

CHAPTER XXIII

ASSESSMENT, REFUND, AND ADMINISTRATIVE APPEAL PROCEDURES

Section A. *Assessment and Audit Procedures*

3.1 *Introductory note*

As noted earlier the Netherlands income tax statute actually consists of three separate though closely related laws (individual income tax, wage tax on employees, and corporation profits tax).

The discussion below of assessment and audit procedures focuses just on the income tax; then follows a summary of the differences peculiar to the two other related taxes.

3.2a *Details of the assessment and audit procedures re individuals (income tax)*

Netherlands income tax legislation is not geared to the so-called self-assessment system. However, it does rely on a taxpayer's so-called tentative return in making tentative assessments, and to this limited extent there is resemblance in fact if not in theory. The ultimate assessment though is made by an inspector in reliance, but only in part, on a yet different final return which, in essence, is a questionnaire showing the net income received during the *preceding* calendar year. But at least part of the tax due for that calendar year normally was paid in the course of that same year, on the basis of the tentative or estimated assessment which generally was made at some point between April and August. That tentative assessment was then payable in at least five monthly installments. Also, during that calendar year, tax was withheld at the source as to certain types of income, especially in respect to wages and dividends.

To illustrate, this overall reporting scheme is triggered in, say, 1966, when on or about February 1, the typical taxpayer receives a form containing his final return for 1965 and the tentative return covering income anticipated during 1966, both of which must be returned by April 1, unless for good cause the taxpayer is able to secure an extension.

Should he fail to file by the due date without cause, a fine of five percent is imposed on the tax due. And on complete failure to file, the inspector is authorized to prepare assessments based on his estimate of the taxpayer's income.¹ Further, for gross negligence in preparing the return or for deliberately filing a false return, a deficiency tax can be imposed, to a maximum of 100 percent. In addition, a deliberately false return is ground for a criminal indictment, which can lead to a heavy fine (or even a prison term), though this fine and the administrative tax increase mentioned above are not both imposed in the same case.²

The tax form contains four pages, and is accompanied by an explanatory booklet of approximately sixteen pages which answer the most frequently recurring questions about the tax law and the procedure to be followed in preparing the return. The form itself is in effect a questionnaire, seeking data regarding the taxpayer's personal affairs, i.e., marital status, number of children, sources and amounts of income, deductible items, and the amount withheld on wages,³ dividends,⁴ and certain other types of income. Taxpayers carrying on a trade or business must also attach signed copies of a balance sheet and profit and loss statement. Also, if the taxpayer's capital, however invested, exceeds a certain amount,⁵ he is liable for a separate proportional capital tax, *vermogensbelasting*, and must fill in a form with two extra pages, covering both his income and capital tax, to which he attaches a list of his investments and the income therefrom.

To return to our illustration, the inspector upon receiving the tax form on or before April 1, 1966, typically does rely on it to make the tentative assessment for 1966, and thereby facilitates commencement of the installment payments. But the final return covering 1965 is examined before the final assessment for that year is made.⁶ The information there is verified,

¹ Since such an assessment is unlikely to err in the taxpayer's favor, such taxpayers usually lodge an administrative appeal.

² Legally these are two distinct penalties that can be imposed for the same offense. The Under Secretary, however, has instructed the inspectors that they must refrain from assessing the deficiency tax in cases where there has been a criminal indictment.

³ The tax on wages is withheld at a progressive rate.

⁴ Withholding rate as of 1967 is a flat 25%.

⁵ For a married taxpayer the free capital is f. 55,000, raised for each dependent child by f. 13,500. Thus, a married couple with three dependent children would have free capital of f. 95,500.

⁶ The term inspector includes not only inspectors of the academic level, but also any member of the inspectorate's personnel belonging

first by reference to the files maintained in the inspectorate.⁷ However, even with the aid of these files, the inspector will not always know that a given taxpayer resolved a doubtful issue in his own favor even though, in consequence, a certain item was omitted in computing income, or a doubtful deduction was taken.⁸ Also, if the issue was exposed to light, the explanation attached to the return may not be in sufficient detail to permit the inspector to resolve the issue. Thus, as explained below, the inspector's examination may be complemented by the audit division's verification of the taxpayer's accounts, and in either setting the taxpayer may be asked, by telephone or in writing, for additional information as to matters set out in the return or in an accompanying document. Should the taxpayer fail to comply with any such request, the statute provides that if he contests the assessment at a later date he will have the burden of proof.

