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Tax Litigation in Last Instance in the Netherlands: The Tax Chamber of the Supreme Court

This article describes tax litigation in the Netherlands, especially the organization, functioning and judicial policy of, and access to, the Tax Chamber of the Supreme Court of the Netherlands.

1. Judicial Protection in Tax Matters in the Netherlands

Tax litigation in the Netherlands starts with the submission of objections by a taxpayer to the inspector of taxes (“the Inspector”) against a tax (self-)assessment with which the taxpayer does not agree, or against another administrative decision taken by the Dutch Tax Administration. If the Inspector’s decision regarding the objection does not satisfy the taxpayer, the taxpayer may appeal that decision before one of the (regionally competent) Courts of First Instance, which are general courts, adjudicating not only on tax matters, but also dealing with civil, criminal and (other) administrative cases. These courts decide on both questions of fact and questions of law.

If the decision of the Courts of First Instance does not satisfy either the taxpayer or the tax administration, either party may appeal such decision to one of the four (circuit-competent) Courts of Appeal, which are also the appellate courts for civil and criminal cases. These appellate courts also decide on both questions of fact and questions of law. In principle, in tax cases, the appeal involves a full re-examination of the (remaining) dispute.

If one of the parties is not satisfied with the decision of the Court of Appeal, it may lodge an appeal in cassation, i.e. a request for legal review, to the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*).¹ In contrast to the Courts of First Instance and Courts of Appeal, the Hoge Raad does not examine the facts, but only the correct application of substantive law and of fundamental procedural rules.

In tax cases, in all judicial instances, a moderate court fee is charged, the amount of which depends on the taxpayer being a natural or a legal person and on the instance in question. The fee increases as a case moves up the judicial process. Legal representation is not compulsory at any

stage in tax litigation, except before the Hoge Raad, where the taxpayer or the tax administration wishes to argue their case in a hearing. In these circumstances, both parties require qualified legal counsel.

As only questions of law or procedure are at issue before the Hoge Raad, most cases are decided without a hearing, on the basis of written submissions. Although not compulsory, legal representation for taxpayers is common, particularly if the taxpayer is a legal person or an unincorporated business, and especially the further along the judicial process a case has progressed. The competent Inspector has the legal standing to represent the tax administration in Courts of First Instance and Courts of Appeal. However, before the Hoge Raad, the tax administration is represented by the State Secretary for Finance, except, as indicated, where it wishes to argue its case in a hearing, in respect of which it requires legal representation.

Table 1 sets out the number of tax cases decided in 2013 by the three levels of tax courts in the Netherlands.

Instance	Number of cases
Courts of First Instance	26,000
Courts of Appeal	3,900
Hoge Raad	888 (2014: 1,000)

2. Tax Litigation in Last Instance: the Hoge Raad

2.1. The task of the Hoge Raad

The Hoge Raad is the Court of Last Instance in the Kingdom of the Netherlands. It can quash decisions of the lower courts on the grounds of violation or misapplication of the law, or the violation of fundamental procedural rules,² the most important of which is that a lower court’s decision must be duly reasoned. The Hoge Raad does not investigate facts, but starts from the facts as they were established in the impugned judgement. However, the insufficient or inconsistent establishment of facts by a lower court is a fundamental procedural defect. Consequently, if the ascertainment of the facts by a lower court cannot support its judgement, the Hoge Raad quashes the decision for violating the obligation to adequately provide reasons.

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1. Literally translated, the “High Council of the Netherlands”, but usually translated as the “(Netherlands) Supreme Court”.

2. NL: *Wet op de Rechterlijke Organisatie* (Judicial Organization Act, WRO), art. 79.

The Hoge Raad reviews the judgements of the four Courts of Appeal. It does so in civil matters (the First Chamber), criminal matters (the Second Chamber), and tax and certain social security and subsidy matters (the Third Chamber). The government further intends to integrate the current Central Appeals Board, which is a specialized administrative appellate court for social security matters, into the regular judiciary, i.e. into the four Courts of Appeal, with the possibility of subsequent appeal in cassation. This may result in a very substantial increase in workload for the Hoge Raad, and possibly in the establishment of a fourth chamber for social security cases.

With regard to non-tax and non-social-security administrative cases, the Council of State (*Raad van State*) is, or will be,³ the highest judicial instance, adjudicating cases in appeal from the district courts, on both questions of fact and questions of law. Delegations of the Raad van State and the Hoge Raad meet regularly and informally to discuss and, if possible, agree on the uniform application of (especially) administrative law, notably the General Administrative Law Act (*Algemene wet bestuursrecht*), which applies to all litigation in administrative cases, including tax procedure. Some justices of the Hoge Raad are also associated members of the Raad van State and partake in the hearings and decisions in cases before the Raad van State involving matters of common interest. There is no legal obligation, however, for the Hoge Raad or Raad van State to conform to each other's precedent. Both courts are autonomous.

The Hoge Raad's mission statement is not as such set out in the Constitution of the Netherlands or in the Judicial Organization Act (*Wet op de Rechterlijke Organisatie*), but it can be inferred from the statute law provisions that enable the Hoge Raad to summarily adjudicate on certain cases so as to be able to concentrate on cases that matter. These provisions⁴ imply that the Hoge Raad's three most important tasks are guaranteeing:

- (1) the uniform application and certainty of the law;
- (2) judicial protection; and
- (3) the development of the law, i.e. the practical application of the law based on current circumstances and in accordance with current general social and public views.

