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General Information and Legitimate Expectations in the Context of the Rule of Law: A Multidisciplinary Analysis

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Abstract

This chapter addresses taxpayer communication and issues of legitimate expectations. The Dutch Tax and Customs Administration (DTCA) provides general information to citizens about tax laws, which requires a 'translation process' from tax law to comprehensible information.[1] The DTCA provides general information to citizens about tax laws, which requires a 'translation process' from tax law to comprehensible information. This can lead to miscommunication, because of a trade-off between legal correctness and comprehensibility. The legal protection of taxpayers is based on the doctrine of legitimate expectations. It is argued that the current legal framework for the legal protection regarding the DTCA's duty to inform needs to be re-evaluated to better reflect the citizen's perspective. Communication theories offer inspiring viewpoints for the legal perspective below.

Introduction

In the tax literature it is widely acknowledged that tax authorities have the duty to inform taxpayers about tax laws to help them in their tax matters.[2] In the Netherlands, the tax

[1] The chapter is based on my dissertation, TA Cramwinckel, *Voorlichting door de Belastingdienst in rechtsstatelijke context. Een juridisch en communicatiewetenschappelijk onderzoek naar gewekt vertrouwen [Provision of information by the Dutch Tax and Customs Administration in the context of the rule of law. A legal and communication science study into legitimate expectations]* (Leiden University 2022), to which I refer for more background and references.

[2] Inter alia: RH Happe, *Drie beginselen van fiscale rechtsbescherming [Three principles of tax legal protection (Dissertation Leiden University]* (Deventer, Kluwer, 1996); K Gangl et al, 'How Can I Help You? Perceived Service Orientation of Tax Authorities and Tax Compliance' (2013) 69 *Finanz Archiv/Public Finance Analysis* 487–510; JD Blank and L Osofsky, 'Simplexity: Plain Language and the Tax Law' (2017) 66 *Emory Law Journal 189*–264.

authorities (Dutch Tax and Customs Administration: 'DTCA') do indeed extensively provide general information to the public about the interpretation and application of tax laws to guide taxpayers in their legal rights and obligations, for example in the form of information on their website (www.belastingdienst.nl), by a special telephone line (*Belastingtelefoon*) and in explanations accompanying (digital) tax return forms. In this chapter 'General Information' (in Dutch: *voorlichting*) is defined as information that, unlike an individual tax ruling for instance, is not tailored to the specific circumstances of a particular taxpayer but contains general guidance about the interpretation, implementation or application of tax rules, institutionally embedded within the duty of the DTCA.[3] The aim of such information is to provide clarification, instruction and explanation to taxpayers about tax matters in general terms, for example to help taxpayers fill in their tax returns. In the Dutch legal framework, General Information is perceived as intended to be helpful to taxpayers but in principle, it has no legal status like the tax law itself.

The Problem

In fulfilling its duty to implement and enforce tax laws, the DTCA is faced with the task of 'translating' often complex tax laws into comprehensible and accessible information.[4] By necessity, the DTCA must bridge the gap between 'legal reality' on the one hand and the 'taxpayer's reality' on the other hand. Especially with respect to non-sophisticated taxpayers, such as citizens with relatively little tax knowledge, this translation process requires that tax laws, written in technical language, be presented in an understandable non-technical way. Shortcomings, such as inaccuracies, incompleteness or lack of clarity, may arise in the 'translation process'. This makes General Information a high-risk type of communication.

Problems may arise, for instance, when a taxpayer uses General Information to prepare his or her tax return, this Information proves to be incorrect after the fact, the tax inspector applies the law (instead of that Information) when imposing the tax assessment, and the citizen receives a tax assessment that is higher than expected. This raises the question whether the taxpayer should be able to rely on the Information.

The duty of the tax authorities itself to provide General Information raises fundamental questions in the context of the rule of law, such as: What is the relationship between the democratically legitimised tax law and the 'translation' by the tax authorities as a law enforcement agency? What is the legal protection for taxpayers that rely on the Information provided by the tax authorities instead of the tax law itself? These types of questions instantly reveal that, with respect to the definition of the rule of law, this chapter is based on a relatively thick and wide-scope conception (see further *Legal Basis in the Principles of the Rule of Law*).

[3] General Information seems to share some features with the concept of *guidance* in terms of explanation and information. Key characteristics of General Information are its lack of status (in principle not legally binding), communication style (more comprehensible) and target audience (taxpayers).

[4] See also TA Cramwinckel, 'Lost in Translation? A Multidisciplinary Approach on Legal Issues in Tax Communication', (2016) 74 *The Clarity Journal* 13–17.

What has been overlooked in Dutch academic literature so far is the legal embedding of the DTCA's task to provide General Information, including a critical analysis of the legal consequences.[5] This topic is scientifically, practically and socially of great importance, since most citizens do not read tax laws, but use the more comprehensible information (a 'translation' of the tax law) provided by the tax authorities.[6]

Although this chapter is embedded in and focuses on Dutch tax law, the underlying issue may come into play when tax authorities communicate in more comprehensible language than the underlying source text (the law), leading to questions about the trade-off between *legal correctness* and *comprehensibility*, the need for weighing (sometimes conflicting) interests, and legal protection for taxpayers. Literature indeed shows a cross-jurisdictional relevance, although the specific legal approach depends on the relevant legal system.[7]

Research Question

This chapter explores the tension between the legal perspective and the citizen's perspective with respect to General Information. The aim is to re-evaluate the current Dutch legal approach regarding the doctrine of the principle of legitimate expectations with respect to General Information, with due regard for both the legal perspective and the citizen's perspective. This requires a careful analysis of relevant viewpoints and interests. The research question is:

> Should the application of the principle of legitimate expectations in the provision of General Information by the DTCA to citizens be re-evaluated, and if so, how?

To answer the normative question, an assessment framework is needed. This will be determined based on the underlying values, assumptions and principles of the current legal framework. Moreover, the citizen's perspective will be included in the re-evaluation. This perspective is especially relevant given the intensified legal awareness for the interests of citizens in the context of the wider debate about the relationship between the government and citizens in the Netherlands. To interpret the citizen's perspective, insights from the discipline of language and communication science are used. This approach is particularly suitable, because the provision of General Information is (a form of) communication.