It is recognized that an examination based just on the inspectorate's files will not expose all errors in all returns, but it is not feasible to undertake a more detailed examination of every return. These competing considerations are compromised; annually a proportion of the returns are examined with extreme care, primary attention being focused on those involving high incomes or those which tend to involve complex tax problems. Further, emphasis is placed on returns showing profits from a trade or business, as distinct from those reporting incomes from easily verified sources such as stocks, bonds, or annuity contracts. Returns of the former type typically are prepared by tax practitioners. While this fact is a reasonable guarantee that the figures in the return and supplementary records are accurate, it is no guarantee that the return includes no doubtful issues. While standards and instructions govern an inspectorate's selection process, the inspector has discretion to add any returns to those otherwise falling in the full-examination category. Once in this category, the books of the taxpayer will be examined by the Audit Division of the

(footnote continued)

to a group (*hoofdcontroleur, commies*) authorized by legislative regulation to perform tasks assigned by the statute itself to an inspector.

⁷The inspectorate maintains for each taxpayer a *legger* containing the returns of previous years and a *dossier* which contains information of long-run value, such as reports from death duty inspectorates, copies of pertinent contracts, etc.

⁸The inspector sometimes discovers that a taxpayer has erred in the government's favor and paid more in taxes than was owing. Under such circumstances, the inspector makes the correction.

inspectorate. In particularly intricate cases, however, the Fiscal Audit Office takes over.

Either the Audit Division or the Fiscal Audit Office is free to and will draw its own conclusions as to what the audited records reveal. In the course of their audits, they will resolve interpretative issues and recommend a course of action to the inspector, giving their supporting reasons. It must be recognized, however, that their function is purely advisory. The inspector alone makes the final decision as to whether or not a deficiency assessment—or a refund—is in order.

Illustrating the foregoing is data pertaining to one recent year. Out of the approximately two and a half million income tax assessments, 440,000 taxpayers' books were examined. Of these, the Fiscal Audit Office checked about 72,000 and the inspectorates' own Audit Divisions--composed of *hoofdcontroleurs* and lower ranking staff members--the balance.

It should be emphasized, however, that the statute empowers the inspector alone to make or refrain from making an assessment. This power extends to the compromising of claims or issues, including the splitting and/or trading of issues in the course of reaching a settlement with the taxpayer over all-yes-or-all-no questions of law.⁹

Higher echelons do not interfere with the inspectors' handling of their work and this noninterference extends to the inspectors' settlement activity. No careful check is made on the cases settled by the splitting or the trading of issues. In part, this is because the inspectors are trusted, bribery being nonexistent. In part, it is a realistic recognition that the taxpayer will litigate if he feels he is not receiving fair treatment, the inexpensiveness and accessibility of the courts making such litigation easy and available.

On the whole taxpayers (or their representatives) tend to accept the position taken by inspectors as being correct appraisals of the situations in question. Typically, if an inspector sees an item on a return with which he disagrees or which he questions, he telephones the taxpayer to come in to discuss the matter. At this initial point of contact, prior to any definite assessment, there can be and frequently is a settlement between

⁹The Dutch term for this type of agreement is *dading*, the equivalent of the French term *transaction*. While the word is used in commercial dealings, in the tax area it means an act whereby the tax administration consents not to institute proceedings on the basis of an asserted deficiency in return for the payment of an amount of money mutually agreed upon.

the parties of outstanding points in controversy, including the splitting or trading of issues. Moreover, at such a conference the inspector is free to and from time to time will make suggestions to the taxpayer for the taxpayer's benefit.

Only when the inspector himself concludes that he needs advice will he consult the head of the inspectorate or a higher echelon. Within the hierarchic setting, however, the Regional Office does maintain a running check on the inspectorates under its supervision. Incident to this, of course, the Regional Office may sample the quality of an inspectorate's assessments, including its handling of administrative appeals.¹⁰ Should it locate an error, whether in favor of the government or the taxpayer, it will force a correction.

