Is Mediation the Panacea to the Profusion of Tax Disputes?

Several countries are intending to implement mediation in their domestic tax law procedures in order to deal with an increasing amount of appeals. This article researches how the principles of mediation should be applied in tax law in order to achieve an effective dispute resolution procedure. For this research, the author compared four different countries that have many years of experience with mediation in substantive tax disputes. The study follows a multidisciplinary perspective to explain why certain choices regarding mediation in tax law have failed while others have succeeded. This article will outline the effectiveness of mediation as a dispute resolution procedure in tax law.

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Many countries are interested in implementing mediation as an alternative dispute resolution (ADR) in order to deal with tax controversies. The most common reason for countries to implement mediation is to address an excessive and increasing volume of tax appeals, which jeopardize the legal protection of taxpayers. Countries expect mediation to offer a more efficient, less expensive and faster way to prevent or solve tax appeals. In some countries, mediation looks very successful in resolving tax disputes, but in others it seems to have been a complete failure. In the United States, for example, mediation and other ADR seems to be flourishing. The Internal Revenue Service (IRS) implemented mediation in 1998, and currently several kinds of ADR are offered to taxpayers, such as Fast Track Settlement, Fast Track Mediation and Post-Appeals Mediation. The News Release of the IRS even mentions that the IRS resolved a long-standing tax dispute using Fast Track Settlement with an interest amount exceeding two billion dollars.\(^1\) In contrast, Canada introduced mediation in tax cases in 2000, but the Canada Revenue Agency (CRA) has settled just one case via mediation and has basically stopped offering mediation to its taxpayers.\(^2\) Mediation in Canada thus appears to be quite unsuccessful, while Canada and the United States are in other respects two comparable countries.

One of the most difficult issues in this research is that almost every country and every area of law seems to create its own definition and standards for mediation,\(^3\) even in tax law.\(^4\) Brown and Marriot defined mediation as:

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A facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding to them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.  

This definition is commonly used, but when tax authorities implement mediation it is also important that mediation can interact with the principles of tax law, such as the legality principle. Furthermore, mediation has to function as an effective procedure in practice. This means that tax authorities have to make several choices regarding mediation, such as who to appoint as an “impartial mediator”. The United States and the Netherlands, for example, have chosen to appoint tax officers as mediators, which can be seen as infringing the principle of the “impartial third party”. These kinds of choices apply to other characteristics of mediation as well, such as the techniques that are used and interference of the mediator “without adjudication”. These interpretation differences influence the functionality of mediation and possibly also its efficiency. In the Netherlands, the tax authorities implemented mediation to solve tax disputes arising from disputants’ attitudes and related to emotions. In Belgium, mediation is a legal right for taxpayers and is used for all kind of disputes, except when interpretation of law, public rulings or instructions of the tax authorities are concerned. The CRA was of the opinion that mediation is only appropriate for cases concerning an amount exceeding CAD 300,000, because the tax amount in dispute must cover the commercial mediator’s fee. The above illustrates the widely divergent perspectives on mediation and the way it should be applied in tax cases. Therefore, this research will start by outlining the basic principles of mediation in tax law in order to provide a theoretical framework and a more uniform image and definition of mediation in tax law.

Mediation has been transplanted from the United States into other jurisdictions, from common law into civil law systems and within these systems into several different areas of law. Therefore, it is questionable whether mediation is an appropriate procedure in tax law. For example, one of the principles of mediation is that it takes the underlying interests of the disputants as a starting point to solve the dispute. This means that personal feelings and the disputants’ experience of fairness are important as well. This is a very individual and personal approach towards dealing with disputes, but in tax law it is also important.

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5. H.J. Brown & A.L. Marriot, ADR Principles and Practice at 154 (Sweet & Maxwell 2011). Although they mention several definitions in their book, the quoted definition continues to be applicable.


8. D.C. Olsen, Alternative Dispute Resolution, Appeals Branch Revenue Canada, in Conference Report 1997 12:1 et seq. (Canadian Tax Foundation 1997) [hereinafter Conference Report 1997]; P. Lynch, FPC Presentation Series on the CRA Approach to Compliance Appeals, DR and the Revenue Canada Appeals Process (non-dated comparative research regarding procedural tax law); Canada Revenue Agency (CRA), Appeals Branch, Mediation Pilot (19 May 1999); Appeals Branch, Mediation Pilot Project, Results for the 2003-2004 Fiscal Year and Recommendation/Proposed Next Steps (7 Apr. 2004). These documents were obtained via an Access to Information procedure (see sec. 1.3.).

9. In civil law, countries tend to take a more systematic approach to law compared to common law countries. Civil law systems are classified into branches. The most common is private law and public law (see V. Thuronyi, Comparative Tax Law at 60 (Kluwer Law International 2003)). This classification between public and private law illustrates the differences in the legal relationship.
to ensure equal treatment between taxpayers. Mediation is based on certain principles, as is tax law, and the author of the opinion that tax disputes differ significantly from other kinds of disputes. Therefore, this study starts by considering the principles of mediation. Subsequently, this article will analyse the differences between tax disputes and other kinds of disputes. This is followed by a comparative study regarding different interpretations of the basic principles of mediation by several countries to discover which interpretation fits the best with tax (law) disputes. The last part of this research looks at the efficiency of mediation in domestic tax disputes.

Since the improvement and (re)design of dispute resolution procedures is influenced by more than just the law, the author uses theories drawn from diverse scientific disciplines. This multidisciplinary approach provides a broad perspective on what stimulates or jeopardizes the effectiveness of mediation in tax disputes. However, due to limits in the scope and size of this research, it is not possible to discuss all relevant theories in great detail; thus, the focus will mainly be on social psychology, in addition to (tax) law. Furthermore, some practical aspects and experiences with mediation will be discussed.

The purpose of this research is to reveal how the principles of mediation should be applied in tax law in order to provide an efficient dispute resolution procedure. Mediation is often implemented to reduce or prevent tax disputes or to compensate the lack of trust of taxpayers in the tax authorities. Mediation can indeed contribute to that, but, in addition, greater knowledge about people’s behaviour and the use of certain principles of mediation like mediation techniques can be effective in preventing or solving disputes as well. One of the main important aspects of dispute resolution is to recognize that the quality of the procedures in tax law and the quality of the interpersonal contact with the tax authorities strongly influences the conflict behaviour of taxpayers and the voluntary compliance in the long term. This means that more knowledge about conflict behaviour and perceived justice can also be used to improve the regular procedures.

1.2. Methodology and scope of the research

In this paper, the focus is on the principles of mediation, the differences in interpretation of the principles of mediation and the effectiveness of mediation in tax law. The main research question is therefore:

What are the principles of mediation and how should these be applied in tax law in order to achieve an effective dispute resolution procedure in domestic tax law?

In order to answer this question, the following sub-questions are posed:

– What are the reasons behind designing and implementing mediation in relation to (tax) law?
– What are the principles of mediation and what is the goal of these principles?
– What are the typical characteristics of tax disputes, and how do these differ compared to other disputes?

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– How is mediation applied in tax law in several jurisdictions, and which approach generates the (best) interaction with tax law?

– What interpretation of the principles of mediation is effective in tax law, and why?

Mediation is developed to respond on certain social developments, such as more assertive taxpayers, an increasing amount of (complex) tax legislation and a rising number of appeals. To understand the principles of mediation, it is thus important to obtain a deeper knowledge about some of the social developments in Western countries since the 1950s, because these developments drove the implementation of mediation in several legal systems. Therefore, section 2. will start with a description of some important social developments that influenced tax law. This will explain why mediation has certain distinguishing characteristics and why many countries specifically chose to implement mediation as an alternative way to deal with tax disputes. In section 3., the principles of mediation will be formulated and the purpose of these principles clarified in greater detail. This section further examines the characteristics of mediation and why it differs from other forms of dispute resolution.

In section 4., the author researches why tax disputes differ from other disputes. This multidisciplinary analysis explains that tax law has unique elements compared to other legal areas; for example, tax law stipulates the importance of equal treatment. Furthermore, the taxpayer experiences tax disputes in different ways compared to tax authorities.

Mediation as a dispute resolution procedure is or has been applied in different ways by various countries, such as Australia, Bangladesh, Canada, France, Germany, Italy, Mexico, New Zealand, Poland, South Africa, the United Kingdom and the United States. The diversity in its application and development in tax law is enormous, which makes it difficult to compare the various systems. Given the general purpose of this research, the author selected four countries with approximately 10 years of experience with mediation in substantive tax law cases, and solely concentrated on mediation as offered by their tax authorities.

For this comparison, the United States were the obvious first choice, because mediation seems highly developed in this country. The United States were one of the first to implement mediation in tax law and seem to have the most extensive ADR procedures in fiscalibus. Another significant country is Canada, where mediation is very successful in almost all areas of law with the exception of tax law; Canada probably has the smallest number of mediation cases in tax law compared to other countries. On the other hand, Belgium seems to have the most successful fiscal mediation procedure in the world, with the most mediation cases per year, so Belgium formed the logical third focus for this study. Belgium is moreover a country in which mediation has a mature legal framework. Finally, the Netherlands will be considered because this country has a very different perspective on the functionality of mediation compared to the other countries selected. Thus, the United States, Canada, Belgium and the Netherlands were chosen for the deeper comparative analyses. Section 5. will compare the differences in interpretation of the principles of mediation in these countries, and how these interpretations interact with tax law and tax disputes. Thereafter, in section 6., the effectiveness of mediation in practice will be examined. General conclusions are drawn in section 7.

For the record, the author wants to emphasize that this research will solely concentrate on mediation that is facilitated by tax administrations for disputes between taxpayers and tax authorities. In case it contributes to the discussion and the analysis, other forms of medi-
ation will be discussed as well, such as mediation that is encouraged or facilitated by the tax courts in the United States and the Netherlands. Mediation is also offered by institutes including the Tax Ombudsman, PRODECON or Taxpayers Advocate Service in tax controversies regarding tax officials; however, these institutes either advocate for taxpayers only or do not deal with substantive tax disputes. For this reason, the author did not include these institutions in her research. In this research, the sole focus is on substantive tax disputes. This will include income tax, corporation tax or VAT in domestic situations (domestic tax law), while excluding local taxes like provincial taxes or taxes on a state level, and international tax disputes (for instance, mediation as offered via some tax treaties). Finally, this research was finalized on 15 July 2017 (and reviewed for publication on 15 December 2017).

1.3. Definitions and sources

Law and language are closely related and this can easily lead to misunderstandings, particularly in a comparative study. In this research, the following terms and definitions will be used:

- ADR: A variety of methods or procedures of resolving disputes, other than traditional legal procedures such as objection at tax authorities or litigation at tax courts.
- Appeal: A procedure at a tax court or a court comparable with a tax court.
- Appeals stage: Begins when the taxpayer lodges an appeal at the (tax) court, and lasts until the judge makes a decision.
- Assessment stage: Lasts until the tax amount due is formalized through an assessment.
- Distributive justice: The justice perceived by the taxpayer regarding the outcome of a decision made by tax authorities.
- External mediator: A mediator that is not an employee of one of the disputing parties. Thus, commercial mediators and judges that act as mediators are qualified as external mediators. An ombudsman can also qualify as a mediator but the procedure at the ombudsman will be seen as a separate dispute resolution procedure.
- Interactional justice: Justice related to people’s perceptions of fairness in how they are treated by authorities (for instance, with politeness, dignity and respect). In this research, “interactional” and “procedural” justice are used interchangeably.
- Fiscale Bemiddelingsdienst (hereinafter Belgian Mediation Service): A separate and independent fiscal mediation division within the tax authorities of Belgium.
- Internal mediator: A mediator who is also an employee of the tax authorities, such as a tax officer (or a bemiddelaar in Belgium).
- The Taxpayer Advocate Service cannot qualify as a mediator because it advocates for the taxpayer. Nevertheless, it is possible that the Taxpayer Advocate Service has a mediating role in controversies between taxpayers and tax authorities. The Taxpayer Advocate Service will be considered as a separate dispute resolution procedure.

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- Mediation techniques: Advanced dispute resolution techniques that are used in a certain order and related to conflict behaviour and the dynamic of conflict.

- Objection: The (administrative) appeals procedure at a tax administration. If taxpayers disagree with a tax decision of the tax authorities such as a (re)assessment, they can appeal against it at the tax authorities.

- Objection stage: Begins when the taxpayer lodges an objection at the tax authorities and lasts until the tax authorities make a decision.

- Procedural justice: Justice related to people’s perceptions of the experienced fairness of a(n objection and appeals) procedure and how the government institution (such as the tax administration) has acted when applying them. In this research, “interactional” and “procedural” justice are used interchangeably.

- Tax authorities: The following will be considered in this study:
  - United States: the IRS;
  - Canada: the CRA;
  - Belgium: Federale belastingadministratie, or FOD Financiën [hereinafter Belgium Tax Administration (BTA)]; and
  - The Netherlands: Belastingdienst [hereinafter Dutch Tax Administration (DTA)].

In this research, male pronouns are exclusively used to make the text easier to read; however, any reference to “he” should always be taken to include the female equivalent. Additionally, references to sources appear in their original language and (if possible) to the exact page(s) within the source, in order to facilitate verification.

For this research, the following data is used. First, literature and jurisprudence in commercial databases such as IBFD, Hein online, Westlaw, Kluwer Navigator and NDFR, and public research databases that are available via the internet (e.g. SSNR, NARCIS and DARE). Second, research data related to pilot mediation projects in tax cases has been collected from the DTA (the Netherlands), the IRS (United States) and the CRA (Canada). Part of such information is unpublished, and is only available via legal procedures such as the Access to Information Act (Canada), the Freedom of Information Act (USA) and Wet Openbaarheid van Bestuur (the Netherlands). By combining the Access for Information Act and the Freedom for Information Act, it was possible to access unpublished IRS reports regarding their pilot mediation projects. In the footnotes, references can be found to these reports. Third, data was collected from the Council for the Judiciary in the Netherlands (Raad voor de Rechtspraak) and empirical research was conducted using files from the Ministry of Justice (Dispute Resolution Department) in Canada and the tax court in Arnhem in the Netherlands regarding pilot mediation attempts. There was no need to be selective in which empirical data to use regarding mediation pilots, since the amount of data was manageable. Lastly, the author used published empirical data about mediation in other areas of law. To understand the practice of mediation, the author interviewed stakeholders such as tax court judges, project leaders of tax authorities that have implemented mediation, mediators in several countries, ombudsmen, and legal representatives of taxpayers. In addition, some tax mediations were observed. These interviews and observations are not used as

direct sources but rather to put the collected data into perspective. Some of this data, such as the empirical data about pilot mediation projects, has also been used for the author’s doctoral thesis about the functionality of mediation in the Netherlands. The current paper is a follow-up to that research.

2. Changes in Society and Reasons for Implementing Mediation

In the author’s opinion, mediation is a response to certain social changes over time. These social changes can be recognized in many modern societies and also influence the relationship between taxpayers and tax administrations. For example, 60 years ago it was inconceivable in most countries that tax administrations would think about the best way to approach taxpayers to stimulate voluntary compliance. Nowadays, it is quite common for tax authorities in many Western countries to use terms such as “enhanced relationship” and “cooperative compliance” to define their relationship with taxpayers. Therefore, the author is of the opinion that several social developments influenced the introduction of mediation in tax cases. Social developments are always difficult to describe because they are related and interwoven. In tax law, the following developments in recent decades can be recognized:

- increasing autonomy of taxpayers;
- increasing (and increasingly complex) tax legislation;
- an increasing number of tax disputes; and
- a changing relationship between taxpayers and tax authorities, such as the “enhanced relationship” and “cooperative compliance”.

These developments will be illustrated in a global overview of some of the turning points over the last five decades, followed by an explanation of why these developments led to the use of mediation in tax law.

2.1. General developments in society

Around the 1960s, a movement toward individualism started. At that time, people in Western countries started to receive better education, information was more accessible and more people started to travel nationally and internationally. Due to these developments, people’s self-belief increased, they started to express and share their emotions, and they became more sensitive and self-centred. As a result, people started to consider themselves as equal to others, irrespective of position or status. This influenced power distances between, for instance, parents and children, teachers and students, and civil servants and citizens.

Furedi considered the 1960s an important turning point where “power” obtained a more negative connotation. He argued that in the 1950s, people believed that power was a way to gain control and avoid disorder and anarchism. In the 1960s, however, people in Western

countries were of the opinion that power limits the freedom and autonomy of people. The power of the authorities became a topic of discussion.16

From the 1960s onwards, many children in Western countries were raised based on a perception of low power distance. They had a more equal relationship with their parents and they had more influence in family matters.17 Therefore, it became more common for these children to be involved in decision-making processes. These children grew up to have more self-esteem, thought that relationships with authorities were more egalitarian, and were more critical about public decisions and more assertive than previous generations. This impacted the relationship between governmental bodies and citizens, and thus between taxpayers and tax authorities.18

Schuyt argued that the development of individualism during the 1960s and 1970s had an influence on mutual trust. He stated that a lack of mutual trust in society was compensated by more legislation (“juridification”19), and that defensive and critical citizens demanded more (specific) legislation in order to get what they want. He added that over time, more people had to rely on legislation, which was necessary given the increasing welfare and social security. Moreover, he argued that more situations required legislation because, for instance, childcare was provided by institutions instead of family and friends. Additionally, basic moral principles, such as principles of good governance, were codified more frequently.20

2.2. Developments in tax law

From the 1970s, more taxpayers started to become interested in reducing their tax burden and avoid tax. Especially in European countries, taxpayers started to consider public finances and taxes as a responsibility of the “government” and did not identify with it. People became alienated from the government, which became an unidentified opponent instead of a representation of the community (“us” became “them”). In the United States, there was already a long history of resentment and distrust towards the government and the IRS.21

In 1977, a Dutch professor published a book called Only Fools Pay Tax.22 In this book, he discussed some loopholes in the Dutch tax systems and exposed the fact that tax could be easily avoided with advanced and artificial legal structures. This book can be said to reflect the general opinion of society: at that period of time, tax avoidance was considered smart. This certainly applied for the Netherlands, but probably equally applied for other Western

16. F. Furedi, Why is Authority Always a Problem?, Thomas More speech (Radboud Universiteit Nijmegen, 11 Nov. 2009).
18. Van Hout, supra n. 13, at 35.
19. The author defines this as an increasing amount of rules and legislation between the government and citizens, which increases bureaucracy and legalism.
21. See, for example, D.A. Burnham, A Law Unto Itself: Power, Politics, and the IRS (Random House 1989). This is not only based on the literature but also on the answers received during the interviews taken for this study in the United States.
22. F. de Kam, Betalen is voor de dommen. Over de miljardenmazen in ons belastingstelsel (Bert Bakker 1977).
countries. This is in contrast to the social movement of today, where the general idea is that taxpayers have to pay their “fair share” to the community.