[5] However, Happe, above n 2, provides an extensive Dutch study with respect to the principle of legitimate expectations. International literature, inter alia: A Monroe, 'Hidden in Plain Sight: IRS Publications and a New Path to Tax Reform', vol 1 21 (2017) *Florida Tax Review*' 81–147; Blank and Osofsky above n 2; E Cauble, 'Detrimental Reliance on IRS Guidance', 3 (2015) *Wisconsin Law Review* 421–74; S Daly, *Tax Authority Advice and the Public* (London: Bloomsbury Publishing, 2020).

[6] Office of Tax Simplification, *Guidance for Taxpayers: A Vision for the Future* (October 2018) 8: Very few taxpayers will ever wish to read tax legislation; guidance is the only way in which taxpayers can know and understand what the law means for them in practice', 13; Monroe above n 5, 83: 'Very few taxpayers turn directly to the Internal Revenue Code to determine their federal income tax liability. Instead, taxpayers rely on intermediaries-legal experts, tax return preparers, commercial software, and the IRS-to navigate their annual filing obligations.'; Blank and Osofsky above n 2, 235; JLM Gribnau, 'Belastingen en de burger. Over het burgerperspectief in het belastingrecht' [*Taxes and Citizens. Regarding the Citizen's Perspective in Tax Law*], *Tijdschrift Formeel Belastingrecht* 2018/42, 26.

[7] See also Blank and Osofsky above n 2; Monroe above n 5.

The *legal perspective* is defined as the approach taking Dutch tax law as its starting point. The *citizen's perspective* is defined as the approach taking taxpayers as its starting point, being citizens in their capacity of language users. With respect to the citizen's perspective it should be noted that there are different kinds of taxpayers, from sophisticated to non-sophisticated, varying in terms of recourses, capabilities, knowledge, interests and skills. The focus is on non-sophistic taxpayers, meaning average individuals, with an average, relatively limited, knowledge of (tax) law ('citizens'), since they are a prominent and specific target audience of General Information provided by the DTCA. Moreover, sophisticated taxpayers may have better tools and recourses to mitigate risks in relation to their communication with the tax authorities.

This chapter addresses the legal perspective, the citizens perspective and a confrontation of both perspectives, and closes with final remarks.

The Legal Perspective: The Legal Framework for the DTCA's Duty to Provide General Information

What is the legal framework for the DTCA's duty to provide General Information? Although the (Dutch) legal literature on taxation agrees on the *existence* of that duty and the Dutch Supreme Court explicitly refers to the DTCA's 'duty to inform'[8] (*voorlichtende taak*), hardly any theory is available on what that duty entails and what information is expected to provide from a legal perspective. Why and, on what grounds and with what level of discretion is the DTCA expected to inform citizens? What are the quality requirements for the provision of information? These questions will be addressed below.

The 'Why': Legal Basis for the DTCA's Duty to Inform in the Rule of Law

Three related arguments should primarily be identified as to why the DTCA provides General Information to the public.

Three Arguments: Fundamental, Practical and Policy

The first argument is of a *fundamental* nature: in short, the DTCA should provide General Information because of its institutional position (the executive power in the constitutional system of separation of powers and checks and balances[9]). The second argument is of a *practical* nature: General Information is practically useful and necessary in the practice of taxation, both for taxpayers and the DTCA. The third argument

[8] The Dutch Supreme Court of 26 September 1979, ECLI:NL:HR:1979:AM4918: '… that the Dutch tax authorities perform their duty to inform …'.

[9] JLM Gribnau, 'Netherlands', in AP Dourado (ed), *Separation of Powers in Tax Law* (Amsterdam, IBFD/EATLP, 2010) 145–75.

is of a *policy* nature: it proves to be efficient and effective for the DTCA's implementing tasks (see *DTCA's Communication Strategy*).

Legal Basis in the Principles of the Rule of Law

These three arguments are based on various written and unwritten legal rules, each derived from rule-of-law principles. According to authoritative literature[10] in the Dutch legal debate, which entails a substantive and thick conception[11] of the rule of law, the main principles for the rule of law consist of:

(i) the principle of legal certainty (clarity on legal position);
(ii) the principle of equality (equal treatment of equal cases);
(iii) the principle of democracy (democratic procedures); and
(iv) the principle of the service-minded government (the idea of 'government for the people' not citizens serving the interests of the government).

In this substantive[12] conception of the rule of law, it can be argued that the underlying principles do generate a duty for the DTCA to communicate with taxpayers. From this angle, the main driver and fundamental legal basis for the DTCA's duty to inform stems from the principle of *legal certainty*. As tax legislation has become too complex for most citizens and most citizens do not read and understand (complex) tax laws. General Information fills – and *should* fill – the gap where the tax law itself fails to ensure legal certainty in the context of the rule of law. General Information is a sort of compensation strategy where the law itself fails to provide legal certainty.

General Information furthermore stimulates equality (principle of *equality*), supports transparency (principle of *democracy*) and shows a willingness to help and a service-minded approach of the DTCA (principle of *the service-minded government*). General Information therefore serves several related functions in the context of the rule of law: to enhance their information position, to improve their legal certainty, to stimulate taxpayer's compliance and to show a service-minded attitude towards citizens.

Level of Discretion of the DTCA

The DTCA's duty to inform is not codified in Dutch law, but is acknowledged by the Dutch Supreme Court[13] and the Dutch Government.[14] Within its powers as a law

[10] M Scheltema, De rechtsstaat' (*The Rule of Law*), in JW Engels et al (ed), *De rechtsstaat herdacht [The Rule of Law Rethought]* (WEJ Tjeenk Willink: Zwolle, 1989) 15; for a theoretical underpinning of this substantive conception of the rule of law, based on Dworkin's idea of equal concern and respect, see JLM Gribnau, '*On the Rule of Law and Democracy: Policy Rules and Principles in Dutch Taxation*' (2024) 2 *British Tax Review* 211–38.

[11] Reference is made to the definition of the rule of law in Daly, Chapter 2 in this volume (who contrasts 'thin' and 'thick' conceptions of the rule of law) and Lindsay, Chapter 3 in this volume (who contrasts a narrow scope and a wide scope rule of law).

[12] See also Gribnau, above n 10.

[13] Inter alia, the ruling of the Dutch Supreme Court of 26 September 1979, ECLI:NL:HR:1979:AM4918.

