de Nederlandse Orde van Belastingadviseurs
The Dutch Association of Tax Advisers

The tax advisor and the right of non-disclosure

1. Introduction

This memorandum discusses the right of non-disclosure as it relates to tax advisors. The discussion focuses on the definition and content of the legal right of non-disclosure in tax matters and subsequently on the tax advisor's right of non-disclosure. The memorandum presents the position taken by the Dutch Association of Tax Advisors (*Nederlandse Orde van Belastingadviseurs*; "NOB") regarding the importance of the tax advisors' right of non-disclosure. This memorandum was drawn up by the board of the Procedural Tax Law division[1] and subsequently adopted by the board of the NOB.

Normally, the tax advisor's right of non-disclosure is referred to as an 'informal right of non-disclosure' to distinguish it from the legal or formal right of non-disclosure as referred to in Article 53a General Taxes Act (*Algemene wet inzake rijksbelastingen;* "AWR"). Based on legislative history and case law (see below), the right of both forms of non-disclosure are based on the concept that citizens (in this context: taxpayers) must have access to legal assistance without being afraid that the information entrusted to their legal counsel will be used against them. This principle is referred to as the **confidentiality principle**. It can be concluded from the Supreme Court's judgement of 23 September 2005 (see below) that the tax advisor's right of non-disclosure is partly based on the **principle of fair play**. Consequently, the tax advisor's right of non-disclosure now has a stronger foundation than it did before this judgement. Still, for the sake of clarity, the term 'informal right of non-disclosure' will be used to distinguish it from the legal right of non-disclosure as referred to in Article 53a AWR.

2. What does the right of non-disclosure in tax matters entail?

The legal right of non-disclosure in tax matters is laid down in Article 53a AWR.[2] This provision gives a number of specifically named professional groups the legal option to refuse to comply with the obligation to provide information on the taxation of third parties. This right of non-disclosure applies both judicially and extrajudicially[3]. In this context, extrajudicially means that the party to whom the right of non-disclosure applies can invoke their right of non-disclosure against the tax inspector's demand to disclose information about third parties. Article 53a AWR gives the legal right of non-disclosure to the clergy, civil law notaries, lawyers, physicians and pharmacists. These professionals can invoke this right based on the confidentially obligation of their office or profession.

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[1] The members of the board of the Procedural Tax Law division are: D.G. Barmentlo (chair), P.J. van Amersfoort, M.J. vanDieren, J.A.R. van Eijsden, M. Hendriks, F.R. Herreveld, P. van Iersel, W.E. Nent, M. Arichi (secretary).

[2] The parallel provision for tax collection is Article 63 of the Collection of State Taxes Act 1990.

[3] Art. 8:33(3) of the General Administrative Law Act in conjunction with Art. 165 (2)(b) of the Code of Civil Procedure and Art. 218 Code of Criminal Procedure.

According to the Supreme Court, the legal right of non-disclosure[4] is based on a legal principle generally applicable in the Netherlands, which entails that, for these trusted advisors, the public interest that is served by the truth coming to light in court is secondary to the public interest served by a citizen being able to freely turn to these advisors for assistance, without fearing that what was discussed will be disclosed. The unencumbered performance of their profession by the parties to whom the right of non-disclosure applies, as set out in Article 53a AWR, means that information that is disclosed to these persons in confidence may only be used for the purposes for which assistance was sought. This limitation is necessary to safeguard the accessibility of these service providers.

The legislative history of the legal right of non-disclosure in tax matters shows that the right of non-disclosure arose because of the position of the service providers referred to in Article 53a AWR who can refuse to provide information to the tax authorities by invoking the right to confidentiality. The interests of the Treasury are secondary.

