

# Commission work is not an independently pursued economic activity

By **Editors** - June 26, 2020



**Commission work is not an independently pursued economic activity**

The interested party has performed work for various ministries as chairman or as a member of an objection advisory committee as referred to in Section 7:13 GALA. She has been appointed for this purpose for a period of four years by the minister of the relevant ministry. The interested party receives a fee for the committee work. The interested party has paid the fees received on the turnover tax return. She has objected to this satisfaction, because she believes that she does not act as an entrepreneur within the meaning of Article 7 of the OB Act when carrying out the committee work.

The Court has argued that the interested party does not carry out the committee work independently.

According to the Supreme Court, the members of the objections advisory committee do not carry out their activities within the framework of that committee in a relationship of subordination to the terms of employment and the responsibility of 'the employer'.

However, the committee work does not constitute an independently pursued economic activity as referred to in Article 9 of the VAT Directive. This follows from the fact that both the chairman and the other members of the objections advisory committee do not have individual duties or responsibilities. They carry out the activities or actions as members of the complaints advisory committee and not in their own name, for their own account and / or under their own responsibility. These members of the objections advisory committee are not exposed to economic risk. A person who carries out committee work as referred to in Section 7:13 of the Awb does not therefore do so as an entrepreneur within the meaning of Section 7 of the OB Act.

It is clear from the [IO judgment](#) that persons who are at risk of income are also considered to be self-employed within the meaning of Article 9 (1) of the VAT Directive if, with regard to the performance of the agreed activities or activities, they have the economic bear the risks yourself. The interested party therefore does not owe any turnover tax on the commission work.

High Council      Conclusion      Court of Justice

Authority

High Council

Date of judgment

06/26/2020

Date of publication

06/26/2020

Case number

02/18684

Formal relationships

Conclusion: ECLI: NL: PHR: 2019: 1327

In cassation on: ECLI: NL: GHAMS: 2018: 1696

Jurisdictions

Tax law

Special characteristics

Cassation

Content indication

Sales tax; artt. 9 and 10 VAT Directive 2006; art. 7, paragraph 1, Law OB 1968; art. 7:13 Awb; entrepreneurship; compensation for chairman and / or members of an objection advisory committee; requirement of independence.

Locations

Rechtspraak.nl

Viditax (FutD), 26-06-2020

VN Today 2020/1671

VN Today 2020/1673

FutD 2020-1919 with annotation of Fiscal up to Date

NTFR 2020/2020 with annotation of Mr. MWC Soltysik

NLF 2020/1492 with annotation by Werner Gelderblom

Enriched statement

## Statement

SUPREME COURT OF THE NETHERLANDS

TAX ROOM

Number 18/02684

Date June 26, 2020

JUDGMENT

in the case of

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

against

## THE STATE SECRETARY OF FINANCE

to the appeal in cassation against the judgment of the Amsterdam Court of Appeal of 29 May 2018, no. amount of turnover tax paid on the tax return for the period 1 January 2014 to 31 December 2014. The Court's judgment 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 12 December 2019, Advocate General CM Ettema decided to declare the appeal in cassation well-founded.<sup>1</sup>

## 2 Assessment of the plea

2.1 The following can be assumed in cassation.

2.1.1 The interested party has performed work 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. She has been appointed for this purpose for a period of four years by the minister of the relevant ministry.

2.1.2 If an objection has been lodged against a decision by an administrative body of one of the ministries involved, the interested party may be asked to take a seat on the objections advisory committee as chairman or as a regular member. This committee hears the person submitting the notice of objection and advises on the objections to the administrative body of the relevant ministry.

2.1.3 The interested party will receive a fee for her work as chairman or ordinary member of an objection advisory committee (hereinafter: the committee work). The amount of this is determined on the basis of the Decree on fees for advisory boards and committees. She has objected to this satisfaction because she believes that she does not act as an entrepreneur within the meaning of Article 7 of the Turnover Tax Act 1968 (hereinafter: the Act) when carrying out the committee work.

2.2 Before the Court, the committee work had been carried out as an entrepreneur within the meaning of Article 7 of the Act in the event of a dispute or interested party.

2.2.1 For the interpretation of Article 7 of the Act, the Court sought alignment with Articles 9 (1) and 10 of the 2006 VAT Directive. It ruled that the committee's activities are economic activities as referred to in Article 9 of the VAT Directive 2006. According to the Court, the interested party acts as a participant in a market by performing work for the objection advisory committees for a fee. In the opinion of the Court, this does not detract from the fact that the interested party must perform the work in person, nor that the committee work serves the general interest and is regulated by law.