[14] Strategy of the DTCA as set out in the explanatory memorandum of the state budget (Parliamentary papers II, 2023–2024, 36 410 IX, 2, 78): 'Through its strategy, the DTCA aims to influence the behavior of citizens and businesses in such way that they structurally comply on their own initiative with (tax) rules (compliance); that is, without (coercive and costly) actions on the part of the DTCA. This should safeguard the continuity of tax revenues. The DTCA strives to act in accordance with the principles of proper administration

enforcement agency, the DTCA has a certain amount of discretion in fulfilling its duty to inform, whereby it is bound by the law and general legal principles, including the general principles of proper administration (see *Legal framework of the Dutch Doctrine Regarding the Protection of Legitimate Expectations*).

Quality Requirements

The DTCA's duty to inform turns out to be not merely a 'service' to citizens – contrary to what is generally brought forward in Dutch case law.[15] In fact, it is embedded in the rule of law principles (see *Legal Basis in the Principles of the Rule of Law*). General Information must meet certain quality requirements to fulfil its functions, such as legal correctness and comprehensibility. But these requirements are, to some extent, at odds with each other. This is a balancing act, meaning that General Information may contain imperfections (eg inaccuracies, omissions and ambiguities) because of eliminating legal complexity in favour of comprehensibility.

The balancing act can be adequately illustrated by the concept of 'simplexity', introduced by Blank and Osofsky,[16] a contraction of *simplicity* and *complexity*. It exposes that communication types such as General Information presents a matter in a relatively understandable and comprehensible way, while at the same time the underlying matter itself is not simplified. The underlying complexity moves to the background, as a result of the trade-off between legal correctness and comprehensibility. Simplexity, which is indeed manifest in General Information, raises normative questions about the legal status of such information, the trade-off, the influential position of the tax authorities in making this trade-off and the allocation of risks between taxpayers and the DTCA.

The way for Dutch tax law to safeguard legal protection in the context of General Information should be assessed within the legal framework as identified in this section.

DTCA'S Communication Strategy

Let's shift to a more practical angle. How does the DTCA itself interpret its duty to provide General Information in terms of policy?[17] To answer this question, primary

and, wherever possible, tries to act proactively and in time rather than being reactive. Within this context, the DTCA, wherever possible, puts citizens and businesses at the centre, taking into account their personal situation. All this means that the DTCA, where possible in cooperation with public and private parties: (–) gives citizens and businesses adequate treatment (proper, timely, proportionate); (–) *effectively informs citizens and businesses about their rights and obligations*; (–) *strives to make it as easy as possible for citizens and companies to comply with (tax) obligations*; and (–) takes appropriate corrective action in case of non-compliance.'

[15] Dutch Supreme Court judgment of 9 March 1988, ECLI:NL:HR:1988:ZC3780: 'In the case of statements which are not to be construed as a promise or statement but in which *only general information is given to facilitate the completion of a tax return …*.'

[16] Blank and Osofsky, above n 2.

[17] A service-based approach in international tax literature: Gangl, above n 2, and Blank and Osofsky, above n 2.

sources (ie. communication policy documents of the DTCA) and secondary sources (such as scholarly literature and research reports) are analysed. It is striking that the DTCA as a government organisation developed a well-considered vision of comprehensible communication with citizens already in the 1980s ('Communication Policy').

Developments in the DTCA's Communication Policy

The DTCA is remarkably productive and transparent about its Communication Policy.[18] Nowadays, it is 'a matter of course' for the DTCA to be service-orientated and helpful, provide a great deal of information, assume trustworthiness of taxpayers, and take corrective action only where necessary. But taxpayers were not always approached in this way. Initially, the DTCA presented itself as an authoritative authority and communication with citizens was barely a topic of interest.

A solid analysis of the Communication Policy over the past decades shows that the interpretation of the duty to inform has changed greatly since the 1980s.[19] From that time onward, communication became a key instrument in the implementation strategy of the DTCA, which, as a law enforcement agency aimed to promote *compliance*.

The orientation of communication as an instrument enhancing compliance is illustrated strikingly by the wording in the DTCA 2011–2015 Communication Policy Plan:

> Mission and vision
>
> The DTCA wishes to promote that citizens and businesses fulfill their obligations and exercise their rights. An important condition for this is that people are aware of their rights and obligations. According to the Government Communication Principles the DTCA is obliged to inform people of those rights and obligations. But communicating involves more than providing people with information. It can contribute in many ways to compliance.
>
> When we communicate, we always start from the question: how do we communicate in such a way that we promote the desired behaviour? To do that well, we make use of knowledge of how behaviour works. We do not look at what people should do, but at what they actually do, and why they do it.[20]

The DTCA's Communication Policy conveys that it serves the interests of both parties: adequate communication enables taxpayers to excise their rights and fulfil their obligations (citizen's interests), *and* it enables the DTCA to perform its duty to impose and collect taxes more efficiently (DTCA's own interest).

In conclusion, the policy angle on taxpayer communication clearly shows that the implementation of the DTCA's duty to inform is based on a well-considered policy strategy that has changed significantly since the 1980s. This raises the question whether the ambitions of DTCA's duty to inform are sufficiently considered in the current legal framework.

[18] The communication policy of the DTCA is published in *ia* communication policy plans, reports, policy memoranda and policy audits studies.

[19] Cramwinckel, above n 1, ch 3.

[20] Belastingdienst Beleidsplan Communicatie [*DTCA's Communication Policy Plan*] 2011–2015, 10–11.

Legal Framework of the Dutch Doctrine Regarding the Protection of Legitimate Expectations

What is the current legal position in Dutch tax law on the doctrine regarding the protection of expectations raised by General Information, and should it be re-evaluated? To answer this question a critical analysis of Dutch Supreme Court case law since the 1970s is to be made.[21]

Doctrine: General Principles of Proper Administration

In the Dutch legal framework, the protection of taxpayers with respect to expectations raised by acts of the DTCA is assessed by the doctrine of the general principles of proper administration (*algemene beginselen van behoorlijk bestuur*) and more in particular, the principle of legitimate expectations (*vertrouwensbeginsel*).[22]

The general principles of proper administration provide binding standards for the DTCA to act in a proper and fair manner. The doctrine regarding the general principles has been developed by the Dutch Supreme Court over the last decades. Since 1978 the Court accepted that, under specific circumstances, certain principles, including the principle of legitimate expectations, do have *contra legem* effect.[23] Within the Dutch legal system, this means that the strict application of the law is set aside by the acts of the DTCA in order to protect the taxpayer, often resulting in a more favourable tax treatment of the taxpayer than based on the strict application of the tax law.[24]

It should be noted that in the Dutch system, the principle of legitimate expectations with respect to the taxpayer's substantive tax position may result in (only) two options: (i) upholding the expectation in full (the taxpayer's expectations of his tax treatment are fully honoured) or (ii) disappointing in full (the taxpayer's expectations are violated and his tax treatment is different than expected based on his expectations). This binary 'all or nothing' distinction when it comes to substantive tax treatment is peculiar to the Dutch approach. It does not offer much remedial creativity when it comes to substantive tax treatment.