3. The tax advisor's right of non-disclosure

3.1. General

Tax advisors are not legally protected in the Netherlands and consequently their profession is not governed by statutory regulations. This means that tax advisors potentially have more freedom to practice their profession, but, at the same time, it also means that anyone can call themselves a tax advisor. The major professional associations of tax advisors in the Netherlands[5] are aware of this, and their members are subject to codes of professional conduct and disciplinary proceedings. This allows these tax advisors to distinguish themselves from those who do not comply with the rules and educational and other requirements of the professional associations. What these codes of professional conduct have in common is that they oblige tax advisors to observe confidentiality in the practice of their profession.[6] As a rule the general terms and conditions of tax advisory firms also include a confidentiality obligation, whereby a client can assume that their tax advisor will not disclose any information provided by the client.

However, tax advisors are not holders of confidential information within the meaning of Article 53a AWR[7] and without the informal right of non-disclosure they would have to provide, upon request, data and information that could be used to tax third parties. Pursuant to Article 51 AWR, a confidentiality obligation (even a legal one[8]) or the confidential nature of certain information is not cause to refuse to comply with the provisions of Articles 47 et seq. AWR.

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[4] Supreme Court 1 March 1985, *NJ* 1986, 173 (Maas II).

[5] The Dutch Association of Tax Advisors and the Register of Tax Advisor (*Register van Belastingadviseurs*).

[6] Cf., for example, Article 4 of the Rules of Professional Practice of the Dutch Association of Tax Advisors.

[7] Supreme Court 6 May 1986, NJ 1986, 815.

[8] Other than the parties to whom the right of nondisclosure applies and who are explicitly listed in Article 53a of the AWR.

3.2. Legislative history of the informal right of non-disclosure

During the parliamentary debates on the AWR, the legislator acknowledged that taxpayers must have the opportunity to consult in a confidential manner with their tax advisor. It was noted:

"that taxpayers should have the opportunity to consult in a confidential manner with their advisors. In this regard, current legislation states that the Dutch Tax and Customs Administration must not expect accountants and tax consultants to provide access to the advice provided to their clients or the correspondence with their clients."[9] *That is why, according to the legislator, the existing practice could be continued. It was not possible to introduce legislation on the non-disclosure for tax advisors as the profession of tax advisor is not legally regulated.*[10]

It was laid down in later policy rules that neither advice nor oral consultation between tax advisors and their clients have to be disclosed to the tax authorities.[11]

3.3. Content of the informal right of non-disclosure

As stated above, the limitation of the obligation contained in Article 53 AWR under which tax advisers and accountants must provide information, is referred to as the informal right of non-disclosure. The informal right of non-disclosure covers tax advice to, and correspondence and consultation with, clients.

Advice (that is, sufficiently substantiated advice) generally contains both facts and analysis. The abovementioned legislative history shows that such advice cannot be requested, not even if directly requested from the taxpayer in question. Moreover, with regard to these documents, the tax advisors' confidentiality obligation and the position of trust they have developed with their client must be protected. The NOB has always maintained that 'mixed documents' (documents containing more than one type of information) also fall under the informal right of non-disclosure. This was confirmed by the judgement of 23 September 2005, *BNB* 2006/21 discussed below.

It can be inferred from the definition of the informal right of non-disclosure that this should relate to advice provided in the context of exercising one's profession. With regard to the tax advisor, the informal right of non-disclosure will therefore be limited to tax advice and other reports issued in the context of the exercise of their profession, such as second opinions or due diligence reports.

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[9] Parliamentary Documents I 1958/59, 4080, no. 7a, page 10, left column.

[10] Parliamentary Documents II 1957/58, 4080, no. 7, page 13, right column, and Parliamentary Documents I 1958/59, 4080, no. 7a, page 9, right column.

[11] These policy rules have since been withdrawn.

Pursuant to legislative history, confidential consultations with the client fall under the scope of the tax advisor's informal right of non-disclosure. This means that tax advisors are not required to make the content of such discussions known to the tax authorities, nor do they have to make available the minutes of such meetings.