Around the 1960s and 1970s, tax law also became a separate discipline or specialization at universities such as Universität Wien, Boston University, Oxford University and Tilburg University. Students were graduating from these universities as highly educated tax lawyers and were assertive towards the established order. They enhanced accounting and law firms, which quickly grew into large companies such as PwC (PriceWaterhouse Coopers) and EY (Ernst & Young). To contend with tax evasion and (aggressive) tax planning, it was required that governments kept amending their tax legislation. Furthermore, from the 1980s the incorporation of tax expenditures in the tax system became popular, which made tax legislation even more complex than it already was.

All of the aforementioned social developments required the tax authorities to change as well. Tax administrations such as those in Canada and the Netherlands were reorganized and a so-called “client-centred” approach was introduced. This was probably also influenced by the “management thinking” of the 1980s, with the result that “taxpayers” transformed into “clients”. In the literature, some authors have even stated that this new approach stimulated taxpayers to start behaving as defensive clients; however, the author doubts this interpretation because conflict behaviour is influenced by many more elements, such as nurture and nature, level of education, affect intensity and the ability to cope with (legal) procedures.

In the last few decades, many Western countries have had to deal with an increasing amount of legal disputes in all areas of law. Consequently, the processing time of lawsuits has extended and many courts have had to deal with backlogs. In the United States, this development started as far back as the 1960s and 1970s. Liebermann called this the “liti...

23. There are several theories available as to why tax avoidance increased at that time and there are even theories that refute that the tax morale decreased at that time. The attitude of taxpayers therefore reflects probably only a part of the reasons because some countries also increased the tax rates, implemented a self-assessment system or the amount of taxpayers increased. See, for example, J.A. Roth, J.T. Scholz & A. Dryden Witte eds., Taxpayer Compliance (vol. 1, University of Pennsylvania Press 1989).

24. Universität Wien was incorporated in 1968 by the previous tax officer, Anton Lager, first professor of financial law. It was later called the Institute for Austrian and International Tax Law. See https://www.wu.ac.at/taxlaw/institute/history/.

25. Boston University’s Graduate Tax Program was established in 1959. See https://www.bu.edu/law/current-students/ilm-student-resources/graduate-tax-program/.

26. Tax Law has been taught at Oxford University since the 1960s, when Professor Ash Wheatcroft first introduced the Personal Tax course onto the Bachelor of Civil Law. See https://www.law.ox.ac.uk/research-subject-groups/tax-law.

27. The Fiscal Institute at Tilburg University was a new initiative for a cooperation between lawyers and economists in the area of tax in 1968. N. Nobel, 50 jaar Nederlandse Orde van Belastingadviseurs, WFR 2004/975 (2004).


30. WRR, supra n. 15, at 101.


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People relied too much on the legal system; thus, self-reliance in dealing with disputes decreased. Moreover, it became recognizable that the outcome of lawsuits did not necessarily resolve the conflict of the disputants. In order to reduce the judiciary caseload, scholars began to search and experiment with ADR. The aim was to design a dispute resolution procedure that was more efficient and informal (“de-juridification”). In addition, it was crucial for disputants to retain responsibility for and control over (resolution of) the conflict in order to allow them to elucidate and consequently resolve issues important to them. This improvement in dispute resolution was thought to potentially lead to a more efficient way to deal with legal disputes, and perhaps result in a decrease in the number of appeals or the courts’ caseloads.

2.3. Development of ADR

In the period 1975-1982, several experiments started with ADR in the United States. These experiments were focused on reducing the time and costs of litigation and providing more responsive and effective dispute resolution. Several professors, among whom R. Abel, L.L. Fuller, F.E.A. Sander and R. Fisher, were of the opinion that dispute resolution could be improved by combining theories from different scientific disciplines, such as mathematics (for example, specific game theory), anthropology (dispute resolution in traditional cultures), psychology (conflict behaviour) and social psychology (perceived justice and fairness). In addition, Sander stated that too many disputes were brought to court in the United States, and that disputants had to be taught and guided in how to resolve their conflicts privately.

He stated that disputants must take responsibility to resolve conflicts, instead of the government, and suggested that more efficiency could be achieved if different disputes (legal, factual, emotional, etc.) were allocated to the most appropriate procedure. This idea led to the implementation of the Multi-Door Courthouse in the American court system. This is also one of the reasons why ADR is sometimes called “appropriate dispute resolution”.

35. Van Hout, supra n. 13, at 53-55.
41. Sander, supra n. 38, at 5.
42. However, Sander also mentioned that the Multi-Door Courthouse is a simple idea that is difficult to execute in practice. F.E.A. Sander & M. Hernandez Crespo, A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse, 5 U. St. Thomas L. J. 3, at 665 (2008), available at http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1164&context=ustlj.
instead of “alternative dispute resolution”. Fuller stated that the most important aspect of dispute resolution is to restore the relationship between disputing parties:

[mediation] reorient[s] the parties toward each other, not by imposing rules on them, but by helping them to achieve a new shared perception that will redirect their attitudes and dispositions toward one another.  

Diamond described this way of dealing with disputes as typical for traditional societies. He criticized the retro-perspective approach of the American judiciary system, which focuses mainly on two questions: “what happened?” and “who is to blame?”

He stated that Western countries ignore the restorative aspect in legal procedures, such as “what can be done to repair the harm done?” He was of the opinion that dispute resolution procedures could be improved if they were more prospective than taking a retro-perspective. This prospective approach to mediation will be explained in section 3.4.

2.4. Development of ADR in tax law

In the 1990s, ADR was institutionalized in the United States due to Congress’ acceptance of the Civil Justice Reform Act. This act obliged every US District Court to design a programme to decrease the costs of litigation and reduce delays. In the same year, Congress also approved the implementation of the Administrative Dispute Resolution Act (ADRA) in order to stimulate ADR at government level. The goal of the ADRA was to stimulate ADR specifically by means of a neutral third party. ADR was not only a response to increasing litigation costs, but was also a specific response to the “generally unsatisfactory results” of litigation. Due to ADRA, the IRS started to offer mediation in various forms. The IRS hoped that the use of mediation would improve the taxpayer’s view of the tax collection system, and improve the voluntary compliance of taxpayers.

In Canada, in April 1997, the Minister of National Revenue (hereinafter “Minister”) announced the Appeals Renewal Initiative (ARI) after Revenue Agency client surveys had revealed that the objection procedure was not widely perceived by taxpayers as impartial, timely and objective. The ARI was therefore designed to instil greater public confidence in the objection procedure by improving transparency and increasing the accessibility of

45. J. Diamond, *The World until Yesterday, What Can We Learn from Traditional Societies?* at 123 (Viking Penguin 2012). The original quotation is: “who did it” instead of “who is to blame”; however, it is the author’s opinion that the latter is in fact a better reflection of what Diamonds meant.
46. Id., at 86–88.
48. Title 5 USC, § 571 et seq.
49. Congress was of the opinion that litigation was time-consuming and expensive. Furthermore, litigation jeopardizes the mutual relation. Therefore, Congress stated that: “federal agencies [should] avoid these problems by offering prompt and inexpensive administrative processes for resolving disputes; yet over the last 30 years, agency processes have grown more formal, costly and time consuming”. See Report of the Chairman, Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, *IRS Initiatives to Resolve Disputes Over Tax Liabilities* (May 1997) (obtained by combining the Access to Information Act and the Freedom of Information Act (FOIA)).
50. A.S. Wei, *Can Mediation be the Answer to Taxpayers’ Woes?: An Examination of the Internal Revenue Service’s Mediation Program*, Ohio State Journal on Dispute Resolution, at 549 (2000).
appeals officers for various questions without changing the statute.\textsuperscript{54} Furthermore, the ARI entailed a study about ADR in tax disputes.\textsuperscript{55} The involvement of a third party between taxpayers and appeals officers was considered a first step to improving the objection stage.\textsuperscript{56} This third party could not be an arbitrator, since the Statute did not grant him the authority to assess the liability of a taxpayer. This would require an amendment of the statute, which was considered undesirable within the scope of ARI. Moreover, if the position of an arbitrator were introduced into the statute, it would be too similar to that of a judge, which was considered a drawback. Since arbitration could not be adopted without modification of the statutes, mediation was considered the best alternative for tax cases,\textsuperscript{57} provided that the mediators would be completely independent from the Minister. Therefore, a joint committee recommended a two-year pilot project to test the effectiveness of mediation. In order to reduce the scope of the pilot project, it was suggested to limit it to income tax objections.\textsuperscript{58,59}

In the Netherlands, the implementation of mediation started with research about the future of the Dutch democratic constitutional state (\textit{De toekomst van de nationale rechtsstaat}) in 2002. In this study, the researchers recommended that the government had to redirect mutual responsibility between citizens and the government.\textsuperscript{60} The government needed to reduce its role in order to deal with the citizens’ declining confidence in it.\textsuperscript{61} One of the recommendations to accomplish this was to make members of Dutch society responsible for their own dispute resolution. This recommendation was followed by the Dutch Cabinet.\textsuperscript{62} Consequently, the government started to promote ADR.\textsuperscript{63} At that time, the Ministry of Justice in the Netherlands also aimed to improve its court system, and noticed that mediation had been successful in the United States and Canada.\textsuperscript{64} Therefore, the Dutch government sent a team of researchers to the United States to investigate mediation, the Multi-Door Courthouse and the American system of legal aid.\textsuperscript{65} Based on this research, the

\begin{footnotesize}
\item\textsuperscript{54} CRA, \textit{supra} n. 29, at 97-107.
\item\textsuperscript{55} Olsen, \textit{supra} n. 8, and \textit{Conference Report 1997, supra} n. 8, at 12:1 et seq.
\item\textsuperscript{56} E. Kroft, \textit{Dealing with Tax Officials: Selected Issues in Administration, Enforcement and Appeals} at 128 (McCarthy Tétrault LLP 2010), available at http://www.cba.org/cba/cle/PDF/tax10_Kroft_TaxDispute_paper.pdf. Tax Law Review Committee, \textit{Interim Report on the Tax Appeals System}, Institute for Fiscal Studies, at 21 (1996): ‘If an internal review procedure is to function effectively, it must function, and seems to function, as a genuine ‘hard look’ at the relevant law and facts by someone not previously involved in the case and who is wholly independent of the original decision maker’. Furthermore, the right to an independent judgment is described in the Declaration of Taxpayers Rights (a circular from the CRA on the relationship between taxpayers and the CRA).
\item\textsuperscript{57} Jaglowitz, \textit{supra} n. 53.
\item\textsuperscript{58} For the first year only in an appointed area of Canada, to limit the costs of travelling.
\item\textsuperscript{59} Olsen, \textit{supra} n. 8, at Appendix A. Documents developed in Phases 1 and 2 of the CRA’s Mediation Pilot (obtained via an Access to Information request).
\item\textsuperscript{60} WRR, \textit{supra} n. 15, at 110 and 261.
\item This development is called \textit{terugtrekende overheid}, which is translated as a “distancing government”.
\item The Dutch Cabinet comprises ministers and state secretaries. For more information about the Dutch Parliament, see www.houseofrepresentatives.nl.
\item The response of the Cabinet to the research of the WRR (\textit{De toekomst van de nationale rechtsstaat}) was published in a letter on 27 Oct. 2003, no. 03M60939. \textit{See also} the report \textit{Andere overheid}, which reflects the vision of the Cabinet consisting of CDA, VVD, and D66, published in 2003, regarding the recommendations of the \textit{Bevrijdende kaders} of the Council for Social Development and Departmental Task Analysis (Raad voor Maatschappelijke Ontwikkeling en de Departementale takenanalyse) of the Ministry of Finance of 20 Sept. 2005, PAOF 2005-00061.
\end{footnotesize}
Dutch Ministry of Justice started several pilot projects with mediation in the Netherlands, also at the tax court. The DTA (via the Ministry of Finance) felt that it also had to start a pilot project on mediation at the assessment and objection stages. The tax authorities felt that it was more efficient to prevent appeals via mediation than to solve them via mediation at the tax court. This was also one of the main reasons why the Canadian tax court opted not to implement court-encouraged or court-engaged mediation. The pilot project on mediation of the DTA in the Netherlands started simultaneously with the pilot project of “horizontal monitoring”. Both pilots had the goal of investing in mutual trust regarding the relationship with taxpayers in order to create more cooperation and compliance. Due to the implementation of horizontal monitoring, researchers consider the Netherlands to be one of the first countries to utilize an “enhanced relationship” as the new approach of tax administrations in dealing with taxpayers. In addressing disputes, mediation had to improve the taxpayer’s perception of fairness, which was intended to contribute to taxpayers’ voluntary compliance.

Belgium took a different approach, and started by implementing legislation for mediation in 2005 for private law (such as family and commercial law). In the Act of 25 April 2007, Belgium also introduced mediation in tax law. One of the most important reasons to implement mediation in tax law was to decrease the enormous volume of tax appeals and the workload of the judges of the courts. Maus mentioned that Belgian (tax) courts (first instance) received 4,000 cases per year and had a backlog of 17,000 cases in 2003. This meant that the workload of judges was far too high. Furthermore, it was important to reduce the costs (of the taxpayers and tax administration) and the processing time of these lawsuits. Belgium additionally hoped that mediation would be a better way to address the complexity of tax legislation and would stimulate voluntary compliance.

66. Tax Court Bench and Bar Committee, Minutes of Meeting of 12 July 2002 in Ottawa, Ontario.
69. See Letter of the State Secretary for Finance, supra n. 6.
73. BE: Wetsontwerp houdende diverse bepalingen (IV) (Draft law regarding several provisions), Parlementaire stukken Kamer no. 51 (2006/2007), 2873/001, at 87.
76. Hensen, supra n. 71, at 24.
77. BE: Parlementaire stukken Kamer (2006/2007), 2873/019, at 21. This was criticized by Maus because the government mentioned in this respect that taxpayers had to accept their tax burden: “de noodzaak om de belastingplichtigen akkoord te laten gaan met de heffingen waaraan zij onderworpen zijn” (“it is necessary to make the taxpayers agree to the taxes they are due”). See Maus, supra n. 74, at 16.
3. The Principles of Mediation
3.1. Introduction

Many researchers have argued that mediation has ancient roots. For example, Swartz and Miller stated that the development of legal systems started with mediation, where an independent third party intervenes in a conflict to help solve it.78 Nelson stated that settling disputes and enforcing decisions79 was one of tasks of the legal institutional pyramid in Ancient Mesopotamia.80 Roebruck established that in the Paleo-Assyrian period (1900-1800 BC), dispute resolution81 started with a confrontation between the disputing parties and a referee, and that this referee had to facilitate conciliation,82 similar to mediation.83 Pei described mediation as a method of dispute resolution that is typical for Chinese culture, since litigation is considered as vulgar.84 Some Dutch researchers have stated that mediation is a typical Dutch approach, based on the existence of mediation in Dutch legal systems in the late Middle Ages.85 The author is of the opinion that mediation can be found in all periods of time, in countless varieties, cultures and for all kinds of disputes.86 In the Netherlands and Belgium, it is even a linguistic issue because “mediation” can be translated as bemiddeling in Dutch, but while Belgium chose to use the Dutch word bemiddeling87 in its legislation in 2005, the Netherlands introduced the English term88 as a new Dutch word in 2005.89

Mediation as we know it appears to originate in the United States as a response to the aforementioned social developments. Its principles and characteristics make it distinctive from other (ancient) forms of dispute resolution. Principles are in general normative, and the inner value of the principles of mediation are mostly also interconnected with social developments, as mentioned in section 2. (such as increasingly egalitarian relationships). The characteristics of mediation separate it from other forms of dispute resolution and support the principle. When a characteristic is respected, the underlying principle is respected as

81. Commercial disputes.
83. Roe buck, supra n. 78, at 275 et seq.
86. Van Hout, supra n. 13, at 64-75.
87. BE: Wet van 21 februari 2005 tot wijziging van het Gerechtelijk wetboek in verband met bemiddeling, BS 22 Mar. 2005 (general act regarding the implementation of mediation in the law) and Wet van 25 april 2007. L. Goovaerts, Alternatieve geschiloplossing: bemiddelaars en onderhandelaars aan tafel (Auxis 2000) argued that mediation (bemiddeling) can also be recognized in much older dispute resolution procedures in Belgium.
89. Bemiddeling and mediation as introduced in Belgian and Dutch tax law are based on the same principles as described in secs. 3.2. to 3.7. For a comparison, see Hensen, supra n. 71, at 23.
well. Therefore, the author does not draw a strict dogmatic distinction between the principles and characteristics of mediation. The following sections will discuss the principles of mediation.

3.2. Facilitative

In section 1.1., it was stated that mediation is a facilitative process in which disputing parties engage the assistance of an impartial mediator, who has no authority to make any decisions and solely helps them to resolve their dispute without adjudication. In this definition, the word facilitative is important. A mediator does not decide; he just facilitates communication between the disputing parties with the aim of respecting their autonomy. This means that the parties do not attribute the decision over the case to a third party, but the disputing parties remain in control regarding solution of the conflict. It promotes voluntary decision-making by the parties of the dispute. Thus, mediators, unlike a judge (or another third party), do not have the authority to impose or determine a result in a controversy.

The facilitation is without adjudication, which can be illustrated as follows:

**Figure 1 – Facilitation versus adjudication**

The autonomy of the parties is the starting point and the mediator simply facilitates between the parties on an equal footing. This is also the reason why mediation is considered inappropriate for legal interpretation disputes. This approach of dispute resolution fits with an egalitarian and individualist society with low power distances.

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91. Model Standards of Conduct for Mediators, at Preamble and Standard I (2005), adopted and approved in 2005 by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution [hereinafter Model Standards of Conduct for Mediators].
93. Id., at 161-164.
94. See sec. 2.
3.3. Self-determination

In mediation, it is crucial that the conflict and the solution to the conflict remain under the control of the parties who had the conflict. The autonomy of the parties and voluntariness are therefore fundamental in mediation. The American Bar Association (Section of Dispute Resolution) created the Uniform Mediation Act and Model Standards of Conduct for Mediators to increase uniformity in law among states and confidence in mediation. Standard I of the Model Standards defines self-determination as follows:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

This definition is a very good example of the various elements of the self-determination principle of mediation. First, self-determination means that the parties are free to make their own choices ("procedural self-determination") regarding using mediation, and selecting the mediator and the conditions to be included in the mediation agreement. Procedural self-determination also means that parties may withdraw from mediation at any time. Mediation is a voluntary procedure, although some commitment is required. The voluntariness is related to the idea that an agreement is only closed voluntarily if there is no undue pressure to close it. Brown and Marriot stated that dispute resolution procedures that impose sanctions on parties if no agreement is reached cannot be associated with mediation, as this undermines the self-determination of the parties, which they consider one of the fundamental principles of mediation. This is even established in the European Directive on Mediation. However, there is disagreement on this point in the literature, and some legal systems (for example, the province of Ontario in Canada) offer mandatory mediation in certain civil actions. Italy even has mandatory mediation for tax disputes.

