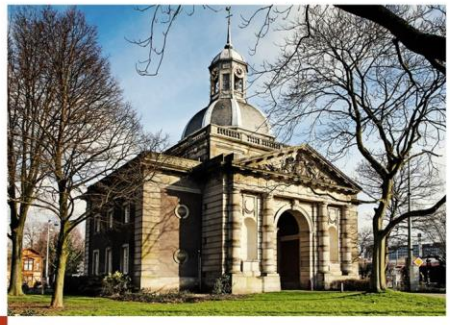
de Nederlandse
Orde van
Belastingadviseurs



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Tax advisers' duty of confidentiality and right of non-disclosure

Compiled in liaison with the Formal Tax Law Section Board and the Professional Affairs Committee

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1 Executive summary

Duty of confidentiality

Article 4 of the Code of Professional Conduct requires NOB members to treat information from and about clients confidentially. Under some statutory provisions, however, tax advisers can be required to disclose information from and about clients. This can sometimes give rise to tensions.

Right of non-disclosure

Unlike, for example, lawyers, notaries and doctors, tax advisers do not have a *statutory right of non-disclosure* under Article 53a of the State Taxes Act [*AWR*]. However, they do have an *informal right of non-disclosure*, based on the principle of fair play applied by the Dutch Supreme Court. Based on the same principle, tax advisers' clients, in turn, have a *derived informal right of non-disclosure*.

Right to remain silent

In the event of a criminal prosecution, the statutory duty to provide information is restricted by the right available to any suspect to remain silent. The right to remain silent applies both if a tax adviser is suspected of committing a criminal offence and if information is requested in connection with an administrative penalty. Case law from the European Court of Human Rights (ECtHR) on Article 6 of the European Convention on Human Rights (ECHR) makes no distinction between criminal and administrative law.

Tax audits

If tax advisers face an audit by the tax authorities, it is important – in order to avoid possible liability – not to disclose any more information about clients than the information that they are required to provide by law. It is also important to establish whether the audit is being performed under Article 47 of the State Taxes Act (STA) (i.e. a request for information to be provided on the taxpayer himself) or Article 53 STA (i.e. a request for information to be provided on a third party). Or whether it is an audit for detecting a criminal offence. In this latter case, other rules and authorisations apply.

Criminal investigations

Invoking an informal right of non-disclosure is not an option for tax advisers in the event of a criminal investigation. However, tax advisers' duty of confidentiality means that they are not required to provide a statement to the Fiscal Intelligence and Investigation Service (FIOD) as a witness in a criminal case. In the event, however, of being summoned to appear before a delegated judge, tax advisers are obliged to make a statement. Otherwise, the delegated judge may apply a coercive measure (specifically ordering the adviser to be detained for failing to comply with the order). The tax adviser will then be taken into custody.

Tax advisers who are a suspect or co-suspect in a criminal investigation can invoke the right to remain silent. This is because, as a suspect, they are not obliged to incriminate themselves and so cannot be forced to make a statement. Tax advisers in such situations are advised not to underestimate the seriousness of the situation. Arrests are normally made at unexpected times; invoking your right to remain silent is then important to avoid making incorrect statements under pressure. You are also strongly recommended to contact a lawyer.

Administrative law sanctions

The Fourth Tranche of the General Administrative Law Act [*Awb*], which came into force on 1 July 2009, introduced various statutory provisions that are important for the duty of confidentiality. Under certain circumstances, the forms of co-perpetratorship introduced into administrative law by the Fourth Tranche (i.e. aiding and abetting, *de facto* ordering an offence to be committed, enticement, causing an offence to be committed, and complicity) allow the right to silence to be invoked.

Working for a party with a statutory right of non-disclosure

Tax advisers may invoke the derived right of non-disclosure if they are engaged as an expert by a lawyer, notary or other person who has a statutory right of non-disclosure and who is representing a taxpayer.

Money Laundering and Terrorist Financing (Prevention) Act [*Wwft*]

The *Wwft* obligations take priority over tax advisers' duty of confidentiality. This means that advisers have to report any *unusual transactions* of clients, and possibly also provide details and other information. But the client must not be told that such transactions will be or have been reported.

Mandatory disclosure (DAC6)

Since 1 January 2021, information on certain arrangements in tax advice of a cross-border nature has had to be reported. The arrangements to which this applies have one or more characteristics indicating a potential risk of tax evasion. In principle, parties with a right of non-disclosure are exempt from this reporting duty. However, this does not apply to tax advisers.

Parliamentary enquiries

Tax advisers must cooperate with a parliamentary enquiry. This means that, if requested, they have to appear as a witness or expert and answer questions under oath. Although certain grounds for a right of non-disclosure are provided in law, it is almost impossible for tax advisers to successfully invoke any of these grounds.

2 Tax advisers' duty of confidentiality

2.1 General

Tax advisers have a duty of confidentiality to their clients, as stated in Article 4 of the Code of Professional Conduct:

> *A member is obliged to observe confidentiality in everything that comes to his knowledge when practising his profession. This does not apply if he has been relieved or partially relieved of this obligation by the client or if he has a legal or legally based obligation to disclose information, or if disclosing the information is necessary in order to enable the member to defend his own interests.*

This means, for example, that information that becomes known to tax advisers when performing their work must not be disclosed to third parties. In other words, information from and about clients must be kept confidential.[1]

But despite this duty of confidentiality, certain statutory provisions mean tax advisers may be required to disclose information. The requirement to disclose information to protect tax advisers' own interests will then be conflict with their duty of confidentiality to their client.

Examples of statutory provisions that require information to be disclosed include:

- the obligation, if requested, to provide the tax authorities with information that may be important for levying tax on third parties (see Article 53 STA). See also section 3;
- the obligation to submit files to the FIOD that have been seized as part of a criminal investigation (see Article 94 *et seq.* Code of Criminal Procedure). See also section 4;
- obligations arising from the Money Laundering and Terrorist Financing (Prevention) Act [*Wwft*]. See also section 7;
- obligations arising from the European Directive on Mandatory Disclosure Rules (MDR)/DAC6. See also section 8;

An example of a situation in which tax advisers may have to disclose information in defence of their own interests is when they are involved in civil, disciplinary or criminal law proceedings. In such cases, they are allowed to breach their duty of confidentiality.

[1] For more details, see the Code of Professional Conduct, Article 4(1), (2) and (3), including the explanatory notes.

With regard to the right to refuse to comply with obligations relating to tax levied on third parties, Article 53a of the STA states that:

> *Only holders of a clerical office, notaries, lawyers, doctors and pharmacists can invoke the fact that they have a duty of confidentiality by virtue of their position, office or profession* (i.e. a statutory right of non-disclosure).

This statutory right of non-disclosure applies only in respect of tax levied on third parties and so not in respect of tax levied on the party with a right of non-disclosure.[2] Tax advisers are not mentioned in Article 53a of the STA and so have no statutory right of non-disclosure. In principle, therefore, they cannot refuse to provide factual information to the tax authorities. The same applies if a tax adviser is asked to provide information as part of a criminal investigation or as a witness in civil proceedings (see Article 218 Code of Criminal Procedure and Article 165(2), heading and (b) Code of Civil Procedure).