The informal right of non-disclosure also applies to correspondence with the client carried out in the context of the exercise of one's profession. The informal right of non-disclosure also covers emails exchanged with the client, as this also falls under 'correspondence with the client'. The same should apply to client-related correspondence and emails that take place within the tax advisor's office. It should be noted that the protection of correspondence is laid down in the European Convention on Human Rights (ECHR).[12]

3.3.1 Supreme Court, 23 September 2005, *BNB* 2006/21

It is clear from the legislative history discussed above, that advice and correspondence fall under the informal right of non-disclosure. However, at issue was whether due diligence reports should be provided to the tax authorities. In its judgement of 23 September 2005, *BNB* 2006/21, the Supreme Court ruled on this question. The Supreme Court also clarified the extent to which the right of non-disclosure also relates to 'mixed documents'.

The case in question concerned a due diligence conducted for a bank. The interested party refused to make the report available.

In an obiter consideration, the Supreme Court concluded:
"Because the first question is also of importance with regard to other disputes, it is noted that the principle of fair play, which is one of the general principles of sound administration, is incompatible with an inspector making use of the authority granted to him under Article 47 AWR to obtain reports and other documents prepared by third parties insofar as they outline the taxpayer's tax position or advise the taxpayer thereon. This consideration also applies to those parts of the documents that contain information of a factual or descriptive nature for that purpose. The remaining parts (which were not prepared for that purpose) must be provided, upon request, for which it may be necessary to split or edit the documents."

The principle of fair play that the Supreme Court referred to in its judgement is often mentioned in the literature in the same breath as the principle of due care. To date, this has been mainly used in case law where the government has treated a citizen unfairly by withholding information or by not taking account of the fact that, without legal

[12] Article 8 of the ECHR:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

representation, the citizen is up against a powerful government. In the case in question, the principle of fair play was applied in the sense that the government must treat a citizen fairly. In light of the legislative history set out above, it is apt that the Supreme Court also applied the principle of fair play in this case. Furthermore, applying the principle of fair play is correct. The tax authorities would otherwise obtain an 'unfair' advantage over the taxpayer, because it is familiar with the tax analyses and the arguments compiled based on the facts.

3.4. Determining the scope of the informal right of non-disclosure

The NOB considers that the right of non-disclosure means that a tax advisor will assess, without interference from the tax authorities, whether a particular document falls under their informal right of non-disclosure. The NOB believes that its position follows from the Supreme Court judgment of 29 March 1994, *NJ* 1994, 552, which is discussed in section 3.6 below.

Two recent rulings are relevant for who determines, in a specific case, what falls under the tax advisor's right of non-disclosure.

In the Amsterdam District Court ruling of 6 October 2011, LJN BT6955, the preliminary relief judge ruled that, based on the abovementioned judgement rendered in 1994, tax advisors themselves must decide to which documents their informal right of non-disclosure applies. This can relate to all or part of the document. If, in the documents, the tax advisor discusses the different options available to the taxpayer, the admissibility and possible risks of certain choices, the strategy to be used with regard to the tax authorities, etc., such passages may be deleted before the document is provided to the tax authorities. The District Court concluded that this would apply both to requests made by the taxpayer for advice on such issues and to the answers provided. Furthermore, other parties may have a derived informal right of non-disclosure that is derived from the tax advisor's right of non-disclosure. The preliminary relief judge also concluded that the responsibility for determining which documents have to be provided to the tax authorities lies with the holder of the confidential information, and that the tax authorities may not challenge this decision. This means that the holder of confidential information does not have to justify its selection to the tax authorities by providing a list of the contents of the file. Incidentally, the ruling has been appealed by the taxpayers who were also a party to the proceedings.