2.2. Composition and organization of the Hoge Raad: advocates-general's opinions

The Hoge Raad currently consists of 32⁵ justices, i.e. 1 President, 11 civil justices, 9 criminal justices and 11 tax justices, and 23⁶ advocates-general, i.e. 1 Procurator General, 11 civil advocates-general, 7 criminal advocates-general and 4 tax advocates-general. The Procurator-General and his advocates-general do not prosecute, but, rather, write independent opinions comparable to the opinions of the

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3. The cabinet intends to integrate the current Trade and Industry Appeals Tribunal (*College van beroep voor het Bedrijfsleven*), a specialized administrative court for the industry, into the Raad van State.
 4. Arts. 80a and 81 Judicial Organization Act.
 5. Plus four otherwise retired justices, who are now in extraordinary, i.e. part-time, service.
 6. Plus four otherwise retired advocates-general who are now in extraordinary, i.e. part-time, service.

advocates-general of the Court of Justice of the European Union (ECJ). They do not partake in the deliberations of the Chambers. Both parties may submit their views with regard to the advocate-general's opinion before the Hoge Raad hears the case. Every justice has one law clerk, or, to put in another way, every panel of five justices has five law clerks, and every advocate-general has two to three law clerks.

The Hoge Raad has six vice-presidents, two in each Chamber. The vice-presidents chair the panels deciding the cases. The Hoge Raad decides in panels of three or five justices. In important cases, especially those concerning the uniform application of the law or an intended change of established case law, the full Chamber, i.e. 10 or 11 justices, is consulted. In very important cases, which affect the competences of one or both of the other Chambers, the other two Chambers are also consulted, but the judgement is always given by a panel of five justices. Sometimes, a *chambre mixte*, i.e. a mixed panel, is constituted, comprising five justices from all three chambers.

Day-to-day management and matters concerning the budget are carried out by the President, the Procurator-General and the Director of Operations, acting together. The Hoge Raad has its own budget, which is separate from that of the lower courts, whose budgets are negotiated with the Ministry of Security and Justice by the Council for the Judiciary (*Raad voor de rechtspraak*) before being allocated. The latter is an organization placed in between the executive and the judiciary for the purpose of the (budgetary) separation of powers.

The Hoge Raad speaks with one voice, except for the opinions of the advocates-general. No dissenting or concurring opinions are published, nor are individual votes or voting ratios; the Hoge Raad is usually rather succinct, to the common law eye possibly even apodictic, in its reasoning, as if only one approach and one outcome were possible. This is partly explained by the one-voice approach and partly by the fact that, in all civil and criminal cases, and in complex or important tax cases, an advocate-general's opinion is available that discusses other possible approaches. These opinions, especially in tax cases which have been selected for an opinion, are often lengthy, extensively documented and argued and written from a comparative perspective. They may be regarded as both concurring and dissenting opinions, given in advance. In tax cases, the Hoge Raad arrives at the same result as the advocate-general in approximately 70% of the cases.

2.3. Appointments to the Hoge Raad

Justices in the Hoge Raad are appointed for life, i.e. until the retirement age of 70, unless they choose to leave earlier. They are appointed by Crown Order, i.e. by cabinet decision, and chosen from a nomination list of three drawn up by the lower house of the Dutch Parliament (*Tweede Kamer*).⁷ The Hoge Raad has the right to recommend candidates to Parliament; it always exercises that right. Parlia-

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7. NL: *Grondwet voor het Koninkrijk der Nederlanden* (Constitution for the Kingdom of the Netherlands), art. 118.

ment draws up its nomination list of three based on that of the Hoge Raad. The name at the top of that list of six is the Hoge Raad's preferred appointee for the vacancy. The composition and order of the list are determined by professional skills and background and by the vacancy to be filled, i.e. by the practical needs of the HR. From 1945, almost invariably, Parliament has adopted the top three names of the Hoge Raad's recommendation list unchanged. Political discussions with regard to appointments are usually avoided. In practice, the Hoge Raad's preferred candidate is, therefore, almost always appointed.

The regional, political or religious background or preferences of appointees have not been an issue since the 1970s. Professional skills prevail. Only once in recent years has the competent parliamentary committee indicated that it had objections (of a political nature) to a candidate and, in this instance, the Hoge Raad withdrew the candidate concerned. There has been some discussion regarding gender and the Hoge Raad intends to appoint more women. At present, 28% of the justices and 22% of the advocates-general are women.

As advocates-general do not decide cases, they are not nominated by Parliament, but appointed by Crown Order on the basis of a shortlist drawn up by the Procurator-General after consulting the Hoge Raad's Chambers. Their selection is also non-political. Although many of the advocates-general have experience as (substitute) judges in lower courts, they are often not career judges, but, rather, have a background partly in legal practice and partly in academia. One advocate-general in the tax division is an economist who was previously a university professor of fiscal economics, and before that a tax adviser, who had to study hard in his late forties to acquire the required law degree to be eligible for the post. Many of the advocates-general hold part-time professor's chairs, publish in scientific and professional journals, and speak and debate at public professional and scientific seminars and conferences. This is less common for the Hoge Raad's justices, as the Court prefers to avoid justices commenting on the Hoge Raad's judgements. The "secret of chambers", i.e. speaking with one voice only through its judgements, is considered to be inviolable.

