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Lost in translation? A multidisciplinary approach on legal issues in tax communication

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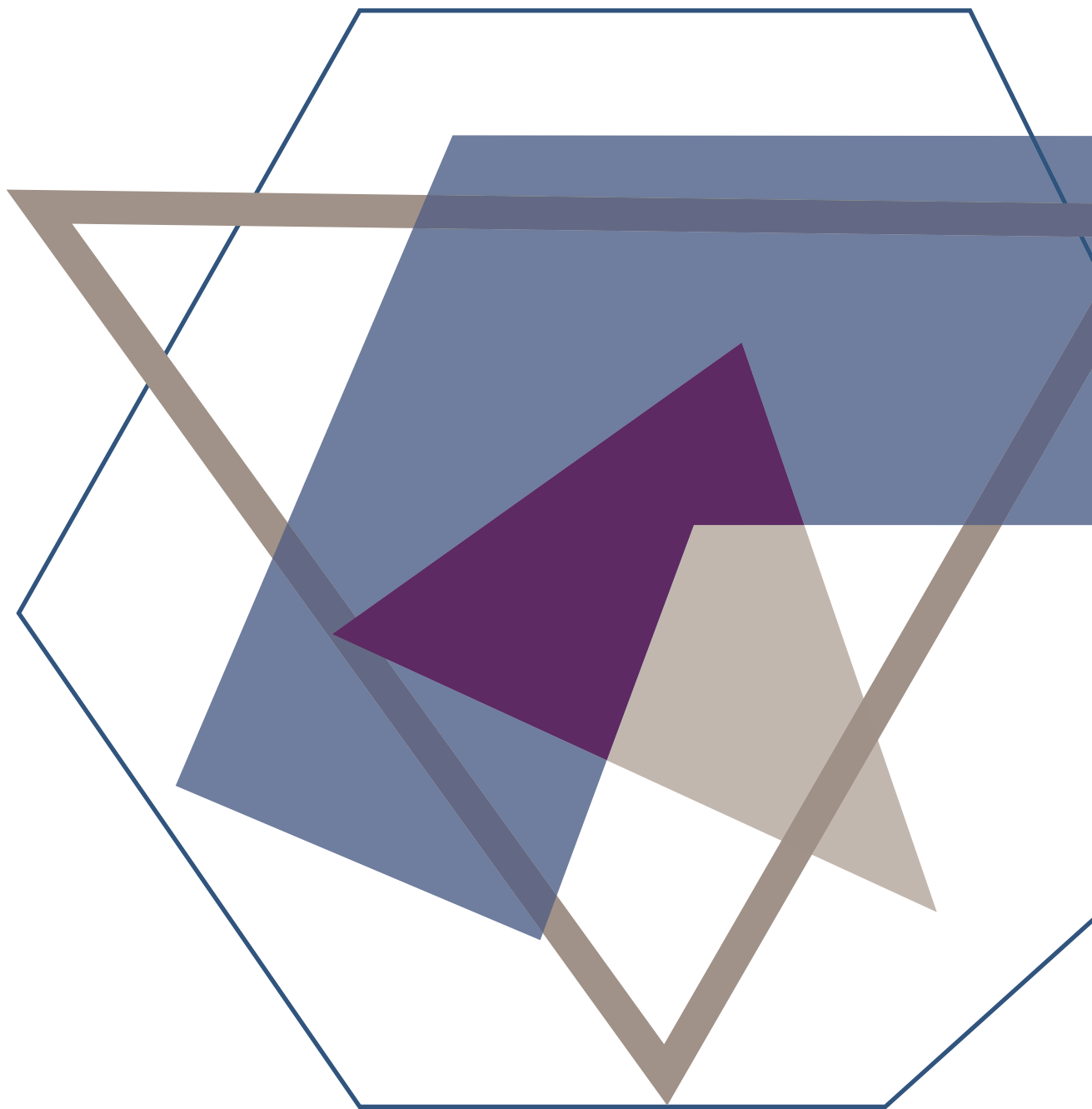
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Lost in translation? A multidisciplinary approach on legal issues in tax communication