96. Model Standards of Conduct for Mediators, supra n. 91.
97. According to the first standard in 1994: "Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time".
98. Van Hout, supra n. 13, at 41 (in which the author introduced this term for the first time; in Dutch: formele zelfbeschikkingsrecht).
100. Brown & Marriot, supra n. 5, at 162-163.
102. See, for example, E. Gathier, De Mediationclausule. Afdwingbaarheid van de mediationclausule at 51-58 (Sdu Uitgevers 2009).
104. IT: Decreto legislativo del 31 dicembre 1992 [Legislative Decree of 31 Dec. 1992], n. 546, art. 17bis. For assessments not exceeding EUR 20,000.
The self-determination principle also indicates that parties are autonomous regarding the substantive outcome of mediation (“substantive self-determination”\textsuperscript{105}). Disputing parties maintain control regarding resolution of the conflict at any time. The idea behind substantive self-determination is that parties are capable of finding the best solution to the conflict. Disputants only need some guidance because almost all people in conflict situations are biased regarding their conflict and are convinced of their own right. The more a conflict escalates, the more (overly) convinced they become. Therefore, the mediator should empower the disputants. Additionally, it is important to allow disputants to speak for themselves, with the goal of determining an outcome that meets their needs.\textsuperscript{106} Basically, the presumption is that disputing parties are capable enough to solve their problems. This assumes that the parties are reasonably well informed about alternatives compared to the offered solutions\textsuperscript{107} (informed consent)\textsuperscript{108} and are thus capable of making informed choices.\textsuperscript{109}

3.4. Underlying interests

The main purpose of mediation is to restore the relationship between the disputing parties. This is one of the reasons why underlying interests can be considered an important principle of mediation. This principle is a response to the increasing amount of legislation (juridification), and the sometimes unsatisfactory outcomes of lawsuits. Furthermore, this principle is characteristic of modern forms of mediation and separates mediation from ancient forms, from legal procedures and from other (A)DR approaches.\textsuperscript{110} Disclosure of the underlying interests is essential because it shows the true reason for a certain (legal) position or opinion. A (legal) position or opinion is considered a self-chosen solution, but other solutions may also be appropriate. The mediator focuses on underlying interests, such as desires and concerns;\textsuperscript{111} this inevitably also means that taxpayers’ legal positions (as a starting point) are ignored. In mediation, the mediator does not seek the truth. Mediators are interested in the real issues at stake, such as personal feelings of mistreatment, legal uncertainty, financial problems, etc. Mediation is therefore a prospective approach towards solving disputes, involving “what has to be done in order to deal with the problem”. This is almost the opposite of a legal procedure, in which the conflict and the facts first have to be translated into legal terms. When proper legal terms are found, the law provides the solution. This procedure also narrows the range of (relevant) facts. Furthermore, it is a retrospective approach

\textsuperscript{105.} Van Hout, supra n. 13, at 41 (in which the author introduced this term for the first time; in Dutch, materiële zelfbeschikkingsrecht).


\textsuperscript{107.} Sandel, supra n. 99, at 95–96.

\textsuperscript{108.} A.F.M. Brenninkmeijer et al. eds., Handboek mediation at 30 (Sdu Uitgevers 2013).

\textsuperscript{109.} Model Standards of Conduct for Mediators, supra n. 91. These standards also state that a mediator should make the parties aware of the importance of consulting a professional in order to help them make informed choices. The author questions whether this is completely in accordance with this principle of mediation.

\textsuperscript{110.} As discussed in sec. 3.1.

\textsuperscript{111.} This is based on research by the Harvard Negotiation Research Project (sometimes also called the Harvard Model). This Model is occasionally associated with facilitating mediation, which is based on four principles of negotiation: separate the people from the problem, focus on interests instead of positions, invent options for mutual gain, and insist on using objective criteria (this type of mediation will be explained further in sec. 3.7.). For more information about these principles, see also R. Fisher & W. Ury (and, for the revised editions, B. Patton), Getting to Yes, Negotiation Agreement without Giving In (Random House Books 2012).
Is Mediation the Panacea to the Profusion of Tax Disputes?

3.5. Impartial and independent mediator

The participation of a third party in a conflict changes the dynamic of the conflict. This means that it can influence whether the conflict (de-)escalates or not. The acceptance of this third party in a conflict is related to the confidence of the disputing parties in that person. Confidence is usually based on the independent position of that person, and his expertise or personality, knowledge of disputes, skills, character and independence.

Mutual trust in the mediator is important because disputing parties usually distrust each other. Therefore, it is common in disputes for the intervention between two disputing parties to be carried out by an impartial third party. Impartiality normally means that the third party is independent from either of the involved parties, is neutral, does not help or support one of the parties, has no interest in the outcome, has no conflict of interests, etc.

3.6. Confidentiality

When using mediation to solve conflicts via the underlying interests of the disputants, confidentiality is considered an important condition. Confidentiality has a supportive function to underlying interests and ensures a trustful environment for the disputants. It must guarantee that the parties can speak freely and reveal their concerns and interests and should make parties more open and eager to disclose information. The frankness of parties in mediation is key to the success and rise of mediation. In order to ensure that people are able to speak freely, mediation agreements usually contain a confidentiality provision.

3.7. Mediation techniques and procedure

Characteristic of mediation is the use of advanced techniques in a certain order to solve the dispute. Mediators use these techniques to stimulate the de-escalation of a conflict and

112. See also sec. 2.
117. For more details about the differences between “independent” and “impartial”, see H. Hung, Neutrality and Impartiality in Mediation, 5 ADR Bulletin 3 (2002); Brown & Marriot, supra n. 5, at 159-160.
to resolve it. This requires a high level of knowledge about disputes, and skills to deal with conflicts. Mediators therefore acquire knowledge about the development of disputes and the behaviour of people in conflict situations, and need to practice their skills during their education.\textsuperscript{119}

### 3.7.1. Mediation techniques

Regarding mediation techniques, there are several conflict intervention styles, which are divided into schools with either a process focus or a substantive focus.\textsuperscript{120} Process-focused schools (“process control”) are focused on the process and empowerment of the parties. Mediators of these schools believe that the disputing parties solely need assistance in the process of solving the dispute. Facilitative and narrative mediation are well-known examples of process-focused schools. Substantive-focused schools (“outcome control”) are focused on reaching a settlement. Therefore, a mediator who practices this school is much more directive and even gives advice about a possible solution to the conflict.\textsuperscript{121} Evaluative mediation is an example of a substantive-focused school.\textsuperscript{122} Facilitative mediation is one of the most commonly promoted styles\textsuperscript{123} and will be used here to explain the process of mediation.\textsuperscript{124} Facilitative mediation is generally used for impersonal disputes.

\begin{itemize}
\item \textsuperscript{119} Many mediators are members of professional associations or ADR associations, such as the ADR institute of Canada, the Dutch Mediation Association, the International Mediation Institute (IMI), etc. These professional organizations usually require a minimum amount of practice per year to provide professional recognition (for instance, as chartered or registered mediators), which is sometimes also a (legal) requirement to act as a mediator in court-encouraged mediations. The legal status of these institutes is sometimes unclear, but most have disciplinary rules to protect the profession of mediator. The requirements for chartered mediators are published at http://adric.ca/pdf/CMedCriteriaSept2011updated2013July9_000.pdf; the requirements for MfN are published at https://mfnregister.nl/login-registermediator/onderhoudseisen/ (accessed on 1 Dec. 2017); and the requirements for IMI mediators are published at http://www.imimization.org/. The DR section of the American Bar seems to support local initiatives on credentials for mediators, but does not support a nationwide credential system for mediators. This is published in American Bar Association, Alternative Dispute Resolution Section of the American Bar Association: Final Report (2012), available at http://www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf.
\item \textsuperscript{120} Many more theories can be used to categorize the intervention styles of mediators. However, this division is a common one. The term used in this publication is a derivative of the classification of C.W. Moore, \textit{The Mediation Process: Practical Strategies for Resolving Disputes} (Jossey-Bass 2014); see Brown & Marriot, \textit{supra} n. 5, at 169-174, for the differences in classification.
\item \textsuperscript{121} Evaluative mediation seems to have been developed around 1980 in the United States when courts referred cases to a third knowledgeable person who provided an expert review of the case in order to stimulate early settlements and avoid litigation costs.
\item \textsuperscript{122} Moore, \textit{supra} n. 120, at 2014.
\item \textsuperscript{123} J. Freerick, \textit{Towards Uniform Standards of Conduct for Mediators}, South Texas Law Review 38, at 458 (1977).
\item \textsuperscript{124} In sec. 5.7., the author will also discuss evaluative mediation.
\end{itemize}
3.7.2. Mediation procedure

In mediation, the procedure is connected to conflict behaviour. In facilitative mediation, the mediator uses a certain order to solve a dispute: opening, de-escalation, communication and problem-solved cooperation. This procedure will be described hereinafter.

3.7.2.1. Opening

Normally, mediation starts with an opening stage in which the mediator introduces himself and explains the procedure using a mediation agreement. He explains, for example, the voluntariness of the procedure, the required commitment of the parties and the confidentiality provisions of the mediation agreement. It is common to use a certain standard mediation agreement; however, as explained in section 3.3., procedural self-determination requires that parties are free to create their own procedural rules as long as the basic principles of mediation are retained. Following opening of the mediation procedure, the mediator will proceed to the conflict diagnosis and the de-escalation of the conflict.

3.7.2.2. Conflict diagnosis and de-escalation

Disputants do not always behave in a rational way, even in impersonal disputes, such as tax conflicts. Certain human behaviour in conflict situations is common even if experienced lawyers are involved. First, people in general aim towards consistency. This means that it is natural for people to search for arguments that confirm their preconceptions. Parties tend to focus on the arguments that confirm their opinions, and ignore counterarguments. This is where confirmation bias starts to develop. Parties create a bias and become “compartmented” in their conflict, which means that they sometimes even move away from the true reasons behind the dispute. Glasl developed an escalation ladder to illustrate the behaviour of people in disputes. An example of human behaviour Glasl described is when people who are involved in a dispute describe it in a way that makes the listener agree with them and confirm their statements. This is a way to get people on their side. Many mediators use Glasl’s model, or variations of it, to recognize the behaviour of the disputants and to identify the stage of escalation they are in. This is called a conflict diagnosis. This diagnosis is also helpful to judge whether mediation is a suitable way to resolve the dispute. If a dispute


127. Confirmation bias is a commonly described phenomenon in social psychology. D. Kahneman & A. Tversky were among the first researchers to describe cognitive biases. See, for example, D. Kahneman, P. Slovic & A. Tversky, *Judgment Under Uncertainty: Heuristics and Biases* at 149 (Cambridge University Press 1982). For a simple explanation of confirmation bias, the author refers to D. Kahneman, *Thinking, Fast and Slow* at 81 (Allen Lane 2011).

128. F. Glasl, *Konfliktmanagement. Diagnose und Behandlung von Konflikten in Organisationen* at 423 (Haupt 1980); in particular, it is important to analyse this model using the explanation in the book and Glasl’s continued research.

129. For example, H. Prein, *Conflicten*, in Breninkmeijer et al. eds., supra n. 108, at 89-94. For international references to the theory of Prein and Glasl, see, for example, J. Bercovitch, *Resolving International Conflicts, Theory and Practice of Mediation* at 243 (Lynne Rieder Publishers 1996).
has escalated too much, mediation will probably not resolve it;\textsuperscript{130} it is considered useless to add new arguments to a dispute that has already escalated too much since most people stop listening to the opponent once a certain escalation stage is reached. Adjudication is then the most appropriate procedure to end the dispute.

Glasl’s escalation ladder has nine stages that can be divided into three phases. Every stage represents a certain human behaviour and each phase represents a general experience of the disputing parties.\textsuperscript{131} Basically, it implies that disputing parties in phase 1 consider their dispute to be a problem. In phase 2, the mutual relationship is also the source of the tension, for instance because the conflict infects the position of the parties. This means that (one of) the parties also use(s) emotional arguments, more people (besides the original disputants) get involved in the dispute and arguments are starting to repeat. In phase 3, the disputing parties have lost their hope in finding a mutual solution and only want to end the conflict. Ultimately, people can reach a stage in which they want to end the dispute regardless of outcome.\textsuperscript{132}

In phase 1, negotiation can solve the dispute; in phase 2, the involvement of a third party is required to solve the dispute; and in phase 3, adjudication will solve the dispute. Glasl’s stages can be reformulated as follows:

\textit{Figure 2 − Conflict intervention model}

<table>
<thead>
<tr>
<th>Phase 1: Conflict considered a problem</th>
<th>Phase 2: Conflict becomes personal (there is tension in the mutual relationship)</th>
<th>Phase 3: Conflict is mainly concentrated on winning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiation</td>
<td>Mediation</td>
<td>Adjudication</td>
</tr>
<tr>
<td>No assistance of a third party</td>
<td>Assistance of a third party who facilitates</td>
<td>Assistance of a third party who decides for the parties</td>
</tr>
<tr>
<td>Parties are capable of dealing with the conflict</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The mediator normally starts by trying to de-escalate the dispute, because this enables resolution of the conflict. This approach differs from the approach of a lawyer because the mediator uses emotions of the disputing parties, such as anger or frustration, to resolve the case and reveal the underlying interests at stake. On the other hand, lawyers eliminate the emotions of the disputing parties in order to resolve the dispute based on the law. For that reason, most lawyers assume that people in conflict situations are rational (in their behaviour and in their way of thinking), while psychologists think that people in conflict situations are far from rational.

3.7.2.3. Communication

After the dispute has been de-escalated, the mediator starts to stimulate the parties to change their perspective on the conflict and reflect on their position in a more neutral way.

\textsuperscript{130} Prein, \textit{supra} n. 129, at 93. In phase 3, all parties have given up hope in solving the conflict; mediation is not really possible in this stage and other interventions are more appropriate to solve the dispute.

\textsuperscript{131} Glasl, \textit{supra} n. 128, at 232-326.

\textsuperscript{132} Id., at 317.
As noted above, parties are usually somewhat blinkered by their position in the conflict, and it is important that they get a more objective perspective on their position, for example through the realization that they could lose the case. The mediator assists the disputants in (empathically) understanding the opponent’s way of thinking, the power of their point of view and the emotional force with which they believe in it. Most people are realistic in their thinking, but in a conflict situation they are not always sufficiently aware of the perspective of the opponent; they see only what they want to see. Therefore, sharing each other’s interests can reveal the different perspectives and open the door for negotiation. Moreover, it contributes to the way people experience justice because it enhances the main elements of procedural and interactional justice: let people tell their story (“voice”) and recognize their perspective (“recognition”) and “active listening”.

3.7.2.4. Problem-solving

After the above stages, the mediator will try to identify, isolate and (re)frame the issues. He then determines which issue needs to be discussed first; which interests are mutual, which can be united and which will remain separated. Subsequently, the mediator can help to generate alternatives to deal with the issues at stake. In the following stage, the mediator will verify the generated options with the parties and move towards an agreement. In case an agreement is reached, the mediator will draft a settlement agreement. If no agreement is reached, the mediator will summarize the (remaining) issues and discuss the results of the mediation session. Normally, mediation clarifies the underlying interests of the parties and the issues that led to the conflict, even if no agreement is reached. The mediation procedure is closed by using common rituals such as shaking hands, offering drinks, etc. The more personal and emotional the conflict, the more extensive the rituals. Tax disputes are usually impersonal, and require less extensive rituals than personal disputes.

Given the above, mediation is a facilitative procedure in which the mediator tries to resolve a dispute with full respect for the autonomy of the parties. The mediator is independent and impartial and has no authority to make a decision. The disputants remain in control of the mediation procedure (formal self-determination) and regarding the substantive solution of the dispute (substantive self-determination). The mediator uses certain techniques, skills and procedures related to conflict behaviour, with the aim of revealing the underlying interests and eventually solving the dispute. Therefore, it is important that the disputants can speak freely and openly. Consequently, the mediation is confidential in order to guarantee such a trustful environment.

133. Fisher & Ury, supra n. 111, at 24-25.
134. This does not mean that a party must share the opponent’s point of view, but it is important that the other party understands it.
135. There are a number of studies about the influence of procedural justice on perceived fairness, but those of E.A. Lind also specifically mention the influence of “voice” and “recognition”. See, for example, E.A. Lind, Social Conflict and Social Justice: Lessons from the Social Psychology of Justice Judgements, Inaugural Oration for the Leiden University Fund Chair in Social Conflict (June 1995) and Interview of E.A. Lind in Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Prettig contact met de overheid, De legitimiteit van de overheid, aanvaarding van overheidsbesluiten & ervaren procedurele rechtvaardigheid at 40-45 (2013).
4. What is Different about a Tax Dispute?

Section 3. outlined the principles of mediation. This section analyses, from a multidisciplinary perspective, the differences between tax disputes compared to other disputes. This analysis will be used to research (in section 5.) how some countries have dealt with these differences when implementing mediation in tax law. This contributes to answering the subquestions in section 1.2.: how can the principles of mediation be applied for the best synergy with tax law?

4.1. General principles of tax law

Tax law differs from most other areas of law because resolution of the dispute has to be in accordance with the law due to the legality principle and the principle of equal treatment. The legality principle stipulates that all disputes between taxpayers and tax authorities fall within a legal relationship. The legality principle also limits the power of tax authorities and protects the taxpayers from arbitrariness. Therefore, the legality principle can reduce the authority of tax authorities to enter into an agreement with an individual taxpayer, because it would imply that tax is imposed otherwise than under the general rule of law.\(^\text{136}\) In case there is room to negotiate with tax authorities regarding the substantive tax liability, this is called discretionary authority or Feies Ermessen.\(^\text{137}\) Many countries leave some room for tax authorities to negotiate, mostly regarding the interpretation of facts. However, it is important to note that the borders of the discretionary authority can differ greatly from country to country, and even from tax official to tax official.\(^\text{138}\) For example, in Canada, saw off agreements (or split-issue agreements) where parties split the difference in valuation issues, are considered illegal\(^\text{139}\) because the valuation system has to be in accordance with the law.