A tax adviser required to make documents available must keep any items relating to a party with a statutory right of non-disclosure separate. The adviser must notify the party with the right of non-disclosure before handing over such documents. It is up to the party with the right of non-disclosure to decide whether documents should fall under the right of non-disclosure.

2.2 Informal right of non-disclosure

The Supreme Court ruling of 23 September 2005, BNB 2006/21 states:

> *… that the principle of fair play, which constitutes part of the general principles of good administration, precludes an inspector from using his powers under Article 47 STA to take note of reports and other documents of third parties insofar as their purpose is to inform or advise a taxpayer on his tax position. This also applies to any parts of such documents that contain details, for that purpose, of a factual or descriptive nature. The remaining parts of such documents (not relating to that purpose) should be made available, on request, such that it may be necessary to divide or redact the document.*

Literature on the subject describes the principle of fair play as an extension of the formal duty of care, which is one of the general principles of good administration. The principle of the formal duty of care refers to the care that an administrative authority has to observe when preparing, making and formulating a decision. The principle of fair play requires the tax authorities to treat taxpayers correctly, impartially and unbiasedly.

[2] See Article 51 STA and, for example, Supreme Court, 28 August 2020, ECLI:NL:HR:2020:1332, V-N 2020/44.14: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2020:1332.

The Supreme Court refers to reports and other documents of third parties insofar as their purpose is to inform or advise on a taxpayer's tax position. In line with the principle of fair play, parts of these documents containing information of a factual or descriptive nature for that purpose do not have to be submitted to the inspector. The Supreme Court does not explicitly refer to the informal right of non-disclosure, but aligns with the general principles of good administration.

Any parts of reports and documents not intended to be used to inform or advise a taxpayer on his tax position must, therefore, be made available, if requested. This may mean documents have to be divided or redacted. In a ruling on 6 October 2011, the District Court of Amsterdam[3] stated that it was up to tax advisers themselves to decide whether information was covered by the informal right of non-disclosure, unless it could not reasonably be doubted that documents were not covered by the right of non-disclosure.[4] Documents drawn up by a tax adviser will often have been prepared for tax advice purposes. This may not necessarily be the case with documents of a factual nature used for a client's tax return, and these items may therefore have to be submitted. For that reason, too, it is advisable to keep tax return files and tax advice files strictly separate. There is no requirement to provide information explaining or qualifying tax-related facts. Your substantiation of an arguable position is also information that you do not need to provide.

In practice, the tax authorities have often tended to interpret the Supreme Court ruling narrowly, such that only tax advice is covered by the principle of fair play and does not need to be made available. The Supreme Court, however, applies a wide interpretation, which includes reports and other documents intended to inform or advise on a taxpayer's tax position.

Practitioners should be aware that clients themselves or third parties (such as a bank) to whom this advice has been made available are also not required to submit such documents as they have a derived informal right of non-disclosure (see section 2.4). You are also recommended to inform third parties who have no right of non-disclosure that a derived informal right of non-disclosure exists and to forbid them, in advance, from making the relevant items available to the tax authorities. In this respect, it is also undesirable for tax advice to be included in a report not relating to tax matters because – even though the Supreme Court accepts the possibility of dividing files – this increases the risk of the whole report, including the tax advice, becoming available to the tax authorities.

[3] District Court of Amsterdam, 6 October 2011, ECLI:NL:RBAMS:2011:BT6955, V-N 2011/55.5: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2011:BT6955.
[4] Sometimes the tax authorities may suggest working with a special confidentiality officer to assess jointly whether the decision to redact or not to provide information is correct. You are advised to reject such suggestions and to assess the matter for yourself.

Tax advisers' right of non-disclosure is often referred to as an 'informal right of non-disclosure' to distinguish it from the statutory or formal right of non-disclosure referred to in Article 53a STA.

The Appeal Court of Arnhem-Leeuwarden ruled on the scope of the principle of fair play in 2022.[5] Essentially, it stated that as long as the requested information may be of importance for levying tax on the tax adviser, information could be requested under Article 47 STA. The adviser in this particular case had argued that the records were essentially being investigated for the purposes of gathering information about tax on third parties. The Appeal Court rejected this argument, however, because the inspector had stated in a letter and also confirmed during the court hearing that he would not use the substantive contents of the tax advice for levying tax on or investigating third parties. An appeal in cassation has been launched against this ruling.

2.3 Derived informal right of non-disclosure

Based on the Supreme Court case of 23 September 2005 referred to above, it has been established that a request by a tax inspector for documents containing tax advice and other tax reports conflicts with the principle of fair play. This applies not only if the inspector requests such information from a tax adviser, but also if the inspector requests it from the taxpayer, who in this situation has a derived informal right of non-disclosure.

Taxpayers assisted by someone with an informal right of non-disclosure, such as tax advisers, can invoke their derived informal right of non-disclosure, such that they do not have to provide correspondence on tax matters (such as tax advice or other tax reports) to the inspector on request.

The derived informal right of non-disclosure arises from the informal right of non-disclosure. Otherwise, an inspector who was unable to obtain information from a tax adviser on the grounds of the latter's informal right of non-disclosure would simply be able to request the same information from the client to whom the tax correspondence had been sent and for whom it was intended. This would then make the informal right of non-disclosure an illusion.

The derived right of non-disclosure also applies to third parties who have no advisory relationship with the tax adviser, but who have access to the tax adviser's reports, such as banks whose files include a due diligence report prepared by a tax adviser.

[5] Arnhem Court of Appeal, 1 February 2022, ECLI:NL:GHARL:2022:715: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2022:715.

The District Court of Amsterdam acknowledged the existence of a derived informal right of non-disclosure in its ruling on 6 October 2011.[6] In this case, a tax adviser sought to act under the right of non-disclosure of a colleague/lawyer's intern. The District Court found that items entrusted to the lawyer by a tax adviser were covered by a derived informal right of non-disclosure and that, in principle, the tax adviser could determine whether the items were covered by this right of non-disclosure.

2.4 Tax advisers' right to remain silent in criminal proceedings

In the event of a criminal prosecution under Article 6 ECHR, the statutory duty to provide information is limited by the right to remain silent that is available to any suspect (including tax advisers). The European Court of Human Rights (ECtHR) ruled in *Saunders,*[7] for example, that the right to remain silent and the right not to incriminate yourself are essential elements in what should generally be understood to constitute a fair trial as referred to in Article 6 ECHR. In *Jussila*[8] the ECtHR ruled that a tax penalty in administrative law can also fall within the scope of Article 6 ECHR owing to the deterrent and punitive nature of such a penalty.[9] The right to remain silent applies, therefore, both if a tax adviser is suspected of committing a criminal act and if information is requested for the purposes of imposing an administrative penalty.

In principle, tax advisers cannot invoke Article 6 ECHR regarding documents in their possession. The court ruled in *Saunders* that the right to remain silent did not include material existing independently of the defendant's will. Following *Saunders,* the Supreme Court, too,[10] ruled that Article 6 ECHR did not extend to not providing documents because these existed independently of the defendant's will (within the meaning of the ruling in *Saunders*).

