

## #22: A sledgehammer to fight tax fraud?

Is the Dutch government using a sledgehammer to crack a nut in the fight against tax evasion and tax fraud? In [lawlunch#13](#) we discussed the upcoming tax measures which were announced by the Dutch state secretary of finance concerning the prevention of tax evasion and tax fraud. One of the announced measures that especially caught our eye was the abolishment of voluntary disclosure. We discussed the implications of the abolishment in [lawlunch#19](#). The abolishment however seems to be more extensive than expected; it also impacts the protection from criminal liability after voluntary disclosure. Furthermore, the state secretary announced a measure that enables authorities to publish administrative penalties imposed to so call professional facilitators, such as tax advisors and lawyers. So what is changing? And what is the current state of affairs?

The state secretary made clear he did not want to lose any time on fighting tax evasion and fraud. In July 2018 he presented an online [draft of a national Anti-tax avoidance Act](#) concerning the details of the 'administrative penalties publication'-measure for consultation that was regarded critically by professionals. In addition, the state secretary presented the [Tax Plan 2018](#) and related [other tax Measures 2018](#) containing the ultimate abolishment of voluntary disclosure on annual Budget Day.<sup>[1]</sup> On 20 July 2017 the law went into consultation for the public, which was closed on 28 September 2017. It is still to be expected when parliament will be deciding upon the proposal, nevertheless it is possible that the proposals will become new legislation in the Netherlands as from 2018.

In [lawlunch#19](#) we elaborated upon the voluntary disclosure procedure. We also explained that the state secretary at that

time did not announce to abolish the protection of criminal liability after a voluntary disclosure. Nevertheless it seems that the state secretary has reconsidered his thoughts. Not only article 67n of the General Law on State Taxes, containing the voluntary disclosure-rule, will be abolished, this also applies to article 69 (3) of the General Law on State Taxes which contains the protection of criminal liability. Consequently, if the proposal will be accepted Dutch law no longer contains any possibility to prevent criminal liability as a result of successful voluntary disclosure.

Concerning the arguments we put forward in lawlunch#19, it is no surprise we are not in favor of this measure. The abolishment of the complete voluntary disclosure does not encourage the tax payer to come forward if he had filed wrong tax returns in the past. Therefore the abolishment of the criminal component of the voluntary disclosure could lead to less recovery of unpaid taxes. In our opinion – as explained in lawlunch #19 – abolishment of the voluntary disclosure-rule should at least involve examination of the possibility to enlarge legal bases for safeguarding against criminal charge.

Further, in [lawlunch#6](#) we explained the possibilities under Dutch law to impose penalties to facilitators. The state secretary now proposes to publish every administrative penalty resulting from a tax related offence that is being held against any criminal facilitator. According to the state secretary this will send a strong message to society and legal tax professionals that ‘advising on and implementing unacceptable tax routes will not be accepted’. In his statement, the state secretary emphasizes the preventive effects of the measure and besides information benefits for society. A lot of criticism was made against this proposal, amongst which for instance by the Dutch Tax Consultant Association (Dutch: Nederlandse Orde van Belastingadviseurs).

In its review of the consultation, the Associations’ main argument against the proposal concerns the proportionality of

the rule in relation to the interests involved: not only will publishing administrative penalties lead to a severe violation of the privacy of a tax professional concerning one's digital footprint, more important is that the proposal of the state secretary does not fit the rule of law. The Association emphasizes the position of the tax professional as a citizen who should be protected against (abusive) state power. Publication of every administrative penalty as a general rule will put pressure on this fundamental idea. Therefore, the Association at least requires an accurate procedure to safeguard individual legal rights before a judge and a fair balance of interest.

The Association does not explicitly address the risks of a direct violation of article 6 ECHR (right to fair trial), but focusses more on compromising article 8 EHCR (right to privacy and private life). As the object of the matter is a fine article 6 ECHR should be respected. Noted is that the proposal is to publish in the objections phase, hence at that point there is no decision of a judge yet. This means that the penalty will already be published before the person involved had a chance to defend himself or to request an impartial court to judge upon the penalty. As our colleagues described it, immediate publication of administrative penalties as a result of an offence will therefore easily lead to 'a license to kill' for the tax inspector.

The publication could easily lead to severe consequences in the relationship of the professional with his clients. Professionals would like to avoid such a situation. When professionals are pushed in a position to not become a target for the tax inspector, it also becomes harder for them to stand up against the tax inspectorate in the interest of their clients. This is an undesirable situation. The implications of the publication measure as proposed by the state secretary will be substantial. We are alarmed by the paralyzing effect it may cause as the proposal may hang over legal tax

professionalism as the sword of Damocles, not only in terms of private life but also in terms of criminal procedure. In our opinion, the state secretary did not sufficiently acknowledge these results of this proposal, and it is to hope that Dutch parliament won't shut its eyes for the interests of legal tax professionalism.

It is to be expected that parliament will decide upon the proposals in the near future. Time will tell whether these proposals will become the law and what their scope will be. For the time being, our view is that the state secretary indeed is using a sledgehammer to crack a nut. Consequently, we pin our hopes on the fact that 'The Hague' will absorb the serious objections of the (criminal) tax professionals and value their arguments to make up its mind.

Do you have any questions about this subject, are you confronted with a related issue and would you like to discuss this with us? Please feel free to contact us via [boezelman@hertoghsadvocaten.nl](mailto:boezelman@hertoghsadvocaten.nl) and [boer@hertoghsadvocaten.nl](mailto:boer@hertoghsadvocaten.nl).

[\[11\]](#) Article XX of the 'Other tax measures 2018 Act' (Wet Overige fiscale maatregelen 2018) states that article 67n of the 'General Tax Act' (Algemene Wet inzake Rijksbelastingen) will be withdrawn.