the fact that transfer pricing is not an exact science. Nevertheless, taxpayers can be expected to make it plausible that independent parties in comparable circumstances would enter into a similar agreement.

8. (In)tangible fixed assets

If (in)tangible fixed assets are transferred to a group company while this group company does not add any value to the respective assets because the required functionality is absent and is therefore not able to control the risks with regard to the (in)tangible fixed asset, the criterion of the arm's length principle will not have been satisfied.

On the basis of the arm's length principle associated enterprises are deemed to aim for profit maximisation. In independent relationships a transaction with regard to an (in)tangible fixed asset will normally only be entered into if both parties can expect an increase in their own profit from it. This expectation is only actually possible for the vendor and purchaser if there is an expected increase in the joint profit. The expected profit increase can only take place if the purchaser adds value in one way or another. This is only possible if the purchaser has the required functionality and the purchaser is able to use it to control the relevant risks (the relevant functionality). If there is no expected increase in the joint profit the bid price of a potential purchaser will be less than the asking price of a potential vendor. In that case transfer of the asset is commercially irrational and will not come about partly because the transfer will also involve transaction costs. Such a transaction between associated enterprises will therefore not meet the criteria of the arm's length principle.

In addition, in the arm's length assessment attention must also be paid from the vendor's as well as from the purchaser's perspective to the question of whether the vendor and/or the purchaser have other realistic options which are more attractive to them. In the situation described above the vendor as well as the purchaser have a realistic option not to enter into the transaction. After all, the total operational profit jointly generated by the parties is not higher than in the situation in which the transfer would not have taken place. Because the transfer is associated with extra costs (for instance of formulating the contracts) the joint operational result is expected to be even lower than in the situation

where no transfer would have taken place.

It sometimes happens that the purchaser of an (in)tangible fixed asset is established in a low taxing jurisdiction. The mere fact that the purchaser is established in a low taxing jurisdiction will not lead to an increase in the joint profit if the purchaser does not have the relevant functionality. In the situation where the functionality has been left behind with the vendor, following the transfer the purchaser will become completely dependent on the vendor for the value development and the operation of the asset. Under arm's length circumstances the purchaser will not be able to expect any operational profit. Therefore, under arm's length circumstances he cannot benefit from the low(er) tax rate.

On the basis of the arm's length principle of Section 8b of the CIT Act the disadvantage of applying different conditions, compared with independent enterprises, must be eliminated from the taxable profit of the Dutch vendor. This disadvantage is the difference in profit compared with the situation in which the transfer would not have taken place.
The analysis of such cases is in line with example B 'transfer of valuable intangibles to a shell company' in par. 9.190 et seq. of the OECD Guidelines.

In some situations the legal ownership of (in)tangible fixed assets is held by group companies without this being preceded by a transfer by another group company. If in this type of situation the legal owner also does not have the relevant functionality, this will be treated by the tax administration according to the principles outlined in this paragraph. This means that only a relatively minor remuneration can be granted to a legal owner of the (in)tangible fixed asset who does not have the relevant functions with regard to the asset.

9. Intra-group procurement

Paragraphs 9.154 to 9.160 of the OECD Guidelines describe an example of the implementation of a central purchasing function within a group. Business-economic arguments for deciding to centralise the purchase activities include for instance cost saving (pooling purchasing power and/or procurement expertise), reduction of operating capital and improvement of product quality. Often there is also the wish to establish a purchasing entity close to the market where the products are purchased.
The activities associated with procurement can range from carrying out supporting activities to purchasing activities which can be regarded as core functions of the group. The functional analysis centres particularly on the relative interest of the purchasing function in the total value chain of the group. Then, it must be assessed which members of the group carry out the various purchasing activities. Finally, the activities carried out by the purchasing entity can be analysed.

In the event that the activities of the purchasing entity are of a routine nature, it will not be exposed to too much risk. Such activities include for instance:
- the selection of potential suppliers;
- the (local) coordination with suppliers;
- the quality control of the purchases;
- arranging transport and other logistics activities.

In practice it appears that with regard to such activities the purchasing entity is not or is hardly exposed to price or stock risks.

It sometimes happens that the activities are of a more complex nature and that the purchasing entity is also active in composing the product range for instance (which ought to be considered as a separate function).