In the Netherlands, on the other hand, these kinds of settlements are very common in valuation issues because they are seen as an interpretation of the facts.\(^\text{140}\) Another example can be found in the United States, were appeals officers have, in general, more discretionary authority than revenue agents\(^\text{141}\) because the former is also entitled to settle cases based on the “hazards of litigation”.\(^\text{142}\) This means that the appeals officer may look beyond the scope

\(^{136}\). Thuronyi & Espiejo, \textit{supra} n. 10, at 71.

\(^{137}\). H.D. van Wijk, W. Konijnenbelt, & R. van Male, \textit{Hoofdstukken van bestuursrecht} at 141-151 (Elsevier 2005). To reduce the size of this research, the author has simplified the more dogmatic and detailed analyses from this literature.


\(^{140}\). Commonly used agreements are “middelijke waarderingen” and some advanced price agreements. Legislation that applies in this respect for settlement agreements is NL: Burgerlijk Wetboek (Dutch Civil Code), 1992 [hereinafter BW] arts. 7:900 and 7:902. The specific regulation regarding the discretionary authority regarding settlement agreements between taxpayers and tax officials can be found in Besluit Fiscaal Bestuursrecht sec. 26, especially sec. 26.11. See, for literature about these kinds of settlements, E. Poelmann et al., \textit{Cursus Belastingrecht Formeel Belastingrecht} 2016 sec. 4.6.4. (Wolters Kluwer 2016) and L.A. de Bieck et al., \textit{Algemene wet inzake rijksbelastingen} sec. 6.3. (Wolters Kluwer 2015).

\(^{141}\). The IRS Examination Division is only entitled to settle cases based on the Internal Revenue Code. Wei, \textit{supra} n. 50, at 549 et seq.

\(^{142}\). IRS, Internal Revenue Manual (IRM) 1.2.1. Policies of the IRS Handbook, 1.8.4., Policy Statement P-8-47 (2); the Appeals Settlement Authority is “the only administrative function of the Service with the authority to consider settlements of tax controversies, and as such has the primary responsibility to resolve these disputes without litigation to the maximum extent possible”.

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of the legal merits of the claim itself and can even consider the (legal) costs of litigation when negotiating with taxpayers. Thus, since tax law is based on the legality principle, it implies that a tax official in mediation will have more legal restrictions to consider than, for example, individuals in a family law dispute, and the room to negotiate can differ a great deal between tax officials.

The legality principle is also relevant to ensure equal treatment. Equal treatment is important because if taxpayers are treated unequally, it can undermine the whole system of levying tax. In, for instance, contract law or family law, equal treatment is less important because it involves only individuals. In tax law, every outcome of a dispute has a certain precedent. This means that although it is inevitable that certain differences will always exist, situations where taxpayers in the same position are treated differently or feel as though they are being treated differently should be avoided. For example, if a taxpayer discovers he has closed a poor deal with the tax authorities compared to other taxpayers, he will feel misled. Similarly, if a taxpayer discovers that another taxpayer in the same position reached a favourable compromise, the former will feel deceived. Unequal treatment therefore jeopardizes the relationship with tax authorities in the long term and will negatively influence the level of compliance of taxpayers. This is not only important from a legal perspective, but also from a social psychology perspective because consistency in treatment (between taxpayers) positively influences the way taxpayers experience justice.

This implies that the law cannot be completely ignored in tax disputes. It remains the framework in mediation.

4.2. Power differences

In the previous section, the author mentioned that in tax law tax authorities are bound by the legality principle but the law also grants various administrative powers to the tax administration in order to levy tax. Most of these powers concern the (enforcement of the) cooperation of taxpayers with the tax administration in the various procedures necessary to apply tax law. Gribnau described these differences in power between taxpayers and a tax administration as a legal asymmetric relationship:

145. Bentley, supra n. 138, at 224, for a more precise analysis. Furthermore, the author mentions that countries can have a different ranking of the principles in tax law. In the Netherlands, for example, the principle of legitimate expectation (an administrative right) can sometimes overrule the legality principle if a settlement between the tax authorities and the taxpayer is not in accordance with the law and it was not readily apparent for the taxpayer that the settlement is contra legem ("zozeer" criterion). See, for more details about the requirements and the references to jurisprudence in the Netherlands, E. Poelmann et al., Cursus Belastingrecht, Formeel Belastingrecht 2016 sec. 4.6.2.G.b. (Wolters Kluwer 2016) and De Blieck et al., supra n. 140, at sec. 6.3. This is contrary to Canada where, for example, the Federal Court has confirmed in CA: FCA, Ludmer v. the Queen, 95 DTC 5311 that the CRA is required to follow the law absolutely, and varying and flexible principles such as principles of natural justice cannot breach it. One of the reasons behind this Canadian case law and the case law mentioned in supra n. 141 is to ensure equal treatment between taxpayers.
146. Van den Bos, supra n. 32, at 190.
asymmetry pervades the relationship between tax administrations and taxpayers, as the former has considerable unilateral powers to determine its legal relationship with citizens, particularly as to the tax liability of taxpayers.\textsuperscript{148}

Gribnau further recognized a practical asymmetry in power in the relationship between taxpayers and tax authorities.\textsuperscript{149} He argued that practical asymmetry in power is also to the advantage of the tax authorities because they have more expertise available, more experience in tax disputes and more information sources. In the literature, most authors have argued that the power in the legal relationship between taxpayers and tax authorities is distributed in favour of the latter. Great differences in power between conflicting parties are an indication that mediation is not a suitable procedure for the particular dispute.\textsuperscript{150} Power imbalances have a negative impact on the principle of self-determination of the parties.\textsuperscript{151} This can go in both directions. The most powerful party can utilize his power to influence negotiations in order to persuade or subjugate the opponent. This can be done by the former demonstrating his power and knowledge, dominating or manipulating the conversation, showing that he has better alternatives, etc. It is also possible that the less powerful party accuses the most powerful party of this behaviour in order to make the most powerful party provide some concessions or give in.\textsuperscript{152} The power differences in these circumstances are then used to compensate the lack of substantive legal arguments in order to force the other party into the desired agreement, which can ultimately lead to duress. Furthermore, if the difference in power is too big, it is even possible that one of the parties will be (too) reluctant to share his underlying interests with the most powerful party.

In tax law, there is always some power imbalance between the tax authorities and the taxpayer because the tax administration has most of the decision-making authority in the conflict. The tax officer is often the person who has the authority to assess or to decide in case of an objection. On the other hand, power balance is rather complex and can be influenced by many factors; it also goes beyond having more legal power, experience or knowledge of tax law. Power balance is also influenced by factors such as financial budget,\textsuperscript{153} personality, gender and culture.\textsuperscript{154} Power balance thus has more dimensions than administrative power, level of knowledge or expertise and it explains why even tax authorities are sometimes willing to settle tax cases. Power balance between tax authorities and taxpayers is often in


\textsuperscript{149} Id., at 207.

\textsuperscript{150} Brenninkmeijer et al. eds., supra n. 108, at 75; A.H. Santing-Wubs, Mediation in juridisch perspectief at 82 (Kluwer 2012).

\textsuperscript{151} Brenninkmeijer et al. eds., supra n. 108, at 75 and 125; M. Barendrecht, P. Sluijter & C. van Zeeland, Duurzame rechtsbijstand, Legal empowerment en microrecht, NJB 43 (2008).

\textsuperscript{152} See, for example, H. Prein, Besluitvorming, in Brenninkmeijer et al. eds., supra n. 108, at 125; H. Prein, Benaderingen en inspiratiebronnen van mediation at 35 (Sdu Uitgevers 2006).

\textsuperscript{153} See, in general, for example, O.M. Fiss, Against Settlement, 93 The Yale Law Journal 6, at 1076-1077 (1984). For tax cases, see, for example, C. Miller Parr, Why Post Appeal Mediation isn't Working and How to Fix it, Tax Notes 14, at 1113 (Sept. 2009). Miller Parr feels that power distance between tax officials and taxpayers is also to the advantage of the tax authorities, because tax authorities in the United States have no incentive to settle the case while taxpayers have much stronger motives to do so (for instance, to avoid litigation costs).

\textsuperscript{154} Kelly and Haynes created a list of factors based on empirical research that influences the power balance. J.B. Kelly, Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention, 13 Mediation Quarterly 2, at 85 et seq. (1995); J. Haynes, Power balancing, in Divorce Mediation: Theory and Practice at 285 (J. Folberg & A. Milne eds., Guilford Press 1988).
favour of the tax administration, but it is not always unbalanced. Furthermore, mediators are equipped to deal with power imbalances because in conflicts there is always power imbalance between parties; for instance, in a divorce where one party has more power than the other based on financial recourses or parental authority over the children. This means that mediation is not per se an inappropriate dispute resolution procedure due to the differences in power between the taxpayer and the tax authority. Nevertheless, in tax law the power imbalance is more significant than in other kinds of disputes.

4.3. Conflict behaviour and perceived justice in tax law

The average taxpayer is not usually extensively equipped with knowledge of tax law, nor able to judge the decision based on case law or interpretation of the law. Taxpayers evaluate the outcome of the decision (distributive justice\(^{155}\)) on a limited amount of sources.\(^{156}\) Van den Bos stated that people always seek information based on a drive to understand what happened. Therefore, people start searching for information that is available. This is mostly information they have obtained from the procedure or how they were treated, such as whether the tax official was friendly, listened to the disputant’s story, understood the disputant’s position, etc.\(^{157,158}\) This means that most taxpayers will use information about the procedure in his perception to judge the outcome of the procedure.\(^{159}\) In this psychological process, the taxpayer will take into account – or even solely base his opinion on – the way he has been treated by, and the quality of interaction with, the tax authorities.

In other words, as Van de Bos asserted, taxpayers that are not able to understand the merits of a tax decision start to focus on the procedure and base their judgement about their tax liability on how they were treated (procedural and interactional justice) instead of the outcome of the decision (distributive justice).\(^{160}\) Thus, if the average taxpayer with no knowledge of tax experiences the procedure as fair, he is more likely to also consider the outcome of the procedure to be fair. This applies in the opposite situation as well: if the procedure has


\(^{156}\) Kahneman, Slovic & Tversky, *supra* n. 127.

\(^{157}\) Moorman, *supra* n. 155, at 845, et seq. For the record, the author wishes to mention that procedural justice is not only about the procedure in a legal sense, but the perceived procedure in general.

\(^{158}\) This is also because this information is available sooner than the outcome of the procedure. Information that reaches people first influences them more strongly. The latter also applies in disputes. See K. van den Bos, R. Vermunt & H.A.M. Wilke, *Procedural and Distributive Justice: What is Fair Depends More on What Comes First Than on What Comes Next*, Journal of Personality and Social Psychology 72, at 95 et seq. (1997).


been experienced as unfair, it is likely that the outcome of the procedure will also be considered unfair.\textsuperscript{161} However, people from most Western cultures feel that they are driven by the substantive outcome of the procedure (distributive justice) instead of the interaction. This is called the “myth of self-interest”. People from Western cultures also consider it the norm to act in a way that maximizes their material interests,\textsuperscript{162} and are not aware that they are influenced so strongly by procedural justice.\textsuperscript{163} An enormous amount of research in social psychology has confirmed that civilians are strongly influenced by procedural justice.\textsuperscript{164} Lind even stated that procedural justice is one of the most influential elements in forecasting whether people accept the outcome of a legal procedure. He concluded that it makes no difference what kind of case it is, or the financial interests at stake.\textsuperscript{165}

Since the relationship between tax authorities and taxpayers is established via the law and legal procedures, such as the objection stage and appeals stage, it is important that these procedures are conducted carefully because they influence the conflict behaviour of taxpayers and voluntary compliance in the long term.\textsuperscript{166}

The aforementioned findings also imply a difference in the perceived justice between the tax authorities and regular taxpayers. Tax authorities (and tax lawyers) are less influenced by procedural justice than taxpayers are; the former understand the decision and are capable of reflecting on it. Taxpayers, on the other hand, are more focused on procedural justice (but think they are influenced by distributive justice). Allewijn argued that the escalation process is also generally slower and less emotional for public authorities (tax administrations) than for civilians (taxpayers). Furthermore, legal issues cumulate much faster in time (per objection and appeals stage) than personal disputes due to the legal relationship between the disputants.\textsuperscript{167}

5. Comparative Analyses of Mediation in Tax Law

In section 1.1., the author mentioned that mediation is transplanted from different jurisdictions and from several areas of law, and when the tax authorities of the United States, Canada, Belgium and the Netherlands implemented mediation in tax law, they all made different choices. This resulted in various interpretations and application of the principles of mediation, and differences in the functionality of mediation. Sections 5.2.-5.7. analyse these different choices in order to discover which application or interpretation of the principles of mediation interact best with tax law. In section 5.1., the author briefly describes, in chronologic order, the several procedures followed in the United States, Canada, Belgium and the Netherlands, to provide a better understanding of the analyses in the sections that follow.

\begin{itemize}
\item \textsuperscript{161} Van den Bos, supra n. 32.
\item \textsuperscript{163} Van den Bos related the theory of Miller (id.) to procedural justice; Van den Bos, supra n. 32.
\item \textsuperscript{164} T.R. Tyler, \textit{Psychology and the Design of Legal Institutions} at 36-37 (Wolf Legal Publishers 2007); see also id.
\item \textsuperscript{165} Lind (1995), supra n. 135.
\item \textsuperscript{166} A.K.J.M. van Steenbergen & J.L.M. Gribnau, \textit{Ervaren legitimiteit en het dilemma van belasting betalen}, Tijdschrift voor Formeel Belastingrecht 7 (2016), available via NDFR.
\item \textsuperscript{167} Regarding conflicts between governmental bodies and citizens, see D. Allewijn, \textit{Tussen partijen is in geschil... De bestuursrechter als geschilbeslechter} at 123 et seq. (Sdu Uitgevers 2011); D. Allewijn, \textit{Met de overheid om tafel. Fair play aan beide kanten} at 123 et seq. (Sdu Uitgevers 2013); D. Allewijn, \textit{Met de overheid om tafel. Vertrouwen in de overheid als central thema in mediation} at 15 (Sdu Uitgevers 2007). For disputes between tax authorities and taxpayers, see Van Hout, supra n. 13, at 89.
\end{itemize}
5.1. ADR in tax law

In section 2., it was mentioned that mediation was developed in the United States. EY surveyed more than 20 countries, and called the US’s ADR system in tax law the most extensive and “mature”. The United States were in fact one of the first to introduce ADR into its tax law. The IRS started the first pilot mediation project in 1995. In the same year, the Chief Council announced the introduction of mediation in appeal cases. In the Restructuring and Reform Act of 1998, mediation and other dispute resolution procedures became institutionalized. Nowadays, the IRS offers at least three ADR procedures in which mediation is used:

1. **Fast Track Settlement**: This procedure aims to resolve disputes during the assessment stage (Examination) within a short period of time (60-120 days). Therefore, the IRS assigns a trained mediator from the IRS Office of Appeals to assist the disputing parties to reach an agreement on the disputed issue(s). The mediator in Fast Track Settlement is entitled to make suggestions regarding the solution of the conflict. For many years, this procedure was available for examination cases, but as of 5 December 2014 it is only available for collection cases.

2. **Fast Track Mediation**: This procedure is only offered to small business/self-employed taxpayers to provide the opportunity to mediate their collection disputes with an appeals official. This appeals official serves as a neutral party or mediator to solve the dispute within approximately 30-40 days. Fast Track Mediation includes strict criteria in the Internal Revenue Manual regarding participation of the mediator, and prohibits him from making suggestions regarding the solution of the dispute. Mediators in these procedures have no settlement authority, based on the “hazards of litigation” in the mediation process. For many years, this procedure was available for examination cases, but as of 5 December 2014 it is only available for collection cases.

168. Ernst & Young, supra n. 4.
169. The Chief Counsel for the Internal Revenue Service provides advice to the IRS Commissioner on all matters pertaining to the interpretation, administration and enforcement of the Internal Revenue laws; represents the IRS in litigation; and provides all other legal support needed by the IRS (IRM 1.1.6.1).
171. Parsly, supra n. 143.
172. In the United States, the term “examination” is used.
173. Depending on the taxpayer category, for large business and international taxpayers the goal is to reach a resolution within 120 days. For small businesses/self-employed taxpayers and tax-exempt and government entities, this goal is within 60 days. Legal sources and information about the different types of ADR are available at https://www.irs.gov/compliance/appeals/appeals-mediation-programs.
174. See sec. 3.7.
175. Initially, Fast Track Settlement was only available for large business and international taxpayers after testing it for many years in certain cities in the United States. For small businesses/self-employed taxpayers it started in 2006 and for tax-exempt and government entities, tests started in 2008. According to Internal Revenue Bulletin 2008-1224, Rev. Proc. 2008-110, this form of settlement started in Chicago, Houston, and St. Paul (original test cities). On 14 Dec. 2007, the pilot was extended to Philadelphia, central New Jersey, and San Diego, Laguna Nigel and Riverside in California. Tests were extended for another two years for all of these cities from 1 Dec. 2008.
176. IRM 8.26.3. On 5 Dec. 2014, Fast Track Mediation was revised to eliminate examination cases, limiting it to collection cases.
177. IRM 8.26.5.1 (3) and provision 1 of the Model Agreement to Mediate (IRM 8.26.5-1).
(3) **Post-Appeals Mediation**: Post-Appeals Mediation is available for all types of taxpayers in the objection stage. In Post-Appeals Mediation, a trained mediator from the IRS Office of Appeals aims to resolve a dispute between the taxpayer and the IRS to reach an agreement within 60-90 days.

The IRS’s ADR programme also mentions Early Referral. Early Referral is comparable with partial prorogation; it enables taxpayers to request that one or more unresolved issues in the assessment stage proceeds to the Office of Appeals of the IRS (which normally deals with objections). This procedure is not considered an ADR process in this research because it is not an alternative procedure compared to a legal procedure. The IRS has offered arbitration for 14 years as ADR, but in September 2015 it was removed from the ADR programme due to the lack of success. The tax court facilitates mediation, as court-annexed mediation (and arbitration), under Tax Court Rule 124.

In 1999, Canada started a pilot project to test mediation in federal income tax disputes. Initially, the pilot project was launched only in the area referred to as Greater Toronto, but, as of July 2001, the pilot area was extended to the rest of Canada. In 2000 and 2001, the framework and plan of action was set up for the pilot project, including the development of procedures, guidelines, and supporting documents such as a standard mediation agreement and a standard settlement agreement. Officially, the project started in early 2000, and in 2004, the pilot project was continued after evaluation by the Appeals Branch. The author was only able to identify one case, in 2004, that was resolved via mediation. Until 2007, the CRA has offered mediation in tax law. Currently it is not clear whether the CRA still

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179. Cases that are under the jurisdiction of Appeals, IRM 8.26.5.3, and regarding the type of taxpayers, Rev. Proc. 2014-63.