The Hoge Raad aims to achieve a balanced diversity of professional backgrounds of its justices, thereby recommending to Parliament candidates from the judiciary, (tax) law practice, government service and academia. Many justices have a background in two or more of these fields, but the largest group of appointees consists of career judges from the appellate courts, who may have been, however, as far as the Tax Chamber is concerned, Inspectors or practicing tax lawyers in previous professional lives. Very few justices have (also) been in politics or industry. Most often, an appointment to the Hoge Raad is the final phase in a legal career. Typically, justices are in their fifties when they are appointed to the Hoge Raad. Advocates-general are on average younger on appointment and do not always stay until retirement, but, sometimes, return to practice or academia, or become justices in the Hoge Raad, for which

they must then be recommended to and nominated by Parliament.

At least once a year, the Hoge Raad advertizes in a legal professional periodical and a general newspaper requesting the legal profession to recommend eligible candidates for a longlist, with whom the Court may engage in exploratory talks as to possible recommendation in respect of future vacancies. With regard to vacancies in respect of advocates-general, usually vacancy-specific advertisements are published calling both for candidates and on professionals who may wish to recommend someone for a vacancy.

2.4. The media

The Hoge Raad has a 'press justice' and a 'press advocate-general' who may be approached by the media for clarification regarding judgements and opinions, respectively, and it has a twitter account and a website. Clarifications are only of a legal and/or technical nature; no comments are made on any political or practical implications of a judgement. Publications from justices or advocates-general in general newspapers or appearances on TV are very rare. Occasionally, the President or the Procurator-General may, however, grant an interview to a general newspaper or a TV station.

Press releases are published if an opinion or a decision is expected to attract public attention. On very rare occasions, a decision is (also) given in English in a public (press) session. This happened in the *Srebrenica* case⁸ regarding the question of whether the Netherlands, which supplied troops for a peace-keeping operation under UN command, could be held liable, instead of the United Nations which enjoys full immunity, for the deaths of three Muslims who were not evacuated by the Dutch UN battalion at the UN Srebrenica compound after the Bosnian-Serb army of general Mladic had taken the compound which was full of tens of thousands of refugees. Mladic's troops later turned out to have carried off and killed more than 8,000 male Muslims.

3. The Tax Chamber of the Hoge Raad

3.1. Composition, organization, case load and procedure

The Hoge Raad has existed since 1838, but it has been deciding tax cases only since 1915. Interestingly, in the first four years of its competence in tax matters, tax cases were heard and decided by its Second Chamber (criminal matters). A specialized Third Chamber for tax matters was only established in 1919. That Tax Chamber now consists of 11 justices and 4 advocates-general. In tax matters, only the 15% most complex or important of cases are selected by the advocates-general for an opinion.

In contrast to the Civil Chamber, the Tax Chamber of the Hoge Raad may decide a case on other grounds than those

8. NL: HR, 6 Sept. 2013, Case 12/03324, ECLI:NL:HR:2013:BZ9225, RvdW 2013/1037.

advanced by the parties.⁹ Although the parties are the masters of the dispute in the sense that the Hoge Raad is not at liberty to alter the dispute or go beyond the boundaries of the dispute, the Court may, within the boundaries of the dispute, find for the appellant on legal grounds not submitted by him or reject the appeal on the basis of a legal defence other than that relied on by the defendant party. This is because: (1) tax law is non-discretionary public law; and (2) legal representation is not mandatory in tax cases. Consequently, a taxpayer litigating a case before the Hoge Raad cannot be required to know and understand all of the relevant legal grounds and subtleties.

The parties to the litigation in tax or social security cases before the Hoge Raad are, on the one hand, the taxpayer or the social security benefiter or contributor, and on the other the taxing or social security authority, i.e. the state, province, municipality or the social insurance institution. There are two rounds of submission of written argument. These are the appeal and the defence, followed by either a reply and a rejoinder, for which no representation by counsel is required, or counsel pleas, for which representation by counsel is required. The Hoge Raad may request additional information from the parties, or from third parties, but very rarely does so.

As the Tax Chamber of the Hoge Raad does not review findings of fact, witnesses are not heard. The Hoge Raad may consult experts, but there is no specific budget for this and, in principle, only questions of law are at issue, which the Court is supposed to answer itself: *ius curia novit*. The author cannot think of an occasion on which the Hoge Raad directly heard expert witnesses. This is not to say that expert opinions are never brought to the attention of the HR, as the parties are free to submit written expert opinions annexed to their written pleas and, in the case of oral pleas, they are free to bring experts to the hearing, but these must then speak through counsel. In a recent, extremely technical, case on the valuation of assets and liabilities of a large market maker in share options, the advocate-general, before opining, submitted technical questions to both parties, but the law does not provide for such procedure.

If the case has been selected for an opinion by an advocate-general, there is a third round of argument, as both parties may comment on the opinion within two weeks of its issue.

The opinion of the advocate-general is published separately to enable all of the interested parties to have the same knowledge as the tax administration, which, as a permanent repeat player in all tax litigation, disposes of all opinions in all tax cases. Between the opinion and the decision, on average, half a year elapses, sometimes only two months, but in complex and difficult cases sometimes more than a year.