Balancing between Principles

If the DTCA does not act in accordance with expectations that were raised by the taxpayer based on General Information, the question is whether the expectations should

[21] For the UK see *Gaines Cooper* [2010] UKSC 47.

[22] See JLM Gribnau, 'Horizontal Monitoring: Some Procedural Tax Law Issues and Their Broader Meaning' in R Russo (ed), *Tax Assurance* (Deventer: Kluwer, 2015) [8.3.1]: 'The law does indeed leave the tax administration room for an informal cooperative compliance strategy.'

[23] The Dutch Supreme Court decision of 12 April 1978, ECLI:NL:PHR:1978:AX3264. The *contra legem* effect evidences Dworkin's idea of equal concern and respect which in this situation prevails over the principle of equality (equal treatment), see Gribnau, above n 10.

[24] It should be noted that legitimate expectations also can be raised regarding, for example, procedural tax matters, such as if the DTCA gives the taxpayer the expectation that they will not undertake an audit or that

be legally protected. In such a case, in the Dutch approach, tension arises between, on the one hand, the *principle of legitimate expectations* and, on the other hand, the *principle of legality* (which ensures that the law is applied).[25]

In its case law since 1978, the Dutch Supreme Court has provided legal rules on how to weight these principles for categories with specific type of acts and statements of the DTCA that may raise expectations among taxpayers, such as *policy rules* ('*beleidsregels*'), *commitments* and *position statements (*'*toezeggingen*' and '*standpuntbepalingen*') and *general information* ('*algemene voorlichting*' and '*inlichtingen*'). For each of these categories, the Dutch Supreme Court formulated a legal rule that prescribes under which specific circumstances legitimate expectations should be honoured.

For example, for the category of *commitments* the legal rule states that if the tax inspector made a commitment to a taxpayer, the taxpayer's expectations based on this commitment are protected if, in short:[26]

(i) the taxpayer has provided the information that is correct and relevant to the commitment; and
(ii) the commitment is not so clearly contrary to the correct application of the law that the taxpayer could not reasonably rely on it.

If both conditions are met, the principle of legitimate expectations takes priority over the principle of legality, meaning that the DTCA is legally bound to its commitment and the taxpayer may rely on the DTCA's commitment, even if was a *contra legem* commitment. The legal rule regarding the category of commitments thus comprises the basic position of the protection of expectations ('yes, provided that').

Protection of Legitimate Expectations Regarding the Category of General Information

With respect to expectations raised by General Information, the legal rule of the Dutch Supreme Court is based on the principle that expectations are *not* honoured, *unless* certain conditions are met ('no, unless'). Save in exceptional cases, a strict application of the law takes precedence based on case law of the Dutch Supreme Court from 1979 (the 'current legal position').[27] This main rule means that, in principle, the risk of incorrect information must be borne by the taxpayer, unless the taxpayer meets both of the following conditions:[28]

(i) the lack of knowledge requirement (*niet-kenbaarheidsvereiste*); and
(ii) the disposition requirement (*dispositievereiste*).

The lack of knowledge requirement (i) implies that the information provided was not so clearly contrary to a correct application of the law that the taxpayer could

an extension of a certain time limit is granted. Again, in principle, in the Dutch approach, the legal effect of the principle of legitimate expectations is binary.

[25] A Dutch systematic study on the general principles of proper administration. See Happe, above n 2.

[26] ECLI:NL:HR:1979:AM4918; Dutch Supreme Court decision of 19 June 2020, ECLI:NL:HR:2020:1069.

[27] ECLI:NL:HR:1979:AM4918; more recently see the Dutch Supreme Court judgment of 5 November 2021, ECLI:NL:HR:2021:1654.

[28] ECLI:NL:HR:1979:AM4918; recently ECLI:NL:HR:2021:1654.

and should in all reasonableness have been aware that the information provided was incorrect.

With respect to the disposition requirement (ii) for decades this requirement implied that the taxpayer, relying on the incorrect or incomplete information, has performed or omitted an act that results in a situation in which the taxpayer not only has to pay the tax legally due, but also, the taxpayer suffers damages.[29] It is apparent from Dutch case law that taxpayers in a great many cases do not meet the disposition requirement.[30]

Recently, after 40 years of established case law, the Dutch Supreme Court mitigated the disposition requirement to a certain extent.[31] The current interpretation of the disposition requirement implies that the taxpayer, relying on the incorrect information, has performed or omitted an act that results in a situation in which a higher amount is levied from the taxpayer than he believed to be due based on that information.

Under this new interpretation, a higher amount of taxes than expected may qualify. But the condition still entails a high threshold by requiring that the taxpayer must have acted based on the information, for instance by making an investment, cancelling an insurance or buying a car. However, this implies acting or omitting an act, *besides* acts that relate to the performance of tax obligations (such as filing a form based on information provided, or following instructions based on the DTCA's explanatory notes).

Arguments Supporting the Current Legal Position

The main argument of the Dutch Supreme Court for its legal rule 'no, unless' was motivated in the 1970s by the taxpayers' interest in allowing the DTCA to carry out its duty to inform unimpeded.[32] The underlying viewpoint of the Dutch Supreme Court seems to be that the DTCA should not be too readily bound by erroneous information. The law should not be set aside easily if 'only' General Information is provided, since the feature of this information is that it is not tailored to the situation of the specific taxpayer at hand. In addition, from a legal point of view, *contra legem* application of the principle of legitimate expectations should be applied with restraint.