180. It is difficult to identify which procedure can be considered as ADR because the IRS considers many procedures as alternative, while it is more a variety within certain procedures, such as the Rapid Appeals Procedure and Compliance Assurance Process. See IRM 8.26 for an overview. In the literature, even the objection stage itself is sometimes considered as ADR because taxpayers are not obliged to lodge an objection before going to court. Taxpayers have several options for legal protection.

181. See Publication 4167, supra n. 178.


183. More countries have the opportunity for “prorogation” or something similar in their procedural tax rules.


186. US: Tax Court Rule 124 was introduced in 1990, but only mentioned arbitration. In the Explanatory Note to Rule 124 109 TC 596, the Tax Court confirmed that mediation was also possible according to Tax Court Rule 124. On 5 May 2011, mediation was officially amended in Tax Court Rule 124. IRS regulations can be found in the IRM from §35.5.5.4 onwards. Since the court offers facilities for mediation and a special trial judge as mediator, this can be considered court-annexed mediation.

187. The administrative provisions of the IRS regarding ADR are available in the IRM, part 8.26.1-8.26.11 for the assessment and objection stage and part 35.5.5 regarding the appeals stage.


189. All mentioned documents were obtained via an Access to Information request.

offers mediation in tax law, since it is rarely used in practice. This latter may be because Canada also took various other stimulatory measures to encourage agreements between taxpayers and the CRA and to speed up litigation procedures (such as Case Management and Settlement Conference\textsuperscript{191}), though this falls outside the scope of this research. In March 2015, a new initiative was started in Quebec with mediation in tax cases but this seems only available on a provincial level.\textsuperscript{192}

Since 2005, the tax authorities in the Netherlands have offered facilitative mediation at the assessment and objection stages, and the judiciary offers court-encouraged mediation (in tax cases). The Netherlands has no legislation for mediation or any other (administrative) provisions for mediation in tax law. In the Netherlands, it was considered a paradox to design legislation for a procedure that was a response to an increasing amount of (complex) tax legislation\textsuperscript{193} and that was tending to be an alternative to legal procedures. Nonetheless, in June 2015 the Minister of Justice announced his intention to provide legislation for mediation in all areas of law, except criminal law.\textsuperscript{194} From 13 July 2016 to 30 September 2016, draft legislation to stimulate mediation and provide mediators with privileges was in consultation in the Netherlands\textsuperscript{195} but up until the closure of this research, no legislative proposal was submitted.

Based on the Act of 25 April 2007, Belgium implemented mediation in its tax legislation.\textsuperscript{196} Belgium is unique compared to the aforementioned countries because all procedural rules regarding mediation are established by law and not by regulation. The Belgian Mediation Service was also established by law on 9 May 2007.\textsuperscript{197} The Belgian Mediation Service is an independent service within the BTA (FOD Financiën) with the aim of researching the request for mediation in objectivity, impartiality and independence in order to reconcile between the BTA and the taxpayer.\textsuperscript{198} The Belgian Mediation Service was operational as of June 2010 after appointing its staff.\textsuperscript{199,200} Mediation is possible for substantive tax law disputes and disputes regarding the enforcement of tax.\textsuperscript{201} The Belgian Mediation Service mediates and writes a report about the case, in which it is allowed to make proposals to

\begin{flushright}
\textsuperscript{192}. Tax Mediation Association, see http://www.mediationenfiscalite.info/en/pilot-project/.
\textsuperscript{193}. Mediation had to be an alternative for “juridification” and stimulate “de-jurification”. See sec. 2.
\textsuperscript{194}. NL: Van Oosten, Kamerstukken II 2014/15, 33727, no. 12, V-N 2015/28.9.
\textsuperscript{195}. Draft legislation is available at https://www.internetconsultatie.nl/wetmediation.
\textsuperscript{196}. Wet van 25 april 2007.
\textsuperscript{198}. Wet van 25 april 2007, art. 116, para. 1.
\textsuperscript{199}. Hensen, supra n. 71, at 25, n. 22.
\textsuperscript{200}. BS 1 Feb. 2010.
\textsuperscript{201}. The following are a list of taxes in Belgium: Personenbelasting, vennootschapsbelasting, rechtspersonenbelasting, belasting van niet-inwoners, bedrijfsvoorheffing, roerende voorheffing, verkeersbelasting, belasting op de in verkeerstelling, euvorgiet, belasting op de automatische ontspanningstoestellen, belasting op de spelen en de weddenschappen, btw, registratie- en successierechten, kadastraal inkomen, douane en accijnsen [income tax, corporate income tax, corporate tax, tax of non-residents, company withholding tax, movable property withholding tax, immovable property withholding tax, traffic tax, registration tax, Eurovignette, automatic entertainment devices tax, betting and game tax, VAT, registration and inheritance tax, cadastral income tax, customs and excise tax]. For more (specific) information, see http://financien.belgium.be/nl/over_de_fod/structuur_en_diensten/autonome_diensten/fiscale_bemiddeling/wie_wat_wanneer_waarom___#q3 (accessed on 13 July 2017).
settle the case. Both disputants (taxpayer and the tax authorities) are free to repudiate the recommendations in this report.\textsuperscript{202}

5.2. The choice for mediation

5.2.1. The choice for mediation from the perspective of tax authorities

Fayle argued that the effectiveness of tax mediation depends on the willingness and good faith of the parties to negotiate.\textsuperscript{203} This is only partly true, for several reasons. In tax law, it appears to have been overlooked that the tax officer is the disputant in the mediation and the person that has the decision-making power (regarding the tax dispute). This partly influences the choice to use mediation in tax cases. In the context of the Netherlands, the author researched how many offers to mediate resulted in a mediation, who had refused mediations and the reasons why they refused mediation. The author noted that there were 1,240 written offers to mediate a tax case, but only 152 referrals to mediation in 2005 in the files of the tax court in Arnhem. However, it should be noted that 32\% of the files was not accessible or was missing, and therefore the data was not reliable. Within the remaining 697 files, it was discovered that in 66\% of these cases the tax authorities refused the mediation.\textsuperscript{204} Data from the United States and Canada seems to indicate a similar outcome, but all available data was either incomplete or too limited to draw conclusions.\textsuperscript{205} This also applies to other research in administrative law in the Netherlands. Nevertheless, this gave the impression that many tax authorities are reluctant to use mediation. This led to deeper analyses.

In the United States, Canada and the Netherlands,\textsuperscript{206} the decision to initiate mediation is mutual, although all tax administrations in these countries work with a mediator coordinator. These mediation coordinators first verify whether the case is appropriate for mediation. If the mediator coordinator permits the case to proceed to mediation, he contacts the tax official that has decision-making authority in the particular case. The tax official then has to decide whether he agrees with mediation. In practice, there is little benefit for this official to choose mediation, and it sometimes even generates more work compared to a decision. The latter even specifically applies if the tax official has to initiate the mediation. A (proactive) decision for mediation additionally means that the tax officer has to admit that he is incapable of handling the dispute without the assistance of a third party, while dispute resolution is a task that is specifically delegated to him. Therefore, it is possible that the decision to pursue mediation can be experienced as a personal failure. Moreover, tax officials are not always well informed about the advantages of mediation,\textsuperscript{207} and will look at the case from a

\begin{itemize}
\item \textsuperscript{202} A. Tiberghien, Handboek voor fiscaal recht 2014–2015, at 977 (Wolters Kluwer 2014).
\item \textsuperscript{203} R. Fayle, Mediation in Tax Disputes, 2 Journal of Australian Taxation 2, at 93 (1999).
\item \textsuperscript{204} Other research has also shown that most offers to mediate were refused by the governmental authorities during the period 2005–2007 at the court Zwolle-Lelystad in the Netherlands; however, these cases were administrative law cases and not specific tax law cases. For more information, see M. Guiaux, Afwijzingsgronden mediationvoorstel, WODC Fact Sheet 2009-3 (WODC Ministerie van Justitie 2009); Van Hout, supra n. 13, at 267 et seq.
\item \textsuperscript{205} Wei, supra n. 50. Wei mentions that in the first test period, 9 requests for mediation were made and 5 were denied (note that these were cases with at least USD 10 million at stake in tax), and in the second period, 9 requests were refused out of a total of 17 requests (see Success of Mediation Tests, sec. C). In Canada, documents regarding the pilot mediation project initially mention 5 cases, and in a later report, 21 cases that were selected for mediation. However, none of these cases proceeded to mediation. In total, only one case initiated by taxpayers was eventually accepted for mediation.
\item \textsuperscript{206} The same goes for Australia.
\item \textsuperscript{207} M. Jone & A.J. Maples, Mediation as an Alternative Option in Australia's Tax Dispute Resolution Procedures, Australian Tax Forum 27, at 542-543 (2012).
\end{itemize}
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strict legal perspective. This broadly applies to many tax experts, including tax lawyers, tax practitioners and tax judges. Another reason that was occasionally mentioned for refusing mediation was the lack of discretionary authority. Research by the Australian Law Council reported that:

the ATO does not provide their officers with sufficient authority to take part in a mediation such that they are an effective representative of the ATO in the matter including them having the power to reach settlement.\(^{208}\)

The same applied in the Netherlands. To research this in greater detail, Guiaux interviewed the representatives of government entities in the Netherlands about mediation in the appeals stage. The interviewees were of the opinion that they do not have enough discretionary authority and in the appeals stage this even diminishes further because the judge has the decision-making power in appeal.\(^{209}\) Guiaux therefore stated that the limited discretionary authority of (tax) authorities is an indication that mediation is not a satisfactory dispute resolution procedure in some particular cases.\(^{210}\) Olsen and Jaglowitz suggested that the lack of discretionary authority of tax authorities in Canada also undermines the effectiveness of mediation in tax cases.\(^{211}\) Olsen therefore advised in 1997 that the Income Tax Act should be amended to give the Minister the possibility of settling tax cases based on the “hazards of litigation”, as in the United States.\(^{212}\) This advice was ignored due to the general principle of the ARI to implement mediation without changing the law in Canada.\(^{213}\) All of the above-mentioned studies seem to reveal that mediation is mostly not an appropriate dispute resolution procedure due to the lack of discretionary authority of tax authorities.

Euwema opined that a lack of discretionary authority is a matter of perspective. He stated that the parties that think so have already transformed the issues at stake into legal definitions and arguments.\(^{214}\) In time, parties are likely to add various legal arguments to reinforce their position, especially in tax cases.\(^{215}\) This means that over time and within each stage, it becomes more difficult to detach parties from their legal position in order to convince them to pursue mediation. The author agrees with Euwema that a lack of discretionary authority is sometimes only a matter of perspective. For example, in the United States, the majority (85-90%) of objections end in a settlement by the Appeals Division.\(^{216}\) In Canada, the majority of tax court cases are also resolved without a hearing before a judge (52%), most often resulting in full or partial consent between the taxpayer and the CRA (73%).\(^{217}\) The CRA


\(^{210}\) Id., at 7.

\(^{211}\) Jaglowitz, supra n. 53; Olsen, supra n. 8, at 24-27.

\(^{212}\) Olsen, supra n. 8.

\(^{213}\) Id. For similar proposals, see Report of the Technical Committee on Business Taxation (Department of Finance, 1997); P.W. Hogg, J.E. Magee & J. Li, Principles of Canadian Income Tax Law at 565 (Thomson Carswell 2009).

\(^{214}\) M.C. Euwema, L. van der Velden & C.C.J.M. Koetsenruijter, Prettig contact met de overheid at 55 (Ministerie van Binnenlandse zaken 2010).

\(^{215}\) From a legal perspective, in order to get a stronger position in trial, but also from a psychological perspective because this is common in conflict behaviour. See sec. 4.3. and Glasl, supra n. 128.

\(^{216}\) Saltzman, supra n. 144.

has even mentioned that 95% of income tax objections, in addition to 27% of appeals, are settled “on the building steps of the court”. In the Netherlands and Belgium, it is also common to settle tax disputes, which suggests that a lack of discretionary authority is not a bigger problem when using mediation than without it. Therefore, it seems that a lack of discretionary authority regarding mediation is partly a subjective issue, as Euwema concluded. Nevertheless, the perspective of the disputants cannot be ignored. Mediation is a voluntary process for which disputing parties can opt. If these parties feel that they have no room for negotiation, they will not choose mediation, regardless of whether this is a false assumption. In section 5.2.3., possible solutions to this issue will be discussed.

5.2.2. The decision to opt for mediation, and power imbalances

The decision to use mediation is possibly also influenced by power differences. Some researchers have found a correlation between parties that are traditionally seen as less powerful and the acceptance of mediation, where the less powerful are more willing to accept proposals of mediation, compared to more powerful parties. Fix and Harter concluded that individuals choose mediation more often than governmental institutions do. Barendrecht and Baarsma even stated that it is misleading to refer a weaker party to mediation because it suggests that a fair solution can be offered. Kahneman explored the mediation decision as well, but from the perspective of the decision-making process based on prospect theory. He argued that a less powerful person will be more willing to settle for a compromise because it offers the chance to get a better result, while the more powerful person will probably choose to go to court in order to protect his position. In the previous subsection, the author discussed the fact that in tax law tax officials are presumably more reluctant to accept a proposal for mediation than taxpayers. Since it is the tax official that has decision-making authority in the assessment and objection stages, he is often in a more powerful position than the taxpayer. This indicates that, in tax law, it is better to make the decision for mediation objectively. Additionally, it is important to realize that mediation can give a false impression to taxpayers. Therefore, it is essential that taxpayers (in particular) understand that mediation is only a facilitative procedure: the mediator does not offer legal protection or legal aid. Furthermore, the legality principle and the principle of equal treatment also apply in mediation.

218. CRA, FPC Presentation Series on the CRA Approach to Compliance, at 15 (fifth paper, updated) (obtained via an Access to Information request).
220. Van de Velde, supra n. 68.
221. Baas, supra n. 125, at. 45 et seq.
5.2.3. How to facilitate the decision on whether to use mediation in tax law

Belgium is the only country in this comparison to have incorporated mediation as a mature procedure in its tax code. Furthermore, Belgium has institutionalized its mediation service. The benefit of this mediation service is that it allocates and objectifies the decision for mediation to an independent department within the tax authorities. This institutionalization of the decision for mediation and allocation of the mediation procedure to a different department ensures that the involved parties have less subjective arguments to refuse it. The choice for mediation is then based more on objective grounds, which seems to be more efficient than leaving the decision solely in the hands of the disputants. Additionally, the choice for a legal mediation procedure fits with the legal relationship between taxpayers and tax authorities. Mediation in Belgium is also a legal right for taxpayers; as such, they are more willing to opt for mediation. In the other countries compared, mediation is more an unknown voluntary facility. In Belgium, a mediation request is only inadmissible if it is obvious that the request is without grounds or if the taxpayer has not discussed the dispute with the tax authorities. Belgian law requires that the Belgian Mediation Service verifies all mediation requests on these two grounds. Thus, the Belgian tax officer is free to repudiate the request for mediation, but must have substantial arguments to show that the request is without any grounds. The decision regarding the substantive solution (substantive self-determination) of the dispute is nevertheless still in the hands of the disputing parties.

Belgium and the Netherlands followed a contrary approach regarding their implementation of mediation in 2005. The DTA did not implement any regulations for mediation at all. The DTA and the Dutch judiciary chose to use the current Dutch legislation like contract law in order to avoid “juridification”. The disadvantage of having (almost) no regulations is that mediation becomes very non-committal. The Dutch Ministry of Justice therefore intends to amend the Administrative Code (which also applies to tax law) to encourage mediation. These arguments of the Dutch government are understandable, but in the first Dutch draft

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226. The United States also has legislation on ADR (see Title 26, § 7123 USC), but this legislation directs the IRS to implement procedures that allow ADR.
227. See sec. 4.1.
228. BE: Wet van 25 April 2007, art. 116 §1 lid 1.
229. This can be considered one of the core values of the self-determination principle. See sec. 2.
231. Various proposals: NL: Voorstel van wet van het lid Van der Steur tot wijziging van de Algemene wet bestuursrecht en de Algemene wet inzake rijksschelastingen ter bevordering van het gebruik van mediation in het bestuursrecht (Wet bevoroging van mediation in het bestuursrecht), Voorstel van wet van het lid Van der Steur tot wijziging van Boek 3 en 7 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijke Rechtsvordering alsmede enkele andere wetten in verband met de bevordering van het gebruik van mediation (Wet bevoroging van mediation in het burgerlijk recht) and Voorstel van wet van het lid Van der Steur tot het stellen van regels om trente de registratie en de bevordering van de kwaliteit van mediators (Wet registermediator) [Bill to amend the General Administrative Law Act and the General Tax Act regarding the use of mediation in administrative law (Law promoting mediation in administrative law), Bill to amend Book 3 and 7 of the Civil Code and the Code of Civil Procedure and other laws regarding the promotion of mediation (Law Promoting Mediation in Civil Procedures) and the Bill to introduce a law regarding the registration and the promotion of the quality of mediators (Law Register Mediators)]. These proposals have been withdrawn by Van Oosten, Kamerstukken II, supra n. 194, with the intention to submit them as a legislative proposal of the Ministry of Justice, because Van der Steur became Minister of Justice. On 13 July 2016, draft legislation to stimulate mediation was published on the website of the Ministry of Justice for consultation purposes but a legislative proposal was not submitted yet.
legislation, civil servants were required to choose mediation.233 This legislative proposal is an illustrative example of an overreaction. Requirements to force tax authorities or taxpayers to choose mediation underlines the voluntariness of the procedure and thus breaches the principle of self-determination.234 Belgium took a better approach: taxpayers have the legal right to request mediation if they are of the opinion that a dispute is not resolved sufficiently.235 However, the inconsistency in the Belgian system is that the Belgium Code offers no formal opportunity for tax authorities to initiate mediation.236 Naturally, legislation should ideally enable both parties to request mediation.