In *J.B. v. Switzerland*, however,[11] it seemed that documents could also fall within the scope of Article 6 ECHR. In this case a ski instructor refused to provide bank statements, among other things. The ECtHR ruled that these documents had no existence independent of the will of the suspect (or defendant) and that the penalty that had been imposed for not submitting the bank statements consequently breached Article 6 ECHR. In *Chambaz,*[12] a penalty imposed for failing to provide bank statements was found, with reference to *J.B. v. Switzerland,* to be in breach of Article 6 ECHR.

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[6] District Court of Amsterdam, 6 October 2011, ECLI:NL:RBAMS:2011:BT6955, V-N 2011/55.5: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2011:BT6955.
[7] ECtHR 17 December 1996, ECLI:NL:XX:1996:ZB6862, BNB 1997/254; see also ruling in *Funke*, ECtHR 25 February 1993, ECLI:NL:XX:1993:AW2060, BNB 1993/350.
[8] ECtHR 23 November 2006, ECLI:NL:HR:2006:AV0394, BNB 2006/150.
[9] The Supreme Court ruled similarly in HR 19 June 1985: ECLI:NL:PHR:1985:AC8934: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:1985:AC8934, BNB 1986/29.
[10] Supreme Court, 27 June 2001, ECLI:NL:HR:2001:AB2314: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2001:AB2314, BNB 2002/27.
[11] ECtHR 3 May 2001, ECLI:NL:PHR:2001:AB2314, BNB 2002/27.
[12] ECtHR 5 May 2012, ECLI:NL:XX:2012:BW5997.

The *Chambaz* case demonstrates that the ruling in *J.B. v. Switzerland* was not a one-off ruling. We believe that, in contrast to what had previously been believed on the basis of the ruling in *Saunders*, it can be concluded from the above cases that imposing a sanction because of refusing to make documents available can in certain circumstances be in breach of Article 6 ECHR. It is not clear from the above cases, however, as to which specific circumstances determine whether such refusal is in breach of Article 6 ECHR.

The existence of a criminal charge does not mean that tax advisers can invoke their right to remain silent regarding a request for information relating to the establishing of a taxpayer's *own* tax liabilities, as shown in the Supreme Court rulings HR 27 February 2004, BNB 2004/225 and HR 27 April 2012, BNB 2012/231. The first of these cases involved a criminal investigation into a taxpayer suspected of stock market fraud. It became clear during the investigation that the taxpayer's income tax return had not been correctly filled in. Claiming his right to remain silent, the taxpayer then refused to answer questions raised by the inspector after the former had filed an objection to an amended tax return. The Supreme Court ruled that the fact that a criminal prosecution had been initiated did not exempt the taxpayer from the obligation laid down in Article 47 STA. Unless the tax adviser is a suspect, the position will be no different regarding the obligation arising for tax advisers under Article 53 STA. The second case showed that a taxpayer could refuse to comply with an obligation to disclose information by invoking the confidentiality of his contacts with a party holding confidential information.

It is important, therefore, for tax advisers to establish what the tax authorities' request relates to. If the purpose of the request is to impose an administrative or criminal law penalty, the taxpayer can invoke the right to remain silent. But the duty to disclose information regarding the levying of tax applies even if no guarantee is given that the information will not be used as evidence in a criminal case against the taxpayer.[13]

It follows, by analogy, from the Supreme Court ruling of 27 February 2004[14] that a tax adviser cannot invoke the right to remain silent regarding tax to be levied on third parties if a criminal prosecution has been initiated in which the adviser is accused of being involved in committing an act punishable by an administrative or criminal law sanction. In that case, too, the decisive factor is whether the information is being requested with a view to levying tax or to imposing an administrative or criminal law sanction.

Reference is made in this respect to Article 5:10a General Administrative Law Act (GALA), in which the Dutch legislator included a provision on the right to silence relating to the imposition of a punitive sanction.

[13] Supreme Court, 8 August 2014, ECLI:NL:HR:2014:2144: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2014:2144, BNB 2014/206.
[14] Supreme Court, 27 February 2004, ECLI:NL:PHR:2004:AF5556: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2004:AF5556, BNB 2004/225.

This Article states that “A person who is questioned with a view to the imposition of a punitive sanction on himself is not required to make statements concerning the violation for this purpose.”

3 Audits by the tax authorities

The tax authorities may request information about a taxpayer from the taxpayer himself, but also from third parties such as the taxpayer's tax adviser. Tax advisers' rights and obligations in the event of an audit by the tax authorities are discussed below. Given their duty of confidentiality, and to avoid possible liability, tax advisers should not disclose any more information about clients than they are required to provide by law. In the event of a forthcoming visit by the tax authorities, it is very important for tax advisers to establish beforehand whether the tax authorities are visiting in connection with a tax audit under Article 47 STA or under Article 53 STA or as part of an investigation into criminal offences. This should always be established, and so also in the event of a written request for information.

If the tax authorities' investigation relates to the detecting of criminal offences, the rules and authorisations applying (Article 80 *et seq.* STA) differ from those applying in the case of a tax audit. This section assumes the tax authorities are visting for audit purposes. Visits to a tax adviser as part of an investigation into criminal offences are discussed in section 4 of this brochure.

Under Article 53(1) STA, any person liable to keep books and records must, on request, provide data and information to the tax authorities and allow these books and records to be inspected. In the case of any person liable to keep books and records under the provisions of Article 52, the obligations regulated in Article 47 and Articles 48 to 50 apply similarly with regard to:

(a) the levying of taxes on third parties;
(b) the levying of taxes, the withholding of which is incumbent upon such persons.

This means that tax advisers (who are liable to keep books and records under the provisions of Article 52, STA) are required, if requested, to provide the tax authorities with the following:

- any data and information that may be of importance for the levying of taxes on third parties;
- any books, documents or other data carriers or their contents – at the inspector's option – the examination of which may be of importance for ascertaining such facts as may influence the levying of tax on third parties.

Tax advisers providing more information than 'requested' breach their duty of confidentiality. If, for example, the tax authorities request information about turnover tax relating to the first quarter of 2022, tax advisers are only required to provide information relating to turnover tax for that specific quarter. A tax adviser first has to obtain the taxpayer's consent before providing any information that may be desirable to provide, but that goes beyond the information requested by the inspector.

As advisers must also be sure that the requested information may be important for the levying of tax, they should separately assess each request against this criterion set in Article 47 STA. As well as questions important for the levying of tax, some requests from the tax authorities may include questions that are of no importance at all for the levying of tax. Tax advisers must not answer such questions without their clients' permission. Otherwise they will breach their duty of confidentiality.

Under Article 53 STA, information can be requested only if it is important for the levying of taxes on third parties. The tax authorities can request information if they have indications that a third party is liable for tax in the Netherlands and they can reasonably claim that the information and data requested may be of importance for the levying of tax. The tax authorities must take account of the principles of good administration in this respect. It follows from the reference in Article 53 STA to Articles 47 *et seq.* STA that, with regard to the levying of taxes on third parties, tax advisers also have a duty to actively cooperate by providing data and information requested by the tax authorities. The tax authorities sometimes state in letters announcing an investigation involving third parties that the duty of confidentiality arising from Article 67 STA applies. This provision does not relate, however, to relationships that parties liable to keep books and records have with third parties.