The Dutch Supreme Court recently affirmed the current principle and main rule.[33] However, the argument of 'effective legal protection' has resulted in the mitigation of (ii) the disposition requirement (see section *Legal Framework of the Dutch Doctrine Regarding the Protection of Legitimate Expectations*). But this does not afford better legal protection to citizens who have done nothing other than to follow the information (and have not suffered any additional disadvantage due to actions or omissions based on the information). Still, the current legal framework thus provides relatively little legal protection to taxpayers who have derived expectations from General Information.

[29] ECLI:NL:HR:1979:AM4918; Based on the Dutch Supreme Court judgment of 29 January 2021, ECLI:NL:HR:2021:142.
[30] Cramwinckel above n 1, [4.3.4.1].
[31] ECLI:NL:HR:2021:1654.
[32] ECLI:NL:HR:1979:AM4918.
[33] ECLI:NL:HR:2021:1654.

By Way of Illustration: Case Law Study

How often do taxpayers successfully invoke the principle of legitimate expectations with respect to expectations raised by General Information? A systematic study into published Dutch case law[34] for the 1979–2020 period provides illustrative numbers. This case law study – containing of in total 131 relevant results – shows that in most cases taxpayers did not have legally protected expectations in the case of expectations raised by General Information.[35] In approximately 95 per cent of the decisions, the principle of legitimate expectations was invoked unsuccessfully. Taxpayers therefore successfully invoked the principle of legitimate expectations in only 5 per cent of the cases.

Critical Analysis of the Arguments Supporting the Current Legal Rule

Following a detailed analysis of the case law, the current legal approach appears to be based on presumptions that no longer apply in full. The most striking findings in this respect are, summarised, that information is not *just* information; not to the DTCA, nor to taxpayers, nor in light of the legal and policy functions of the provision of information. The current approach thus places a disproportionate amount of risk on taxpayers.

Furthermore, the distinction made by the Dutch Supreme Court between communicative acts within the DTCA's duty to inform and within the DTCA's other duties turns out to be a theoretical one. It results in legally constructed distinctions between categories of communicative acts and their respective legal rules regarding the protection of expectations, that turns out to be problematic in case law.

The conclusion of the analysis of this Part of the chapter is that the application of the principle of legitimate expectations is inconsistent, does not offer remedial flexibility, does not meet the legal framework for the DTCA's duty to inform and lags behind developments in law and society. A re-evaluation is needed, which should also involve the citizen's perspective.

The Citizen's Perspective

The 'citizen's perspective' has garnered a great deal more attention in Dutch legal discourse.[36] This development underlines the importance of assessing the legal soundness of the current legal approach also from this angle.

While taxpayers (citizens) in general will expect that the DTCA acts in line with its own communication, Dutch tax case law has showed that General Information by the

[34] See www.rechtspraak.nl. In the Netherlands, in general far from all (tax) case law is published.

[35] See Annex I of Cramwinckel above n 1.

[36] Partly as a result of the Dutch childcare benefits scandal, in which citizens were 'crushed' by the legal system and the tax authorities due to the very strict implementation of repayment rules of childcare benefits. This scandal led to a great deal of attention from institutions such as the Dutch Parliament, legislature and judiciary. See, eg the Dutch Parliamentary Questioning Committee Childcare Benefits Report 'Unprecedented Injustice' (*Ongekend Onrecht*) of 17 December 2020.

DTCA is mostly considered to be merely non-binding communication. The approaches to the reliability of General Information thus diverge. How do citizens perceive communication by the DTCA and what do they expect in terms of commitment?

To answer this question an approach is needed that provides insight into communication between the DTCA and citizens. An interpretation of the citizen's perspective through language and communication science provides these insights. The purpose is to lay the groundwork for the citizen's perspective. This enhances the development of a re-evaluated legal position that better reflects (also) the perspective of the citizen, and thus the reality covered by the law.

The Citizen's Perspective on the Expectations to be Derived from DTCA'S Information

What is the citizen's perspective on the expectations to be derived from General Information? In this chapter, the perspective of citizens is given a communicative interpretation, which is particularly suitable, because the provision of information is (a form of) communication.

Research Method for the Citizen's Perspective

The citizen's perspective is to be operationalised using insights from various subdisciplines of language and communication science, such as linguistics (language as object of study), text science (text as object of study), pragmatics (focused on language use), discourse studies (focused on the quality and effectiveness of language use) and psycholinguistics (focused on psychological effects of communication). A *functional* approach to the citizen's perspective is used. The purpose of this perspective in relation to the central research question is to understand the citizen's perspective regarding the expectations that are derived from General Information. The multidisciplinary approach in this study aims to obtain a more accurate legal approach to legal protection.

Communication Framework and Quality Requirements for Government Information

The most important insight from communication theory is that communication of the government, including the DTCA, is embedded in an *institutional context*. According to theoretical insights of Renkema, institutions (such as the institution of taxation) involve power relations and asymmetry.

> In the interaction between government and citizens (…) one of the most prevailing characteristics is asymmetry.[37]

[37] J Renkema and C Schubert, *Introduction to Discourse Studies* (Amsterdam/Philadelphia: John Benjamins Publishing Company, 2018) [14.5].

This asymmetry is manifest in terms of expertise, being a more (or less) sophisticated communicative partner and impact.

As Bax aptly discusses, General Information in this context is not 'just information' with respect to the speech act of providing information (in Dutch: *voorlichten*):

> According to common definitions, the purpose of providing information – unlike advertising – is to increase knowledge (e.g. of consumers): informing is about providing accurate information. As such, information falls under representative speech acts. Yet the purpose of providing information is not adequately and fully characterised in this way. If I inform someone that France is not currently a kingdom, that my brother is a physiotherapist or that a bee dance is a subtle communication medium, I may have conveyed correct information, but it goes against intuition to say, that I have entered the field of the provision of information. This is partly related to the fact that information practices are usually embedded in some institutional framework (a government agency, a business organisation). But more important in this context is the fact that the provision of information pursues underlying goals. The government provides information about the harmful effects of cigarette smoking, so that the smoking citizen, given this increased knowledge, changes his behaviour (i.e. quits smoking altogether or decides to smoke a pipe or cigar). Through the transmission of factual information (…) the sender seeks to influence the behaviour of the receiver (…). The initial function of the provision of information undeniably serves that underlying function.[38]

General Information is information *from the authorities*, embedded in the institutional context of taxation. It is *targeted* and *goal-orientated* information, not just providing factual information but also seeking to influence taxpayers' behaviour (see *Legal Basis in the Principles of the Rule of Law* and section *DTCA's communication strategy*).