Mediation procedures should have a legislative framework; however, the author recommends that mediation not be regulated in great detail in order to respect the procedural self-determination principle of mediation.237 As mentioned above, the Netherlands has no specific legal requirements regarding mediation in tax law, and even the mediation agreement is limited and very general. This is almost the opposite to the situation in the United States, where the IRS has developed different rules for every procedure and prescribes all procedural rules, including the mediation agreement, in great detail in its Internal Revenue Manual.238,239 Since the tax authorities are always one of the parties in a mediation, it is understandable that tax authorities publish their requirements regarding mediation. This does not per se infringe on the principle of procedural self-determination. However, mediation was developed as a response to (too much) regulation, and the self-determination principle aims to avoid "juridification".240 Therefore, the author suggests that there should be some room for flexibility and individual circumstances in the procedural rules for mediation. In this respect, too, Belgium can be seen as a good example. Belgium offers mediation as an informal procedure, without any strict or detailed procedural requirements.241 For example, Belgian taxpayers are allowed to request mediation orally, by telephone, by email or by post.242 This means that mediation is an informal procedure in Belgium with time limits only for the Belgian Mediation Service to respond to a mediation request.243

233. This was also recognized by the legislator because a specific exception was drafted for tax cases (in NL: Algemene Wet inzake Rijksbelastingen, 2 July 1959).
234. Currently, in Belgium, Canada, the Netherlands and the United States, mediation in tax law is a voluntary process. This applies for most countries (such as Australia and South Africa). Taxpayers and the tax authorities are free to withdraw from mediation at any time, although some commitment is required. Italy is, to the best of the author’s knowledge, the only country that has mandatory mediation in tax law. See also supra n. 106.
236. However, it is also not excluded by law according to Hensen, supra n. 71, at 38.
237. See Van Hout, supra n. 13, at 347, in which the author warned about the "juridification" of mediation in the Netherlands (meaning the creation of too many regulations regarding the procedure of mediation).
238. The IRM can be qualified as Revenue Rulings. The provisions regarding ADR can be found in sec. 8.26 of the manual.
239. For the record, it should be mentioned that this is probably also due to the size of the country and the amount of taxpayers the United States have to deal with. In that respect, Belgium and the Netherlands are not comparable with the United States.
240. Van Hout, supra n. 13, at 347.
241. Belgian law mentions only two specific requirements in art. 116(1) Wet van 25 april 2007. The mediation request is obviously groundless and the taxpayer has not discussed his case with the tax authorities. Art. 9 KB of 9 May 2007.
illustrates that it is possible to implement mediation in law without the need for detailed procedural rules.

5.3. Conflict behaviour in tax law, and self-determination

In Belgium, the Netherlands and the United States (only in some specific cases\(^\text{244}\)), mediation is used to provide knowledge and help taxpayers understand more about tax law and the decisions made by tax authorities. To illustrate this, the following is drawn from article 8.26.3.2 of the Internal Revenue Manual regarding Fast Track Mediation:

The Appeals Official serving as a neutral participant assists SB/SE Collection and the taxpayer to understand the nature of the dispute and to reach a mutually satisfactory resolution ...\(^\text{245}\)

The Netherlands, Belgium\(^\text{246}\) and (in the case of small businesses/self-employed taxpayers) the United States all use mediation to provide information about tax law and to improve the way taxpayers experience justice. The aim of this approach is to stimulate voluntary compliance and acceptance of the outcome by taxpayers.\(^\text{247}\) By using mediation in order to inform taxpayers about tax law, it responds basically on the cause of the conflict as described in section 4.3.

Mediation is a horizontal way of dealing with disputes and does not guarantee a fair outcome. The self-determination principle presumes that parties are autonomous and capable of finding the best solution for the conflict.\(^\text{248}\) A lack of informed consent infringes on the principle of substantive self-determination; therefore, mediation ought only to be used in conflicts where the taxpayer is reasonably capable of overseeing the alternatives while negotiating. In case a taxpayer has no representative and is not sufficiently equipped with knowledge of tax law (which applies to most taxpayers), it is possible that he will be incapable of seeing or verify alternative solutions to the dispute. Although mediation takes the underlying interests as a starting point to resolve the dispute, in section 4.1. it was argued that in tax law all agreements have to be in accordance with the legality principle and the principle of equal treatment. Tax authorities are therefore much better informed and capable of overseeing the opportunities and constraints of the possible settlements compared to the average taxpayer.

For the above-mentioned reasons, it would only be fair to the taxpayer to use mediation in tax disputes if he reasonably understands the opportunities and the types of compromises that are available to him.\(^\text{249}\) This opinion is also reflected in empirical research, which gives the impression that taxpayers sometimes accept solutions in mediations that – from a legal

\(^{244}\) Nowadays, this is only true regarding specific cases (small businesses and self-employed taxpayers, and collection cases). Before 12 May 2014, it was only true regarding small businesses and self-employed taxpayers, but also regarding substantive tax issues.

\(^{245}\) In Rev Proc. 2003–41, mediation was not restricted to collection cases until 12 May 2014. Before this date, the quote was: "The Appeals Official serving as a mediator assists SB/SE and the taxpayer to understand the nature of the dispute and to reach a mutually satisfactory resolution".

\(^{246}\) However, in Belgium, the Belgian Mediation Service provides recommendations that differ compared to the Netherlands, where mediation is a more facilitative procedure.

\(^{247}\) In the Netherlands, the theories of social psychologists are also embraced by the Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Ministry of Internal Affairs) and incorporated into Prettig contact met de overheid, a national guideline for civil servants about how to improve their relationship with citizens and which offers a solution-oriented and informal way of resolving disputes. For more information, see www.prettigcontactmetdeoverheid.nl.

\(^{248}\) See sec. 3.3.

\(^{249}\) Van Hout, supra n. 13, at 357.
point of view – are not in their best interests. Mediators usually advise taxpayers that have no legal representative to seek legal review of the settlement agreement, but this is when the parties have already agreed to a certain solution. Taxpayers are sometimes reluctant to seek professional legal review of the agreement because the amount at stake is too small or they do not want to pay an extra fee regarding a dispute that seems to have been resolved. Furthermore, most people consider it very difficult to refute a decision that has already been made (and will even search for arguments to support their decision).

Therefore, the author concludes that the overall fairness of offering mediation to non-represented taxpayers or taxpayers with no knowledge of tax law (and mostly with small claims) is questionable due to the disparity in expertise between the average taxpayer and a tax officer. Mediation then becomes a procedure by which to convince taxpayers, instead of a procedure that respects the autonomy of disputants and the substantive self-determination principle of mediation.

5.4. Underlying interests in tax law

With respect to underlying interests, many scholars have used Fuller’s interpretation that mediation is about restoring relationships. McDonough argued that long-term relationships are rarely at stake in tax law; the issue is either to pay or not. Therefore, McDonough suggested that there is little room for mediation and reconciliation because the underlying interests of the parties are opposite regarding the tax amount due. This argument seems self-evident, but in her comparative research the author discovered that there is an enormous diversity in (perspectives on) underlying interests in tax law.

The first difference noted by the author pertained to the Dutch perspective on underlying interests in tax cases compared to the American and Canadian perspectives. This difference in perspective is probably because the Netherlands had a different goal compared to the United States or Canada regarding the implementation of mediation. At the introduction of mediation in the Netherlands, the State Secretary of Finance was of the opinion that mediation, as offered by the tax authorities, is especially appropriate for relational and

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250. Id., at 158. This empirical research illustrates that in seven of the 48 settlement agreements it was obvious that the taxpayer came to the worst possible agreement because, for example, he had withdrawn the appeal without any compensation. Continuing the appeal would at least have provided a change in compensation, even if the taxpayer lost his case. In a previous work of this author (see supra n. 13, at 298), an overview was provided of all the settlement agreements in mediation in the Netherlands during the pilot mediation project at the Tax Court of Arnhem in 2005. To find out whether these Dutch settlement agreements in tax mediation were the result of a lack of knowledge, a distinction was drawn between settlements in which the taxpayer was represented and those in which he was not. In this research, there are no differences between these two types of settlements, but it is important to note that the involvement of representatives of the taxpayer is unclear – for example, it is unclear whether the representative was present during the mediation or whether the representative examined the settlement agreements, etc. Furthermore, there were only 48 settlement agreements in tax mediation to examine, which is not enough to draw reliable conclusions. During attended tax mediations, it was noted that some taxpayers were not aware of their legal position and therefore agreed with (all) suggestions made by the tax officers. This means that this empirical research does not offer enough data to verify whether there was a lack of “informed consent” on the taxpayer’s part regarding the settlement agreements they closed. To obtain a more reliable perspective, this should be examined in greater detail to refute the idea that mediation in tax cases is used to force taxpayers to close an agreement.

251. Kahneman, supra n. 127, at ch. 27 ("The Endowment Effect").

252. Quoted from Fuller, supra n. 44, at 325.

253. McDonough, supra n. 51, at 38 et seq.

254. See sec. 2.
emotional disputes. From the author’s perspective, this simultaneously limited the functionality of mediation and the opportunity to recognize possible other underlying interests in tax cases.

Allewijn researched settlement agreements in administrative law in the Netherlands regarding mediations between citizens and civil servants, and came to the conclusion that the five most common solutions in these settlement agreements are clearing misunderstandings, solving miscommunications, raising complaints about mistreatments, explaining the decision-making process and creating payment arrangements. He argued that many settlement agreements are about (mis)communication and have no effect on the primary decision of the governmental official, although most disputes are presented as legal interpretation issues. In the empirical research regarding the settlement agreements that were closed during the mediation pilot project in the Netherlands' tax court in Arnhem, the author noted that many settlement agreements had no influence on the tax amount. The various agreements were basically about communication, misunderstandings or providing additional information; for example, providing payment facilities, taxpayers who had problems with the way they were treated, providing additional proof, etc. This conclusion is in line with the findings of Allewijn.

As noted above, the United States took a different perspective on the functionality of mediation. One of the requirements of the ADRA in the United States was to introduce a dispute resolution procedure that would limit the litigation costs of governmental entities. Therefore, mediation was initially only available for Coordinated Examination Program cases involving companies with assets of more than USD 250 million and financial interests of USD 10 million or more. In the Canadian pilot project, the financial interest had to be at least CAD 12,000, but the primary goal was that the commercial mediator’s fee was covered. This meant that during the pilot project the CRA only selected cases with a financial interest of CAD 300,000 to 7 million. This is in stark contrast to the Netherlands, where, for example, Jongmans argued that mediation is inappropriate for cases with large tax amounts at stake. Regarding the United States, the author was unable to research the settlement agreements; however, mediators from the United States (and Canada) mentioned in interviews several examples of closed agreements with a broad range of underlying interests, such as interests of stakeholders other than the taxpayer (for example, employees or shareholders), interests in the protection of data (as in royalty cases), legal certainty, interest in preventing other (private law) lawsuits and personal interests (such as losing face because of the large amounts at stake). This revealed enormous differences in

255. Supra n. 6.
257. Van Hout, supra n. 13, at 298-299.
259. S.M. Key, Seven Steps for Effective Mediation of Tax Controversies, Tax Notes 18, at 363 (1999).
260. Olsen, supra n. 8, and Conference Report 1997, supra n. 8, at 12:1; Lynch, supra n. 8; CRA, supra n. 8; Appeals Branch, supra n. 8.
262. In Canada, the author spoke with several mediators of the ADR Institute of Ontario regarding their experience with mediation, but none of the mediators had experience with cases that were only about tax law.
263. Her Majesty’s Revenue & Customs (HMRC), Alternative Dispute Resolution in Large or Complex Cases: Pilot evaluation summary (HMRC 2013), available at https://www.gov.uk/government/publications/alternative-dispute-resolution-in-large-or-complex-cases-pilot-evaluation-summary. Page 6 of this document discusses the issues that were covered in large and complex cases, but these were too general to use as an example.
underlying interests compared to those in the Netherlands, and highlighted a broad spectrum of possibilities with mediation in tax law.

The comparative study elucidates that underlying interests in tax cases can be very diverse, and that it is beneficial for the functionality of mediation to have an unbiased and broad perspective on underlying interests. Mediation in tax law certainly enhances the mutual relationship and mutual understanding between disputants. Therefore, it works well in countries that try to build a relationship between taxpayers and tax authorities that is based on trust and cooperation, akin to an enhanced relationship or cooperative compliance. In the Netherlands, mediation even functions as a good filter for disputes that arise from the attitudes of the disputants, are related to miscommunication or emotions and in essence do not belong in court. Nevertheless, mediation is also appropriate for more complex controversies involving various issues (even those spread over several years). In this respect, interpretation of the underlying interests principle comes too much, in countries like the Netherlands, from a social psychological viewpoint, instead of based on what it can also do in tax cases. Tax law, especially for entrepreneurs, is connected to all kinds of additional issues, such as legal certainty; equal treatment; investment decisions; interests of shareholders, employees, subsidiaries or parent companies; etc. Especially in these kinds of cases, mediation can offer a good alternative compared to regular legal procedures because it offers many more opportunities to settle the case.

5.5. Impartiality and independency of internal mediators

The United States, Belgium and the Netherlands all use tax officers as mediators (internal mediators). This is also common in countries such as Australia, South Africa and New Zealand.266 Of the countries compared here, Canada is the only one that solely used external mediators in fiscal mediation. In the United States, the IRS started to use external mediators in pilot mediation projects, but nowadays it is only possible to appoint an external mediator in a team mediation (together with an internal mediator) in Post-Appeals Mediation.268 The latter also applies to the Netherlands, but this is not commonly known.269

264. For that reason, it has often been argued that mediation is an appropriate dispute resolution procedure in horizontal monitoring issues. For example, L.G.M. Stevens et al., Commissie Horizontaal Toezicht Belastingdienst, Fiscaal Toezicht op maat, Soepel waar het kan, streng waar het moet at 92 (Ministry of Finance 2012); J.G. Kuiper, Mediation - het compromis voorbij, Tijdschrift Formeel Belastingrecht 6, at 14 (2006); J.G. Kuiper, Horizontaal toezicht en de Harvard-onderhandelingsmethode, WFR 2008/1439 (2008).


266. In New Zealand, these are called facilitators. These facilitators are senior employees from the Inland Revenue Assurance group (Investigations and the Legal and Technical Service), the Litigation Management Unit and the Office of the Chief Tax Counsel. For more information and sources, see M. Jone & A.J. Maples, Mediation as an Alternative Option in New Zealand’s Tax Disputes Resolution Procedures: Refining a Proposed Regime, New Zealand Journal of Taxation Law and Policy 19, at 303 and n. 11 (2013).

267. G.P. Mathews, Using negotiation, mediation and arbitration to resolve IRS taxpayer disputes, Ohio State Journal on Dispute Resolution 19, at 709 et seq. (2004). The reason for the switch is quite vague due to the experience in other areas. During the pilot project, use of an external mediator was already discouraged because the IRS could refuse the mediation if a taxpayer chose an external mediator.

268. IRM 8.26.5.4.9.1, (1): “In addition to the Appeals mediator”.

269. The DTA is not very open about this possibility, probably to avoid too many people requesting an external mediator. That it is possible at all can only be found in the following sources: Brief Staatssecretaris van Financiën (31 mei 2005), no. DGB 2005/2841, V-N 2005/29.2; J. Kastelein & K. van Kalsbeek, Wettelijke verankering van mediation?, NTFR 2012/1735. In court-encouraged mediation in the Netherlands, it is only possible to appoint an external mediator.
In the literature, it is widely believed that using internal mediators breaches the principles of independence and impartiality that facilitate mediation.270

In the United States and the Netherlands, a common counter-argument is that internal mediators are equally, or sometimes even better evaluated in surveys, compared to external mediators.271 In the Netherlands, some tax officers have even complained that some internal mediators have tried too hard to prove to the taxpayer that they are impartial (that is, they have overcompensated). However, these findings can be criticized for two reasons.272 First, the surveys from both the United States and the Netherlands fail to show whether the position of the mediator as a tax officer had any influence on the choice to use mediation. It is possible that a perceived lack of impartiality of these internal mediators influences the choice to use mediation among taxpayers.273 Second, the parties in question could not compare internal with external mediators, but only give their opinion on the mediator they had during the mediation. A research report by the DTA illustrated that appreciation of the mediator decreases significantly for all issues when the mediation does not end in a settlement agreement.274 Therefore, a correlation is also possible between appreciation of the mediator and the outcome of the mediation (settlement agreement or not), though this hypothesis should be researched in greater detail.

In the Netherlands, parties have also mentioned in several surveys that they appreciate it when a mediator has knowledge about tax law,275 although such knowledge is not necessary for mediation since the mediator only facilitates communication between the parties and does not provide a legal service.276 Nonetheless, the author is of the opinion that a sufficient knowledge of tax law is beneficial for confidence in and acceptance of the mediator.277

Clearly, the advantage of using internal mediators is that they are probably sufficiently educated in tax law and know the workings of the tax administration from the inside (for example, practical notes, protocols, instructions, etc.). For example, in Belgium it is even a legal requirement that the internal mediator has a university degree in tax law.278 Wei argued that

270. For example, Mathews, supra n. 267, at 730; R.M. Kavelaars-Niekoop, We nemen nog een rondje extra! Fiscale mediation als alternatief voor geschilbeslechting?, WFR 2006/1365 (2006); Maus, supra n. 74, at 15.


273. Mathews, supra n. 267, at 731.

274. See Pilot Mediation, Deelevaluatie mediations, supra n. 271.


276. See sec. 3.4.

277. See also J.B.H. Röben, Mediation, WFR 2004/1181 (2004); Jongmans, supra n. 261 (only for complex tax issues); Kavelaars-Niekoop, supra n. 270. However, Kavelaars-Niekoop also mentions in this publication that knowledge of tax law can be counterproductive in some disputes.

the use of external mediators may even slow down the mediation process if the mediator is not familiar with tax issues and tax law.\textsuperscript{279} The author agrees with this argument, noting that knowledge of tax law is not exclusively related to internal mediators.\textsuperscript{280} Nonetheless, in case a mediator has insufficient knowledge of tax law compared to the disputants, the mediator will indeed inhibit the communication. For example, if, during the mediation, the mediator is the only person that does not understand what a reassessment is. If both disputants have knowledge about tax law, a comparable level of knowledge is even more essential for them to accept the mediator. Furthermore, the mediator should be able to recognize a party's use of unreasonable arguments or unfair positions.\textsuperscript{281} In tax disputes, this essentially means that some knowledge of tax law is required.\textsuperscript{282} Although choosing for an internal mediator is not in accordance with the principles of mediation of having an impartial and independent mediator, one may question the extent to which being an internal mediator really jeopardizes his impartiality in practice. First, the countries researched have taken several precautions to ensure the independency and impartiality of the mediator as much as possible. In Belgium, the Belgian Mediation Service is an independent and autonomic service within the BTA.\textsuperscript{283} In the United States, the mediators are appeals officers of the IRS’s Appeals Division, which is already an autonomic division within the IRS.\textsuperscript{284} In the Netherlands, the internal mediators are bound by mediation rules and the Code of Conduct of the Dutch Mediation Association (Mediation federatie Nederland, MfN).\textsuperscript{285,286} This Code of Conduct falls under the scope of the disciplinary rules of this national association. The disciplinary board of the MfN is able to impose various sanctions on the mediator in case the Code of Conduct is breached.\textsuperscript{287} Ultimately, the association may suspend the mediator (for a fixed term), which

\begin{itemize}
  \item \textsuperscript{279} See sec. 4.3.2. and M. Brink, \textit{(Business) mediation en materiedeskundigheid} at 137 and 184 (Boom Juridische uitgevers 2012).
  \item \textsuperscript{280} See sec. 4.1.
  \item \textsuperscript{281} BE: Art. 1, sub. 3° KB 3 december 2009 houdende regeling van de diensten andere dan operationele van de Federale Overheidsdienst Financiën [Royal Decision of 3 Dec. 2009 regarding arrangement of services other than operational services of the Federal Public Service Finance], BS 9 Dec. 2009; BE: KB 9 mei 2007, art. 13, to implement “Hoofdstuk 5 van Titel VII” of the legislation of 25 April 2007 to incorporate the “Fiscale Bemiddelingsdienst” [Fiscal Mediation Service].
  \item \textsuperscript{283} For more information, see https://mfnregister.nl/login-registermediator/klacht-mfn-registermediator/ (accessed on 13 July 2017).
\end{itemize}
means that he is no longer allowed to act as a mediator. Furthermore, in the United States and the Netherlands, disputants may also choose an external mediator (in a team mediation) or refuse the mediator that is suggested by the tax authorities. Lastly, mediation is a voluntary procedure, thus the parties can step out of the mediation at any time in case they are of the opinion that the mediator is not impartial and is acting in favour of the opponent.