Under Article 48 STA, tax advisers also have to provide the tax authorities, if requested, with a client's books and records (such as bank statements) that are located at the adviser's premises if the client is being investigated under Article 47 STA. Advisers have to make the data carriers available as if they were the party to whom the books and records in question belonged.

In certain circumstances, the principle set out in the final sentence of the previous paragraph may mean that books and records are not allowed to be inspected; this applies if, for example, inspection under Article 47 STA cannot lawfully be demanded directly from the client.[15] To assure themselves of the position applying, tax advisers should preferably, therefore, contact the client before making books and records available to the tax authorities. Tax advisers should also check whether the tax authorities have complied with their obligation to 'inform the person whose data carriers they request for examination from a third party that they have made such request' (Article 48(2) STA).

Under Article 49 STA, data and information must be provided to the tax authorities 'in a clear and positive fashion, and without any reservation'. The tax authorities may decide how they prefer to receive the information – in writing, verbally or in any other form – and can also specify a deadline for providing the information. Here, too, the general principles of good administration must be observed. Tax advisers should

[15] Because, for example, of not complying with the principle of fair play; see Supreme Court, 23 September 2005, ECLI:NL:PHR:2005:AU3140: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2005:AU3140, BNB 2006/21 or, in the appeal phase, Supreme Court, 10 February 1988, BNB 1988/160, ECLI:NL:HR:1988:ZC3761: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1988:ZC3761.

expect the tax authorities to state in writing what information they want to receive or inspect and the reasons for the request (see Article 3.46 GALA).

4 Criminal investigations

4.1 General

Under Article 80(1) STA, the detection of offences punishable under tax legislation is incumbent upon officials of the national tax administration, in addition to those persons referred to in Article 141 of the Code of Criminal Procedure. Under Article 142(1)(c) of the Code of Criminal Procedure, a special investigating officer is a person charged, under special acts, with detecting the criminal offences referred to in these acts and who has been sworn into office. In other words, FIOD or tax authority officers are authorised only to detect offences if they have been sworn into office for this purpose (Special Investigating Officer Decree [*Besluit buitengewoon opsporingsambtenaar*] of 11 November 1994). You are recommended, therefore, to ask officers for proof of identity and, if possible, to make a copy of the identity document presented. If permission to make a copy is not given, you should record the details of the identity document.

Given that the FIOD and its specialised officers are almost always engaged for detecting tax offences, all officers involved in detecting punishable offences in tax law are, in principle, regarded as authorised to investigate (see Article 80(1) STA). In other words, the officers involved may be 'ordinary' investigating officers.

Someone with a statutory right of non-disclosure is also not obliged to make documents available in the case of a criminal investigation.

The earlier mentioned provisions on the right to remain silent under Article 6 ECHR in the case of an administrative penalty also apply in respect of a criminal prosecution. ECtHR case law makes no distinction between criminal law and administrative law, but states that Article 6 ECHR applies to all cases involving a criminal charge. As soon as a criminal charge applies, a tax adviser can invoke Article 6 ECHR. If a tax adviser is a suspect in a criminal investigation within the meaning of Article 27 Code of Criminal Procedure, he can also invoke his statutory right to remain silent, as provided for in Article 29 Code of Criminal Procedure.

Invoking an informal right of non-disclosure (see section 2.3) is not an option for tax advisers in the event of a criminal investigation. Tax advisers must allow documents to be seized if the FIOD issues an order to this effect (see Article 98 Code of Criminal Procedure). It should be noted that tax advisers are not required to talk to the FIOD and so should invoke their duty of confidentiality. It is important in this respect to note that the Board of Appeal (the NOB's highest disciplinary body) ruled on 21 February 2013[16] that where there is

[16] https://www.nob.net/uitspraak-raad-van-beroep-21-februari-2013-b-85.

no statutory duty to provide information to the FIOD, any provision of such information is in breach of the NOB member's duty of confidentiality. The Board of Appeal stated that:

> *Under Article 8 of the Code of Professional Conduct of the NOB applying at the time of the hearings, a member is obliged to observe confidentiality regarding everything that comes to his knowledge when practising his profession, unless he has been relieved or partially relieved of this obligation by the client.*
>
> *According to the explanatory notes to this Article, this provision does not affect any statutory obligations of the member to provide information to government bodies in situations where no right of non-disclosure applies, such as when the Disclosure of Unusual Transactions (Financial Services) Act applies. It has been established that, when being interviewed by the FIOD, the appellant had no statutory duty to provide information. It has also been established that, before being interviewed, the appellant asked neither C NV nor the applicant to relieve him of his duty of confidentiality. Neither did C NV or the applicant relieve him of this obligation at their own initiative. Given that the statements made also cannot be said to have served the interests of C NV or the applicant, the appellant should have invoked his duty of confidentiality vis-à-vis the FIOD. The appellant did not do this. Therefore, by disclosing in rebuttal what came to his knowledge in exercising his profession, the appellant acted in a manner justifying a complaint.*

The duty of confidentiality means that a tax adviser will not make statements to the FIOD as a witness, but only in the presence of a delegated judge in a criminal case. If such a situation arises, therefore, tax advisers should refuse any such request by the FIOD and refer to their duty of confidentiality. The delegated judge – often after a tax adviser's refusal – can opt to order that the tax adviser should be interviewed and to delegate responsibility for conducting the questioning to FIOD officers. The FIOD officers then have to be able to present an order from the delegated judge under Articles 177 and 181 Code of Criminal Procedure. In practice, this means that the interview will not need to be attended by the delegated judge, but that the lawyers of the suspect(s) will have the opportunity to attend. Lastly it should be noted that while being interviewed as a witness, a tax adviser can become a suspect and will then have the right to remain silent.

Tax advisers and their colleagues are advised to prepare well for a visit by the FIOD. A protocol setting out the obligations to the FIOD and a lawyer's contact details can prove useful.

4.2 Criminal offence?

If tax advisers believe they can successfully invoke a derived right of non-disclosure and consequently refuse to provide documents and the FIOD officer contests this invoking of the derived right of non-disclosure, the FIOD officer can conclude that a criminal offence has been committed under Article 69 STA,

Article 64 Collection of State Taxes Act [*Invorderingswet*] 1990 and Article 184 of the Criminal Code. In that case an adviser will have been caught in the act ('caught red-handed') and so the FIOD officer can even arrest the adviser for questioning (Article 53 Code of Criminal Procedure).

It is conceivable that the FIOD officer may decide only to draw up an official report. The merits of the refusal to grant access to a client's file or provide documents can be tested in the subsequent criminal proceedings against the tax adviser. In practice, the documents requested may be handed over, in sealed form, to a delegated judge; the person with the right of non-disclosure can then decide whether to invoke his right of non-disclosure in the presence of the latter and the dean (if the accused is a lawyer).

