

#15: Fundamental rights are not always stretched to fit the purpose

Procedural errors are the thorn in the side of lawyers. At least, the (lack of) consequences of such errors. In [Lawlunch #02](#) we explained how the system for compensation due to procedural errors works in the Dutch criminal law. Case law shows that it is an uphill battle to get procedural errors acknowledged and to receive compensation for these errors the government made during investigation. In tax law other criteria are applicable when it comes to procedural errors. These criteria and the interpretation by the courts are very refreshing.

Article 359a of the Dutch Criminal Procedural Code (DPC) provides the basis to decide what kind of implications a procedural error could have. The Court can decide that an irreparable procedural error during the criminal investigations of the proceedings should result in the inadmissibility of the prosecution, exclusion of evidence or a reduction of the sentence. To decide upon one of these consequences, the Court has to weigh three factors. The first factor is the interest that the violated 'rule' aims to protect, the second factor is the seriousness of the infringement and the third factor is what disadvantage the omission has for the suspect. As the implications provided by article 359a DPC are discretionary, the Court can also suffice with the mere observation that the procedural error occurred. Accordingly, the error could also stay without any consequences at all. [Case law shows](#) that inadmissibility only rarely results as a consequence of procedural errors.

The rationale behind the strict rules on procedural errors that follow from the case law is that a suspect or tax payer

should not profit from mistakes the authorities made. In our opinion the lack of consequences nourishes the idea of tax inspectors and police officers that it is all right to make mistakes, as mistakes do not compromise the case itself. But if tax inspectors and police officers are allowed to make mistakes and disobey the rules, why should suspects and tax payers? It seems that tax inspectors and police officers do not face any repercussions for making procedural errors. A double standard which in our opinion bites the tail of the rule of law.

Given the strict criteria for compensation for procedural errors, the firm decision of a lower tax court of [29 November 2016](#) is very refreshing. In Dutch tax law, the law does not provide an enumeration of lawful evidence as the Dutch Criminal Procedural Code does. All sorts and all forms of evidence can be used by the tax court. The selection of evidence is also up to the discretion of the court. Dutch tax law also does not provide sanctions with respect to procedural errors as Dutch Criminal Procedural Law does. Nevertheless, the Dutch Supreme Court may have set an even more strict criteria with regard to the consequences of procedural errors in tax law. In the decision of the Supreme Court of [20 March 2015](#), it is considered that the general principles of reasonable government are fundamental in tax law. Using evidence in breach of these principles is not allowed if the evidence is obtained in a manner which goes against these principles in such a way that it does not fit what may be expected of a reasonable government. This is for instance the case if the right to a fair trial in the sense of article 6 ECHR is breached.

The decision of the tax court of 29 November 2016 in that sense is interesting. The case concerns the appeal against a so called 'information notice'. This relatively new phenomenon in Dutch tax law provides more legal protection to the tax payer when it comes to requests for information from the tax

inspector. However it is also a tool for the tax inspector to establish the shift of the burden of proof from the tax inspector to the tax payer. An information notice can be imposed since 1 July 2011. The tax inspector can do so if the tax payer does not answer certain questions or does not provide requested information. The tax payer can object against the information notice and in that procedure the court ultimately can decide whether or not the questions have to be answered or that the information has to be provided which can result in the shifting of the burden of proof. In this specific case in the appeal procedure against the information notice the tax payer stated that the tax inspector was not allowed to ask the questions he asks, as the questions were based upon a folder with material which had been obtained unlawfully by the tax inspector.

The folder was taken during a visit to the premises of the tax payer. The legal provisions in this respect however have not been followed since the owner of the premises did not give permission to the tax authorities to enter his home. Therefore the court concluded that this visit in principle breached the right to privacy in the sense of article 8 ECHR. This is in line with the case law of the European Court of Human Rights in this matter. The permission has to be provided voluntarily. This means that the owner of the premises needs to be informed fully on the purpose of the visit. The authorities have [the burden of proof](#) that this permission was granted. In this case the tax inspector introduced himself in a certain function, while in reality he acted as tax inspector to gather information with the goal to use that information for tax purposes, while he had no permission to enter the premises as a tax inspector.

The tax court considers this a serious breach on the fundamental right of article 8 ECHR. Therefore the evidence was gathered in a way which breached the principles of reasonable government in an unacceptable way. According to the

court, the use of this evidence is unacceptable under all circumstances. Since the information notice was based solely on the information obtained during this event, the tax payer's appeal against the information notice was successful.

In this case the government crossed the line by concealing the truth. In our opinion this development shows that the right to privacy is important after all. It is not always stretched to fit the purpose and therefore a 'sham'. It also shows that it pays off to keep fighting for (y)our fundamental rights. Also in cases and jurisdictions in which at first sight the arguments seem to be hopeless. We hope that the Supreme Court will support this development.

If you have questions about this subject or if you would like to discuss this, please contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.