Furthermore, the theory of the Dutch scholars Janssen and Steehouder from the 1980s provides interesting perspectives on the type of interventions that need to be applied in transforming ('translating') a law into a comprehensible informative text for the public.[39] They distinguish four steps, including (1) the adaptation of the perspective of the user instead of the law, (2) the selection process of information, (3) the restructuring process of information, and (4) the wording of the information. These aspects show that providing General Information requires more of the DTCA than merely using comprehensible words. This makes the position of the 'translator' influential.

Communication Creates Expectations, Obligations and Responsibilities

Communicative theory explains that the specific communicative context of providing information to taxpayers has effect in terms of expectations, obligations and responsibilities in the communication with citizens. Specifically relevant here is the

[38] MHM Bax, *Een spiegel van de geest. Over taal, communicatie en cognitie* [*A Mirror of the Mind. On Language, Communication and Cognition*] (Groningen: Martinus Nijhoff Uitgevers, 1995) 84.

[39] Inter alia, MF Steehouder amd CJM Jansen, *Taalverkeersproblemen tussen overheid en burger. Een onderzoek naar verbeteringsmogelijkheden van voorlichtingsteksten en formulieren* [Communication problems between government and citizens. A study on improvement possibilities of information texts and forms] (Den Haag, Sdu Uitgevers, 1989) 16.

theoretical framework of Grice, the founder of influential language philosophy.[40] Grice's *Cooperative Principle* says: 'Make your conversational contribution such as it is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.'[41] It makes clear that communicative partners *cooperate* to communicate successfully. This principle explains why taxpayers, as a basic assumption, will expect that General Information of the DTCA enables them to fulfil their tax responsibilities in a correct way. It also shows that not taking responsibility for communicative utterances (for instance, if the DTCA was not bound by its General Information) breaches this basic principle of cooperation. Furthermore, Grice's *Maxims of Conversation* explain that taxpayers expect that the information is correct (*Maxim of Quality*), sufficient (*Maxim of Quantity*), relevant (*Maxim of Relevance*) and understandable (*Maxim of Manner*).

The work of the psycholinguist Clark on language use makes clear that communication is a form of acting together (*joint action*) that creates *commitment* between communicative partners. This can be easily illustrated by the fact that a person who breaks a promise will be called to account for it. Someone who asks a cup of coffee but leaves without drinking it will be looked at with a raised eyebrow. A person who asks a question but then does not want to hear the answer will evoke a puzzled or even angry reaction. A person who walks away in the middle of a conversation or denies his words may expect to be called to account for it socially.

Applied to the context of the provision of General Information to taxpayers by the DTCA, Clark's theory shows that joint actions in taxation by means of communication to enhance compliance creates some sort of *commitment* between the DTCA and taxpayers as communicative partners.[42] This commitment cannot be breached easily, given what is at stake in acting together for a common purpose, such as taxation. Because the way language users communicate is guided by the universal communication principles, they are also relevant to tax authorities-taxpayer communication to gain a better understanding of the issues with the current legal position from a different angle.

Miscommunication

Communicative theories also provide a better understanding of *miscommunication* between communicative partners. As Sperber and Wilson have explained, communication is not based on 'a failsafe algorithm' but merely on 'a less-than-perfect heuristic'.[43] That makes the risk of miscommunication realistic. Miscommunication can occur, for example, if the taxpayer does not have a correct understanding of the information provided, if the DTCA does not provide a correct interpretation of the underlying law, if both parties do their best effort but legal nuances got 'lost in translation' as a result of simplexity, or more in general if taxpayers perceive information as 'the law' while the

[40] HP Grice, *Logic and Conversation (William James Lectures, delivered at Harvard University in 1967)*, (Cambridge MA: Harvard University Press, 1975).

[41] Grice, above n 40, 45.

[42] HH Clark, *Using Language* (Cambridge, Cambridge University Press, 1996); HH Clark, 'Social Actions, Social Commitments', in N J Enfield and SC Levinson (eds), *Roots of Human Sociality, Culture, Cognition and Interaction* (London: Routledge, 2006), ch 4.

[43] D Sperber and D Wilson, *Relevance. Communication and Cognition* (Oxford: Blackwell 1986) 45.

DTCA only intended to provide non-binding information about the law. What is accurate to solve miscommunication, depends on the circumstances, but in terms of communication there is much remedial flexibility (see sub section *An assessment framework*).

Expectations to be Derived from Communication of the Tax Authorities

Another important theoretical insight is that citizens will perceive government information with the assumption that it is *in conformity with* the law. This law conformity is what language users (citizens) expect, and reasonably *may expect*.[44]

For citizens, information about the law, as a translation of the law, functions as if it were the law itself. Of course, this is not the legal reality, but it does however better reflect the approach of citizens. As shown here, from the perspective of the citizens, they see their communicative relation with the DTCA, and not with the legislator, who is moved to the background.

The communicative approach demonstrates that the DTCA's provision of General Information *inherently* creates communicative expectations. Primarily because of the DTCA's *authority* and *capacity*, by the *institutional context* and by the *communicative purpose* of the provision of information. This leads to normative assumptions regarding the accuracy and reliability of the information provided to taxpayers.

From a communicative perspective, the provision of information is to be seen as a 'translation' of laws and regulations that functions in a new communicative context.[45] Contrary to the legal perspective, in which the law remains dominant, from a communicative perspective the information provided is an autonomous text.

The communicative approach sheds new light on key aspects of the expectations derived from the information provided. Communication comes with responsibilities and obligations – both for citizens and the DTCA. Communicative commitment between partners cannot be breached easily, at the risk of risking – ultimately – acting together at all.

To conclude, the fundamental insight is that the provision of General Information is a form of communication between the DTCA and citizens and that this should be included in re-evaluating the legal perspective on protecting legitimate expectations.

The Legal Perspective Taking into Account the Citizen's Perspective

In this part of the chapter, the lines from the legal perspective and the citizen's perspective are considered together. The objective is to re-evaluate the legal framework with due

[44] C Jansen and M Steehouder, 'How Research Can Lead to Better Government Forms', in D Janssen and R Neutelings (ed), *Reading and Writing Public Documents* (Amsterdam/Philadelphia: John Benjamins Publishing Company, 2001) 13; Cramwinckel, above n 1 [5.4.3, 5.4.5].

