

Mediating Tax Disputes in the Netherlands

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Introduction

This article highlights the practical developments of mediation in the Netherlands for resolving disputes between the Tax Authorities and taxpayers. Mediation, as an alternative for resolving tax disputes, has taken a modest step forward since 2005. This article also examines two cases. At the moment draft legislation is pending in an attempt to further foster and promote mediation in the Netherlands also for tax disputes.

Mediation in tax cases

Emotions can run high on both sides during tax audits. The obligation to provide information and the weapons employed by the Tax Authorities to achieve i.e. increasing the burden of proof, are often perceived as intimidating by the taxpayer. Although nowadays legal remedies can be sought against requests for information made during tax audits (the *decision requiring information*), mediation can also be initiated in an attempt to break the deadlock with a view to disrupting the future relationship as little as possible.

Mediation in tax disputes is arranged by both the Tax Authorities and the Judiciary.

Mediation via the Tax Authorities

Exhaustive information on mediation can be found on the Dutch Tax Authorities (*Belastingdienst*) website¹. The site indicates that mediation may be used in the following cases, among others:

- for disputes arising during an audit or investigation;
- when a complaint is submitted;
- if a notice of objection is filed;
- if a notice of appeal is filed;
- in all other situations in which disputes escalate.

Not all disputes are suited to mediation. For instance, criminal-law conflicts do not qualify, nor do cases involving taxpayers who require a principled ruling on a purely legal issue. As far as the Tax Authorities are concerned, mediation is not the most suitable way of resolving these matters.

¹ See www.belastingdienst.nl.

The Tax Authorities have published the following checklist that helps determine whether or not mediation is appropriate.

Checklist	Yes	No
I feel that the dispute is escalating and that we will be not be able to resolve matters amicably.		
This is a long-running dispute.		
I want a quick and effective solution.		
I see possibilities to resolve matters reasonably.		
I believe that all not all sides of the story are being heard.		
I want a customized solution that I can work with.		
Mediation could save me considerable costs, legal or otherwise.		
I can no longer communicate properly with the other party.		
I want to reach a solution that can also be used in future situations.		
I feel that mediation can help me solve other disputes I have with the other party.		
I and the other party will have regular contact in the future and a good relationship is vital.		
No attempt at mediation has yet been made.		

The Tax Authorities feel that mediation is worth considering if the majority of questions are answered with a 'yes'. Mediation is only possible if both parties are willing to work together. The Tax Authorities have found that in practice both the Tax Authorities and the taxpayer usually respond positively if mediation is requested during a conflict. The Tax Authorities' mediation coordinator (hereafter: coordinator) plays an important role here. If one of the parties wishes to make use of mediation, the coordinator will approach the other party or parties and provide additional information if required. Both parties - Tax Authorities and taxpayer - are entitled to initiate mediation. Once both parties have agreed to mediation, the coordinator will schedule the first meeting and appoint an internal or external mediator.

The Tax Authorities usually work with internal mediators who follow the disciplinary and professional conduct rules laid down by the MfN [Netherlands Mediators Federation].² Although the use of internal mediators could prompt taxpayers to question their neutrality, all practical experiences with internal mediators have generally been positive.

An internal mediator will in all likelihood go the extra mile to maintain neutrality. Moreover, the internal mediator must adhere to the professional rules laid down by the MfN and this is deemed a guarantee of quality, something that can be checked if complaints are received by one of the parties.

² See www.mfn-register.nl

The mediator has no personal or business relationship with the parties involved and is not from the same region as the parties. The mediation coordinator provides the mediator with the addresses of the parties plus a concise description of the dispute details. The mediator enters mediation with no insider knowledge and no knowledge of the underlying legal documentation. This ensures his impartiality. The mediator meets both parties at the first session and discusses the procedure and nature of the dispute with them. All parties then sign a mediation agreement that sets out their rights and obligations.