4.3 Tax adviser is a suspect or one of the suspects

Interview, arrest and taking into custody

A person is not regarded as a suspect unless there is a reasonable suspicion that he is guilty of committing a criminal offence (Article 27 Code of Criminal Procedure). Experience shows that tax advisers are not regarded as suspects until the tax authorities and the FIOD have gathered quite some incriminating material. In that respect, therefore, an interview is not an open discussion, but is often used to confirm existing suspicions. A tax adviser designated as a suspect should not, therefore, underestimate the seriousness of the situation.

Apart from being caught in the act, tax advisers can also be arrested and questioned if they are suspected of having committed a criminal offence for which pre-trial detention is permitted (Article 54 Code of Criminal Procedure). This applies in the case, for example, of the offence referred to in Article 69(2) STA and Article 64(2) Collection of State Taxes Act, i.e. intentionally submitting an incorrect tax return. It also applies if the tax adviser is an accomplice or co-perpetrator in such an offence, given that it carries a statutory term of imprisonment of up to four years (Article 67(1)(a) Code of Criminal Procedure). A suspect can be held for questioning for up to nine hours, excluding the hours between midnight and 09.00 in the morning. After that, the suspect can be held in custody for three days without too many complicated formalities. The check by the delegated judge will take place only after that period.

Tax advisers being questioned as a suspect are not obliged to answer any questions (Article 29(1) Code of Criminal Procedure) because they are not required to incriminate themselves. In that situation, tax advisers can also invoke their right to remain silent regarding their knowledge of their client. Invoking the right to remain silent is important, certainly given that an arrest normally happens completely unexpectedly and so you cannot easily prepare for it. Remaining silent is a way to avoid giving incorrect statements under pressure of circumstances. You are also strongly recommended to contact a lawyer.

When being questioned, it is important to remember, for example, that:

- trick questions, intimidation and/or putting someone under pressure are not permitted;
- your answers must be recorded as literally as possible (you can insist on this);
- you should sign the official report only if you fully agree with the contents.

It is advisable that the tax adviser's family and colleagues or household members know which lawyer they should contact if a tax adviser is arrested. You are therefore recommended to make such arrangements in good time. Since 1 March 2017, suspects have had a statutory right to consult a lawyer before being interviewed ('legal assistance prior to questioning') and to have a lawyer present during the interview.[17]

After a period of arrest has ended, the public prosecutor may order, in the interests of the investigation, that the suspect should be taken into custody in the event of a criminal offence for which pre-trial detention is permitted (Articles 57 and 58 Code of Criminal Procedure). The suspect will be heard separately, and the suspect's lawyer may attend the hearing. The latter will also have the opportunity to comment.

Police custody is possible for up to three days. In an urgent necessity, this may be extended by a maximum of three days (Article 58 Code of Criminal Procedure). No later than three days and fifteen hours after the arrest, the suspect must appear before the delegated judge (Articles 60, 63 and 64 Code of Criminal Procedure). The client is allowed to be assisted by a lawyer when appearing before the judge. This is also the moment at which the suspect and his lawyer first get to see the case documents, i.e. the case file. This will normally provide insight into the reasons for the suspicions and the potential evidence, insofar as this information has not been revealed during an earlier interview.

Entering tax advisers' premises

Article 83 STA is relevant when a tax adviser's premises are entered. This states that:

> *In detecting an act made punishable under tax legislation, the officials referred to in Article 80(1) will have access to any place insofar as that is reasonably required to perform their duties. They are authorised to be accompanied by persons designated by them.*

Given that the FIOD officers are entering the premises for the purposes of detecting a criminal offence, they must have a reasonable suspicion that a criminal offence has been committed. It does not matter in this respect whether the tax adviser is the person suspected of committing this offence. It is difficult for tax advisers to assess whether the above condition has been met when FIOD officers enter their premises. At that moment, therefore, the assessment is in effect made entirely by the FIOD officers.

[17] https://www.om.nl/onderwerpen/verdachte/vraag-en-antwoord/bijstand-door-advocaat.

In practice, therefore, tax advisers have little option but to allow the FIOD officers to enter their premises. Case law also shows that FIOD officers are relatively quickly assumed to have a 'reasonable suspicion'. But if it subsequently turns out that this condition was not met, this may affect the question of whether the detecting activities were carried out lawfully. It may mean, for example, that the results of these activities were obtained unlawfully. In certain circumstances, a court can order that unlawfully obtained evidence must be disregarded or disallowed.[18]

During the corona pandemic, more and more tax advisers started working from home, as well as at their office premises. Although Article 83 STA allows home offices to be entered in certain situations, some additional protections then apply. This is because more safeguards are required when entering someone's home than, for example, when entering business premises or storage space (see Article 96c Code of Criminal Procedure). In addition, a delegated judge must give permission before a residential property can be searched for seizure purposes (see Article 97 Code of Criminal Procedure).

Surrender and seizing of files

FIOD officers' authorisation to seize items is laid down in Article 81 STA. Officers are authorised to demand the surrender of objects permitted to be seized, including digital information. The Supreme Court has ruled that objects can be required to be surrendered under Article 81 STA despite the provisions of Article 96a(2) Code of Criminal Procedure.[19]

If the tax adviser's role is as a witness, surrender and seizure are also permitted under Article 126nd of the Code of Criminal Procedure.

The Supreme Court ruled on 3 May 1986[20] that tax advisers have no right of non-disclosure in the event of a criminal investigation. They cannot therefore invoke their duty of confidentiality as a means to prevent surrender and seizure.

If, however, a tax adviser does not invoke the duty of confidentiality and (possibly tacitly) grants permission for seizure, this permission may negate the consequences of any entering of premises, searching or seizure subsequently found to be unlawful. It is important, therefore, for tax advisers to make it clear that items

[18] See Supreme Court, 10 February 1988, ECLI:NL:HR:1988:ZC3761: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1988:ZC3761, BNB 1988/160, Supreme Court, 1 July 1992, ECLI:NL:HR:1992:ZC5028: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1992:ZC5028, BNB 1992/306, Supreme Court, 12 March 1997, ECLI:NL:HR:1997:ZC6589: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1997:ZC6589, BNB 1997/146 and Supreme Court, 20 March 2015, ECLI:NL:HR:2015:643: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2015:643, BNB 2015/173.

[19] Supreme Court, 29 October 1996, NJ 1997, 232.

[20] NJ 1986, 814 and 815.

are being surrendered under protest and that permission for the seizure has not been granted as this conflicts with advisers' duty of confidentiality. This protest should be recorded in the official report drawn up by the FIOD officer.

In view of the duty of confidentiality, it is also important to properly examine any order to surrender items. Only information specified in the order is permitted to be surrended. You are recommended, therefore, to make a copy of the order.

In order to ensure your own files are complete, you are also advised, wherever possible, to make a copy of the items to be surrendered. You are similarly recommended to prepare a list of the file items to be surrendered (an inventory) and to get the FIOD officer to sign this (Article 94(3) Code of Criminal Procedure).

It is also advisable to make the items available in an envelope sealed with tape and addressed to the delegated judge. You can put and seal the items in the envelope in the presence of the FIOD officer so that the latter knows what is in it.