By Tirza Cramwinckel

1 Introduction

How do taxpayers know their tax obligations and how to fulfill these obligations timely and correctly? Intelligible communication by the Dutch Tax Authorities (DTA) is crucial to achieve these goals. One of the most important tasks of the DTA in this respect is providing accessible information for taxpayers because tax laws and the system of taxation have become too complicated for most taxpayers.¹

In this communication process, the DTA is continuously challenged to convert complex tax laws into understandable information. Out of necessity, the DTA functions as ‘translator’ of the legal language of the legislator into the language of the laymen (taxpayers). Inevitably in this process, certain important legal aspects can get ‘lost in translation’, which could have severe legal consequences for taxpayers. This brings forward important questions:

*If the DTA provides intelligible information, what is the legal status thereof?
And can taxpayers rely on this information as if it were the law itself?*

As will be described below in more detail, the answer is no. Information provided by the DTA is considered a service and has no statutory authority. This is problematic because taxpayers largely depend on the information provided by the DTA, rather than on the original information (the law).² The translator role of the DTA thus raises interesting questions, which cannot be answered from an isolated legal perspective. Current legal debate, therefore, does not offer an adequate answer.

In this paper, I argue that a ‘paradigm shift’ is necessary to address these problems: A multidisciplinary approach is needed, in which the role of the DTA is also investigated from a linguistic angle. I provide multiple arguments based on a multidisciplinary research to reconsider the status quo regarding the DTA’s general information services and the legal impact of misinformation. By combining both legal and linguistic frameworks, I investigate whether the importance of clear communication should outweigh legal accuracy in tax communication.

2. The problematic language of the law

The Netherlands has a very complex and voluminous tax code that frequently changes and is highly technical. There are some obvious reasons why legislation – in general – cannot fully comply with the principles of clear language. Laws have a specific communicative situation.³ They are one-sided (from legislator to subject, not reversed) and address a very heterogeneous public.⁴ Furthermore, the law needs to apply to future and unforeseen situations. As a consequence, laws need to be very concrete while at the same time being abstract enough in terms of ‘open norms’ to offer flexibility. These elements explain the peculiar characteristics of legal language. On a linguistic level, one would be urged to ask at what point the language of the tax legislator loses contact with the common speech.⁵ Tax policy has its own discourse and vocabulary, and taxation has its own jargon, concepts and principles.⁶ Tax laws



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Her master thesis in tax law “Do (not) trust the tax authorities as a translator! A multidisciplinary research on tax communication,” was honored with the Thesis Award by the Dutch Ministry of Finance (2013).

NOTES

1 DTA's Management Report 2007 and Business Plan 2008-2012, p. 15.

2 M.F. Steehouder & C.J.M. Jansen, *Taalverkeersproblemen tussen overheid en burger. Een onderzoek naar verbeteringsmogelijkheden van voorlichtingsteksten en formulieren* (Communication problems between government and citizens. A research into improvement of general information and forms), The Hague: SDU 1989.

3 G.C.J.J. van den Bergh, *Recht en Taal* (Law and Language), Deventer: Kluwer 1979, p. 55.

4 W.J. Witteveen, *Het wetgevend oordeel* (The legislative judgement), The Hague: Boom Juridische uitgevers 2010, p. 26.

5 D. Mellinkoff (1963), *The language of the law*, Boston: Little, Brown and company, p. 11.

6 L. Burkinshaw and J. Frecknall-Hughes, 'Assessing the legal status of HMRC guidance: some first thoughts', mimeo 2014, p. 5.

7 Art. 4.6 Dutch Income Tax Act 2001.

8 Art. 4 Dutch General Tax Code 1959.

9 Art. 8 Dutch General Tax Code 1959.

10 Mellinkoff 1963, p. 11.

11 Witteveen 2010, p. 26.

12 Witteveen 2010, chapters 2 and 3.

13 The DTA, *The Communication Objectives*, Utrecht: 2012.

14 J.L.M. Gribnau, 'Legis-

contain (extraordinarily) long sentences, complex syntax and unusual constructions. Additionally, we can revert to Mellinkhoff's chief characteristics of legal language:

- frequent use of common words with uncommon meanings (e.g. 'substantial interest'⁷ when a taxpayer holds a certain amount of shares),
- use of terms of art and argot (e.g. 'taxable profit', 'mortgage interest deduction'),
- deliberate use of words and expressions with flexible meanings (e.g. the place of residence is determined by 'the circumstances of the case'⁸), and
- attempts at extreme precision of expression (e.g. the obligation to file your tax return 'clearly, certainly and without reservation'⁹).¹⁰

With all this causing fuzziness, it is no surprise that the law cannot enforce its own intelligibility. Instead, it has to rely on the interpretations of those implementing the tax law, that is, the DTA.¹¹

3. Legal and linguistic issues of plain tax communication

Since the 90's, the DTA has provided intelligible information to taxpayers through different communication channels, for example, in brochures, explanations on the printed tax return forms, by phone (BelastingTelefoon), through social media and – most importantly nowadays – on the website (*www.belastingdienst.nl*).

With all these types of information services, the DTA is continuously challenged to convert complex tax laws into understandable information for taxpayers. This is a daunting task. The legal language of the law and the ordinary language of taxpayers do not 'match', and the DTA thus has to provide a solution for this language discrepancy.¹² In this process, the DTA must balance legal accuracy and precision with comprehensibility and clarity. The Communication Objectives of the DTA describe this aim as follows:

*We want texts that are fiscally accurate and are formulated in intelligible language. Accuracy should not come at the cost of intelligibility.*¹³

However, comprehensible information bears a certain incompleteness compared to the law. Inevitably, in the process from law to general information, certain aspects get 'lost in translation'. For example, last year the DTA stated on the website – inaccurately – that the costs for a stairlift were deductible under a rule for medical aids. However, given a legislative change, stairlifts were no longer deductible as 'medical aid'.

The provided communication can also have shortcomings due to discrepancies between jargon and ordinary speech. Furthermore, accessible information includes the main features of the tax rules; details and exceptions are left out. This leads to 'incomplete' translations. Examples of problems that can arise because of this are inaccurate explanations of the law or wrong references to certain amounts (e.g., the amount of a tax deduction).

Importantly, taxpayers might not be aware of the eventual misinformation, which could lead to problematic situations. Taxpayers may derive certain expectations about the application of the law and rely solely on the 'translation' provided by the DTA. Problems arise when the DTA takes a different ('correct') position with regard to the interpretation of the law (e.g. when imposing a final tax assessment), that deviates from the 'translation' in the previously provided general information. From a legal perspective, this raises questions: How should one deal with the taxpayers' expectations based on the earlier provided information? What are the legal consequences of misinformation?

4. DTA's legal framework and taxpayers' expectations

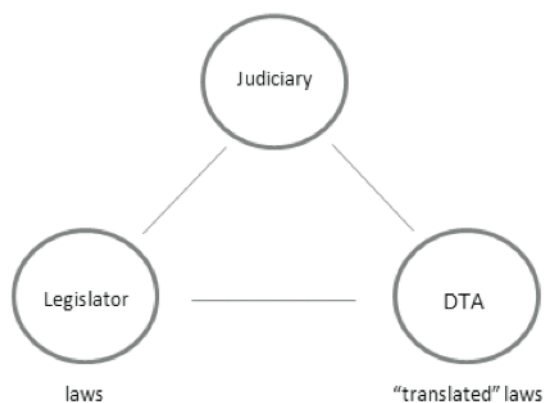
In Dutch case law, general information provided by the DTA is considered a client-orientated service to help taxpayers fulfill their obligations. It has no statutory authority as such.

However, the DTA is bound by unwritten legal standards, the so-called 'principles of proper administration'.¹⁴ One important principle is 'the principle of honoring legitimate expectations'. This principle may – in exceptional cases – justify a deviation from the strict application of the law, in favor of legitimate expectations of taxpayers. This principle is not codified, but developed in case law of the Dutch Supreme Court.

In 1988, the Dutch Supreme Court decided that the DTA is not bound by flaws and imperfections in general information, unless certain requirements are met.¹⁵ These requirements are that the taxpayer:

- i. could not be aware of the misinformation; and
- ii. made a decision based on this misinformation due to which he suffered financial disadvantage, beyond the tax liability under the law.