The Tax Chamber has two panels (*afdelingen*) of five justices each. Broadly, panel A decides cases on company and unincorporated business profit taxation, VAT, customs

9. NL: *Algemene wet inzake rijksbelastingen* (State Taxes Act, AWR), art. 29e(2).

duties and payroll tax, and panel B decides cases involving individuals which are not entrepreneurs and cases on non-state (local) taxes. The vice-president chairing panel A reads all of the draft decisions of panel B, and vice versa, and regularly the full Tax Chamber (panels A+B) convenes to discuss selected cases to secure uniformity in the application of the tax law.

Table 2 categorizes the 1,021 tax appeals that were docketed by the Tax Chamber in 2014.

Type of case	Number	Percentage of total (%)
Income tax (individuals and unincorporated businesses)	454	44.5
Value Added Tax	82	8.0
Payroll tax and social security contributions	60	5.9
Vehicle taxation	35	3.4
Custom duties	31	3.0
Corporation tax	30	2.9
Tax recovery	23	2.3
Transfer tax	18	1.8
Inheritance and gift taxes	15	1.5
Dividend withholding tax	4	0.4
Excises	1	0.1
Other national taxes	23	2.3
National taxes: total	776	76.0
Local taxes	169	16.6
Social security benefits and industry board cases	55	5.4
Requests for reopening of cases	21	2.1
Total	1,021	100

In 2014, the Tax Chamber of the Hoge Raad decided exactly 1,000 cases, in 141 of which an opinion was issued by an advocate-general. Of these 1,000 appeals in cassation in tax cases, 144 resulted in the quashing of the judgement of the previous instance, but this does not produce an accurate success rate, as 283 of these appeals were dealt with in a simplified procedure (*see* section 3.2.), i.e. they were declared to be inadmissible as not meeting the admission requirements or for lack of sufficient relevance, which generally means that the appeal was either prospectless or that there was no judicial protection issue of any significance.

In 2014, the average time of a tax case before the Hoge Raad was 320 days.

3.2. Access to the Tax Chamber and case load control

A court's case load may be controlled by limiting its intake or by simplifying its procedures. The Netherlands has chosen not to adopt a leave-to-appeal system, nor has it made legal representation mandatory in tax cases. Court fees in tax matters of between EUR 123 and EUR 497 only discourage appeals involving relatively small financial

interests. In tax matters, it is not considered to be appropriate for the state, which imposes the tax, to make it procedurally difficult or expensive for citizens to challenge tax assessments in court in at least two instances. This makes the inflow of cases difficult to predict and, therefore, difficult to manage.

Case load control was sought not at the “in” door of the tax courts, but at the “out” door: manifestly ill-founded or inadmissible tax appeals may be dealt with in a simplified and summary procedure by both the Courts of First Instance and the Courts of Appeal.

At the level of the Hoge Raad, the following three mechanisms have been introduced to enable the Tax Chamber to efficiently process tax cases with no prospect of success and to decide run-of-the-mill cases within a relatively short period¹⁰ so as to be able to devote most of its time and effort on cases that matter:

- (1) Where the procedural requirements for an appeal in cassation have not been met (e.g. the time limit has not been observed, the court fee has not been paid or no (intelligible) written grounds for the appeal have been submitted within the prescribed period), the appeal may be declared inadmissible without any further procedural steps and without deliberation. This happened in 12% of the tax cases in 2014.
- (2) Technically admissible appeals may, nevertheless, be declared inadmissible if they do not merit further deliberation as a result of a manifest substantive lack of prospect of success. The Hoge Raad may reject such appeals without stating other reasons than the said lack of prospect. This occurred in 16% of the tax cases in 2014.
- (3) If examination of the appeal in cassation does not reveal any reasons for quashing the judgement of the previous court nor raises issues regarding the unity or the development of the law, the Hoge Raad may confine its grounds for rejecting an appeal to so stating. In such cases, the appeal has nevertheless been fully deliberated in a chamber of usually three justices. Only the reasoning is confined to the said formula. In 2014, 40% of the appeals in cassation in tax matters, i.e. 405 cases, were decided in this way.

These rejections are based on a (summary) assessment of the legal admissibility or on the legal merits of an appeal and are, therefore, not discretionary, i.e. there is no leave-to-appeal system, although the procedures under categories (2) and (3) are not very far off this. The percentages noted reveal that in 2014, only 32% of the appeals in cassation in tax cases received a full treatment. By definition, all of the 144 cases in which the lower court’s judgement was quashed, i.e. 14.4% of the total number of cases in 2014 (see the numbers cited in section 2.3.), were in this fourth category. Obviously, these are the more complex or more generally important cases. This is the group of tax cases from which the advocates-general select cases on which

to write opinions.¹¹ As in only 15% of the total number of tax cases an opinion is issued, it follows that less than half of these fully fledged tax procedures included the issuing of an opinion. This illustrates that only the legally, politically, financially or socially most important tax cases are selected for an opinion.

In 2014, a simplified and/or summary procedure case took, on average, 156 days (category (1)) or 166 days (category (2)). A fully deliberated, but only summarily reasoned case (category (3)), took an average of 317 days. A fully argued, deliberated and reasoned case took, on average, 431 days. As the general average throughput time for a tax case was 320 days in 2014, a category (3) case may apparently be considered to be the paradigm average case, at least with regard to throughput time, but probably also in terms of substantive complexity.