Confidentiality is key in mediation. What happens during mediation, stays in mediation. This ensures that participants feel free to say what they want. Taxpayers may be assisted by attorneys or tax advisors during mediation who can assess the solutions from a tax perspective. The solutions are subsequently laid down in writing in a settlement agreement, which is signed by both parties. Even if the parties cannot agree on all points, the partial agreement is still recorded in writing. This restricts the normal proceedings to the remaining points at issue, leaving parties to make arrangements for their further consideration.

While mediation confidentiality is essential, the question is how the mediator will act if during mediation he begins to suspect that crimes have been committed. There is no clear case law on this particular point. If it relates to a possible punishable crime that has nothing to do with the tax conflict of the mediation, I can imagine that this crime will not fall under the confidentiality obligation. If it relates to a possible criminal construction of an act that itself is the subject of mediation, then the taxpayer can - in my opinion - in principle invoke the confidentiality clause. A mediator is, in any event, wise to warn parties in advance that it is quite likely that mediation confidentiality does not cover criminal offences. After all, forewarned is forearmed.

The normal tax proceedings are temporarily halted during mediation. Consider, for example, collection measures, objection or complaints handling. The normal proceedings will recommence if parties - despite mediation - are unable to agree or if they can only agree in part. The solution chosen by the parties must fall within the scope of the law. The Tax Authorities state that almost 80% of their mediation proceedings have a positive outcome.³ The time involved in mediation is an average of 4.5 hours. It usually takes a couple of weeks before the first meeting takes place, counting from the time that parties opt for mediation. Mediation is often financially cheaper than other measures.

³ Data originating from, among others, the pilot investigation mediation in tax cases (2004) conducted by the Dutch Tax Authorities; in this respect R. Vos, Mediation in tax cases, FSVU Magazine 2010, p. 26 et seq.

Generally speaking, mediation is usually cheaper for both parties than regular court proceedings. Mediation via the Tax Authorities is free. The only costs the taxpayer will incur are his own costs i.e. those incurred for the assistance of an attorney or tax advisor.

Mediation alongside legal action

Mediation alongside legal action means that the district court or the court of appeal where the tax proceedings are being heard, advise parties of the mediation option. This can be done in writing: both parties receive a letter with an information brochure, the mediation self-test and a reply form. Furthermore, during a hearing the judge may state that mediation is appropriate to the case in question: he will then suggest mediation to the parties. Parties themselves are also entitled to approach mediation officials who are at the disposal of all district courts and all courts of appeal. The mediation official answers questions, approaches the other party to propose mediation, assists parties in finding the most suitable mediator and sets up the first meeting.

If mediation is opted for, the tax proceedings will be halted. Court proceedings will be terminated if parties reach agreement in mediation. If parties fail to agree or only agree in part, whole or part of the case will be referred back to the court handling the case. The termination, partial continuation or continuation of the proceedings will be arranged by the parties themselves through their attorney or tax advisor, or the Tax Authorities.

The course of mediation follows the same course as mediation conducted through the Tax Authorities. The first meeting starts with an explanation of the mediation rules and the mediation agreement that sets out the duties and obligations of all parties involved. At this meeting the mediator examines whether parties will be able to reach agreement. All parties are, in principle, present at all meetings. The mediator lays down the agreements and resolutions in a settlement agreement. At the last meeting all parties, attorneys and other parties involved who were present at all the meetings will complete a questionnaire, which they subsequently submit to the mediator.

Mediation alongside legal action is open only to mediators who are listed on the MfN's register; they must also be registered with the Legal Aid Board. These registered mediators are bound by the MfN rules, which state that they have a duty of confidentiality and must be independent, impartial and able to act expeditiously. MfN mediators are bound by independent disciplinary rules for mediators. If a party is dissatisfied with a mediator, a complaint may be made using the MfN complaints procedure. Complaints about other aspects of mediation alongside legal action can be submitted to the Management Board of the judicial authority at which the tax proceedings are being heard.

