Invoiced VAT not paid on the declaration, but also not deducted, is not important for the presence of the intent

Through **Editors** - May 29, 2020

Invoiced VAT not paid on the declaration, but also not deducted, is not important for the presence of the intent

Interested party owns two golf courses. The interested party has issued an invoice to its 100% subsidiary for the rental of one of the golf courses. It charged the subsidiary VAT on this invoice. The interested party has not paid the invoiced VAT on the declaration. The subsidiary has not deducted the invoiced VAT.

The Tax and Customs Administration has levied the invoiced VAT from the interested party, taking the view that it is the intention of the interested party to blame that it has not paid this amount in VAT (on return).
The Court has ruled that the interested party can be blamed for not paying the invoiced VAT. The Court concluded from statements by the interested party and its authorized representative that, at the time when it should have paid the invoiced VAT on the return, it was aware that - even if there were a material fiscal unity between the interested party and the subsidiary - invoiced VAT was due and that it knowingly chose not to pay that VAT on the declaration. In the opinion of the Court, the intention of the interested party does not alter the fact that the subsidiary did not deduct the invoiced VAT when filing the turnover tax return.
According to the Supreme Court, it is not important for determining the VAT due whether the entrepreneur to whom the taxable person has charged VAT or not deducts or can deduct this VAT. The same amount forms the basis for imposing the fine referred to in Article 67f AWR insofar as that amount has not been paid (in full) as a result of the taxpayer's intent or gross negligence.

High Council Conclusion Court of Justice Court

Authority
High Council
Date of judgment
29-05-2020
Date of publication
29-05-2020
Case number
18/02775
Formal relationships
Conclusion: ECLI: NL: PHR: 2019: 781
In cassation on: ECLI: NL: GHSHE: 2018: 2196
Jurisdictions

Tax law

Special characteristics

Cassation

Content indication

Sales tax; artt. 20 AWR and art. 67f AWR; artt. 14, 15 and 37 DB Act; invoiced turnover tax is not paid on the declaration by the entrepreneur and is not deducted by the customer; important for the presence of intent? Fact to be taken into account when assessing whether a fine is appropriate and necessary?

Locations

Rechtspraak.nl

Viditax (FutD), 29-05-2020

UN Today 2020/1410

Enriched statement

Pronunciation

SUPREME COURT OF THE NETHERLANDS

TAX ROOM

Number 18/02775

Date May 29, 2020

JUDGMENT

in the case of

[X] BV in [Z] (hereinafter: interested party)
against

THE STATE SECRETARY OF FINANCE

to the appeal in cassation against the judgment of the Court of Appeal in 's-Hertogenbosch of 18 May 2018, no. Brabant (no. BRE 16/3879) concerning a fine decision given to the interested party. The judgment of the Court is attached to this judgment.

1 Proceedings in cassation

The interested party lodged an appeal in cassation against the judgment of the Court. The appeal in cassation is attached to this judgment and forms part of it.
The Secretary of State has lodged a statement of defense.
On 18 July 2019, Advocate General CM Ettema concluded that the appeal in cassation was unfounded.1 The
interested party responded in writing to the conclusion.

2 Assessment of resources

2.1 The following can be assumed in cassation.

2.1.1 Stakeholder owns two golf courses. Since 1 November 2008, it has leased one to [B] BV, a company of which the interested party is the sole shareholder (hereinafter: the subsidiary). The directors of the interested party also managed the subsidiary.

2.1.2 The interested party issued an invoice to the subsidiary on 6 April 2011 regarding the rental of the golf course during the period from November 2008 to April 2011. On this invoice, it charged the subsidiary € 125,875 in turnover tax (hereinafter: the invoiced sales tax).
The interested party did not pay the invoiced turnover tax on the declaration. The subsidiary has not deducted the invoiced turnover tax.
2.1.3Tijdens a book study has found that due concerned the sales tax was billed as its own general ledger and that it neither reported and remitted. The Inspector has therefore collected the amount of the invoiced turnover tax from the interested party. The Inspector has taken the view that the intention of the interested party is that she did not pay this amount in turnover tax (on declaration). Pursuant to Section 67f AWR, he simultaneously imposed a fine of 75 percent on the interested party for the subsequent sales tax.

2.2.1 It was in dispute at the Court whether the intention of the interested party is due to failure to pay the invoiced turnover tax and, if that question is answered in the affirmative, whether the penalty imposed is appropriate and appropriate.

2.2.2 The Court has ruled that the interested party can be blamed for not paying the invoiced turnover tax. The Court concluded from statements by the interested party and its authorized representative that, at the time when it should have paid the turnover tax invoiced on the return, it was aware that - even if there were a material fiscal unity between the interested party and the subsidiary - invoiced sales tax was due and that it knowingly

chose not to pay that sales tax on declaration. In the opinion of the Court, the intention of the interested party does not detract from the fact that the subsidiary did not deduct the invoiced turnover tax when filing the turnover tax return.