[45] J Hulst and L Lentz, 'Public Documents in a Multilingual Context', in D Janssen and R Neutelings ibid, ch 5, 87–88: 'a translation is seen as an autonomous document that functions in a new communicative environment, and not as a derivation of the (…) original text'.

regard for the legal perspective and the citizen's perspective. It is, however, not about 'merging' both perspectives into a single perspective, but about enhancing the legal approach.

Confronting the Legal Perspective with the Citizen's Perspective

The focus shifts towards the question how the legal perspective relates to the citizen's perspective when it comes to the protection of expectations raised by General Information. The starting point is the interim conclusion from above that the legal soundness of the current legal position ('no, unless') falls short. Below it is examined whether, and to what extent, the legal perspective conflicts with the citizens' perspective.

In terms of methodology, the legal perspective is functionally compared with the citizens perspective, with the aim of determining the added value of this perspective for the envisaged re-evaluation of the principle of legitimate expectations.

Clash of Perspectives

The key conflict between the legal perspective and the citizen's perspective can be illustrated by the following visuals.

Figure 1 Legal Perspective

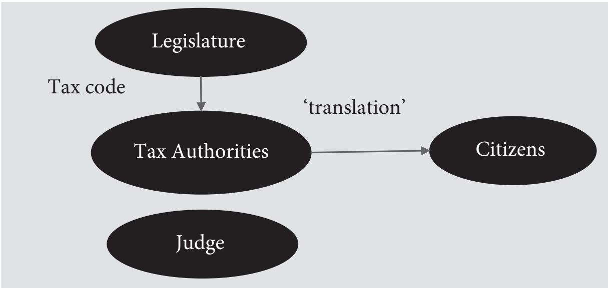
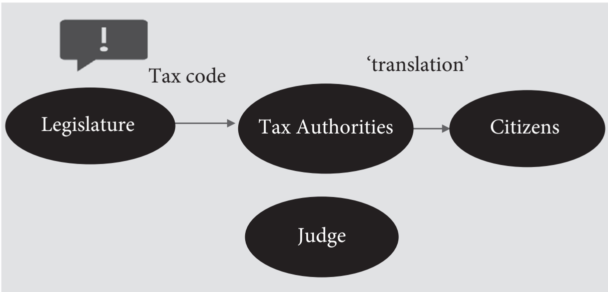


Figure 2 Citizen's Perspective



While the legal perspective explains why primacy lies with the law, given the democratically legitimised legislature, the citizen's perspective shows that the taxpayer has a communicative relationship with the DTCA. The DTCA explain the tax law; as if the DTA is the legislature. The legislature disappears from this picture: for the citizen, the information provided is 'the law'. Of course, this is not the legal reality, but it explains that taxpayers may perceive it differently.

Further Analysis of Conflicting Perspectives

Conflicts between the two perspectives essentially occur because, in short, the citizens and the DTCA:

(a) use different source texts (the information provided and the law, respectively);
(b) see different starting points for commitment to communication (through the act of communication or only after meeting certain legal criteria); and
(c) their views on the status of the text differ (a comprehensible representation of the law or an autonomous text functioning in a new context).

The Added Value of the Confrontation of Perspectives

The confrontation of perspectives shows that the current legal rule regarding the protection of expectations based on General Information ('no, unless') is 'uncooperative' from a communicative perspective. This is not only contrary to the citizen's perspective and the DTCA's compliance strategy but is also at odds with the objective and purport of the principle of legitimate expectations. Moreover, from both perspectives, the current allocation of risk poses a great amount of risk to taxpayers, resulting in a disbalance between the interests of law enforcement and legal protection.

Furthermore, the confrontation shows that the weighing of interests required by law is not visible in the communicative approach from the citizen's perspective. At the same time, the confrontation also shows that the support for the main rule 'no, unless' is supported by legal arguments that are as such insufficiently persuasive in the citizen's world. The importance of the 'unimpeded duty to inform' turns out to be insufficiently convincing to taxpayers to justify such a significant deviation from the citizen's perspective. Ignoring this may alienate citizens from the law.

Back to the 'Why': Why should the Citizen's Perspective be Relevant to the Legal Perspective?

Why bother about the citizen's perspective? Indeed, it could be argued that the two perspectives mirror different worlds, with different outcomes. However, the law serves the society with its citizens, not the other way around. If the gap between the two worlds becomes too large, the law alienates itself from the world to which it should relate.[46] That may be harmful to the legitimacy of and the trust in the government and to the effectivity of DTCA's implementation strategy. These words may sound vague, but a case study based on Dutch case law illustrates that these effects actually manifest themselves in certain ways.[47] Despite the fact that the Netherlands is a relatively high-trust society, trust in the DTCA and the government is currently under pressure.[48]

A re-evaluation of the application of the principle of legitimate expectations turns out to be inevitable, both from the legal perspective and the citizen's perspective. The most important reasons to do so follow from the previous parts of the chapter, in sum: (i) the main legal rule 'no, unless' is incorrect in light of the legal framework for the DTCA's duty to inform; (ii) the legal characterisation of General Information as 'only' informational is not adequate; and (iii) there is a lack of balance between on the one hand the goals and ambitions of the DTCA's duty to inform and on the other hand the legal protection against information arising from this task.

Re-Evaluation Proposal

The focus shifts to improving the current Dutch doctrine regarding the principle of legitimate expectations with respect to General Information by the DTCA. What is the best way to re-evaluate the application of the principle of legitimate expectations?

Assessment Framework for Designing a Better Legal Position

The search for a better solution obviously involves a dilemma, where – given the approach in the Dutch legal system – two (or more) interests point in different directions, as the interest of honouring legitimate expectations may interfere with the interest of a strict application of the law.

In terms of research methodology, a standard is needed to determine how to weigh these interests in a proper – and even improved – legal manner. In short, the way in which Dutch tax law should deal with the protection of expectations derived from General Information provided by the DTCA, should meet the criteria of the rule of law (*Legal Basis in the Principles of the Rule of Law*). These existing criteria should be completed by taking into account the citizen's perspective. This leads to the proposal of 'the assessment framework of the rule of law that observes the citizen's perspective'.