In contrast to mediation at the Tax Authorities, parties are jointly responsible for payment of the mediator's fees. The list with the names of the mediators attached to the district court also gives their hourly rates, which vary from mediator to mediator. Parties agree on the apportionment of the costs, which are usually equally divided between the two.

Tax qualified mediator important or a hindrance - VFM

A frequently asked question is whether a mediator who is also a tax advisor increases or decreases the chances of successful mediation in tax disputes. Tax cases are rather technical in nature. I can well imagine that discussions between the Tax Authorities and the taxpayer will be difficult to follow if the mediator has no experience at all of tax matters. On the other hand, one pitfall is that if the mediator is skilled in tax matters, he could focus on the substance of the matter and consequently lose sight of the underlying problem in the discussion. There are many specialist areas in the taxation system but you do not need to be a VAT specialist to be able to mediate. It does, however, help if you can speak the tax language so that you are able to follow the discussion. In other words: because I understand what parties are talking about, it is easier for me to focus on the underlying problem.

The Dutch Tax Mediation Association ⁴(*Vereniging voor Fiscale Mediation (VFM)*) was founded in the Netherlands in 2007. The association is an initiative of the members of the Dutch Association of Tax Advisors (*Nederlandse Orde van Belastingadviseurs (NOB)*), the Dutch Register of Tax Advisors (*Register Belastingadviseurs (RB)*) and the Dutch Association of Attorneys and Tax Advisors (*Nederlandse Vereniging van Advocaten-Belastingkundigen*). The objective of the Dutch Tax Mediation Association (hereafter: VFM) is to promote the awareness and applicability of mediation in tax disputes, and in commercial disputes in which tax issues play a role. Parties with tax disputes requiring a mediator with tax expertise can consult the VFM website for a list of the VFM members.

Tax mediation - real-life examples

Below are two possible real-life examples. Any similarity to a current case is purely coincidental.

'Audit' case

Entrepreneur Jans has a business travel agency and is also a fervent regatta sailor. He networks at the regattas and the resulting business contacts lead to numerous contracts for his travel agency. On top of that, his company name is also displayed on the yachts. The yachts are transferred to a subsidiary of his holding company and the holding company funds the sailing activities. Jans is a trader in the truest sense of the word and focuses on selling travel packages. However, his accounting records are rather disorganized and not everything has been properly documented.

The Tax Authorities are carrying out an audit which has, in the meantime, been under way for over two years. The entrepreneur blames the Tax Authorities for extreme sluggishness and the Tax Authorities adopt the position that the entrepreneur does not provide sufficient information and fails to comply with his obligation to provide information. Further escalation is anticipated and the decision requiring information is not forthcoming. It does, however, become clear that the ultimate final report on the audit will lead to a huge additional assessment.

⁴ See www.vfmmediation.nl.

Jans engages an attorney who will attempt to convince the Tax Authorities to conclude the audit and who will, by means of a settlement agreement, attempt to reach an amicable solution. The negotiations are harmonious, the Tax Authorities cooperate during the discussions, but later on - presumably after internal consultation - they revert to their original final results of the audit.

The consequence of this mode of action is that the attorney will also revert to the entrepreneur's initial assumption, to wit, the sailing costs are business costs. Communication takes place, among other things, by email. In error, one of the employees working for the Tax Authorities also sends an email intended for a colleague to the entrepreneur's attorney. Given that the Tax Authorities then state that the consultation regarding a substantive solution can be continued, the dispatch of the relevant email need not be further addressed. After the follow-up meeting, the attorney records the basic assumptions for a settlement agreement in writing with a request for mediation if parties fail to reach agreement. The attorney subsequently receives a reply stating that the negotiations are being suspended and that the final report on the audit will be concluded as soon as possible. The attorney disagrees with this course of action and considers the suspension of negotiations unlawful and, to boot, justification for a complaint. The attorney reports the case for mediation with the region's mediation coordinator from the local tax office. The Tax Authorities address the mediation request and the negotiations are finally resolved with the aid of an internal mediator from the Tax Authorities. Agreements are also made on past issues, and on forward-looking working arrangements regarding the quality of the accounting records and the cases to be submitted to the Tax Authorities in the future.