2.2.3 With regard to the amount of the fine, the Court concluded, taking everything into account, that a fine of € 62,500 is appropriate and appropriate. In the fact that the subsidiary has not requested a refund of the invoiced turnover tax, the Court has seen no reason to mitigate the fine. The Court subsequently reduced the fine thus determined for exceeding the reasonable period for the objection and appeal phase by € 2,500.

2.3.1 Means 1 is directed against the judgments of the Court set out above in 2.2.2. It argues that for the basis of the fine referred to in Article 67f (2) of the AWR, the Court should not only have taken into account the turnover tax that the interested party had to pay on the declaration, but should also have taken into account that the subsidiary invoiced the turnover tax has deliberately not deducted.

2.3.2 If the intent or gross negligence of a taxpayer is due to the fact that the tax that must be paid on the declaration has not been paid, has not been paid in part, or has not been paid within the stipulated period, the inspector can - simultaneously with the assessment of the additional assessment - impose a penalty on the taxpayer under Article 67f AWR of no more than 100 percent of the amount of the tax that was not paid or was not paid on time as a result of the intent or gross negligence.

2.3.3 The requirement of intent within the meaning of Article 67f AWR is met if the taxpayer's acts or omissions are aimed at not (fully) paying the tax referred to in 2.3.2. For the turnover tax penalty, this means that the actions of the taxpayer must have been aimed at not paying (in full) the amount of turnover tax owed by him in a period that he deducted - after deduction of the provisions of Article 15 of the turnover tax 1968 (hereinafter referred to as: the OB Act) should have been paid on the basis of Article 14 of the OB Act. To determine the aforementioned turnover tax due, it is not important whether the entrepreneur to whom the taxpayer has charged turnover tax, deduct or cannot deduct this turnover tax. It is therefore the (balance) amount of turnover tax owed referred to in Article 14 of the DB that, if not paid in full or in full, forms the basis for the taxpayer following Article 20 (2) AWR after amount of sales tax to be levied. The same (balance) amount forms the basis for imposing the fine referred to in Article 67f AWR insofar as that amount has not been paid (in full) as a result of the taxpayer's intent or gross negligence.

2.3.4 In view of what has been considered in 2.3.2 and 2.3.3 above, the judgments of the Court of Justice set out above in 2.2.2 do not constitute an error of law. As interwoven with

valuations of a factual nature, they cannot otherwise be examined for correctness by the Supreme Court in the cassation procedure. Nor are they incomprehensible or insufficiently motivated. Medium 1 fails.

2.4.1 Means 3 is directed against the Court's judgment on the amount of the fine as set out in 2.2.3 above. The plea alleges that the Court should have taken into account, as a penalty-reducing circumstance, that the interested party had tried in its own way to avoid the ultimate disadvantage for the treasury by ensuring that the subsidiary did not reclaim turnover tax.

2.4.2 When examining this plea, the Supreme Court puts the following first. It is reserved to the judge, who decides on the facts, to assess whether the offense penalty imposed under Article 67f AWR is appropriate and appropriate in the light of all circumstances to be taken into account. In the event of a dispute about whether or not a circumstance is taken into account, either as an aggravating or a mitigating factor, that judge will have to give an opinion. That judgment may not be an error of law and, insofar as it is factual, it must not be incomprehensible. The weighting of the various circumstances taken into account need not be justified. 2 The circumstances that may be taken into account when assessing whether a fine is appropriate and appropriate,

2.4.3 In this case, the Court has imposed a fine of € 62,500 as appropriate and appropriate. In its considerations regarding the sentencing, the Court has stated that the subsidiary did not request a refund of the invoiced turnover tax, but it did not consider this circumstance to be of sufficient weight to reduce the fine. The Court was able to reach this judgment without neglecting what has been considered in 2.4.2 above. For the rest, the judgment of the Court, as interwoven with valuations of a factual nature, cannot be examined for correctness by the Supreme Court in the cassation procedure. Therefore, means 3 also fails.

2.5 The Supreme Court also assessed means 2. The result of this is that this means cannot lead to the annulment of that ruling either. The Supreme Court does not have to motivate why it came to this judgment. Indeed, when assessing this plea it is not necessary to answer questions relevant to the unity or development of law (see Article 81 (1) of the Judicial Organization Act).

3 Process costs

The Supreme Court sees no reason to order legal costs.

4 Decision

The Supreme Court declares the appeal in cassation unfounded.

This judgment was delivered by Vice President RJ Koopman as Chairman, and EN Punt, PMF van Loon, ME van Hilten and EF Faase counsel, in the presence of Acting Registrar E. Cichowski, and delivered in public on 29 May 2020 .

1 ECLI: NL: PHR: 2019: 781.

2 Cf. HR 12 October 2018, ECLI: NL: HR: 2018: 1895, legal consideration 2.3.1.

ECLI: NL: HR: 2020: 973

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