The functional analysis is followed by the question of what is a suitable transfer

pricing method for the activities carried out by the purchasing entity in order to determine an arm's length compensation. This compensation can range from a routine remuneration (based on the own operational costs incurred, or a compensation based on the purchase value) for the purchasing entity with activities of a routine nature, to a profit split type remuneration if the activities can be considered as a core function of the enterprise.

It is known from local independent procurement agents that they particularly provide supporting activities and are generally rewarded with a remuneration related to the purchase value. It is obvious that the percentage of the remuneration will be higher as the responsibilities of the agent increase and will decrease as the purchased volumes increase. When looking for reliable comparables it appears that in practice it is difficult to make a comparison on the basis of a percentage of the purchase value. That is why the tax administration will in those situations usually apply the cost plus method as a test to assess the arm's length nature of the remuneration. In this situation, considering the routine nature of the purchasing entity, the cost base remains in principle limited to the own operational costs of the purchasing entity. The cost price of the purchases does not form part of this.

If by centralising the purchase activities the group manages to realise higher discounts than before as a result of the increased purchase volume, this extra benefit cannot in principle be allocated to the purchasing entity. Such a benefit must be allocated to the members of the group enabling the purchasing entity to realise such (extra) discounts by their joint purchase volumes. Only if and insofar as (extra) discounts are realised by the specific knowledge and skills present at the purchasing entity, will allocation of a part of this to the purchasing entity be at arm's length (see in this context also the Supreme Court 23 April 2004, no. 39 542).

10. Guarantees in loan agreements

Guarantees are provided to group companies for various reasons in connection with loans in associated relationships. These guarantees must be reviewed against the arm's length principle if a group service is involved.

Lenders can receive a guarantee from associated companies for instance for the following reasons:

- the lender does not want to furnish a loan (or only a smaller one) without a guarantee;
- the lender does want to furnish a loan but provides less favourable conditions to the group company without a guarantee;
- the lender wants to avoid the group company to whom funds are lent, becoming insufficiently solvent due to acts by the parent company.

If the group company, independently, without the guarantee of associated companies, is unable to raise a loan in the capital market, the guarantee is usually provided in the shareholders sphere and there is no question of a group service for which a consideration must be charged. However, this changes the loan from a loan by a third party into a loan by an associated guarantor.
If the lender calls in the guarantee from the guarantor, a write down of the debt receivable from the associated group company by the guarantor also takes place in the shareholders sphere.

If the group company is deemed to be able to raise a loan independently, it must be assessed to what extent it would be able to stipulate more favourable loan conditions without a so-called explicit guarantee from an associated company, in comparison to a comparable independent company, merely due to the fact that the former is a member of a group. It will then obtain these more

favourable loan conditions on the basis of a so-called implicit guarantee. This implicit guarantee is the assumption of the capital market that the group will enable the respective group company to fulfil its obligations. If and insofar as this is the case, this does not constitute a group service for which remuneration must be charged (see par. 7.13 OECD Guidelines).

In the other cases, whereby more favourable loan conditions are obtained by an explicit guarantee from an associated company, for which an independent third party would be prepared to pay, this will be a group service for which remuneration must be charged (the guarantee fee).

In determining the amount of guarantee fee due, the credit-rating of the respective group company as well as the credit rating of the group as a whole play a major role.

Companies being members of a group are in principle given a credit rating from credit rating agencies based not only on their own relevant indicators as an independent enterprise but also on the relevant indicators of the group of which they are a member as a whole and on the position they have within the group. This credit rating is further herein indicated by the term 'derivative rating'. This derivative rating must be distinguished from the so-called stand-alone rating which the respective company would be given if it was not a member of the respective group. If there is no question of an explicit guarantee the capital market is prepared to lend to the group company on the basis of the derivative rating.

The capital market would charge an interest rate depending on the relevant rating. Stylised, the difference between the interest rates to be applied could be represented in an example as follows:

- On the basis of the stand-alone rating: 6%
- On the basis of the derivative rating: between 4% and 6%
- On the basis of the group rating: 4%

I am of the opinion that, if a service is involved in connection with the guarantee, in principle the compensation payable for it (the guarantee fee) cannot for tax purposes be higher than the difference between the interest rate corresponding with the derivative rating and the interest rate corresponding with the group rating. That is the maximum benefit that the group company manages to generate by the existence of the explicit guarantee.