'Dismissal' case

The Tax Authorities meet with a group of taxpayers to discuss the taxation of the transactions they performed. During this discussion the tax officials dealing with the tax file begin to suspect that criminal offences were committed in the execution of these transactions. During the criminal proceedings which continued for a number of years, the tax discussion was more or less suspended. After a number of years the criminal proceedings were finally dismissed. What then remains is the tax settlement and the case reverts to the same tax officials who reported the taxpayers to the Ministry of Justice. The taxpayers are furious not only because of the criminal proceedings but because the misery is prolonged by the tax proceedings being continued.

Pending appeal with the Tax Division of the district court, mediation is proposed at the request of the Tax Authorities, partly in the light of all the complaints handling procedures that have also been submitted. Parties agree in principle to mediation, and the district court suspends the tax proceedings for the time being. Parties jointly select an external mediator from three mediators proposed by the district court's mediation unit. First and foremost an introductory mediation meeting takes place led by the external mediator at which meeting the starting points for conducting a mediation are discussed. The 'premediation' meeting takes place in the presence of two of the four taxpayers. The other two taxpayers are abroad on business and are unable to attend the meeting.

It becomes clear at the initial meeting that the taxpayers wish to have the tax claim dismissed and all costs incurred to date for advisors and attorneys, reimbursed. The Tax Authorities are not predisposed to abandoning the tax claim completely and are flexible about the

reimbursement of costs. It emerges at this meeting - in response to a question posed by the mediator - that none of the taxpayers have ever previously been involved in a serious tax dispute. The taxpayers are given room to voice their feelings about all the distress they have been caused which is now compounded by the tax proceedings. The employees working for the tax office say that they understand the emotion but that they are obliged to apply the law correctly with respect to the taxation of the transactions. The law is the law.

It is extremely difficult to get the taxpayers in particular back to the table to continue mediation. In the end it takes approximately four months to bring parties - via what is referred to as the individual shuttle consultation (*pendel-overleg*) with a signed mediation agreement - back to the table. One of the problems during the four months of premediation is that the Tax Authorities wanted all four taxpayers to be present at the mediation session, and not their representatives. The Tax Authorities find that mediation is a personal matter. Nonetheless, the two taxpayers present in the Netherlands are allowed to attend each other's sessions. Another point of issue is who is liable for the costs of premediation and mediation. An essential element in the mediation process is that parties feel safe to put forward their basic assumptions, considerations, interests and feelings. It is also important for the Tax Authorities to include a specific provision on this in this case. It is laid down that parties undertake to refrain from actions and conduct that could seriously obstruct mediation. During the course of mediation the mediator will constantly check whether both parties feel sufficiently confident that mediation will be unhindered. Additionally, it is also agreed that the current proceedings, complaints or otherwise, will be frozen during mediation. The outcome is that the taxpayers will refrain from instituting legal actions against the individual tax officials until such time as mediation is finalized. Furthermore, it is agreed that there will be no contact or discussion with other Tax Authorities' employees during mediation. The long road to signing the mediation agreement was not without result because the case between the parties was finally settled.

Conclusion and final remarks

I have sought to outline the practice and application of mediation in the Netherlands, in particular, with respect to tax disputes. This article includes: mediation via the Tax Authorities and mediation alongside legal action, specialist association VFM and two real-life examples. I conclude by stating that I sincerely hope that the draft legislation with regard to mediation soon will be adopted. A proper legal basis for mediation is, in my opinion, a meaningful contribution to the further expansion of mediation for resolving tax disputes.