In general, this means that expectations raised by general information (deviating from the law) are not honored. As a consequence, the risk of improper general information is borne by the taxpayer, and not by the DTA.



From a legal perspective, this allocation of risks can be explained by the separation of powers as advocated by Montesquieu: The DTA's function is to administer the law, rather than to create laws. Therefore, translations by the tax administration cannot be treated as tax legislation.

However, given the fact that – from a taxpayer's perspective¹⁶ – communication about tax laws provides guidelines for their tax

obligations and certainty about how to fulfill them, is it appropriate that taxpayers bear the consequences of the translations made by the DTA, in which taxpayers are not involved?

An important consideration is that taxpayers, in general, are not able to check the accuracy of the provided information. Most taxpayers will never consult tax legislation in its original form, and if so, they would probably not be able understand it, due to its technical nature. Moreover, taxpayers' compliance largely depends on the extent to which taxpayers understand the information that is provided by the DTA.¹⁷ It is crucial to approach this topic from a different angle, one that takes into account the perspective of the taxpayer in its communicative relation with the DTA.

5. The linguistic framework and taxpayers' expectations

A communication perspective approaches the relationship between the DTA and taxpayers from a different angle. Where the legal perspective abides by the separation of powers (the legislator, the tax authorities and the judiciary), the communication perspective does not. In the communication theory, for example in the classic Communication Model of Shannon and Weaver (1949), only two parties are relevant: the sender and the receiver.¹⁸

lative Instrumentalism vs. Legal Principles in Tax Law', *Coventry Law Journal* 2013 (16), p. 103.

15 Dutch Supreme Court 9 March 1988, 24 199, BNB 1988/148.

16 OECD, Informational Note: Working smarter in revenue administration – Using demand management strategies to meet service delivery goals, 2011.

17 K. Gangl et. al., "How can I help you?" Perceived service orientation of tax authorities and tax compliance', *FinanzArchiv* 2013 (69), p. 487-510 and DTA's Management Report 2011.

18 C.E. Shannon and W. Weaver, *The mathematical theory of communication*, Urbana: University of Illinois Press 1949.

19 J.R. Searle, *Speech Acts. An essay in the philosophy of language*, Cambridge: Cambridge University Press 1970.

20 J.L. Austin, *How to do things with words*, (ed. J.O. Urmson and M. Sbisa), Oxford: Oxford University Press 1976.

21 Austin 1976, p. 6, 151-152.

22 Searle 1970, section 2.5.



When this approach is applied to tax communication, only two relevant parties are recognized: the DTA (sender) and the taxpayer (receiver). The legislator is neither directly nor visibly

involved because of the interposition of the DTA. The linguistic perspective offers different answers to questions concerning the status of the provided information by the DTA and whether taxpayers should be able to rely on this information.

To address these questions, a theory relating to how people produce and comprehend communications is needed. The field of pragmatics, as a subfield of linguistics, takes into account both perspectives by the ‘transmission of meaning’, and therefore can offer inspiring viewpoints on the topic of plain tax communication. Two pragmatic theories are especially relevant here. The first is the Speech Act Theory of Searle.¹⁹ This theory is partly based on Austin’s ideas that when people communicate, the sender is not just producing sounds or words (morphemes, sentences), but he is doing something with words.²⁰ In this case, issuing an utterance is the performing of an action (‘performatives’), for example, to verdict, to inform, to warn, to promise and to congratulate.²¹

Searle’s Speech Act Theory builds on these ideas. According to this theory, a speech act is a communicative act, performed with a certain intention, that has a certain effect on the receiver. For example, consider the act of *promising*. If a speaker promises to do X, he commits himself to actually doing X. The receiver recognizes the intention of the speaker to make a promise and assumes the speaker is committed to it. Every speech act is bound by a set of conventional rules.²²

Let’s evaluate the informative utterances of the DTA and how they are conceived by the taxpayer in the light of this particular theory. It is especially interesting to consider the specific acts of asserting and *informing* when tax law is ‘translated’ into general information by the DTA.

The second row provides the theoretical outline of ‘asserting/informing’ by a Speaker (S). The third row illustrates how the DTA as Speaker provides plain tax information to taxpayers regarding mortgage interest deduction.