Though examinations do delay the final assessment, this does not seriously prejudice the taxpayer, for most of his tax will have been paid earlier, either through withholding or installments. Further, there is a time limit within which the final assessments must be completed; for example, final assessments for 1966 must be made by July 1, 1968. The inspector's notice of final assessment, addressed to the taxpayer may indicate either that a refund¹¹ is in order or that some portion of tax remains unpaid. The latter situation may arise only because of a low tentative assessment, or because the inspector concluded that both the tentative and final returns were incorrect, the final assessment being based on a higher net income. In such case, the inspector must explain the difference¹² in such detail that the taxpayer may decide whether to lodge an administrative appeal within the allowed grace period which commences to run from the date of the final assessment notice.

Although the inspector bases his notice of final assessment on an examination of the taxpayer's final return, even that assessment is not completely final. Under certain circumstances a deficiency assessment is possible. Ordinarily, of course, the preliminary contacts between the inspector and the taxpayer prior to issuance of the notice of final assessment will have resulted in satisfactory resolution of all difficulties and a

¹⁰ While this intermittent activity is useful, it does not insure uniformity among the inspectorates. Factors promoting, if not achieving uniformity, are the statutes, the decisions handed down by the several tribunals, the directives, the technical advice and other literature sent out from headquarters.

¹¹ See note 7 *supra*.

¹² Required by an administrative regulation.

correct assessment. However, whether advertently or inadvertently, the taxpayer may have omitted one or more items which should have been included in total net income and the inspector may not have discovered the omission in the course of his examination for that year. In such cases, a deficiency assessment, *navorderingsaanslag*, is possible, if two conditions are satisfied. First, such deficiency must be assessed within a five-year period beginning with the close of the calendar year in question. Second, there must be a *novum*, i.e., such an assessment must be based on a newly discovered fact. A deficiency assessment cannot be made where the incorrect final assessment resulted from the inspector's own error or omission or because the inspector changed his opinion on a matter of statutory interpretation, for example because the Supreme Court shifted its position.

This limited use of deficiency assessments, authorized by statute and clarified by an extensive body of court decisions dealing with the existence or nonexistence of a *novum*, balances the taxpayer's need for certainty and the tax administration's responsibility for determining tax liability in accordance with the statute, not just in accordance with the taxpayer's return.

The overall assessment arrangement applies to millions of Dutch taxpayers, from men in high income brackets to those in low brackets, such as the greengrocer. However, taxpayers in the middle or lower income brackets who derive their income primarily or solely from wages need not file a return. Their income tax obligations are covered by the wage tax withheld by their employers.

3.2b *Details of the assessment and audit procedures relating to corporations (corporations tax)*

While assessment and audit procedures for corporations are very similar to those for individuals, four differences do exist.

The first and most important difference reflects the legislature's recognition that many controversial questions develop in the corporate setting. When the inspector decides that he will make an assessment which deviates from either the facts or figures in a corporation's return, the statute requires that he first give the corporation's board an opportunity to discuss with him the points at issue. As shown later, this requirement affects also the legal setting of any administrative appeal. Not infrequently, this discussion results in a splitting or a trading of all-yes-or-all-no issues of law. The inspector's power to

enter into binding settlement agreements is as great in the corporate as in the individual setting.

Another difference: withholding of taxes at the source applies, in the corporate setting, only to dividends received by the corporation on stock of other corporations which it owns.

A third difference is in the basis used for a corporation's tentative assessment. While the assessment of an individual taxpayer is based on a current tentative return, the corporate tentative assessment is based on the final return covering the preceding year. This difference stems from the legislature's awareness that it is much more difficult to calculate future profits of a corporation than for a natural person.