3.3. Mechanisms to deal with important unresolved and pending questions of tax law

Although, on the one hand, the mechanisms described in section 3.2. are necessary to discourage or deal efficiently with cases that do not merit a (full) consideration in a third instance, or that do not reveal any issues of unity or development of the law, on the other, mechanisms are needed to enable the Hoge Raad to exercise its task of ensuring uniformity and the development of the law. To this end, the appropriate cases, i.e. those cases that give rise to legally, politically, financially or socially important questions of law, must reach the Hoge Raad. If they do not, legal practice, the administration, politics and society at large are left in uncertainty with regard to important issues.

In particular, highly visible or divisive issues that attract much attention from the public, politics and commentators, should be brought before the Hoge Raad as soon as possible. Normal litigation may not produce these cases. For instance, the parties involved in an important civil law issue that wish to litigate or access the appellate court after a first instance judgement, may refrain from doing so because of the high cost of mandatory legal representation or high court fee in civil matters and the downside risks involved.

In tax matters, this is less of a problem, as: (i) legal representation is not required, not even before the Hoge Raad; (ii) court fees in tax matters are (very) moderate compared to those in civil litigation; and (iii) the tax administration is the (almost) permanent party to all tax litigation and is, therefore, in a position to take stock of pending and unresolved issues and pursue an appeal policy accordingly. Nevertheless, also with regard to tax matters the need was felt for mechanisms to enable the Hoge Raad to decide important pending questions quickly outside regular litigation.

11. In contrast, in the civil and criminal sectors of the Hoge Raad, in principle, an opinion is written in all cases, albeit sometimes a summary opinion. This is because, in criminal and civil matters, representation by legal counsel is required, which better filters the appeals in cassation in these sectors than in tax matters and guarantees a certain minimum quality of cases.

10. Arts. 80a and 81 of the Judicial Organization Act.

In the last decade, a specific need developed for such a mechanism in tax matters, as important issues of company, payroll and turnover taxation no longer reached the HR, and often not even the Courts of First Instance. This is because, in the past ten years, the tax administration has pursued a policy of “horizontal supervision”, initially only for listed companies, with the idea being that these could at least afford having to publish in their financial statements pending tax disputes with uncertain outcome involving large financial interests, and latterly also with regard to large unlisted companies. Very briefly, horizontal supervision means that the company and the tax administration conclude a “covenant”, based on “transparency, mutual understanding and trust”, under which a company undertakes to put, and maintain, its tax house in order, i.e. disclose all (possible) tax skeletons in its closet, notify in a timely manner any new tax issues to the tax administration, apply an effective tax control framework, etc., in consideration of which the tax administration limits its auditing and its information requests, quickly answers questions, is prepared to resolve issues swiftly by mutual agreement within the framework of statute law and case law, pays out tax refunds promptly, undertakes to issue final assessments as soon as possible, etc.

Although hard numbers are lacking, the general impression is that horizontal supervision has significantly reduced the number of tax issues reaching the tax courts, especially those relating to profit determination for tax purposes and corporation and dividend taxation issues. It is striking, for example, that the number of cases on corporation tax that reached the Hoge Raad halved from 2013 (79 cases) to 2014 (34 cases). To place this in perspective, in 2014, 629,000 corporate income tax returns were filed. A similar development is visible with regard to dividend withholding tax matters. Apart from “horizontal supervision”, this drop in corporation and dividend tax cases may also be due to the often very large financial interests at stake and the length, cost and uncertainty of litigation.

With regard to taxation, the following five mechanisms have been designed to enhance (swifter) clarification of tax issues that may affect many taxpayers:

- (1) “Leapfrog” appeal in cassation:¹² an appeal to the Hoge Raad directly from the Court of First Instance, thereby passing over the Courts of Appeal. This is possible if both parties agree, which they often do if only legal questions and no factual questions are at issue. This mechanism is often used by the tax administration to obtain a quick answer to a question at issue in many pending objection proceedings before it, which are typically adjourned until that question has been answered. If the taxpayer involved does not wish to pass over the Court of Appeals or if no suitable case has reached the Court of First Instance, the tax administration may open a “massive objections” procedure (see point (5)).
- (2) Appeal in cassation “in the interest of the law”: the Procurator-General may request the Hoge Raad to quash a lower court decision which he considers to be legally incorrect, but which has not been appealed by either of the parties involved. If the Hoge Raad allows such an appeal, this only sets the general application of the law straight. It does not change the legal positions of the parties involved who, after all, did not appeal. In tax matters, this mechanism is not used often, i.e. only five times to date, as the tax administration is a permanent repeat player in tax cases, usually not accepting the outcome of cases that it considers to have been wrongly decided.
- (3) Quashing ex officio or handing down obiter dicta. As the Tax Chamber, in contrast to the Civil Chamber, may decide on other grounds than those advanced by the parties, provided that it stays within the boundaries of the dispute initiated by the parties, it may use this possibility to make a point of general interest or, at least, affecting other cases than that before it. If EU law is relevant but not relied on by the parties, EU law requires the Hoge Raad to use this possibility to ensure the effectiveness of (directly applicable) EU law, even if this has not been invoked by the parties.¹³ The Hoge Raad may also provide obiter dicta, which are not relevant for the case in hand, but which anticipate certain questions of law that are likely to arise in the near future.
- (4) Since 2012, in civil matters, the lower courts may refer preliminary questions of law to the HR. This procedure¹⁴ was primarily designed for cases in which the same question of law arises in a massive number of pending procedures, for example, litigation between a financial institution that offered a questionable investment product without informing prospective clients adequately of the risks involved, which were later realized, and many buyers are suing the institution for compensation in respect of the losses suffered on the investment. This possibility of preliminary referral to the Hoge Raad will also be introduced in tax matters in 2016. It is much like the preliminary procedure before the ECJ, with the major difference being that the Hoge Raad may decide not to answer the question if it considers that the issue is not suitable or not yet ready to be decided *in abstracto*, dissociated from concrete cases and facts.
- (5) Especially for tax matters, a procedure was introduced in 2003 under which the State Secretary for Finance may designate a specific legal issue on which a massive number of objections have been submitted to the tax administration to be an issue of “massive objection”.¹⁵ The decision in all objections submitted is then suspended until one or a few paradigm cases,