The main reason for countries to choose internal mediators is budgetary. In the United States, the taxpayer is liable for an external mediator’s fee and the tax authorities are liable for an internal mediator’s fee. In the Netherlands, in court-encouraged mediation, parties split the external mediator’s fee, but in mediation at the DTA it is common to use an internal mediator. Mediation can thus be offered without charging any additional fees to taxpayers, if they use internal mediators instead of external mediators. The reason for using an internal mediator is therefore mainly to reduce costs for the taxpayer.

5.6. Confidentiality in tax law

It has been mentioned that confidentiality in mediation should ensure that parties can speak freely and give them the opportunity to be open and eager to disclose information. Many countries have a confidentiality provision in tax law to ensure that taxpayers disclose all relevant information to the tax authorities. This means that confidentiality in tax law is already covered. Nonetheless, tax authorities are governmental institutes and in specific circumstances obliged to disclose information to others – mostly governmental institutions within or even outside of the country. For example, if a tax officer witnesses or has knowledge of a criminal (tax) offence, he is probably obliged to pass this information on to the police or Ministry of Justice. This means that, in general, confidentiality provisions in tax law do entail certain exceptions. These exceptions are in many jurisdictions difficult to identify because they can be found in all kinds of legislation, regulations or treaties. Additionally, the United States, Canada and the Netherlands consider transparency of public decision-making as a primary right. This means that even citizens may request the disclosure of public documents, through the Freedom of Information Act (United States), Access to Information Act (Canada) and Wet Openbaarheid van Bestuur (Netherlands).

In tax mediations, all exchanged information can fall under the scope of this legislation,
although information about the fiscal position of individuals is often excluded from this legislation, as in the Netherlands\textsuperscript{296} and the United States.\textsuperscript{297}

Thus, the communication during mediation will fall under the scope of the regular confidentiality provisions in tax law. This also means that, from a legal perspective, confidentiality in mediation is not fully ensured in any of the researched countries since tax officials also have in certain circumstances the obligation to disclose information. This goes for mediation in tax law, but also other areas of law. Most mediation agreements even explicitly mention that legislation can breach the confidentiality provisions in a mediation agreement. For example, Canada has provisions in the standard mediation agreement that allows exceptions regarding the confidentiality of the mediation if disclosure is required based on the Access to Information Act, the Privacy Act or another similar statute. In the United States, the standard mediation agreement in Post-Appeals Mediation\textsuperscript{298} and the application form for Fast Track Settlement\textsuperscript{299} refer to the general confidentiality and disclosure provisions of the IRS.\textsuperscript{300} In the Netherlands, the mediation agreement mentions only the confidentiality of the mediation, and refers to the provisions of the Dutch Association of Mediators. In practice, this implies that the mediator is responsible for informing disputants that confidentiality is not guaranteed by the mediation agreement. In practice, a detailed explanation of all exceptions in the confidentiality provisions will probably never take place because there are simply too many obligations to tax authorities to disclose information.\textsuperscript{301} It also depends on the kind of information exposed in the mediation; for instance, information pertaining to a (certain kind of) criminal offence, a foreign bank account or a liability issue.

In many legal systems, a contract cannot override legislation or treaties. This means that a legal obligation for governmental entities to disclose information cannot be overridden by a confidentiality provision in a mediation agreement. As a result, the taxpayer (and tax official) is probably not aware that confidentiality in the mediation agreement is not in all situations ensured. This may create a false impression of the scope of the confidentiality provision. Therefore, it is ambiguous for taxpayers when tax authorities close a mediation agreement with a confidentiality provision that only provides limited legal protection.

Some legal tax systems\textsuperscript{302} also recognize privileges regarding the communication during negotiations, as per the “without prejudice” privilege in Canada.\textsuperscript{303} Comparable equivalents

\begin{flushright}
\textsuperscript{296} Art. 10 Wet Openbaarheid van Bestuur.
\textsuperscript{297} § 552(b) USC (obtained through the FOIA).
\textsuperscript{298} IRM, Exhibit 8.26.5-1 Model Agreement to Mediate.
\textsuperscript{299} In IRM 8.26.2.14 for SB/SE taxpayers and for TE/GE taxpayers IRM 8.26.7.9. For LB&I taxpayers, the rules deviate, see, for example, IRM 8.26.1.3.1.
\textsuperscript{300} For example, title 26, § 6103 USC (confidentiality provision for IRS employees) and Title 5 USC 574 (confidentiality provision for ADR).
\textsuperscript{301} For the Netherlands, the author counted more than 30 laws that override the confidentiality provision in tax law in the national context and more than 25 governmental institutes in the Netherlands that receive information from the DTA. See art. 67 Algemene wet inzake rijksschulden [General Tax Act] and art. 43c Uitvoeringsregeling Algemene wet inzake Rijksschulden for the regulation [Ministerial order implementing the General Tax Act]; in the literature, see M.B.A. van Hout, Gedeeld geheim, verloren geheim, 6 Tijdschrift Formeel Belastingrecht 4 (2015), available via NDFR.
\textsuperscript{302} This primarily applies to countries with a common law tradition, such as Australia, Ireland, New Zealand, Singapore and the United Kingdom. These countries all have some equivalent of a “without prejudice” privilege.
\textsuperscript{303} N. Nelson, Nelson on ADR at 25 et seq. (Thomson & Carswell 2003) in general and I. MacGregor, Dealing with the respondent, in The Essentials of Tax Litigation, Department of Continuing Legal Education 3 (The Law Society of Upper Canada 1999) regarding tax law in particular.
\end{flushright}
of this kind of legal protection can be found in procedural tax law in the Netherlands\textsuperscript{304} and in the United States in Rule 408 of the Federal Rules of Evidence. The Canadian without prejudice privilege means that a serious offer, made with the intention of reaching an agreement, may not be used as evidence in any subsequent legal procedure involving the same conflict.\textsuperscript{305} The idea behind this privilege is that law should stimulate parties to reach an agreement without running the risk of being put at a disadvantage in any subsequent trial. This particularly applies when parties deviate from their positions and make concessions in order to reach an agreement.\textsuperscript{306} The without prejudice privilege ends when an agreement is reached between the parties, because settlement agreements need to be primarily enforceable. The without prejudice privilege basically only protects the communication during negotiations. In Canada, the standard mediation agreement implies that all information exchanged between the parties during the mediation process is classified as without prejudice communication.\textsuperscript{307} In essence, this is a good solution for mediation in tax law. In the Netherlands and the United States, the communication in order to reach an agreement is also “privileged”, although these countries do not explicitly relate this privilege to mediation or mention it in their standard mediation agreements, perhaps because the concept is embedded in a different legal context than in Canada. Since communication during negotiations in tax law is probably protected by a “privilege”, this means that it is possible that an important part of the communication is already protected in tax law. This decreases the need for an additional confidentiality provision in a mediation agreement in tax cases.

The advantage of a confidentiality provision in a mediation agreement is merely that parties feel confident that they can speak freely, which positively influences their intentions to reveal their underlying interests. In that respect, the confidentiality provision has an important psychological effect. Moreover, confidentiality in a mediation still offers, in most countries, some additional legal protection although it is limited. Nevertheless, in some situations a confidentiality provision in a mediation agreement can offer an advantage compared to other procedures; for example, in countries were the hearings at (tax) courts are public, as in Canada and the United States. In these countries, mediation can guarantee that certain facts of a case remain confidential. In the famous case \textit{Apple Computer Inc. v. Commissioner},\textsuperscript{308} with a financial interest at stake of more than $114 million it was in the interest of Apple to keep the tax procedure confidential to avoid trade secrets being disclosed. This was one of the reasons why Apple chose arbitration under Tax Court Rule 124, instead of the regular appeals procedure.\textsuperscript{309} It is even possible that with the increase in national and international rules to stimulate transparency in tax law, the importance of this principle of mediation will increase over time.

Confidentiality in mediation has the advantage that it allows people to speak more freely, which is necessary in a mediation. Therefore, it is important to be very transparent about


\textsuperscript{305}. L. Boulle & K.J. Kelly, \textit{Mediation: Principles, Process, Practice} at 301 (Butterworths 2011).

\textsuperscript{306}. Id.

\textsuperscript{307}. According to the standard agreement of the mediation pilot in Canada.

\textsuperscript{308}. US: TC, \textit{Apple Computer Inc. v. Commissioner}, Tax Court Docket 21781-90.

the limited legal protection of the confidentiality provision in a mediation agreement in tax cases. The author suggests that the provision should explicitly mention that it can be overridden if the law, treaties or other provisions in tax law require that information has to be disclosed. In case individual meetings (such as a shuttle diplomacy procedure or a caucus) are allowed, it is especially important to inform the taxpayer about the position of the internal mediator, since this mediator is obliged to follow the same rules for disclosure of information as a tax official. Furthermore, the author underlines the Canadian approach of connecting the without prejudice privilege to the negotiations in mediation. This privilege ensures that parties are able to speak freely while maintaining transparency regarding the settlement agreement. This is essential in order to diminish the impression that mediation is a procedure where taxpayers are able to close settlements with the tax authorities that are not in accordance with the legality principle. For the record, the author would like to state that the draft legislation in the Netherlands that provides mediators with a privilege is in the author’s opinion a partial solution because it protects only the mediator.  

5.7. Mediation techniques in tax law

One of the most commonly used mediation styles in tax law is facilitative mediation. The CRA considered implementing evaluative mediation, but eventually decided to use facilitative mediation. Facilitative mediation is a logical choice because tax disputes are generally less relational and emotional than, for example, disputes between individuals such as spouses or neighbours. Nevertheless, the personal involvement of the taxpayer, and even tax professionals, in a tax dispute should not be underestimated.

Section 4.2. illustrated that in Belgium the Belgian Mediation Service is allowed to make suggestions in order to solve the dispute. The Belgian Mediation Service ends the mediation with a non-binding report with recommendations, and the tax authorities still have to make a decision regarding the dispute. A facilitative style of mediation enables non-binding recommendations. In Belgium, the mediator thus uses in theory facilitative mediation, but in practice he is more directive than, for instance, mediators in the Netherlands. In practice, mediation in Belgium bears more resemblance to evaluative mediation, where an independent expert gives his professional legal opinion about the case. When a mediator adopts a more evaluative approach and attempts to steer the parties on a course of settlement, it remains crucial that the mediator does not use his authority to mandate a particular outcome.

310. See sec. 5.1. Furthermore, this draft does not interact very well with the provisions in tax law, and it is rather sizeable and complex legislation.
311. Or “early neutral evaluation”. See Olsen, supra n. 8 (obtained via an Access to Information request) and Conference Report 1997, supra n. 8, at 14 and Exhibit 1 of Appendix A, “Documents Developed in Phase 1 and 2 of the CCRA’s Mediation Pilot” (obtained via an Access to Information request).
312. See sec. 3.7.
314. Hensen, supra n. 71, at 34.
316. Art. 116, paras. 1 and 3 Wet van 25 april 2007 mention that the Belgian Mediation Service researches and obtains all relevant information and determines the facts (in Dutch: alle vaststellingen doen).
317. Hensen (supra n. 71, at 33-34) even mentioned that the parliament in Belgium drew comparisons with arbitration (in Dutch: een scheidsrechtelijk karakter).
ity intervenes in the procedure of assessing or determining a tax liability, which is in most legislation the primary task of the tax official. To exercise this kind of authority, the law has to facilitate it, since, in most countries, the authority to fix a tax liability is only allocated to certain persons, such as tax officers, the Minister or sometimes judges.  

If a mediator is sufficiently directive, or is too dominating in giving his legal opinion regarding the case, then his role does not substantially differ from that of the tax official in the assessment or objection stage. This jeopardizes the distinct character of mediation. An objection procedure is, in the author’s point of view, an administrative review procedure carried out by another (independent) tax official who is aiming to ensure that the right amount is paid. Appointing an internal mediator to evaluate a case (evaluative mediation) is then comparable with the tax official in the objection stage. Mediation is then more an extra administrative review procedure where the mediator probably counterbalances the lack of trust of taxpayers in the tax authorities. Mediation just becomes an extra safeguard. This should not be the function of mediation in tax law. It is understandable why some countries use mediation as a tool to enhance the confidence of taxpayers in the tax authorities or procedures; however, the author suggests that it is better to verify what can be improved in the regular procedures instead of introducing an alternative procedure for that purpose. In such cases, the author is of the opinion that it would be better to offer legal aid to taxpayers. The Taxpayers Advocate Service in the United States, for example, “advocates” for the taxpayer and has access to the same information as the IRS, which restores the legal and practical asymmetric relationship between the taxpayer and the tax administration. Evaluative mediation can still be useful in tax disputes, but only if it is used by a mediator who is independent from both disputants in a situation where the disputants are in an equal legal position, as in the appeals stage. A good example of this can be found in Tax Court Rule 124 in the United States, in which a Special Trial Judge acts as mediator.

5.8. Tax procedures and procedures related to conflict behaviour

In the United States, Post-Appeals Mediation may be utilized only when other standard settlement procedures, such as Appeals consideration, have failed. In Canada, the CRA used the same requirement in their pilot project. Mediation could only be applied after submission of a Notice of Objection and if the parties were unable to reach an agreement through the administrative process. In the Netherlands, the tax authorities have a different approach. The DTA only uses a checklist to verify whether mediation is appropriate. If parties have already tried to settle the case, this is qualified as a negative indication to attempt mediation.

319. This was also the reason why Canada chose to implement mediation instead of arbitration. See sec. 2.
321. See sec. 5.2.1.
322. The benefit of this institute is further that it is a monitoring authority that observes and tries to improve the quality of the service of the IRS. A very interesting institute is also the Prodecon in Mexico, which aims to ensure that the right amount of tax is paid to contribute to the equal treatment of taxpayers. For more information, see http://www.prodecon.gob.mx/.
323. IRM §8.26.5.3 (2), and see §35.5.5.4 (3) regarding mediation under Tax Court Rule 124.
324. Information on the mediation pilot of the CRA is described in Appeals Branch, supra n. 126.
325. Id., at n. 314.
The advantage of the requirement that previous negotiating procedures have failed is questionable. The author suggests that access to mediation should not depend on the condition of whether the parties tried to settle the case in an earlier stage. Glasl’s phases and stages regarding human behaviour do not correlate precisely with the objection and appeals procedures in tax law.\(^\text{327}\) Sometimes, parties feel that they have done enough to settle the case and just want a court decision, instead of mediation. In other cases, parties were not ready to make concessions in a previous stage and need more time to realize that the alternative is a (court) decision, possibly with a negative outcome. The latter is a common reason why many settlements are made on the “doorsteps” of the tax court.\(^\text{328}\) The requirement that parties have previously failed to settle the case in order to obtain access to a mediation procedure \textit{ab initio} excludes certain cases,\(^\text{329}\) and limits the flexibility to solve the dispute.

From the author’s perspective, mediation should be offered at all stages, especially early ones like the assessment stage. This means that the conflict has not escalated too much and the parties are less biased regarding the dispute. In tax law, it is also important for the parties not to have contributed all possible legal arguments because then the conflict is still “fluent”.\(^\text{330}\) An additional requirement is that the tax officers should (have the impression that they) have discretionary authority to negotiate in that early stage.\(^\text{331}\) The author is of the opinion that Fast Track Settlement is an effective dispute resolution procedure in the United States because it allows disputants to negotiate (at an early stage) on the “hazards of litigation” by using the broader discretionary authority of the mediator (who is an appeals officer).\(^\text{332}\) However, the author thinks that in this respect it is more efficient to enlarge the discretionary authority of the disputing tax official (or appoint a tax officer who has sufficient discretionary authority), instead of appointing a mediator with more discretionary authority.

6. The Efficiency of Mediation

In this section, the author will explore which application of the principles of mediation is the most efficient, and the efficiency of mediation in general.

6.1. The number of tax disputes

The number of cases that have been referred to mediation, or that have been resolved via mediation, is limited in all countries compared, especially, if these figures are compared to the number of taxpayers, the number of objections at the tax administrations or the number

\(^{327}\) See sec. 3.7.

\(^{328}\) See, for example, Technical Committee on Business Taxation, Report of the Technical Committee on Business Taxation (Ottawa Department of Finance 1997).

\(^{329}\) J. Klotsche, \textit{Jousting with the Tax Man: ADR at the IRS part II}, Tax Notes 124, at 357 (2009). This also refers to a survey released in Jan. 2009 of the Manufacturers Alliance for Productivity & Innovation in which 64\% said “yes” to the following question: “Would you support a change in the Post-Appeals Mediation and Arbitration Programs that accelerated the process so that it took place before rather than after the conventional Appeals process?” This could indicate that taxpayers prefer mediation to be offered before the objection stage in the United States.

\(^{330}\) See sec. 4.3.

\(^{331}\) Thuronyi, \textit{supra} n. 9, stated that it is best practice to have within tax authorities an independent quasi-appeals office with authority to settle cases on the basis of the “hazards of litigation”. If such an office were in place and functioning, Thuronyi feels that the vast majority of cases could be settled before reaching court. \textit{See also} Thuronyi & Espejo, \textit{supra} n. 10, at 22.