2.2.2 The Court has subsequently ruled that the interested party independently carries out the committee work as referred to in Article 7 (1) of the Act. In the opinion of the Court there is no room for a "successful appeal to the exception as referred to in Article 10 of the 2006 VAT Directive". The interested party has argued before the Court that it does not carry out the committee work independently because it has a legal relationship with each of the ministries, which creates a relationship of subordination with regard to employment and remuneration conditions and the responsibility of the ministries. The Court rejected this line of argument. Furthermore, the Court rejected the interested party's argument that it does not run any entrepreneurial risk in connection with these activities.

Because the interested party is not sure whether and to what extent she will be asked to actually perform work in one or more individual cases and she will only receive compensation if she has actually performed work for an objection advisory committee, the Court considers that the interested party will as far as economic and / or income risks. In those circumstances, the position of the interested party is more similar to that of a practitioner of a liberal or equivalent profession, at least its position is not sufficiently comparable to that of an employee as referred to in Article 10 of the 2006 VAT Directive, according to the Court. .

2.3 Insofar as the plea is directed against the judgment of the Court stated above in 2.2.1 that the committee's activities are economic activities as referred to in Article 9 of the 2006 VAT Directive, it will fail. Contrary to the plea in law, the answer to the question whether the activities are economic activities within the meaning of that provision is irrelevant as to whether the person who carries out the activities is part of a public body or whether, as in this case, is a member of a government commission established by law.

2.4 The remainder of the plea is directed against the judgments of the Court stated above in 2.2.2. It argues that the interested party does not carry out the committee work independently.

2.5 When assessing the plea in this respect, the Supreme Court puts the following first.

2.5.1 Pursuant to Article 7 (1) of the Act, an entrepreneur is defined as any person who independently conducts a business. The legislator did not intend to attach any meaning to the term entrepreneur used in this provision other than to the term taxable person in Article 9 (1) of the VAT Directive 2006.<sup>3</sup> Under the first subparagraph of Article 9 (1) of the VAT Directive 2006, any person who independently carries out an economic activity, whatever the purpose or result of that activity, is considered to be a taxable person.

2.5.2 The autonomy referred to in Article 9 (1) of the VAT Directive 2006 is lacking if economic activities are performed in a proportion of subordination. A relationship of subordination is not present when the person concerned carries out the work or acts (i) in his own name, (ii) on his own account, (iii) under his own responsibility, and (iv) if he has the economic risk associated with those activities.<sup>4</sup> In addition, the required independence is in any case lacking for salaried employees and other persons who have entered into an employment contract with their employer or who have any other legal relationship that creates a relationship of subordination with regard to the terms of employment and remuneration and responsibility. from the employer,

2.5.3 For the answer to the question whether the person concerned carries out the committee work independently, the legal and factual context under which these activities are carried out must be taken into

account.

2.5.4 Pursuant to Section 7:13 of the Awb, objection advisory committees consist of at least three members, of whom in any case the chairman is not part of and does not work under the responsibility of the relevant administrative body. The objection advisory committee has the task of advising the administrative body that handles the objection about the objection. This task includes hearing and deciding whether confidentiality of the documents pertaining to the case is required. .6

The appeals advisory committee hears the interested party (ies) about the objection and also invites a representative of the administrative body for an explanation of its position.<sup>7</sup> It may instruct the chairman or another member who, like the chairman, does not participate in the hearing. is part of or works under the responsibility of the administrative body.<sup>8</sup> It follows from the history of Article 7:13 GALA that that chairman or that member acts as a representative of the objections advisory committee during the hearing and not in his own name or for his own account.<sup>9</sup>

The objections advisory committee issues the advice in writing.<sup>10</sup> The objections advisory committee cannot leave this task assigned to it by law to the chairman or another member. If the advice has not been issued by the full objections advisory committee, that advice has therefore not been drawn up in accordance with Article 7:13 Awb. 11

2.6 From what has been considered in 2.5.3 and 2.5.4 above, it follows that the members of the objections advisory committee do not perform their activities within the framework of that committee in a relationship of subordination to the terms of employment and the responsibility of 'the employer'. . Those members are therefore not, as such, among the persons with whom Article 10 of the 2006 VAT Directive excludes them from carrying out economic activities independently.

This does not alter the fact that the amount of the remuneration of the chairman and the other members of the objection advisory committee is laid down by law.