Types of rule	Assert, state (that), affirm	Plain tax information on mortgage interest deduction
Propositional content	Any proposition p.	p = Mortgage interest is deductible under certain conditions.
Preparatory	1. S has evidence (reasons, etc.) for the truth of p.	DTA has evidence for the truth of p.
Sincerity	S believes p.	DTA believes p.
Essential	Counts as an undertaking to the effect that p represents an actual state of affairs.	Counts as an undertaking that the STA makes sure that p. represents an actual state of affairs.

From this example, it follows that if the DTA provides information that mortgage interest is deductible under certain conditions (*propositional content*), this implies that the DTA had evidence for the truth of this translation (*preparatory rule*), that the DTA believes this information to be correct (*sincerity rule*), and that it represents an actual state of affairs (*essential rule*). From a taxpayer’s perspective, in turn, this raises expectations about the correctness of the utterance. It presumes that the DTA provides information that is in conformity with the law and therefore is committed to this ‘law substitute’.

According to the Speech Act Theory, interpreting an utterance is not only to comprehend the words and their meaning, but also to understand the commitment to the speech act and the rights and obligations it involves. From this perspective,

it can be argued that the DTA should be held responsible for the 'quality' of its information, and that consequently, taxpayers should not automatically bear the risk of shortcomings.

The second relevant theory for investigating the DTA's role from a linguistic perspective is Grice's General Principle of communication.²³ According to Grice, all cooperative interactions are governed by the Cooperative Principle. This principle is described as follows:

*"Make your contribution such as it is required, at the stage in which it occurs, by the accepted purpose."*²⁴

In other words, to communicate successfully, sender and receiver have to adjust their utterances to each other. Communicators will act in accordance with this principle when they perform in line with the Maxims of Conversation. Grice calls this the Maxims of Quantity, Quality, Relation and Manner.

Quantity relates to the information to be provided ("Make your contribution as informative as required."). Quality appeals to provide a true contribution ("Do not say what you believe to be false or that for which you lack adequate evidence."). The Maxim of Relation says, "Be relevant". Finally, the Maxim of Manner relates not to what is said, but rather to how it is said ("Be perspicuous, avoid obscurity and ambiguity, be brief and orderly.").²⁵

Applying these maxims to DTA communication means that the DTA should provide adequate information (Quantity), should have evidence for the accuracy of the translation of the tax code (Quality), should provide relevant information (Relation) and should do so in an intelligible way (Manner). This assessment provides relevant viewpoints for the underlying questions on plain tax communication, as illustrated in Bach's view on communicative value of these principles:²⁶

Although Grice presented them in the form of guidelines for how to communicate successfully, I think they are better construed as presumptions about utterances, presumptions that we as listeners rely on and as speakers exploit.

In other words, Grice's Maxims show that the sender (the DTA) acts in accordance with these principles and, more importantly, that the receiver (the taxpayer) assumes the communication to be in line with all these rules.²⁷ Moreover, the taxpayer *relies* on this. As a consequence, taxpayers expect that the DTA transfers the law in good faith, despite the fact that it is formulated in less legal language.²⁸ From this theoretical perspective as well, the translator should be held responsible for misinformation provided in its communications, rather than the receiver.

6. Concluding remarks

To conclude, the DTA's role as translator has become more important due to a growing complexity of tax laws and an increasing awareness of the importance of intelligible communication. However, the information provided by the DTA does not have the same legal status as tax code. Nevertheless, from a linguistic perspective the DTA actually functions as *de facto* legislator by prominently and persistently providing intelligible information. In this respect, the current legal approach to the DTA's translating task and its legal consequences by the Dutch Supreme Court seems to be outdated.

23 P. Grice, *Studies in the Ways of Words*, Boston: Harvard University Press 1975, chapter 2.

24 Grice 1975, p. 26.

25 Grice 1975, p. 26-27.

26 K. Bach, 'The Top 10 Misconceptions about Implicature', in: *A festschrift for Larry Horn* (ed. B. Birner and G. Ward), Amsterdam: John Benjamins 2005, p. 6.

27 Searle 1970, p. 54 and Grice 1975, p. 28-29.