

#31: Supplements on VAT tax returns and the right not to incriminate yourself

Since 1 January 2012 Dutch tax payers are obliged to report inaccuracies or omissions in tax returns to the Dutch tax authorities as soon as they are aware of this. This obligation is prescribed in article 10a of the Dutch State Taxes Act (AWR). Which inaccuracies or omissions have to be reported to the tax authority is provided by Orders in Council i. One example is the VAT tax returns. If an omission is detected a supplementation of the VAT tax return has to be filed as soon as possible. If this supplementation has not been filed, or has not been filed in time or not in the prescribed way, this act is punishable with a fine. However, public prosecutors have also used this article to hold people criminally liable for not filing a supplementation of one's VAT tax return. However, a recent judgement stated that someone cannot be held criminally liable for this act and moreover it conflicts with the European *nemo tenetur* principle. Can you be punished for not filing a supplementation for your VAT tax return?

Someone can be held criminally liable if he is, under the Tax Legislation, obliged to provide information, data, or indications, and fails to provide them, or provides them incompletely. This criminal liability is found in article 69, subsection 1, jo. article 68, subsection 1, sub a, AWR. Based on these articles, criminal liability for article 10a AWR is construed. There are several judgements in which the public prosecutor summons a suspect for filing a wrongful Tax return and also for failing to file a supplementation of this tax return.

We believe however that you cannot be held criminally liable for not filing a supplementation of your VAT tax return. For

one, because the parliamentary history does not speak a word of the possibility to hold someone criminally liable based on article 10a AWR. Secondly, article 10a AWR states that the violation of this article is a foul and not a crime. The AWR holds very specific rules for the criminalization of fouls.

Moreover, it would be very strange if someone willfully files an incorrect tax return and is then obliged to report this the second after he files this tax return. This would be a direct infringement of your right not to incriminate yourself. This would possibly be different if the first VAT tax return was not willfully incorrect but someone finds out later that this tax return was incorrect. However it would be strange if the obligation to file a supplementation of the VAT return only counts when someone thought he filed the first tax return correct but finds out later that it is was incorrect.

On 10 July 2018 a higher Court in the Netherlands ruled for the first time that a breach of article 10a AWR is not a criminal act. The Court judges that the parliamentary history does not refer to this possibility. Furthermore the Court gives an extra argument into consideration. Which is that the obligation to file a supplementation on your VAT tax return would infringe the right not to incriminate oneself.

The privilege against self-incrimination is not specifically mentioned in the ECHR. However, today, the existence of such a privilege is be considered to be part of a right to a fair trial ex article 6 ECHR. As article 10a AWR gives an obligation to give information about mistakes in the past we believe that one cannot be held criminally liable nor can be punished for this fact. It seems therefore that article 10a AWR creates an infringement on article 6 ECHR, the right to a fair trial.

We therefore believe that one cannot be held criminally liable for article 10a AWR but also no fine can be imposed.

Do you have any questions about this subject, are you struggling with a related issue or would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.