In the Supreme Court judgement of 27 April 2012, LJN BV3426, the Supreme Court ruled that although a trust office may have information from holders of confidential information as referred to in Article 53a AWR in its possession, a taxpayer may refuse to comply with the requirements of Article 47 AWR by invoking the confidentiality of his contact with a holder of confidential information, but that the tax authorities must have the opportunity to do what is necessary to assess the plausibility of the taxpayer's assertion that this concerns such contact. The Supreme Court subsequently ruled that the trust office must disclose for which taxpayer the confidentiality clause was invoked, and that the opportunity for the tax authorities to assess the information must be the same as if it concerned contact with a holder of confidential information. The Supreme Court also concluded that this assessment can be carried out by a neutral third party, for example a civil law notary.

3.5. In-house tax specialists

The tax advisor's informal right of non-disclosure is based on their relationship of trust with the client. This relationship does not exist for tax specialists who are employed by a taxpayer. In the legislative history on legislative proposal 21 287, the Deputy Minister of Finance noted that, for this reason, in-house tax specialists do not have an informal right of non-disclosure.[13] In this context, we also refer to the ruling of 14 September 2010 by the Court of Justice of the European Union, in which the Court concluded that the principle of confidentiality in European antitrust law does not apply to communications between an in-house lawyer and their employer, because the economic dependence and close ties with their employer means that an in-house lawyer is not as independent as an external lawyer would be.[14] It is possible that the reasoning used in this judgement may also be applied to in-house tax specialists.

The tax authorities can therefore request that a tax affairs support department allows it access to advice provided to another business unit. In response to such requests from the tax authorities, it can be argued that the principle of fair play, as referred to by the Supreme Court in its judgement *BNB* 2006/21, should also apply to advice provided by in-house tax specialists. By gaining access to this advice, the tax authorities would obtain an unfair information advantage. Moreover, it is by no means certain whether advice from the in-house tax specialist – documents of a descriptive nature – have to be provided. The legislator did not want to include descriptive documents under the requirements of Article 47(1)(b) AWR. After all, these documents are not relevant for determining facts, but only give the tax authorities insight into the company's position on tax matters and the arguments substantiating the tax position of the taxpayer. The level playing field between the tax authorities and the taxpayer is thereby disrupted. The legislative history has demonstrated that this was not the legislator's intention.

3.6. Derived right of non-disclosure

Based on Supreme Court case law, tax advisors can derive a right of non-disclosure from the legal right of non-disclosure of lawyers and civil law notaries.[15] In its judgement of 29 March 1994, *NJ* 1994, 552, the Supreme Court accepted the accountant's derived right of non-disclosure. The Supreme Court ruled:

"The nature and complexity of a matter that is entrusted to an attorney can also mean that, to properly perform his task as advisor, the attorney considers it necessary to engage a third party expert, who may or may not be associated with the attorney's law firm, in order to have access to the required special expertise that the attorney does not have. Since the expert in question may have to gain access to certain confidential information and documents in order to provide the service requested, the attorney's own duty of confidentiality and attorney-client

[13] Proceedings II, 21 287, 1992/93, page 6048: *Vakstudie* General part Article 47 AWR, note 3.5.1.

[14] Court of Justice of the European Union, 14 September 2010, no. C-550/07 (Akzo/Akcross).

[15] The legal right of non-disclosure for physicians and the clergy is not relevant in this respect.

privilege should extend to the expert in question. In this context, it does not matter whether the information in question is provided to the expert by the attorney orally or in writing, nor whether the expert examines the content of the documents in question at the attorney's office or whether the lawyer provides the documents or has them provided to the expert. The above also means that the expert may invoke his thus applicable right of non-disclosure, which is derived from the attorney's right of non-disclosure, to oppose the seizure of the letters and documents referred to above, if and insofar the expert has these in his possession in connection with the performance of the assignment that he accepted from the attorney in the context of handling a specific matter entrusted to the attorney by the client. The nature of the derived right of non-disclosure discussed here also means that the ruling concerning the question of whether letters or documents can be part of the subject of a derived right of non-disclosure, in principle belongs to the person from whom the right of non-disclosure is derived."

