

Supreme Court judgment with possible implications for the Dutch VAT position of complaints advisory committee members and similar officials

On June 26, 2020 the Supreme Court rendered judgment in the 18/02684 case. This case concerns the Dutch VAT entrepreneurship of a member of a complaints advisory committee. The Supreme Court ruled that the chairperson or an ordinary member of a complaints advisory committee within the meaning of Section 7:13 of the General Administrative Law Act (*Algemene wet bestuursrecht*; hereinafter: 'AWB') does not qualify as a VAT taxable person. To date, the Dutch tax authorities have designated members of a complaints advisory committee as VAT taxable persons. This judgment therefore deviates from current Dutch practice.

Background

X worked for various Ministries as chairperson or as an ordinary member of a complaints advisory committee as referred to in Section 7:13 AWB. This Section forms the legal basis under administrative law for the existence of a complaints advisory committee. X receives a fee for her activities. In dispute is whether X qualifies as a VAT taxable person for her committee activities. X is of the opinion that she cannot be regarded as a VAT taxable person.

Judgment

The Supreme Court ruled that, in view of the legislative history of Section 7:13 AWB, members of a complaints advisory committee do not perform their duties in a relationship of subordination. The fact that the remuneration of the members of the complaints advisory committee was determined in advance and by law does not detract from this. The Supreme Court subsequently addressed the question whether there is an independently performed economic activity.

It ruled that the activities or transactions performed as chairperson and as ordinary member of a complaints advisory committee do not constitute an independently performed economic activity for VAT purposes. The Supreme Court took into consideration the fact that both the chairperson and the other members of the complaints advisory committee do not have any individual duties and/or responsibilities. The Supreme Court found that the chairperson and other members do not act in their own name, for their own account or under their own responsibility. The members of the complaints advisory committee therefore run no economic risk. In view of the above, the Supreme Court ruled that a chairperson or ordinary member of a complaints advisory committee, as referred to in Section 7:13 AWB, who performs activities cannot be regarded as a VAT taxable person.

Implications for members of complaints advisory committees

This judgment may have implications for members of complaints advisory committees who receive a fee for their activities. The Dutch tax authorities have to date regarded members of complaints advisory committees as VAT taxable persons. As a result of this Supreme Court judgment, the Dutch tax authorities will have to change course.

On the basis of the Supreme Court judgment, members of complaints advisory committees, within the meaning of Section 7:13 AWB, should not be regarded as VAT

taxable persons. This means that complaints advisory committee members do not have to charge VAT on their fees. On the other hand, members of a complaints advisory committee are no longer entitled to recover input VAT in respect of their activities.

Members of complaints advisory committees who have already filed a notice of objection may invoke this judgment. If the judgment is indeed applicable to their situation, previously charged VAT can be credited and the Dutch tax authorities will have to refund the amounts remitted on the VAT returns.

Repercussions for similar positions, such as supervisory directors

The Supreme Court judgment appears to be in line with case law of the Court of Justice of the European Union (hereinafter: CJEU). In the IO case from mid-2019, the CJEU ruled that a member of a supervisory board of a Dutch *stichting* (foundation) does not perform economic activities independently and therefore does not qualify as a VAT taxable person.

For organizations that are not entitled to recover input VAT (banks, insurers, pension funds and charitable institutions, for example), VAT is a cost item and both the Supreme Court judgment and the previous judgment of the CJEU are favorable. We believe that the judgments of the Supreme Court and the CJEU have repercussions for inter alia members of supervisory and advisory boards, for supervisory board members and for investment advisory committees.

To date, however, the Dutch tax authorities have not had a coherent policy on the VAT position of members of, among others, complaints advisory committees and supervisory boards. The Dutch tax authorities argue that whether or not there is VAT entrepreneurship must be determined for each individual taxpayer. Nor has the Deputy Minister of Finance been willing to lay down a general policy applicable to each supervisory board member or regulatory authority. However, after the CJEU judgment the Deputy Minister had indicated that he might publish a general policy after the Supreme Court had handed down its judgment in this case. In view of the Supreme Court's judgment, it is to be expected that the Deputy Minister will soon publish new policy on the VAT position of, among others, members of complaints advisory committees and supervisory directors.

Follow-up

As a result of the CJEU case, we have already successfully filed notices of objection on behalf of various clients against the payment of VAT on supervisory board members' fees by way of the VAT return. On several occasions we have also successfully requested the Dutch tax authorities to deregister supervisory board members for VAT purposes. We expect that this judgment will further contribute to these positive results.

If you would like to know whether this judgment offers any opportunities for you or your organization, the advisors of Meijburg & Co's Indirect Tax Group can of course advise you about this. Feel free to contact one of them or your regular advisor for more information.

Meijburg & Co
June 2020

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