As anyone with a statutory right of non-disclosure retains that right, tax advisers in such a situation have a derived right of non-disclosure. This means that items from a lawyer or notary cannot automatically be given to the FIOD. It is up to the person with the right of non-disclosure to decide whether the items in question should be covered by their duty of confidentiality. In the case of a lawyer, such a decision will be taken in the presence of the dean. If the FIOD officers nevertheless demand surrender of confidential items, the tax adviser can make them available – after consulting a lawyer – in a sealed envelope, stating that these items are covered by the right of non-disclosure.

5 General Administrative Law Act and Article 67o State Taxes Act

5.1 Questioning and co-perpetratorship

The Fourth Tranche of the General Administrative Law Act ('the Fourth Tranche') came into force on 1 July 2009. As the Fourth Tranche introduced statutory provisions that are relevant for the duty of confidentiality, we have included a separate chapter on its consequences. The changes that are relevant here are the statutory right to remain silent during questioning, the authorisation to impose an administrative penalty on co-perpetrators and the obligation for the administrative authority to issue a caution before an interview or questioning.

As mentioned earlier, the introduction of the Fourth Tranche has established a statutory basis in Article 5:10a GALA for the right to remain silent. This does not in itself affect the right to remain silent provided for in Article 6 ECHR. If no right to remain silent is available under Article 5:10a GALA, it may still be possible to invoke the right to remain silent under Article 6 ECHR, given that this Convention takes precedence over national legislation.

The importance, as far as the right to remain silent is concerned, of the introduction of various forms of co-perpetratorship into administrative law (i.e. aiding and abetting, *de facto* directing or ordering an offence to be committed, enticement, causing an offence to be committed, and complicity) is that these forms of co-perpetratorship have made it possible to request information with a view to imposing an administrative penalty on a tax adviser. It is important, therefore, for tax advisers to realise that they can sometimes invoke the right to remain silent even if no criminal investigation against them has been instigated. As mentioned earlier in this brochure, advisers requested to provide information first have to check whether the information requested could be important for the levying of tax. Questions not relating to this do not have to be answered, in part because such information could be used with a view to imposing an administrative sanction on the adviser or the adviser's client.

The administrative authority's obligation to caution tax advisers before questioning them should indicate to tax advisers that they are being questioned. Failure by the administrative authority to caution the adviser may result in the information obtained by the administrative authority not being admissible as evidence. It should be noted, however, that the administrative authority does not have to issue a caution if questions are asked in writing.

The introduction of the various forms of co-perpetratorship into administrative law means that administrative penalties, such as the penalties for omissions or negligence in Chapter VIIIA STA, can also be

imposed on tax advisers. The various forms of co-perpertratorship are interpreted in accordance with criminal law. For more details, see the literature on criminal law.

5.2 Right to remain silent

Because tax advisers can be questioned as a co-perpetrator of an administrative infringement, there are circumstances in which they can invoke the right to remain silent provided for in Article 5:10a GALA. This states that: 'A person who is questioned with a view to the imposition of a punitive sanction on him is not required to make statements concerning the violation for this purpose.' Given the wording of Article 5:10a GALA, it is important, before invoking this provision, to determine which situations constitute questioning with a view to imposing a punitive sanction.

The explanatory notes state that the wording of Article 5:10a(1) GALA firstly makes clear that such a situation is one in which an administrative authority is seriously considering imposing a punitive sanction. The term 'questioning' refers to a situation in which 'a reasonable observer could conclude, based on objective circumstances, that the situation constituted questioning. The subjective view of the investigating officer is consequently not the determining factor.' The subsequent government memo repeated this wording from the explanatory notes, adding that: 'The above text says nothing about the form of questioning. The text consequently does not exclude the possibility that questions submitted in writing could in certain circumstances be regarded as questioning.'[21]

The situation in which Article 5:10a GALA applies is consequently not limited to a certain form of questioning. The subjective view of the investigating officer is also not the determining factor. The situation must, however, be one in which, based on objective circumstances, a reasonable observer could conclude that the situation constituted questioning with a view to imposing an administrative penalty.

The explanatory notes also state that when deciding, based on objective circumstances, whether a situation could reasonably constitute questioning under Article 5:10a GALA, the court also has to take account of Article 6 ECHR. It is not entirely clear from the explanatory notes whether this means that Article 5:10a GALA has to be interpreted in line with the ECHR. In any case, Article 5:10a GALA does not affect the protection available under Article 6 ECHR. For Article 6 ECHR to apply, the sanction has to fall within the scope of that Article. Based on the judgment in *Jussila* (ECLI:NL:PHR:2008:BB5868), Article 6 ECHR also applies to administrative penalties if:

[21] Parliamentary Papers II, 2003-2004, 29 702, no. 7, p. 41.

> *… the offence in question by its nature [is] to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere* (para. 31).

Following *Jussila,*[22] tax penalties can generally be regarded as being in the sphere of criminal law, such that as well as invoking Article 5:10a GALA, it is also possible to invoke Article 6 ECHR. If questioning is under Article 5:10a GALA, advisers may invoke their right to remain silent.

Article 5:10a GALA has been drafted specifically for situations involving questioning. As mentioned earlier, however, the safeguards provided by Article 6 ECHR, including the right to remain silent, also apply in a more general sense as soon as there is a criminal charge. This is the case if an interested party can reasonably deduce from an act by an administrative authority that an administrative sanction is to be imposed on the party.

5.3 Cautioning

Under Article 5:10a(2) GALA, people being questioned have to be informed ('cautioned') beforehand that they are not required to answer. A caution can therefore be a clear indicator of whether, based on objective circumstances, a situation constitutes questioning. The question, however, is what the consequences would be if no caution were to be given in a situation constituting questioning under Article 5:10a(1) GALA. The explanatory notes on the Fourth Tranche state the following with regard to the caution:

> *The background to the duty to issue a caution is that experience shows that an oral interrogation can exert a certain psychological pressure to answer. The caution is designed to prevent people who are being questioned from making statements under pressure, where such statements can no longer be seen as having been given freely.*

In our view, failure to give a caution before questioning a tax adviser is not likely to have consequences. This is because it is established case law that not giving a caution results, in principle, in evidence not being admissible unless the suspect was not disadvantaged by not being cautioned. Criminal law also takes account of whether legal assistance was provided.

[22] ECtHR 23-11-2006, ECLI:NL:XX:2006:AZ9064, incl. annotation. M.W.C. Feteris: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:XX:2006:AZ9064.

