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Judgment of the Supreme Court with possible consequences for the VAT position of members of the objections advisory committee and similar officers

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**drs. OL (Leo)
Mobach**

Rotterdam

088 90 91224

mobach.leo@kpmg.com



**drs. EPA (Eelco)
Brakeboer**


Rotterdam

088 90 92715

brakeboer.eelco@kpmg.com



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On June 26, 2020, the Supreme Court rendered a judgment in case 18/02684. This case concerns the VAT entrepreneurship of a member of an objection advisory committee. The Supreme Court has ruled that a chairman or ordinary member of an objection advisory committee within the meaning of Section 7:13 of the General Administrative Law Act (hereinafter: Awb) does not qualify as a VAT entrepreneur. The Tax and Customs Administration has hitherto classified members of an objection advisory committee as a VAT entrepreneur. This judgment therefore deviates from current Dutch practice.

Background

X has worked for various ministries as chairman or as a regular member of an objection advisory committee as referred to in Section 7:13 of the Awb. This article forms the legal administrative basis for the existence of an objection advisory committee. X receives a fee for her work. It is in dispute whether X qualifies as a VAT

entrepreneur for its committee work. X is of the opinion that she cannot be classified as a VAT entrepreneur.

Judgment

The Supreme Court ruled that, in view of the history of the creation of Article 7:13 GALA, members of the objections advisory committee do not perform their activities in a relationship of subordination. The fact that the compensation for the members of the objection advisory committee has already been determined in advance and by law does not alter this. The Supreme Court then examines whether there is an independently carried out economic activity

The Supreme Court ruled that the activities or actions as chairman and as ordinary member of an objection advisory committee do not constitute an independently performed economic activity for VAT. The Supreme Court considers that both the chairman and the other members of the objection advisory committee have no individual duties and / or responsibilities. The Supreme Court has determined that the chairman and other members do not act in their own name, for their own account or under their own responsibility. The members of the objections advisory committee are therefore not exposed to any economic risk. In view of the above, the Supreme Court has ruled that a chairman or ordinary member of an objection advisory committee as referred to in Section 7:13 GALA that performs activities cannot be regarded as a VAT entrepreneur.

Consequences for members of the objection advisory committees

This judgment may have consequences for members of objection committees who receive compensation for their work. To date, the Tax and Customs Administration

considers members of objection advisory committees as VAT entrepreneurs. As a result of this Supreme Court judgment, the Tax and Customs Administration will have to change its course.

Pursuant to the Supreme Court's judgment, members of objection advisory committees within the meaning of Section 7:13 GALA should not be regarded as VAT entrepreneurs. This means that objection advisory committee members do not have to charge VAT on their compensation. The downside is that the right to deduct input tax for work as a member of an objection advisory committee lapses.

Objection advisory committee members who have already lodged an objection can appeal to this judgment. If the judgment does indeed apply to their situation, previously calculated VAT can be credited and the Tax and Customs Administration will have to repay the amounts paid on the return.

Radiation effect to similar positions, such as supervisory directors?

The Supreme Court's judgment appears to be in line with the case law of the European Court of Justice (hereinafter: CJEU). In the IO case of mid-2019, the CJEU ruled that a member of a supervisory board of a Dutch foundation does not independently carry out economic activities and therefore does not qualify as a VAT entrepreneur.

VAT is an expense for organizations that are not entitled to deduct input tax (for example, banks, insurers, pension funds and charities) and the Supreme Court's ruling and the judgment of the CJEU referred to above are favorable. We believe that the judgments of the Supreme Court and the CJEU have an effect on members of supervisory and advisory boards, on supervisory directors and on investment advisory committees.

To date, however, there is still no unity of policy within the Tax and Customs Administration with regard to the VAT position of members of objection committees and supervisory boards, among others. The Tax and Customs Administration states that it must be determined for each taxable person whether or not VAT is an entrepreneur. The State Secretary has also not been prepared to establish a general policy that applies to every Commissioner or supervisor. However, the State Secretary had indicated after the CJEU judgment that he might publish a general policy after the Supreme Court would have delivered judgment in this case. In view of the opinion of the Supreme Court, it can be expected that the State Secretary will soon publish new policy regarding the VAT position of objections advisory committee members and supervisory directors, among others.

Next steps

In response to the CJEU case, we have already successfully objected on behalf of various clients to the payment of VAT on returns on supervisory board fees. We have also repeatedly asked the Tax and Customs Administration to deregister the statutory auditors for VAT purposes. We expect this judgment to further contribute to these positive results.

If you want to know for yourself or your organization whether this judgment offers opportunities, the advisors of the Indirect Tax Group of Meijburg & Co can of course advise you on this. Please do not hesitate to contact one of them or your usual adviser.

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