A final difference is responsive both to the relatively high potential yield of each corporate return and to the intricacies involved in ascertaining the profit and loss of most corporations. In one recent year for example, just 36,000 corporations paid almost one and a third billion guilders, whereas two and a half million individual income taxpayers paid only two and a half billion guilders, with a like number of wage taxpayers paying another two billion. In consequence, the majority of corporation tax assessments are preceded by an audit of the corporate records. And as to these, the Fiscal Audit Office plays a more significant role than it does in the case of the individual income tax. In a recent year, out of approximately 36,000 corporate returns, 30,000 were audited, 13,000 by the Fiscal Audit Office, and 17,000 by the Audit Division of the inspectorates.

3.2c *Details of the assessment and audit procedures re individuals (wage tax)*

Clues, suggesting that an employer has failed either to withhold the proper amount of wage tax or to forward an amount withheld, typically emerge as members of the inspectorate (most often from the Audit Division), carry on their regular investigations relating to other taxes (i.e., the turnover tax) or to the payment of state old age pension premiums.

Should an employer fail to withhold tax or fail to forward an amount withheld, the inspector can prepare an estimated assessment, as to which the taxpayer may enter an administrative appeal. Further, a deficiency assessment can be asserted where an employer failed to withhold an adequate amount of wage tax even though no *novum* is present, and in such case the tax can be raised by a maximum of 100 percent.

Section B. *Administrative Appeals*

3.3 *Introductory note*

The Netherlands tax statute makes no provision for a taxpayer to argue his case, formally or informally, before an official of the tax administration other than the lowest grade decision-making official with whom the taxpayer first dealt and with whom he disagreed. Since the legislature itself has charged the local inspector of taxes with the task of making the assessments in his geographical area, in theory no other tax official, whether from the district or the national office, has any legal power whatever either to make an assessment himself or to annul an assessment made by the competent authority.

In fact, however, a review procedure in the nature of an administrative appeal does exist, though it is implemented in a manner which preserves the ultimate authority of the inspector. This procedure permits a taxpayer to secure a review only of questions pertaining to his original final assessment; the procedure is not available with respect to a deficiency assessment of any kind—income, corporation, or wage tax. If a taxpayer wishes to challenge a deficiency assessment, he must turn to the courts.

3.4a *Details of the administrative appeal procedure re assessments in income tax (natural persons)*

As noted previously, when an inspector's notice of final assessment differs from the taxpayer's final return, the inspector must include an explanatory note of any changes made. The change may actually be quite acceptable, for the taxpayer may have agreed to it earlier, during the informal exchange of views with the inspector. Illustratively, the taxpayer may have acknowledged he was in error or the change may represent an agreement to split or to trade all-yes-or-all-no issues. It also is possible, however, that the taxpayer, though aware from the earlier discussion that the inspector planned to make the change, decided either that the assessment was too high or that he himself erred earlier in the government's favor by failing, for example, to take a deduction to which he believes he was entitled.

Should the taxpayer decide to protest the assessment, he has two months from the date of the notice of assessment to file a written but informal petition, *bezwaarschrift*, with the inspector. And even where a petition is not filed within the

two-month period, in limited circumstances a taxpayer who has paid the assessment may secure a review by filing a claim for refund, a matter discussed more fully in 3.7, *infra*.

The statute does not require that the taxpayer's petition set forth the arguments on which his protest rests, though this obviously is desirable and usually is done in one degree or another. Further, if the taxpayer desires to be heard by the inspector before a decision is reached, a specific request to this effect must be included in the petition; otherwise the inspector is not bound to communicate with him.

Where a tax practitioner prepared the taxpayer's original final return, that same practitioner usually prepares the petition and handles the case in the inspector's office, though the taxpayer may accompany him. In any event, any correspondence or oral discussions are carried on quite informally.

The statute makes no specific provision regarding the entire burden of proof. However, the inspector may request the taxpayer to supply "such books and documents as can serve in support of the taxpayer's contentions." The statute also provides that, on failure to comply, the assessment will be upheld on the theory that there has been no proof the assessment was erroneous. In short, the statute assumes that the taxpayer who is asked to produce written documentation has these items in his possession, unless the contrary is shown clearly. Thus a taxpayer who withholds records or documents, claiming they would reveal confidential relationships or professional secrets, would bear the burden of proof even though the confidential relationship or professional secret could be established legally.