The derivative rating will be between the stand-alone rating of the group company and the group rating. The derivative rating and thereby the amount of the guarantee fee will particularly depend on the strategic interest of the group company for the group as a whole.

If the strategic interest of the group company is so great that being unable to fulfil the obligations to the capital market will lead to high costs for the group for instance as a result of a lower group rating or damage to reputation, the derivative rating will tend towards the group rating. The interest that such a strategic group company without an explicit guarantee could stipulate independently is close to the interest corresponding with the interest based on the group rating. If the group company has a relatively minor strategic interest for the group as a whole the derivative rating will tend towards the interest based on the stand-alone rating of the group company.

The above is in line with the decision by the Supreme Court of 1 March 2013, no. 11/01985, that in connection with a guarantee under a so-called umbrella credit facility the acceptance by a company of joint and several liability for all the debts of other companies taking part in the credit arrangement has its root in the intra-group relationships between this company and those other

companies. The acts of the companies are in that case governed by the group interest and they thereby accept a liability exceeding the liability that exists when capital is borrowed independently. Such a comparable joint and several liability will rarely be found amongst independent enterprises and in addition, it will be difficult to determine an arm's length compensation for the mutual guarantee of the various associated enterprises.

11. Internal (re)insurance activities

Intra-group companies sometimes act formally as an internal (re)insurer towards members of the group. In several cases this type of company lacks the activities which characterise a professional (re)insurer such as product development, marketing and sales, acceptance of insured parties, asset/liability management and development of an independent reinsurance policy.
In addition, in these cases there is no 'active' diversification outside the group of the risks present at the reinsurer and associated with the internal (re)insurance activity, but only a 'passive' diversification within the group. I would like to go into these two forms of intra-group (re)insurance activities in more detail.

In several of these situations (passive poolers) the members of the group in actual fact pool their risks with the internal (re)insurer without the latter carrying out the activities which are normally carried out by a professional reinsurer.

In other situations whereby the insurance is offered as a by-product, proceeds of insurance in actual fact already realised are transferred in an unbusinesslike way to an internal (re)insurer.

In the cases referred to above only a minor reward for the internal (re)insurer is appropriate whereby its often purely mediating function is taken into account.

Passive poolers

A passive pooler only provides insurance cover for group risks. This is often the excess that the group wants to retain itself or which it is obliged to retain by external insurers. Usually the passive pooler is an extension of the risk management department of the head office. Such a company is forced to accept all insured parties in the group and is usually forbidden from providing insurance cover for the risks of parties outside the group. That is why it does not carry out the typical insurance activities and does not diversify outside the group. The company mainly performs an administrative and/or mediating function, which only justifies minor remuneration. The other benefits created via this company such as the pooling benefit as a result of the fact that, jointly, less capital cover needs to be retained, the benefits as a result of centralised negotiations with any (re)insurers and the investment income generated with the premiums received by the internal (re)insurer accrue to the members of the group pooling their resources in this way. A comparison can be made with an intra-group purchasing entity whereby the activities of the purchasing entity are of a routine nature (see par. 9 of this Decree above).

Insurance as by-product

This relates to situations whereby the insurance is offered as a by-product for customers (non-affiliated customers) of products or services of a group with activities outside the insurance sector. In this connection for instance cancellation insurance and taking out insurance for an extra warranty period come to mind. The respective policy for the customer is generally in the name of a third party (non-affiliated) insurer under the supervision of the local regulator. After having deducted a fee for the third party (non-affiliated)

insurer, the premium is passed on as a reinsurance premium to the internal reinsurer. In practice it is not the internal reinsurer that offers the insurance as a by-product but the member of the group carrying out the main activity of the group. That member of the group provides diversification via its customer base and thereby manages to generate the insurance benefits for the group. The internal reinsurer in actual fact does not perform any insurance function and therefore, on the basis of the arm's length principle, ought not to bear any insurance risk. Such a company only carries out a minor administrative function which justifies minor remuneration.[5]