6 Derived right of non-disclosure in activities performed for persons with a statutory right of non-disclosure

6.1 Derived right of non-disclosure

Tax advisers may invoke a derived right of non-disclosure if they are engaged as experts by a lawyer, notary or other person who has a statutory right of non-disclosure and who is acting for a taxpayer in this capacity. In that case, tax advisers do not have to allow inspection of their correspondence with someone who has a right of non-disclosure and for whom they are working. This also applies to documents (or other material) held by tax advisers in respect of work that they are performing for a person with a statutory right of non-disclosure. Advice and overviews provided to the person with the right of non-disclosure also do not need to be made available.[23]

Tax advisers can avail themselves of their derived right of non-disclosure by arranging for a person with a statutory right of non-disclosure to give them instructions to this effect (preferably in writing). The tax adviser should then maintain separate files for the information made available by the person with a statutory right of non-disclosure and the confidential correspondence with that person. The tax adviser should also invoice the person with a statutory right of non-disclosure directly.[24]

The person with a statutory right of non-disclosure determines whether and, if so, the extent to which the instructions given to the tax adviser are covered by the former's statutory right of non-disclosure.[25] Tax advisers should establish beforehand (by discussing with the person who has a statutory right of non-disclosure) whether the material in question is covered by the statutory right of non-disclosure. A tax adviser unable (or not yet able) to establish this will not be able (for the time being) to provide information requested by the tax authorities.

The position in the case of a criminal investigation (by, for example, the FIOD) is slightly more nuanced. In 2015, the Supreme Court provided rules applying when a person with a derived right of non-disclosure is ordered to allow items to be seized.[26] The Supreme Court found that those with a derived right of non-disclosure and ordered to surrender items and data do not have to comply until they have consulted the person with a statutory right of non-disclosure on whether this party wants to invoke the right of non-

[23] The Supreme Court confirmed this in, for example, its judgments of 29 March 1994, NJ 1994, 552; 12 March 1997, ECLI:NL:HR:1997:ZC6589: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1997:ZC6589, BNB 1997/146, 12 February 2002, NJ 2002, 440 and 27 April 2012, NJ 2012, 408.
[24] See Supreme Court, 29 March 1994, NJ 1994, 552.
[25] See Supreme Court, 12 February 2002, NJ 2002, 439.
[26] Supreme Court, 22 December 2015, ECLI:NL:HR:2015:3714: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2015:3714.

disclosure in respect of the items and data to be surrendered. Only then should the person with a derived right of non-disclosure surrender the items and data demanded. The delegated judge then has to allow the person with a statutory right of non-disclosure to to comment on the right of non-disclosure with respect to the documents and data.

In the case of items that a taxpayer has exchanged with a person with a statutory right of non-disclosure and that are held by a tax adviser who is liable to keep books and records, the tax adviser cannot invoke a derived right of non-disclosure in respect of an investigation of a third party under Article 53 STA. In 2012, the Supreme Court ruled that if information requested does not come directly from the person with a statutory right of non-disclosure, but is held by someone who is liable to keep books and records within the meaning of Article 52 STA, the latter cannot invoke a derived right of non-disclosure.[27] Based on this judgment, however, tax advisers can refuse a request for information by invoking their duty of confidentiality regarding their client's contacts with the person with a statutory right of non-disclosure as far as the request relates to address details, but not relating to books and records.

6.2 Derived right of non-disclosure and the Money Laundering and Terrorist Financing (Prevention) Act

If a tax adviser is engaged as an expert by a lawyer, notary or other person with a statutory right of non-disclosure for advice on a topic on which the person with a statutory right of non-disclosure has no or insufficient knowledge, the activities performed by the tax adviser in this respect are covered by the duty of confidentiality and the statutory right of non-disclosure of the person with that right. In that case, the tax adviser derives a right of non-disclosure from the person with a statutory right of non-disclosure (see section 7.1) and may invoke this vis-à-vis the same authorities as the person with a statutory right of non-disclosure.

[27] Supreme Court, 27 April 2012, NJ 2012, 408.

7 Money Laundering and Terrorist Financing (Prevention) Act[28]

7.1 General

The obligations applying to tax advisers under the Money Laundering and Terrorist Financing (Prevention) Act [*Wwft*] override advisers' duty of confidentiality. These obligations are:

(a) to report unusual transactions to the Financial Intelligence Unit ('FIU-the Netherlands');
(b) to provide information and data, on request, to FIU-the Netherlands;
(c) to provide information on and allow inspection of business information and records, on request, and to provide copies of such information to the Financial Supervision Office (BFT, the supervisory body for the Money Laundering and Terrorist Financing (Prevention) Act).

Although complying with this statutory duty to report and provide information does not conflict with the duty of confidentiality, tax advisers must be careful. Taking insufficient care when reporting under this legislation could result in tax advisers breaching their duty of confidentiality and being held liable for this.

The Money Laundering and Terrorist Financing (Prevention) Act also imposes a duty of confidentiality on tax advisers. They are forbidden, for example, to inform clients or third parties that a transaction has been or will be reported, that possible reporting has been discussed, that information has been provided to FIU-the Netherlands, that a report has triggered an investigation into money laundering or the financing of terrorism or that any such investigation is planned (Article 23 Money Laundering and Terrorist Financing (Prevention) Act; the ban on 'tipping off'). A tax adviser who tips anyone off commits a criminal offence. Tax advisers may discuss facts and circumstances with the client so that the tax adviser can take a properly considered decision on whether a report is required. What tax advisers are not allowed to do, however, is to inform the client that these discussions are for the purposes of assessing a possible report under the Money Laundering and Terrorist Financing (Prevention) Act. Tax advisers may try to prevent a client from executing a transaction regarded as unusual. Then, too, however, they are not allowed to tell the client that they will report the transaction if the client proceeds to execute it.

[28] For detailed information on this legislation, see the Guidelines for the interpretation of the Money Laundering and Terrorist Financing (Prevention) Act for tax advisers and accountants.

7.2 Reporting unusual transactions

Transactions regarded as unusual under the Money Laundering and Terrorist Financing (Prevention) Act have to be reported to FIU-the Netherlands. Any such disclosures must include the following:

- the identity of the client and, where possible, the identity of the person for whose benefit the transaction is or will be conducted (i.e. the ultimate beneficiary, or UBO);
- the type and number of the client's identity document;
- the nature, time and place of the transaction;
- the scale, source and origins of the funds, securities, precious metals or other assets involved in a transaction;
- the reason why the transaction is regarded as unusual;
- other details to be specified in an Order in Council (no other details have yet been specified);
- if the customer due diligence did not produce the intended result, the report must state the reasons for this.

7.3 Providing information and data to FIU-the Netherlands

If an institution has submitted a disclosure to FIU-the Netherlands or been involved in a transaction on which FIU-the Netherlands is gathering data, FIU-the Netherlands can request more data or information in order to assess whether the transaction should be regarded as suspicious and reported to the law enforcement agencies. The institution must then submit the additional data and information in writing or, in urgent situations, verbally to FIU-the Netherlands within the period stipulated by the Unit (Article 17 Money Laundering and Terrorist Financing (Prevention) Act). These disclosures do not breach the duty of confidentiality (Article 4 in the Code of Professional Conduct).