The citizen's perspective is not a principle, but it provides a viewing direction in the interpretation and testing of rule of law principles. In other words, it 'colours' the contemporary interpretation of the rule of law principles. The assumption is that the law observes the citizen's perspective if the application of legitimate expectations can be

[46] See Adviescommissie praktische rechtsbescherming in belastingzaken [*Advisory Committee Practical Legal Protection in Tax Cases*], MBA van Hout et al, *Burgers beter beschermd* [*Citizens Better Protected*] 2021, 3.

[47] See Cramwinckel above n 1, [6.2].

[48] According to the DTCA's 2022 Annual Plan, 6, in general, confidence in the DTCA is at its lowest level since the DTCA has measured the trust of taxpayers.

explained to and understood by citizens. Of course, this is not the same as saying that citizens should always get their way.

Proposal for Re-evaluation

Essentially, the proposed re-evaluation for the application of legitimate expectations is that a change of course and method is needed, in which the main rule 'no, unless' is replaced by an assessment framework.

The proposal can be summarised by the following basic principles:

- **New legal position**
  The principle of legitimate expectations should be applied with less restraint, providing a more comprehensive legal protection, observing the citizen's perspective to a broader extent, and providing a better balance between legal equality and legal certainty. The basic legal assumption should be that citizens must be able to rely on information from the DTCA.
- **New assessment framework**
  To determine whether the principle of legitimate expectations should apply, replace the main rule 'no, unless' with a balancing framework, taking into account the circumstances of the case.

An Assessment Framework

The assessment framework provides a model for the assessment of the principle of legitimate expectations regarding taxpayers' expectations raised by General Information. Essentially, the assessment framework consists of two steps:

Step 1: Reasonable expectations

Are the taxpayers' expectations that are raised by the General Information reasonable in the case at hand, given the relevant circumstances?

Step 2: Legal effect

What is the legal effect of reasonable expectations in the case at hand?

With respect to Step 1, it should be noted that it includes an assessment of the relevant wording, the context and the circumstances of the case. In principle, legitimate expectations must be protected if they are *reasonable* in the given circumstances.

With respect to Step 2, it should be noted that under the current Dutch approach of the doctrine of the principle of legitimate expectations the legal effect is limited to a binary 'all or nothing' approach. There is no remedial flexibility when it comes to substantive tax consequences of legitimate expectations (see *Doctrine: General Principles of Proper Administration*).

However, the communication analysis offers inspiration for a more sophisticated approach in terms of remedial creativity. That is particularly relevant in cases in which expectations are raised while the information provided is not clearly incorrect but is incomplete or unclear. In other words, especially in the grey area where it is unclear who is to 'blame' for miscommunication between the DTA and the taxpayer. Miscommunication thus turns out to be not a matter of 'all or nothing'.[49] To illustrate this, in some situations correcting a misunderstanding will require a communicative partner to keep his word and to uphold the expectation in full ('all'). In another case, where the communicative commitment is relatively weaker, a misunderstanding may also be resolved by both parties making some concessions ('a little'). In yet another case, for example if the communication partners do not have an ongoing relationship, all that is needed is a statement that there was a misunderstanding ('nothing'). In yet another case, for example if the interests are limited, sincere apologies may be sufficient ('alternative').

The communicative angle offers to the Dutch tax approach a wider and more tailored range of remedies. More flexibility better represents the citizen's perspective and offers a better reflection of the specific communication that has taken place between the taxpayer and the DTCA. The range of remedies may include, among other things, alternative financial consequences such as compensation in the form of tax interest, litigation costs, court fees or fines. Furthermore, alternative remedies can be considered such as flexibility in payment arrangements or personal assistance with tax questions. Remedial creativity could also be found in a more 'proportional' rather than 'binary' outcome of the principle of legitimate expectations (for example by means of a discount on the tax to be paid or a partial reduction of the tax assessment), noted that this would require a change regarding the current Dutch approach. However, from a legal perspective, more flexibility could impact legal certainty but, on the other hand, it may reflect better the citizen's perspective.

All things considered, it is clear that the added value of the communication angle on the 'input side' (what expectations are raised in communication between the DTCA and taxpayers) also provides added value on the 'output side' (what remedies are possible). This enriches the legal perspective.

Does the Proposal Lead to Improvement?

If the re-evaluation proposal is tested against the normative standard (see *Assessment Framework for Designing a Better Legal Position*) it follows that the proposal represents a 'good solution': it meets the relevant rule-of-law criteria. Further, it shows an improvement over the current application of the principle of legitimate expectations, as the proposal strengthens the value of *legal certainty*, while it does not impair the value of, in particular, *legal equality* in the context of the rule of law.

Counter-thinking: Main Objections to the Proposal

Subsequently, the most important objections to the proposal need to be discussed ('counter-thinking'[50]). The main concern of providing more legal protection relates to

[49] See Cramwinckel, above n 1 [6.5, 7.4.3.2].

[50] Cramwinckel, above n 1 [7.6] for an extensive overview.

unforeseeable financial consequences for the government in the case of a risk allocation shift, the fear of a more restrained implementation of the DTCA's duty to inform and the risk of a decreased willingness to communicate. These arguments should be taken seriously, but they do not lead to the conclusion that the current legal position should be upheld. The proposed re-evaluation better aligns the application of the principle of legitimate expectations in the provision of information within the legal framework. Moreover, it leads to a better balance between law enforcement and legal protection, it meets the preconditions of the legal system and better reflects the citizen's perspective.

Final Remarks

The main conclusion of the analysis is that the provision of General Information by the DTCA is a form of communication and – following from communication theory – this has consequences in terms of responsibilities, expectations and commitment. The current legal approach does not take this sufficiently into account, while there is room to do so in a legally adequate manner – *more* than is currently the case.

From a tax scholarly viewpoint, this analysis adds value to existing knowledge with respect to the DTCA's communication, since hardly any theoretical framework about the DTCA's duty to inform was available. Further, the research findings expose a conflict between the legal perspective and the citizen's perspective, and then contributes a solution to minimise that conflict and reduce it as much as possible.

The main added value of the research findings is that they reveal that, when dealing with a legal issue that in fact affects all citizens, it is not enough to approach the problem purely from a legal perspective. When the citizen's perspective is involved in the analysis of the legitimate expectations derived from General Information, this sheds a different light on the issue, in particular with respect to remedial creativity regarding the principle of legitimate expectations.

The most important take away is that General Information in the context of the rule of law is much more important for both the DTCA, for taxpayers and for taxation than has been acknowledged in tax law to date. This requires adequate legal protection.