The filing of the petition sets in motion a series of discussions and investigations which explore every aspect of the case, with both sides exposing their evidence, rationale, and arguments. Typically, the process involves much more than a mere restatement of arguments presented earlier. It is entirely possible for the parties at this time to enter into a binding agreement to split or trade all-yes-or-all-no issues of law. Should this occur, the taxpayer withdraws his petition and the inspector notes the adjustments made in the original assessment. The care taken through this entire process, including that associated with the inspector's reconsideration of the rationale behind the original assessment, has led the government to compare the process—juridically a purely administrative one—with that of a trial tribunal, though admittedly more informal. While the inspector who initially made the assessment continues to represent the government, he is free to consult

the head of the inspectorate before making a decision, but is not required to do so.

A period of time, varying from some weeks to many months, will elapse from the time a petition is filed to the point the inspector will hand down his written decision. Whether he accepts or rejects, either in whole or in part, the taxpayer's contentions, the rationale of the decision will be set forth, in part to assist the taxpayer in deciding whether to carry his case to the courts.

Not all petitions will be followed by a formal decision, however. In cases which raise a question of fact or a so-called mixed question of law and fact, rather than a clear-cut interpretative question of law, the inspector and the taxpayer, after exploring all points of view, may reach an informal agreement without actually resolving all of the potential legal arguments. Under such an agreement, the taxpayer may withdraw his petition, thus preventing an eventual recourse to the courts. On his part the inspector, recognizing that the taxpayer has some valid arguments, will have lowered the assessment. In short, something resembling a compromise has been reached.

The reason this procedure is not available in the case of deficiency assessments is attributable to the nature of the exceptional ground on which such an assessment must be based and to the consequent *initial* procedure followed in making this type of assessment. Such an assessment is permitted only if there is a *novum* (new fact). Further, the inspector must contact the taxpayer *before* making the assessment, and at that stage there always is a full exchange of views and arguments. In consequence, after that exchange, it would be superfluous to file an administrative appeal before the same official. Such a taxpayer can turn, however, to the courts.

About one hundred inspectorates deal with income tax matters, though the actual number of individual *inspecteurs* handling these administrative appeals is much larger. It has been estimated that the number of such appeals approximates 230,000 annually.

3.4b *Details of the administrative appeal procedure re corporation tax assessments*

As earlier noted, a corporate tax assessment which varies from the return is preceded by a full discussion between the inspector and either the board of the corporation or its tax adviser. This exchange of views, which may well lead to a settlement of one or more outstanding issues, is comparable

to those occurring during an administrative appeal from an individual income tax assessment. For this reason, the statute permits the corporation, with the written consent of the inspector, to bypass the administrative appeal procedure and appeal directly to the courts. In practice, however, very few corporations follow this route. Most prefer first to resort to an administrative appeal. In a recent year, 3,000 corporations filed administrative appeals, the average being 130 for each inspectorate dealing with the corporation tax.

3.4c *Details of the administrative appeal procedure re assessments in wage tax (natural persons)*

Theoretically, the employee who is subject to a withholding tax has as much right to lodge an administrative appeal as any other taxpayer. In practice, however, an employee is not likely to lodge such an appeal. The wage tax is basically just a method of payment, covering the tax due on employee wages, with the total income tax to be computed later. Hence the wage earner has no reason to use the administrative appeal procedure. Should he succeed in reducing the amount of tax withheld, the amount payable later, covering his total income, would increase proportionately.

When an employer fails to withhold tax or to pay over taxes withheld, he may receive an assessment or a deficiency assessment. Upon receiving an assessment, he may file a petition for an administrative appeal. However, should he receive a deficiency assessment, the administrative appeal procedure is denied him and he must move directly into the courts.

Section C. *Extent Administrative Processing of Refund Claims Departs from Administrative Processing of Assessments*

3.5 *Introductory note*

Except in the limited circumstance described in 3.7, *infra*, the processing of refunds is an integral part of, and not distinct from, the assessment procedure itself.