\(^{332}\) See sec. 4.1.
of appeals at the tax courts. More specifically, the average number of mediations in tax cases (over different periods of time) is as follows.

The United States had an average number of Post-Appeals Mediation cases of 150 in the period 2000-2005, but the number decreased in the period 2006-2009. In 2017, the Taxpayers Advocate mentioned regarding fiscal year 2016: 68 Post-Appeals Mediation in non-collection case receipts and 14 in collection cases. In total, the IRS reported during the same year only 306 ADR case receipts which is less than one half of 1% of the total Appeals case receipts of the year. In the Netherlands, the average number of mediations was 50 per year in the period 2005-2011 and from 2011-2016 in total approximately 310 cases. Canada has the smallest number of mediation cases, with one case in 2004 and Belgium has the most mediation cases per year. The Belgian Mediation Service received 4,535 requests for mediation in 2016. Given these numbers, mediation seems fairly unpopular in the countries compared. This also seems to apply to other countries, like Australia, New Zealand, South Africa and the United Kingdom.

Despite the fact that these numbers show a limited use of mediation in tax law, it is important to mention that this kind of data does not provide much information about the efficiency of mediation. Too many factors influence the data, which makes the information difficult to compare – for instance, due to the differences in legal protection, in case selection for mediation or other practical issues. For example, for several years the Dutch tax courts sent all litigants a letter asking whether they would like to try mediation. This approach almost quadrupled the number of tax mediations during that time. In the following sections, the author will discuss what the most efficient implementation of mediation appears to be.

6.2. The tax amount at stake

Section 5.4. mentioned that initially, mediation in the United States was only available when large tax amounts were involved. One of the aims of the ADRA in the United States was to


334. The Tax Court has approximately 10 mediation cases per year. See the presentation of Special Trial Judge P. Panuthos in J.A. Booj & Y. Schuerman, Verslag seminar "De actieve rechter als conflictoplosser", Tijdschrift Formeel Belastingrecht 3 (2011).

335. In a roundtable report on ADR processes at the National Press Club in Washington D.C. on 19 June 2009 (full text is published in Tax Analyst doc. 2009-14091), D. Rocen mentioned that the number of ADR procedures is dropping annually. For instance, Fast Track Mediation fell from 78 cases in 2006 to 61 in 2009.


337. In 2014, there were 413 ADR case receipts and in 2015, there were 383.


339. In 2005 and 2006, there was a total of 51 mediation cases and in 2007, there were 29 mediation cases. In 2011, there were 97 and in 2012, there were 75 cases. Since 2008, mediation has been available for cases regarding the behaviour of tax officials (and thus non-substantive tax issues). See Van Hout, supra n. 13, at 270.

340. Annual CRA Roundtable Meeting (May 2008); CRA Roundtable Member Advisory (Jan. 2009).


342. Jone & Maples, supra n. 207, at 540.

343. See supra n. 334.
introduce a dispute resolution procedure that would limit the litigation costs of governmental entities. In tax cases, research had shown that 1% of all cases represent a dollar amount of USD 10 million, and that these cases cover 88% of the total procedural costs.\textsuperscript{344} Therefore, mediation was initially only available for cases with a financial interest of USD 10 million or more. The case was similar for Canada.\textsuperscript{345} In contrast, in the Netherlands mediation was considered mostly appropriate for cases with small tax amounts.\textsuperscript{346} Empirical data from the Dutch bureau of mediation of the Dutch judiciary (Nederlands Landelijk Bureau Mediation Naast Rechtspraak) has even shown that most settlements were closed via mediation in cases up to EUR 45,000. The average success rate of mediation in the Netherlands that ended in a settlement agreement was 85%. The United States reported similar success rates of 85% with Post-Appeals Mediation and Fast Track Mediation in 2005\textsuperscript{347} (but recent figures of the Taxpayers Advocate seem to illustrate that the settlement percentages of mediation are dropping\textsuperscript{348}). High success rates of mediation in tax law have also been shown in empirical studies in other countries regarding the number of settlement agreements or the amount of disputes that have been resolved via mediation.\textsuperscript{349}

This data called for deeper analysis, also to discover why the Netherlands had similar results to the United States regarding different cases and opposite results regarding comparable cases. In the Netherlands, the author found it plausible that the reported success rates of mediation were influenced by the perspective of the mediators who worked on (most of the) the inquiries. Only one empirical study of the Dutch Mediation Association (MfN) reported the success rates from the point of view of the disputing parties. In that survey, the success rates of mediation differed significant from the success rates according to the mediators. For example, in this research 70% of the mediators consider the conflict as completely resolved because the mediation ended with an agreement but only 31% of the disputants considered their conflict resolved. Regarding governmental disputes, 24.8% of the parties were of the opinion that mediation increased the dispute instead of resolved it.\textsuperscript{350} In Dutch tax cases, researchers have only examined whether an appeal was withdrawn or whether a settlement agreement was closed, even if the agreement stated that the parties agreed to proceed to court.\textsuperscript{351} Therefore, this empirical data does not provide sufficient information about the effectiveness of tax mediation in general, and led me to a dead end regarding the question

\textsuperscript{344} Report of the Chairman, supra n. 49, at 3.
\textsuperscript{345} Olsen, supra n. 8 and Conference Report 1997, supra n. 8, at 12:1; Lynch, supra n. 8; CRA, supra n. 29; Appeals Branch, supra n. 8.
\textsuperscript{346} Jongmans, supra n. 261.
\textsuperscript{347} Parsly, supra n. 143, at n. 149: these percentages were published by D.B. Robinson, IRS National Chief of Appeals, during a course on Tax Controversies in New Orleans, in S. Statton, Fast-Track Settlement Now Available to Small Businesses, Tax Notes Today (29 Apr. 2005).
\textsuperscript{348} In Taxpayer Advocate Service, supra n. 336, at n. 36, it is mentioned that the settlement percentages are calculated by dividing the number of settlements by the number of receipts.
\textsuperscript{351} Van Hout, supra n. 13, at 330-336.
of whether mediation is more successful in cases of small or large tax claims. In time, the
United Kingdom will perhaps generate more detailed information, because HM Revenue &
Customs (HMRC) makes a clear distinction between mediation regarding small cases and
large or complex cases.\textsuperscript{352}

Mathews argued that mediation is more efficient in cases with large tax amounts at stake.\textsuperscript{353} These taxpayers are most likely represented by lawyers who have the ability to persevere in their opinion and are not afraid of litigation.\textsuperscript{354} Therefore, Mathews stated that mediation is the most efficient in these tax cases.\textsuperscript{355} Parsly stated that it is more difficult to reach an agreement in these kinds of cases because there is more at stake.\textsuperscript{356} Olson and Robison mentioned that as of September 2004, the IRS had received 145 mediation requests involving approximately USD 14.2 billion proposed adjustments. Seventy nine were resolved and 17 not.\textsuperscript{357} Therefore, the impact of these kinds of agreements in such cases can be enormous (for the tax administration and taxpayers). The same seems to apply for the United Kingdom, where the HMRC reports that the size of the cases that have been through ADR represent an amount at stake of GBP 93 million.\textsuperscript{358} Furthermore, it is possible\textsuperscript{359} that a more balanced relationship between parties generates a higher percentage of closed settlement agreements in tax mediation, but to date the results of the empirical analyses are not significant enough to confirm this.\textsuperscript{360} The United States government contends that large tax adjustments cover the biggest percentage of total procedural costs.\textsuperscript{361} Thus, if this also applies to other countries, it would mean that more efficiency can be generated in these kinds of cases. This seems to apply to taxpayers as well. For example, in 1993 Apple saved USD 4 million of legal fees in a transfer pricing case by choosing arbitration under Tax Court Rule 124.\textsuperscript{362} Therefore,
mediation in these kinds of cases seems to be more efficient, and this way of using mediation is also more in accordance with the principles of mediation. 363

6.3. The number of prevented disputes

The implementation of mediation in tax law in the Netherlands was not successful with regard to the number of tax disputes that were resolved via mediation. 364 Nevertheless, the success of mediation in the Netherlands was enormous because it created a different perspective on justice and an awareness that perceived justice can influence conflict behaviour. Mediation techniques are now used by the DTA to improve assessment and objection procedures in order to enhance the relationship with taxpayers. Glasl’s escalation ladder is even explicitly used by the Dutch government to improve the skills of all public servants in order to recognize conflict behaviour and deal with controversies with citizens. 365 This project is called “Prettig contact met de overheid”, and aims to prevent and deal with disputes in a non-legal way (“de-juridification”) in order to provide legal certainty at the earliest convenience for Dutch citizens. 366 One of the examples of “Prettig contact met de overheid” in tax law is tax authorities that contact taxpayers by phone as soon as an objection is lodged. 367 In this telephone conversation, the tax official tries to find out what the underlying interests of the taxpayer are and whether the official is able to solve it. Naturally, some elements of this approach can be criticized as well, 368 but the idea of improving the mutual relationship through interpersonal contact is a good start to prevent or deal with disputes.

The author is of the opinion that this use of mediation techniques and greater knowledge about people’s behaviour in conflict situations can be conductive to preventing or dealing with disputes and creating a better understanding between taxpayers and tax authorities. 369

In other words, knowledge about conflict behaviour and perceived justice can also be used to enhance regular procedures, instead of creating new administrative procedures. In the author’s opinion, tax officers should have the skills to resolve most kinds of controversies, 370 especially if these controversies can be related to a lack of knowledge or procedural justice. 371 Normally, it takes no more than a few days of education to acquire the basic knowledge and skills. In particular, the two main elements that mediators use, “voice” and “recognition”, can increase the quality of the mutual communication between taxpayers and tax authorities. For example, in tax cases tax authorities are commonly not aware of the entrepreneur’s view that tax is just a (minor) part of business. Tax authorities often presume that taxpayers mostly aim towards tax avoidance. On the other hand, tax lawyers and taxpayers are not always aware that the tax authorities are afraid of the legal precedent of a certain case, and feel that tax authorities are being too bureaucratic in their case. Therefore, the use of mediation techniques can be useful in understanding each other’s interests.

363. See sec. 5.3.
364. Van Hout, supra n. 13, at 333.
365. EUwema, Van der Velden & Koetsenruijter, supra n. 214, at 56 et seq.
366. For more information about Prettig contact met de overheid, see http://prettigcontactmetdeoverheid.nl.
367. This approach is called “ellen bij bezwaar” and can be translated as “call when an objection is lodged”.
368. For example, if the telephone conversation is used by the tax authorities to persuade the taxpayer to withdraw his objection.
369. Van Hout, supra n. 13, at 333.
370. Van Hout, supra n. 13, at 357.
371. See sec. 4.3.
If mediation techniques are used in an early stage, such as the assessment stage, it can prevent disputes from escalating and the accumulation of all kinds of legal issues. Improving (the quality of) interpersonal contact between taxpayers and tax authorities can improve regular dispute resolution procedures significantly. This especially applies to countries that rapidly digitalize their tax procedures.\textsuperscript{372} Interpersonal contact and better communication using mediation techniques as a tool to prevent disputes should not be underestimated, because it is more difficult to start a dispute via personal contact than via anonymous (and solely digital\textsuperscript{373}) contact. People feel that confrontation is more difficult via personal contact than when there is a certain distance, as in an anonymous contact.\textsuperscript{374} Mediation techniques such as “active listening” influence the way people experience justice and reinforce contact between the tax administration and taxpayer, but only if these techniques are used by tax officials to take taxpayers’ arguments (more) seriously.

7. Conclusions

In this research, the main question was: What are the principles of mediation and how should these be applied in tax law in order to achieve an effective dispute resolution procedure in domestic tax law? The conclusion regarding this question is as follows.

Mediation is a response to certain social developments, such as a decrease in power distance between governments and citizens, and an increase in legislation and legal disputes that jeopardize the system of legal protection. These social developments can be identified in tax law as well. The implementation of mediation is a response to these developments, because mediation aims to respect the autonomy of the disputants and offer an informal procedure. Moreover, mediation offers more efficiency in dispute resolution and (pilot projects on) mediation showed promising empirical results, with approximately 85% of tax disputes ending in a settlement agreement within a relatively short period of time.

Mediation is almost as old as human kind, and is a polymorphic procedure that can be recognized in almost all cultures. In the author’s opinion, mediation has six distinguishing principles (as described in section 3.2. to 3.7.). Mediation is a facilitative procedure in which the impartial mediator has no authority to make a decision or impose a certain result. The mediator uses certain procedure and techniques to resolve the conflict, where he should respect the autonomy of the disputants. This corresponds with the self-determination principle of mediation. Self-determination is “the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome”.\textsuperscript{375} Disputants remain in control of resolution of the dispute, which also assumes that the disputing parties are capable of making “informed choices”. The capacity to make “informed choices” means that parties are reasonably well informed about their alternatives

\textsuperscript{372} See also Taxpayer Advocate Service, supra n. 336, at 2 (“Special Focus - IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration”: “digitalization and a lack of interpersonal contact can alienate the taxpayer population and over time may undermine compliance”.

\textsuperscript{373} Digitalization will reduce the interpersonal contact, but this author is of the opinion that if interpersonal contact is required, the standard of this contact must be of high quality (and ensure legal certainty). Otherwise, interpersonal contact does not provide any additional value compared to the digital system.

\textsuperscript{374} Although this will differ based on culture – for example, in the United States the (masculine) culture is much more confrontational than the Dutch (feminine) culture, and thus it is more likely that Dutch taxpayers will avoid disputes involving personal contact compared to American taxpayers.

\textsuperscript{375} Model Standards of Conduct for Mediators, supra n. 91.
compared to what is offered (informed consent). Mediation differs from legal procedures because it takes the underlying interests of the disputants as the starting point for solving the dispute. Mediation takes a prospective approach towards solving conflicts, based on what the true interests of the parties are and what must be done to unite these. On the other hand, legal procedures take a retrospective approach and aim to find the facts (“what happened”) in order to get to a legal solution. To ensure that disputing parties reveal their underlying interests, it is important that they can speak openly. Therefore, the mediation agreement should contain a confidentiality provision to make the parties more willing to disclose information.

Mediation in the compared countries seems not to be very successful. Empirical research seems to indicate that tax officials are often not in favour of using mediation. This seems logical, because they judge the case from a legal perspective and have decision-making authority regarding the dispute. Therefore, tax officials feel that they do not have enough discretionary authority to negotiate in a mediation. This is not always grounded. Belgium is the only country of those compared to have implemented mediation in full in the (Judicial) Code and institutionalized the mediator’s role as a separate and independent division (the Belgian Mediation Service) within the tax administration. The advantage of this is that it ensures that the decision to try mediation is made more objectively. Additionally, tax officials and taxpayers will recognize mediation as a mature procedure that fits with their legal relationship, and that is generally established via legal procedures. The disadvantage of implementing mediation in the law is the risk of “juridification”. In that respect, Belgium can be seen as a good example again because the implementation of mediation in their act has not resulted in complex legislation or a procedure with detailed procedural rules, like in the United States. Belgium has succeeded in offering mediation as an informal procedure that even allows taxpayers to request mediation via email, without additional procedural requirements.

In her comparative study, the author discovered a very broad range of underlying interests. In the United States, the author discovered underlying interests such as the interests of other stakeholders (including employees or shareholders), interests in the protection of data in royalty cases, or interests in preventing other (private law) lawsuits and personal interests (such as losing face because of the large amounts at stake). The Netherlands mainly used mediation for underlying interests such as restoring emotions, miscommunication or the relationship between the tax administration and taxpayers. Therefore, the author is of the opinion that it is important to interpret the principle of underlying interests in a broad sense. Mediation is an inappropriate procedure if a tax dispute is solely about a legal interpretation issue, but in practice this is difficult to recognize. Disputants are mostly of the opinion that they have a legal issue. A wide-ranging interpretation of the underlying interests can generate more efficiency because it can also solve tax disputes in large and complex cases. The advantage is that the financial impact of these settlement agreements is huge. Moreover, it is likely to save significant procedural costs (on both sides). This means that using mediation also retains the principle of substantive self-determination because in these disputes the taxpayer is presumably more capable of making informed choices due to his representation by lawyers or tax practitioners. In case a taxpayer is not sufficiently equipped in tax law, or has no representation, there is a reasonable chance that he will be stifled by the arguments of the tax authorities. This is not in accordance with the self-determination principle of mediation.
Many countries appoint a tax official as the mediator (internal mediator). It is unclear whether taxpayers are hesitant to try mediation due to the internal mediator. Empirical data has indicated that internal mediators are valued equally compared to external mediators; however, it is possible that these results are connected to the successful outcome of mediation. The discussion regarding the internal mediator and the principles of mediation should be put into perspective. Mediation is a voluntary procedure, which means that a disputant can leave the mediation at any time when a party has the impression that the mediator is not impartial. Furthermore, in the United States and the Netherlands the taxpayer also has the opportunity to appoint an external mediator. The advantage of internal mediator is that it reduces costs for the taxpayer.

Many jurisdictions have legislation in place to ensure that taxpayers disclose information to the tax authority. It is possible that the confidentiality provision in the mediation agreement will be overridden by legislation or treaties that oblige tax authorities to disclose information about taxpayers (usually) to other authorities. Therefore, it is important that all taxpayers are aware of the legal limitations of the confidentiality agreement in a fiscal mediation to avoid any false impression of legal protection. Communication during negotiations in tax law is probably protected by a “without prejudice privilege” (or a comparable legal equivalent). This means that it is possible that an important part of the communication is already protected by law. However, the advantage of a confidentiality provision is that it still offers some additional legal protection, which can be an advantage compared to other procedures – for example, in countries where hearings at (tax) courts are public (for instance, in Canada and the United States). For some taxpayers, this could be a reason to choose mediation instead of another regular procedure.

The author is of the opinion that appointing an internal mediator to evaluate a case on legal issues (evaluative mediation) bears too much resemblance with the function of a tax official in the assessment or objection stage. Mediation then functions as an additional administrative review procedure. The author suggests that it is better to enhance current procedures than creating a new (alternative) procedure, to ensure that taxpayers’ confidence in the tax authorities increases. Training tax officials in mediation techniques can be very conductive to preventing or dealing with tax disputes, especially if the disputes arise from a perceived injustice or lack of information regarding tax law. With the digitalization of tax authority procedures, improving the quality of interpersonal contact is likely to become even more important over time. Offering a good system of legal aid (specifically) in tax cases can also be beneficial in preventing or dealing with tax disputes. This will (partly) counterbalance the power differences in the relationship between the taxpayer and tax authorities.

In sum, mediation is no panacea for the profusion of tax disputes. Mediation can be very efficient to prevent disputes or deal with tax conflicts in particular cases, but it will not dramatically reduce the number of tax controversies.