12. Financing transactions

a. The OECD Guidelines

On the basis of the OECD Guidelines the arm's length test with regard to financing transactions is carried out as follows. First it is assessed whether the conditions (including the price) under which the transaction has come about, correspond with the conditions which would have been agreed by independent third parties in comparable circumstances in a comparable transaction. If the conditions do not correspond, the consequences of this must be adjusted (see par. 1.6 of the OECD Guidelines). Where possible this adjustment should in first instance take place by a price adjustment (interest). If the loan cannot be rendered at arm's length by means of a price adjustment, it should be considered whether the loan can be rendered at arm's length by adjusting the other conditions. This often involves a risk allocation which does not occur between independent parties in comparable circumstances. In this connection what comes to mind is wrongly not stipulating certain securities with regard to the repayment of a loan provided. If it is not possible to render the transaction at arm's length by adjustment of the price and/or other conditions, this could in exceptional cases lead to disregarding/re-characterising (a part of) the loan (par. 1.65 of the OECD Guidelines). With due observance of the foregoing an interest income/interest expense at arm's length can be subsequently determined for the remaining loan. In connection with the arm's length test the perspective of each of the parties involved plays a major role.

b. The two-sided perspective

The independent lender would, with due observance of his functionality in the market and the associated choices with regard to accepting risks, want to limit his risks as much as possible. He will usually let the grant of the loan depend on the question of whether the independent borrower will be able to pay (back) the loan and the interest calculated on it. Therefore he would sooner grant a loan to an independent party whose creditworthiness, after having entered into the financing transaction, will not drop below a certain level. The creditworthiness is often expressed in the so-called credit ratings. Credit ratings of AAA to BBB-[6] range from high to sufficiently creditworthy, whereby the chance that the independent borrower will ultimately not be able to pay the interest and repayments is considered to be low. The borrower is then called 'investment grade'. Potential borrowers with a credit rating lower than BBB- are not considered as 'investment grade' because the probability that ultimately they will not be able to pay the interest and repayments is considered to be too high. The rating is determined on the basis of certain indicators, including the interest coverage ratio[7] and the ratio of borrowed capital/equity capital. Only in very exceptional situations will an independent lender be prepared to accept a credit rating of the borrower lower than BBB-. An independent lender with a

5 See in this respect also: District Court of The Hague of 11 July 2011, AWB08/9105, LJN BR4966.

6 Standards & Poor's indication. Moody's applies for instance Aaa to Bbb.

7 Operational profit divided by the interest expense.

diversified loans portfolio will sooner grant a loan to such a company than an independent lender which has only one or a very limited number of loans outstanding. On the basis of the foregoing an affiliated lender providing a loan to a borrowing intra-group company having an insufficient credit rating (the rating is < BBB- after the loan has been raised) has to make it plausible that a loan has been agreed under arm's length conditions.

The non-affiliated borrower will endeavour to organise the financing of his business activities efficiently such that this involves the lowest possible capital costs[8]. The extent of the equity capital in comparison with the extent of the borrowed capital plays a major role in the amount of the capital costs. On the one hand it is benificial to finance a certain part of the business activities with borrowed capital. Partly due to the fact that the payment of interest is in principle tax deductible, the return on the invested equity capital increases. On the other hand the additional costs of raising borrowed capital become so high from a given extent onwards that this will have a negative effect on the capital costs and the return from the invested equity capital decreases.
The amount of these costs of borrowed capital depends to a major extent on the creditworthiness of the borrower. An independent borrower will not generally enter into a loan transaction by which his credit rating will drop below the level of investment grade/BBB-. Such a credit rating means that borrowed capital cannot be raised or only with very high costs. In addition, emergencies cannot be coped with and the bankruptcy risk will become too high.
Considering the above, in connection with an intra-group financing transaction leading to a capital ratio and interest expenses such that the borrowing group company is insufficiently creditworthy (a rating < BBB-) after the financing transaction has been entered into, this company has to make it plausible that a loan has been agreed under arm's length conditions.

c. Dutch case law

In the Supreme Court 25 November 2011, no. 08/05323, the question was raised whether in domestic relationships an intra-group loan could be depreciated. The Supreme Court held here that if with regard to a loan between intra-group entities the interest has not been determined in accordance with the arm's length principle, for tax purposes the profit calculation must be based on an interest rate that does meet this principle. The provisions set out above in this paragraph must be taken as a starting point for the determination of that interest rate.
If the adjustment meant above leads to this being a profit-sharing fee, according to the Supreme Court the nature of what the parties agreed would be impaired. If no interest rate can be determined under which an independent third party would have been prepared to provide the same loan to the borrowing group company, for that matter under the same conditions and in the same circumstances, the Supreme Court assumes that upon the lending group company providing this loan a debtor risk will be assumed that this third party would not have taken. In that case it must be assumed - subject to extraordinary circumstances - that the lending group company has accepted this risk with the intention of serving the interest of its affiliated company in the capacity of shareholder or associated company/subsidiary. The Supreme Court calls this an unbusinesslike loan. Any depreciation loss on such a loan cannot be deducted from the (taxable) profit of the lender.