12. Art. 28(3) General tax Act.

13. NL: ECJ, 14 Dec. 1995, Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten* and *Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, ECR [1995] I-04705, ECLI:EU:C:1995:441.
 14. Arts. 392 to 394 of the Judicial Organization Act.
 15. Art. 25a General tax Act.

to be selected by a panel comprising both the tax administration and representatives of taxpayers, has been fully litigated before the courts. This prevents the tax administration and the Courts of First Instance from being inundated with thousands or maybe hundreds of thousands of cases concerning the same issue. Parliament has the right to intervene and overturn the decision of the State Secretary for Finance. After final judgment in the selected paradigm cases, the tax administration decides all suspended objections accordingly, in one “massive” decision published in the media, which cannot be appealed. Individual taxpayers who still wish to litigate may, however, request an individual decision, which they may then appeal in court, but probably to little avail. This procedure has only been used twice to date.

4. Issues of Judicial Policy

4.1. No constitutional review: treaties have primacy over national law – relationship with other state powers

Although in translation the Hoge Raad is often referred to as the “Supreme Court”, it is not a constitutional court. Oddly, the Netherlands does not have any constitutional court or review. The Constitution specifically provides that the judiciary does not review the constitutionality of statute law, i.e. Acts of Parliament.¹⁶ This would appear to make the Netherlands the odd one out in the world. In the Netherlands, two other institutions are expected to oversee the constitutionality of statute law *before* it is enacted. These are the Raad van State (Council of State) in its capacity of legislative advisor (advising the Crown as regards legislative proposals before these are submitted to Parliament), and Parliament itself before adopting legislative proposals. This is referred to as “the primacy of politics”.

Interestingly, however, the Hoge Raad *is* competent, as are all lower courts, to disapply national law, including Acts of Parliament, to the extent that these are incompatible with (directly effective) EU law or self-executing provisions of international treaties concluded by the Netherlands.¹⁷ The judiciary is also competent to disapply or even declare void legislation that is not an Act of Parliament, i.e. “lower” legislation, such as Cabinet Decrees, Ministerial Decrees and Municipal (tax) regulations, where such “lower” legislation is incompatible with “higher” legislation, i.e. the Constitution, Acts of Parliament, and directly effective EU law and treaty law.

The result is rather striking to foreign eyes. On the one hand, no court in the Netherlands is competent to review the constitutionality of statute law, whereas, on the other hand, *all* courts in the Netherlands are competent and even required to disapply any national law that is incompatible with (directly effective) international law.

An example may illustrate the possible implications of this striking feature. Germany and the Netherlands both had comparable gift and inheritance tax legislation providing for a very substantial exemption of businesses and shares in companies. This exemption did not apply to any other possessions. As the Constitution prohibits it, the Hoge Raad could not test this rather manifest tax privilege/discrimination under the Constitutional non-discrimination clause. The Hoge Raad could, however, test the privilege under the non-discrimination clauses of the 12th protocol to the European Convention of Human Rights (ECHR) and article 26 of the International Covenant on Civil and Political Rights (ICCPR). Apparently, however, the latter test is a very marginal one, as the Hoge Raad held¹⁸ that this tax privilege for the entrepreneurial rich was not incompatible with these non-discrimination clauses, given the case law of the European Court of Human Rights (ECtHR), which: (i) affords a wide margin of appreciation to the contracting states in matters of social-economic policy; and (ii) states that, in socio-economic matters, the national authorities are “better placed” to take into account all of the relevant circumstances and to balance all interests involved.

In contrast, in Germany, a comparable tax privilege for the entrepreneurial rich was declared to be invalid by both the German *Bundesfinanzhof* (Federal Fiscal Court, BFH) and, subsequently, the German *Bundesverfassungsgericht* (Federal Constitutional Court, BVerfG), as it violated the non-discrimination clause in the German Constitution.¹⁹ The German courts, therefore, applied a considerably less marginal test under their Constitution than the Hoge Raad did under the ECHR and the ICCPR.

Be this as it may, constitutional law in the Netherlands implies that tax treaties concluded by the Netherlands have primacy over national tax law and may be relied on directly in a tax court by taxpayer. Indeed, almost all of the provisions of tax treaties, notably their distributive, elimination and non-discrimination rules, are self-executing, i.e. sufficiently precise and unconditional to be applied by a court in a concrete case without any prior political policy choice or implementation or transformation into national law being necessary.