2.7 On the basis of this, as has been considered above in 2.5.2, it must also be examined whether the activities or actions as chairman and as ordinary member of an objections advisory committee constitute an independently carried out economic activity as referred to in Article 9 of the 2006 VAT Directive. is not the case. This follows from the fact that both the chairman and the other members of the objections advisory committee do not have individual duties or responsibilities. They carry out the activities or actions as members of the complaints advisory committee and not in their own name, for their own account and / or under their own responsibility. These members of the objections advisory committee are not exposed to economic risk. A person who in the capacity of chairman or ordinary member of an objection advisory committee as referred to in Article 7:

2.8 The Court has ruled that the person appointed as chairman or ordinary member of an objection advisory committee is exposed to an income risk in the sense that this person is not assured whether and, if so, how often he is actually asked to perform committee work, and that he only receives compensation if he has performed work. Apparently, the Court has assumed that this finding will suffice when assessing whether someone is acting independently. However, it is apparent from the judgment of the Court of Justice of 13 June 2019, IO, C-420/18, ECLI: EU: C: 2019: 490, that even persons who are at risk of income in the sense referred to above, are only self-employed in the meaning of Article 9 (1),

2.9 From what has been considered above in 2.7 and 2.8, it follows that the plea is correct in that respect against the judgments presented in 2.2.2 above. Contrary to what was apparently assumed by the Court, it does not follow from the case law of the Court of Justice that for the determination that someone acts independently within the meaning of Article 9 (1) of the VAT Directive 2006, it is sufficient that the agreed activities do not be carried out in a legal relationship as referred to in Article 10 of the VAT Directive 2006. The other means succeed.

2.10 In view of what has been considered in 2.9 above, the judgment of the Court cannot be upheld. The Supreme Court can settle the matter. The interested party does not owe any turnover tax on the commission work. In that case, there is no dispute between the parties that an amount of € 1,955 in turnover tax must be returned.

### 3 Process costs

The Secretary of State will be ordered to pay the costs of the cassation proceedings and the Inspector to pay the costs of the proceedings before the Court of Justice and the handling of the objection.

### 4 Decision

The high Council:

- declares the appeal in cassation well founded,
- set aside the judgment of the Court,
- set aside the judgment of the District Court except insofar as it concerns decisions regarding compensation for non-material damage, legal costs and court fees,
- annul the Inspector's statement,
- grants a refund of € 1,955
- instructs the State Secretary of Finance to reimburse the interested party for a court fee of € 253 paid by the interested party to hear the appeal in cassation,
- instructs the Inspector to reimburse to the interested party the court fee of € 250 paid to the Court for the handling of the case before the Court,

- orders the State Secretary of Finance to pay the costs of the interested party for the cassation proceedings, set at € 1,575 for professional legal assistance, and

- orders the Inspector to pay the costs of the person concerned before the Court of Justice, set at € 1,575 for professional legal assistance and the costs of handling the objection on the part of the interested party, set at € 392 for professional legal aid .

This judgment was delivered by the Vice-President RJ Koopman as Chairman, and the Counselors EN Punt, LF van Kalmthout, ME van Hilten and EF Faase, in the presence of the Acting Registrar E. Cichowski, and delivered in public on 26 June 2020 .

1 ECLI: NL: PHR: 2019: 1327.

2 Decree of 21 January 2009, Stb. 2009, 50, as amended by decision of 6 December 2012, Stb. 2012, 624 (text January 1, 2013 to December 31, 2019).

3 Cf. HR May 2, 1984, ECLI: NL: HR: 1984: AW8625.

4 Cf. CJEU 29 September 2015, Gmina Wrocław, C-276/14, ECLI: EU: C: 2015: 635, point 34, and CJEU 13 June 2019, IDE, C-420/18, ECLI: EU: C: 2019: 490 , points 37 to 39.

5 Section 7:13 (4) GALA in conjunction with Article 7: 4 (6) GALA, Article 7: 5 (2) GALA and Article 7: 3 GALA respectively.

6 Parliamentary Papers II 1988/89, 21 221, no.3, p. 155.

7 Article 7:13, paragraph 3, first sentence, and paragraph 5, Awb.

8 Section 7:13 (3), second sentence, Awb.

9 Parliamentary Papers II 1988/89, 21 221, no.3, p. 155.

10 Section 7:13 (6) of the Awb.

11 Cf. CRvB 1 August 2005, ECLI: NL: CRVB: 2005: AU0694, and ABRvS 5 November 2008, ECLI: NL: RVS: 2008: BG3358, legal consideration 2.7.2.

[ECLI: NL: HR: 2020: 1143](#)



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