Next, an arm's length interest rate must be determined for the unbusinesslike loan. The Supreme Court has provided a rule of thumb to this end. The interest rate of an unbusinesslike loan is determined at the interest the borrowing group company would have to pay if it would borrow, for that matter under

8 In the literature this is also called the 'Weighted average cost of capital (Wacc).

equal conditions and in equal circumstances, from a third party with a guarantee by the lending group company. The consequence is that the interest thus determined is tax deductible for the borrowing group company and is taxable at the level of the lending group company. The difference between the interest actually charged and the interest determined on the basis of the credit rating of the lending group company is situated in the capital sphere.

The test of the businesslike nature of the loan granted can take place at the moment the loan is furnished as well as during its term. This test must be conducted from the perspective of the lending party and the borrowing party. With reference to what has been set out above with regard to the perspective of the parties involved, an affiliated lender furnishing a loan to a borrowing group company with an insufficient credit rating (the rating is < BBB- after the loan has been raised) must also make it plausible according to the approach in the ruling referred to that there is no question of an 'unbusinesslike loan'. The same applies in my opinion to the borrower who as a result of the intra-group financing transaction sees his credit rating drop to a level below BBB-.

The Supreme Court held that the level of the interest rate of an 'unbusinesslike loan', a loan with an unbusinesslike debtor risk, must be determined by taking the credit rating of the lending group company as a starting point, but it did not explain in its ruling how to deal with the credit rating of the lending group company in comparison with the credit rating of the borrowing company.

In the event that the lender has a higher credit rating compared with the credit rating of the borrower, the interest rate which the lending group company itself would be charged should be considered as the appropriate interest rate at arm's length.
If the lending group company does not have a better credit rating than the borrowing group company or if that company itself is not 'investment grade', the fictitious guarantee does not add anything. In that case in any event not more than the risk-free interest rate on the loan can be taken into account.

The ultimate result must be an interest expense/interest income that meets the arm's length criteria of Section 8b of the CIT Act 1969.

13. Subsidies, tax incentive measures and partly deductible costs

It appears in practice that particularly in situations whereby a cost-related compensation is used to determine the arm's length price, the question regularly posed is whether subsidies and tax benefits received are deducted from the cost base. In the Dutch situation it can be assumed that subsidies are deducted from the cost base if there is a direct connection between the subsidy and the provision of the product or service and the respective allowance is granted in the form of a discount on or an allowance in the costs. In this connection a subsidy for the use of more expensive but more environmentally friendly raw materials, a bonus on the acquisition of an energy-efficient business asset but also a contribution under the investment allowance scheme (*Investeringspremieregeling:* 'IPR') come to mind. In the reverse situation extra levies, for instance in connection with the use of environmentally harmful raw materials, lead to an increase in the cost base applied. Reductions in tax levy referred to in Section 3 of the Dutch Salaries Tax and Social Security Contributions Reduced Remittances Act (*Wet vermindering afdracht loonbelasting en premie voor de volksverzekeringen*) reduce the wage costs and result in the cost base on which the profit margin is calculated being reduced.

Subsidies and tax benefits granted to the body as such and which have no causal link with the cost plus activity, will not be deducted from the cost base applied. Insofar as they belong to the taxable profit, they will go separately to

the credit of the profit and loss account.

If the tax allowances are granted in the form of a deduction from the taxable profit, such as for instance the investment tax credit, they will not be deducted from the cost base applied. It applies to this that first the profit is calculated on the basis of the cost plus method and then the allowance is separately deducted from the taxable profit.