This also means that treaty overrides are impossible in the Netherlands, as they are unconstitutional. If the Netherlands is not satisfied with a certain (tax) treaty provision, it must either renegotiate that treaty (provision) or terminate the treaty.

4.2. Precedent: consistency of case law – “swing-overs”

As explained in 4.1, the Hoge Raad is constitutionally bound by ECJ case law and ECtHR case law. It is not, however, bound by its own previous case law. It may, therefore, derogate from precedent. In the interest of consistency and legal certainty, and given the task of ensuring unity of the law and ECHR case law requiring predictabil-

16. Art. 120 of the Constitution. Neither is the judiciary competent to test the constitutionality of treaties concluded by the Netherlands and ratified by Parliament.

17. *Id.*, at arts. 93 and 94.

18. NL: HR, 22 Nov. 2013, Case No. 13/01622, ECLI:NL:HR:2013:1211, BNB 2014/30.

19. DE: BVerfG, 17 Dec. 2014, ECLI:DE:BVerfG:2014:1s20141217.1 bvl002112.

ity of the law,²⁰ the Hoge Raad obviously does not regularly “swing over” and, if so, only for very good reasons. This is not to say that the Hoge Raad’s case law may not regularly and subtly contain small corrections or improve precision.

If a genuine change is at issue, the Hoge Raad usually explicitly announces the “swing over” and states the reasons for it. Sometimes, the new views are not applied in the case that raised them, but only in future cases (prospective overruling).²¹ In such cases, the party (not yet) winning reaps a bitter harvest, i.e. legally winning, but effectively losing. In a very small number of cases, the Hoge Raad has set a deadline for the legislator to adapt statute law to the new interpretation, failing which could cause the Hoge Raad to provide for future cases itself. In very rare cases, the Hoge Raad has itself provided detailed transitional law.

4.3. *Litis finiri oportet*

The Hoge Raad decides the case itself to the extent that this is possible (*litis finiri oportet*). It may do so even if minor questions of fact still remain (if it is very unlikely that further investigations into the facts will influence the final decision), but it must refer the case back to (another)²² lower court if more than marginally relevant facts have to be investigated to give a final decision. After the lower court to which the case has been referred back has reheard and decided the case, both parties may, if they are still not satisfied, reappeal the case in cassation.

4.4. Treaty application: the OECD Model and the Commentary on the OECD Model

The Netherlands has concluded numerous tax treaties, which mostly conform to the OECD Model.²³ If the OECD Model is changed, in principle, that does not affect the interpretation of the tax treaties based on the previous text,²⁴ as that was the text on which the contracting states based their agreement. This is all the more true for later changes in the Commentaries on the OECD Model²⁵ or other treaty-posterior OECD views. But if a tax treaty itself provides otherwise, obviously subsequent OECD views may be applied. For instance, part VII of the Protocol to the Netherlands-Panama Income Tax Treaty (1020)²⁶ states that:

[i]n respect of the attribution of profits to permanent establishments, nothing shall preclude the application of the revised 2010 authorised OECD approach to the text agreed.

20. UA: ECtHR, 7 July 2011, *Serkov v. Ukraine*, Application 39766/05.

21. For instance, NL: HR, 28 June 2000, BNB 2000/275.

22. For reasons of impartiality, in principle, a case in which a decision of a Court of Appeals has been quashed and that cannot be decided finally by the Hoge Raad itself, is referred to one of the other three Courts of Appeal to be reheard and decided.

23. *Model Tax Convention on Income and on Capital*, OECD, Paris (15 July 2014), Models IBFD.

24. See, to this effect, NL: HR, 21 Feb. 2003, BNB 2003/178, ECLI:NL:HR:2003:AF2703.

25. *OECD Model Tax Convention on Income and on Capital: Commentaries* (15 July 2014), Models IBFD.

26. *Convention between the Kingdom of the Netherlands and the Republic of Panama for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* (1 Dec. 2010), Treaties IBFD.

If the treaty provision to be applied is verbally identical to the corresponding provision in the OECD Model and the parliamentary memorandum of explanation or the context indicates that the contracting states wanted to conform to the OECD views, the Hoge Raad considers the Commentaries on the OECD Model at the time of the negotiation and the conclusion of the tax treaty to be “of great significance” in the interpretation of that provision.²⁷ Later OECD Commentaries may be used as an aid, but have less interpretational value. They may be compared to authoritative literature, although the Hoge Raad has never been explicit on this point. It must, therefore, be supposed that, in respect of later changes to the OECD Commentaries, the Hoge Raad, in principle, adheres to a static interpretation.