This consideration by the Supreme Court clearly sets out the what the derived right of non-disclosure entails. In the interests of a case, an attorney may call on the expertise of a third party. Consequently, the attorney's right of non-disclosure is expanded to cover the information disclosed to the third party, either orally or in writing, regardless of where the third party gains access to the information. Based on this Supreme Court judgment, experts who are engaged by those who can invoke a legal right of non-disclosure have a derived right of non-disclosure with respect to information that falls under the right of non-disclosure of the party to whom the legal right of non-disclosure applies.

3.7. Right of non-disclosure of other supervisory authorities/government bodies

Somewhat outside the scope of this memorandum, the NOB notes that the right of non-disclosure of tax advisors, attorneys and civil law notaries does not apply in full in other cases of governmental supervision. Under the Anti-Money Laundering and Anti-Terrorist Financing Act Tax (*Wet ter voorkoming van witwassen en financieren van terrorisme*, "Wwft"), tax advisors are required to screen their clients and report unusual transactions to the Financial Intelligence Unit Nederland. If necessary, information is provided to the supervisory authority - the Bureau Financial Supervision (*Bureau Financieel Toezicht*, "BFT"). The above also applies to attorneys and civil law notaries insofar as they perform services referred to in this Act. In this way, the obligation of confidentiality that tax advisors, attorneys and civil law notaries have is infringed. Nonetheless, the NOB understands the need for this infringement, in light of the legislator's choice to give the public interest of combating money laundering and the financing of terrorism priority over the interest of the individual.

4. NOB position

The NOB considers that tax advisors can be regarded as legal assistance providers of tax law. Taxpayers must have unimpaired access to legal assistance on tax matters, without being afraid that the information entrusted to the assistance provider will be used against them. This applies all the more due to the fact that taxpayers, by definition, are up against a powerful government. The tax advisor's right of non-disclosure is therefore a fundamental right. The NOB feels so strongly about this that it would consider it appropriate for the AWR to grant a legal right of non-disclosure to the party from whom the taxpayer wishes to receive tax

advice. However, legislative history and Supreme Court case law show that the tax advisor's informal right of non-disclosure with regard to tax advice does, in practice, meet the need for the opportunity for confidential consultation. However, it is important to remember that the informal right of non-disclosure is more limited than the legal right of non-disclosure. The main difference being that the informal right of non-disclosure does not extend to facts and circumstances that are not included in the tax advisor's advice.

In conclusion, the NOB recognises the following basic principles:

- The government has the right to know the facts and to obtain these from the taxpayer and other parties, including the tax advisor.
- Taxpayers must have unrestricted access to legal tax assistance, without fearing that the information entrusted to the tax advisor will be used against them by the government or another party.
- The right of non-disclosure with regard to taxation arises from the client's right of access to tax assistance and is, as such, a right associated with the client and not the tax advisor. The fact that the tax adviser's profession is not legally regulated is not an issue in this context. However, the client's right to tax assistance gives rise to the tax advisor's obligation of confidentiality on tax matters.
- The tax advisor's obligation to provide information concerning a client cannot expand the client's own obligation to provide information, given that this would create a barrier for the taxpayer to request assistance from a tax advisor.
- The tax analysis and the advisory services provided by the tax advisor and the underlying facts should therefore fall under a right of non-disclosure. It is not acceptable for the government to put pressure on tax advisors in order to collect taxes. This is contrary to the principle of fair play.
- This principle should also apply to tax analysis and advice provided by in-house tax advisors.
- The nature of the right of non-disclosure is such that tax advisors can, without interference from the tax authorities, determine whether a particular document falls under their informal right of non-disclosure. In the case of a derived right of non-disclosure, the person from whom the right of non-disclosure is derived is responsible for determining, without interference from the tax authorities, which documents fall under the derived right of non-disclosure. In certain cases, this may be determined by an independent third party.
- The informal right of non-disclosure, pursuant to legislative history and Supreme Court case law, has, for the most part, proven adequate in practice.

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