It applies to certain cost categories that under the tax legislation they are only deductible to a limited extent, for instance the costs pursuant to Section 3.14 of the Dutch Income Tax Act 2001 (*Wet inkomstenbelasting 2001*), the costs of depreciation of buildings pursuant to Section 3.30a Dutch Income Tax Act 2001 and the costs pursuant to Section 10 subsection 1 j Dutch Corporation Tax Act 1969 (*Wet Vennootschapsbelasting 1969*). These costs are covered by the cost base on which the cost plus margin is calculated. The restriction in deducting these costs is effected upon the determination of the taxable profit by adding the non-deductible part of the costs to the profit.

14. The documentation requirement

Section 8b subsection three of the CIT Act 1969 provides for the obligation to retain documents with regard to transfer pricing. This documentation consists of a description of the five comparability factors of intra-group transactions as described in Chapter I of the OECD Guidelines, a substantiation of the choice of the transfer pricing method applied and a substantiation of the conditions, including the price, which have been agreed in the transactions. When the documentation requirement was codified it was intentionally decided not to have an exhaustive list of documents required for the substantiation of the arm's length nature of the transactions. In that sense it is an open standard. In assessing whether the documentation is sufficient, the proportionality principle should play a major role. The starting point is that the extra administrative burden as a result of Section 8b subsection three of the CIT Act 1969 must be restricted as much as possible.

With a view to the open standard applied I realise that uncertainty might exist amongst taxpayers with regard to the question of whether the documentation present will be considered sufficient by the tax administration. That is why it is possible to obtain certainty from the competent inspector with regard to the question of whether the documentation requirement of Section 8b subsection three of the CIT Act 1969 has been complied with (see in this respect also the Decision of 11 August 2004, no. DGB2004/1339M).

On 27 June 2006 the Council of the European Union adopted the 'Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (EUTPD)'[9].
One of the reasons for this Code of Conduct was the desire to make the documentation requirement uniform within the European Union. Partly considering the fact that this fits within the Dutch principles with regard to the documentation requirement, taxpayers have the opportunity to comply with their obligation to retain documentation by application of the 'EU Transfer Pricing Documentation'. The application of the proportionality principle as described above is also effective on application of the 'EU Transfer Pricing Documentation' insofar as this involves documentation relating to the requirements for Dutch tax levy as described in Section 8b subsection three of the CIT Act 1969.

9 Resolution of the council and of the representatives of the governments of the member states, meeting within the council on a Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), (2006/C 176/01).

15. Early consultation about possible double taxation

Double taxation as a result of transfer pricing adjustments is undesirable. On the basis of the tax conventions entered into and the so-called EU Arbitration Convention, as a competent authority the International Tax Policy and Legislation Directorate of the Dutch Ministry of Finance offers assistance to taxpayers faced with a tax levy which is not in accordance with the provisions of a treaty. The starting point here is that double taxation is removed as soon and as efficiently as possible. In this connection the Netherlands is endeavouring to begin early mutual consultation procedures with treaty partners. This has been further detailed in the policy decision of 29 September 2008, no. IFZ2008/248M, Government Gazette no. 188.

Experience shows that in several cases during the consultation procedure the double taxation can be removed in a relatively simple way by a mutual exchange of facts and circumstances which are relevant to the respective case. That is why the Dutch tax administration, if a taxpayer expects to be faced with double taxation in the area of transfer pricing as a result of activities by a tax administration of a country with which the Netherlands has the possibility of exchanging information, is prepared to look at the possibilities of preventing possible double taxation at the earliest possible stage by exchanging details or jointly carrying out auditing activities. An application to that end can be submitted to the Dutch inspector by the taxpayer.

The chance that the activities of the foreign tax administration would lead to a adjustment with regard to the transfer prices must be present and be made plausible by the taxpayer in the written application. The possibilities of preventing possible double taxation by exchanging details or jointly carrying out auditing activities will depend on the legal options and the preparedness of other countries to cooperate in such a process.

16. Coming into force

This Decree comes into force as from the day after the date of issue of the Government Gazette in which it will be published.

17. Repeal of old Decrees

This Decree replaces the Decrees of the State Secretary for Finance of 30 March 2001, no. IFZ 2001/295M and of 21 August 2004, no. IFZ 2004/680M.

This Decree will be published in the Government Gazette.

The Hague, 14 november 2013.

The State Secretary for Finance.

mr. drs. F.H.H. Weekers