Tax treaties may refer to national law. Article 3(2) of the OECD Model explicitly does so for terms that are not defined in a tax treaty itself. In this respect, tax treaties must, in principle, be interpreted dynamically, i.e. in the light of current national law. Applying antiquated national law that has long been repealed, does not, in general, make sense. But if national law is changed *in order to* manipulate the distributive rules of a tax treaty, the Hoge Raad may consider such a change to be a violation of the good faith requirement contained in article 31(1) of the Vienna Convention on the Law of Treaties (1969).²⁸ If a unilateral change in national law effectively allows that state to usurp taxing rights it did not have under the national law in force at the time of conclusion of the treaty, the treaty-posterior change of national law is disregarded for the purposes of treaty income allocation.²⁹

4.5. Foreign law

Relevant foreign law (e.g. necessary to decide whether an entity is subject to tax in the other contracting state or whether family ties relevant for tax purposes exist according to the law of the state of birth of the individuals involved), has a somewhat hybrid status in the Dutch legal order, somewhere between law and fact. Foreign law is “law” in that the courts are required to apply it, like national law, even if the parties did not rely on it (*ex officio*) where this is necessary to decide the case correctly under Dutch law.³⁰ But foreign law is not “law” in that a violation or misapplication of relevant foreign law is not a ground for cassation.³¹ As a court cannot be expected to know and understand the law of all foreign states as if it were domestic law, especially not if there are no authoritative sources in a language the court can read, the interpretation of possibly applicable foreign law in an inaccessible language is, in practice, treated as a question of fact rather than of law.

Nevertheless, the Tax Chamber of the Hoge Raad requires the lower courts to “ascertain” the content of relevant

27. NL: HR, 2 Sept. 1992, Case No. 27252, BNB 1992/379, ECLI:NL:HR:1992:ZC5045, Tax Treaty Case law IBFD.

28. *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties IBFD.

29. NL: HR, 5 Sept. 2003, BNB 2003/379, ECLI:NL:HR:2003:AE8398.

30. NL: *Algemene wet bestuursrecht* (General Administrative Law Act, Awb), art. 8.69 and NL: *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure, Rv.), art. 25.

31. Art. 79 Judicial Organization Act.

foreign tax law.³² The court may rely on the submissions by the parties if these agree on the content and implications of the relevant foreign law, on its own research (e.g. in the Tax Research Platform of the IBFD),³³ or on specified information requested from, for instance, the T.M.C. Asser Institute (Centre for International and European Law) or from the IBFD.

Foreign law may also serve for comparative purposes and as an aid in interpretation. In the opinions of the advocates-general of the Hoge Raad, foreign statute law is regularly quoted for comparative law purposes. In this respect, in cases regarding treaty interpretation, the advocates-general may, for example, quote case law of the tax courts of the other contracting state on the same treaty provision.

4.6. Mutual agreements; court decisions in the other contracting state; arbitration awards

The Hoge Raad did not accept as binding on the court the outcome of administrative consultations between the competent authorities on the basis of a treaty provision based on article 25 of the OECD Model. It held that such a mutual agreement procedure (MAP) between two Executives, not officially having been published and not having any specific legal status, could not relieve the courts from their task to interpret and apply the tax treaty.³⁴ Interestingly, the Hoge Raad not only derogated from the MAP, but also from the case law of the last instance tax court³⁵ of the other contracting state (Germany) on the same term in the same treaty provision. This indicates that the Hoge Raad may take notice of foreign judgements (the advocate-general had explicitly drawn the court's attention to the German case law), but does not feel bound by it, not even in an identical case under the same treaty provision concerning the same term.

Since that judgement, the Netherlands has often included in a protocol to its tax treaties a provision stipulating that a MAP between the competent authorities to avoid double taxation or double non-taxation should, following its pub-

lication by both authorities, also be binding in other comparable cases under that tax treaty.³⁶

The Hoge Raad has not yet had opportunity to consider the legal significance of arbitration awards reached on the basis of treaty arbitration provisions or on the basis of the EU Arbitration Convention (90/436).³⁷

4.7. Commercial and tax accounting

Commercial accounting and tax accounting are, in principle, separate worlds in the Netherlands, as commercial accounting is intended to provide a correct insight into the capital, the results, the liquidity and the solvency of the undertaking to investors, shareholders, employees, unions, supervising authorities, the media and other third parties, whereas tax accounting solely serves the purpose of taxation. Commercial accounting is, therefore, based on "generally acceptable principles",³⁸ whereas tax accounting is based on "sound business practice".³⁹ Commercial accounting has been regulated in detail, especially for listed companies that are required to apply International Financial Reporting Standards (IFRS). Apart from specific details and regimes, general tax accounting is less regulated and it was left to the judiciary to operationalize the criterion of "sound business practice". A very large body of case law of the Hoge Raad has, therefore, developed on this basis, drawing from business economics and IFRS where feasible, but staying independent and autonomous. In general, this case law allows businesses to be more conservative in profit calculation for tax purposes than for financial reporting purposes, as taxation should not jeopardize the continuity of the undertaking. As a result, the profit determination for tax purposes is, for a large part, case law of the Hoge Raad.

32. NL: HR, 10 Oct. 2008, BNB 2009/27, ECLI:NL:HR:2008:BF7181.

33. Available at www.ibfd.org.

34. NL: HR, 28 Sept. 1999, BNB 2000/16, ECLI:NL:HR:1999:AA2898.

35. DE: BFH, 10 July 1996, Case I R 4/96, Tax Treaty Case Law IBFD.

36. See, for example, *Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital* Protocol I(3) (Unofficial translation) (5 June 2001), Treaties IBFD.

37. Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (as amended through 2008), EU Law IBFD.

38. NL: *Burgerlijk Wetboek* (Dutch Civil Code, BW), art. 2:362(1).

39. NL: *Wet op de inkomstenbelasting* (Individual Income Tax Act, IB) of 2001 art. 3.25.