The tax statute, not the assessment, creates the source of the Dutch taxpayer's liability. Essentially, the assessment is a provisional consolidation¹³ of the legal obligation created by

¹³In the Netherlands taxability exists as an *obligato ex lege* as soon as the circumstances set out in the tax statute have come into existence: i.e., a natural person has resided within the Netherlands

law. Adjustment can be initiated either by the taxpayer's timely invocation of an administrative appeal (with ultimate recourse to the judiciary) or by the inspector's imposition of a deficiency assessment. Either of these actions, though involving only the assessment procedure, might disclose an erroneous assessment which could trigger an automatic refund of taxes previously paid.

3.6 *Details regarding refund procedures prior to an administrative appeal*

Assume, for example, that the tax withheld from an employee's wages in 1966 exceeded the total liability subsequently set forth in his notice of assessment. No special refund procedure is required to accommodate this. According to the Netherlands' statute, the employee's 1966 tax obligation is fixed by the final assessment he normally will receive during 1967 or 1968. If the taxpayer has overpaid, the notice of final assessment will show a negative amount, i.e., that he is entitled to a refund. If he believes this negative amount should be larger, a petition timely filed will assure an administrative appeal, subject to the same rules as if he had received an assessment he believed to be too high.

A comparable situation arises where the taxpayer's tentative return showed a higher net income than his actual income proved to be. His final return will be followed by a final assessment setting forth a negative amount. Again the taxpayer can file a petition for review if he believes himself entitled to a greater refund.

There is one circumstance, however, where a taxpayer, prior to his receipt of a final assessment, may seek to obtain money previously paid in or withheld. Illustratively, a taxpayer may have filed a tentative return for 1966, received a tentative assessment based thereon, and discovered later that the estimate—and consequently the tentative assessment—was too high. An administrative appeal is not available, because no final assessment based on a final return has been made. Nevertheless, in cases where a delay in refunding would work

(footnote continued)

and has enjoyed a certain net income, whatever the amount, during the past calendar year. Illustratively, should a taxpayer die on January 2 of a certain year, his estate would be legally burdened with a debt arising from the tax on his income of the previous year. It is immaterial that neither a final assessment or final return has been made for that year.

a hardship on the taxpayer, administrative regulations issued by the Under Secretary of Finance authorize the inspector to handle such claims for refund as if they were administrative appeals. Accordingly, the inspector typically refunds an amount he considers reasonable. However, a refusal by the inspector cannot be carried to the courts. At most, if the inspector has acted unreasonably, the taxpayer might request the Under Secretary of State to exert his hierarchic power to change the inspector's mind.

3.7 Details of the administrative appeal procedure re refund claims

Normally, whether a final income tax assessment shows a negative amount (a right to some refund being recognized) or a positive sum, the taxpayer can contest the matter further at the administrative level only if, within a period of two months beginning with the date of the final assessment notice, he files a petition for review.

Not infrequently, however, a taxpayer discovers more than two months after the date of this notice that he did not deduct an item he believes to be deductible. In some such cases, special procedures are available to accommodate a refund. But these procedures are less clearly defined than are those which apply when the taxpayer has petitioned for review within the allotted two-month period. This is because the statute itself authorizes review only in the latter circumstances. The course of action to be followed by our taxpayer depends upon whether his failure to claim his deduction was due to his own negligence or was caused by circumstances beyond his control.

Where the taxpayer failed to claim a refund because of negligence or trivial inconveniences, he has no *right* to relief. Nevertheless, he may request the inspector to grant a refund and the latter may do so without consulting his superiors, provided less than five years have elapsed since the taxable year in question. If more than five years have elapsed, the national office, depending on the circumstances, might grant relief. It is possible, of course, that an inspector might deny a request in a situation where the equities were indubitably in the taxpayer's favor. The taxpayer would have but one recourse, i.e., request the Under Secretary of Finance to exert his hierarchic influence to the taxpayer's benefit.

Where, during the allotted two-month period following an assessment, a taxpayer failed, because of serious illness or other circumstances beyond his control, to invoke an administrative

review of a claimed refund, he may seek a waiver of the two-month rule by filing a written request with the President of the Chamber of Taxation at the Court of Appeal. This official may extend the two-month period otherwise prescribed by statute upon finding that the special circumstances did in fact prevent the timely filing of the petition.