7.4 Providing information to and allowing inspections by the Financial Supervision Office

The Financial Supervision Office (BFT)[29] derives its powers partly from the General Administrative Law Act (see Title 5/Enforcement), which provides wide-ranging powers. The Financial Supervision Office may enter office premises, request information and demand to be allowed to inspect business information and records and to make copies. If it is not possible to make copies at the premises, the Financial Supervision Office can take the information and records away to make copies. It can also oblige anyone to cooperate, insofar as can reasonably expected, within a reasonable period of time. Anyone bound to secrecy by virtue

[29] Responsible for supervising tax advisers' compliance with the Money Laundering and Terrorist Financing (Prevention) Act.

of their office or profession or by law may refuse to cooperate if this follows from their duty of confidentiality (Article 5:20(2) GALA). This does not apply to tax advisers.[30]

Under the GALA, an inspector may only exercise powers to the extent that this is reasonably necessary for performance of his duties. This requirement for proportionality is laid down in Article 5:13 GALA. If the Financial Supervision Office asks, for example, to inspect an entire file that is exempt from the Money Laundering and Terrorist Financing (Prevention) Act (e.g. a file relating to determining a legal position or giving advice before, during or after a legal dispute) or that is covered by a derived right of non-disclosure, you are recommended to refuse such a request. If the Financial Supervision Office wants to check whether the right of inspection genuinely does not apply to the file in question, it is only allowed to subject the contents to a marginal check, without taking any note of substantive contents of the file.

An option would be for the institution's representative to go through the file with the Financial Supervision Office, with only those parts of the correspondence and so on being shown that make it clear that the Financial Supervision Office is not entitled to inspect the file. This is why it is very important to keep separate files on these activities.

The Financial Supervision Office is entitled to *demand* the right to inspect files. It is advisable then to explicitly request any such order in writing so as to avoid being accused by the client of providing information that was not required to be provided.

7.5 Right of non-disclosure and the Money Laundering and Terrorist Financing (Prevention) Act

When applying the Money Laundering and Terrorist Financing (Prevention) Act, it is important to establish whether the duty of disclosure applies to activities performed by a person with a statutory right of non-disclosure and whether that person can invoke this right vis-à-vis FIU-the Netherlands and the supervisory authority.[31] Lawyers are able to invoke this right, unless they are performing the activities referred to in Article 1(1)(a) under 12 and 13 Money Laundering and Terrorist Financing (Prevention) Act.

A tax adviser engaged by a person with a statutory right of non-disclosure derives a right of non-disclosure from that person and may invoke this vis-à-vis the same authorities as the person with a statutory right of non-disclosure.

[30] Exceptions apply if the tax adviser is engaged by a lawyer. In these situations, a derived right of non-disclosure exists in principle.

8 Mandatory Disclosure (DAC6)

8.1 General

Mandatory disclosure has been transposed into Dutch tax legislation through amendment of the Directive on administrative cooperation.[32] Since 1 January 2021, information on certain tax advice of a cross-border nature has had to be reported. The arrangements to which this applies have one or more characteristics indicating a potential risk of tax evasion. The features or characteristics triggering a disclosure are also referred to as hallmarks. They include certain arrangements that, for example, frustrate the exchanging of information. Whether these arrangements result or are intended to result in tax being evaded in a specific case is not relevant.

Information in tax advice has to be reported to the tax authorities if it contains one or more hallmarks. Any such information collected by tax authorities in this way is then exchanged with other EU Member States on an automated basis.

The reason for these provisions is that they enable local tax authorities in the European Union to address unwelcome practices faster and in a more targeted manner. They also make it quicker to combat and discourage certain arrangements that are legal, but unwelcome.

8.2 Adviser primarily has to report as intermediary

In the first instance, the reporting duty is the responsibility of the intermediary. Based on Article 3b of the Decree implementing the International Assistance (Levying of Taxes) Act [*UB WIB*], an intermediary is:

> *any person that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement*
>
> or
>
> *any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that such person has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to the above activities.*

[32] Council Directive 2011/16/EU on administrative cooperation in the field of taxation.

In principle, it is the tax adviser who has to report such arrangements. The very wide-ranging wording means that the concept of the intermediary is not limited to tax advisers, but can also (in principle) include lawyers, notaries, consultants, financial advisers and accountants, for example. In addition, other people at more distance from the reportable cross-border arrangements can also be designated as an intermediary.

To qualify as an intermediary, the person also has to have a nexus to an EU Member State. Basically, a tax adviser who is an NOB member will always be covered by the scope of the Directive simply because of being registered with the professional organisation.[33]

8.3 Confidentiality

An obligation requiring an adviser to report to the tax authorities under the mandatory disclosure legislation would seem to be at odds with the duty of confidentiality also applying to the adviser. This is because an NOB member is obliged to observe confidentiality in everything that comes to his knowledge when practising his profession, and so also in advice given to clients.

This does not apply, however, if advisers have been relieved or partially relieved of this obligation by their client or have a legal or legally based obligation to disclose information, or if disclosing the information is necessary in order to enable members to defend their own interests.[34] Complying with this statutory duty to report and provide information consequently does not conflict with tax advisers' duty of confidentiality.[35] You must always, however, be careful. Taking insufficient care when reporting under this legislation (for example, when is fully clear that no such reporting is needed) could mean you breach your duty of confidentiality, for which you can be held liable.

Failing to comply with the mandatory disclosure obligations, or failing to do so in time, is punishable by a fine in the sixth category of the Criminal Code, subject to a maximum of €900,000 (as at 1-1-2022).[36] In serious cases, criminal prosecution is also possible.[37] Given the potentially (high) penalties, it is understandable that, in the event of any doubt as to whether advice falls within the scope of their reporting obligation, advisers may be inclined to report. The desire to avoid a penalty may mean they are inclined to think that 'Prevention is better than cure'. But by reporting arrangements that did not need to be reported, you can breach your duty of confidentiality. If in doubt, therefore, you are advised to consult a colleague or obtain a second opinion. Asking the client to relieve you of your duty of confidentiality is obviously also a good option.

[33] Article 10h(1)(d) International Assistance (Levying of Taxes) Act [*WIB*].
[34] Article 4(1) Code of Professional Conduct.
[35] Article 4(1) Code of Professional Conduct.
[36] Article 11(2) International Assistance (Levying of Taxes) Act.
[37] Article 11(5) International Assistance (Levying of Taxes) Act.

8.4 Right of non-disclosure

In principle, parties with a right of non-disclosure are exempt from mandatory reporting.[38] This is because Article 53a(1) STA continues to apply to them. This also means that, in the Netherlands, the right of non-disclosure applies only to clerics, notaries, lawyers, doctors and pharmacists, and specifically not to tax advisers. But although parties with a right of non-disclosure can invoke this right, this does not mean that the legislation on mandatory reporting is entirely irrelevant for them.

This is because an intermediary with a right of non-disclosure has to determine on a case by case basis whether arrangements are (in principle) reportable. In each case, and without delay, the intermediary has to inform any other intermediaries involved or, if there are no other intermediaries, the taxpayer that the right of non-disclosure applies. This is referred to as 'notification'.[39] This is relevant because the person with the right of non-disclosure can be fined if they fail to notify the other intermediaries or the taxpayer without delay. Although this is not normally the responsibility of NOB advisers, they may receive notification from someone with the right of non-disclosure.

[38] Article 8ab(5) Directive on administrative cooperation and Article 10h(5), first sentence, International Assistance (Levying of Taxes) Act.
[39] Article 10h(5), second sentence, International Assistance (Levying of Taxes) Act.