

## #32: Tax fraud ≠ forgery

Dutch law distinguishes so called 'ordinary' criminal law and criminal offences described in other laws than the Dutch Criminal Code. In case an offense is specifically punishable under the General Code on Government taxes (GCGT) this provision might be a *lex specialis* and therefore prevail over applicable provisions from the Dutch Criminal Code. Prevail in such a way that the public prosecutor is obliged to prosecute on the basis of the *lex specialis*. If a suspect is prosecuted for the provision in the Dutch Criminal Code the prosecution service should be declared inadmissible. A recent verdict of the regional court of Amsterdam, which was published on [10 August 2018](#), sheds more light on this issue.

Article 69, sub 4, GCGT states that in case there is a suspicion of a tax offense, the suspect cannot also be prosecuted for forgery in the sense of article 225, sub 2, Dutch Criminal Code (DCC). This article explicitly concerns making intentional use of a false document. In principle this could thus be the filling of a false tax return. The making of such a false document (article 225, sub a, DCC) however is not excluded in article 69, sub 4, GCGT.

This raises the question whether it would be desirable to leave open the possibility to prosecute on the basis of the Dutch Criminal Code if the offense concerns filling in a false tax return. Doesn't that undermine the provisions of the GCGT? Should tax offenses in general be prosecuted via the more specialized and equipped GCGT?

The prosecution exclusion of article 69, sub 4, GCGT came into our legal system after a report of the Committee Van Slooten. Even though this report was not published, the legislative history of the GCGT shows some of the background of the exclusion provision. It states that prosecution based on

article 225, sub 2, Dutch Criminal Code does not uphold the specifics of the tax law provisions, such as the possibility of voluntary disclosure and the role of the administrative authorities in the prosecution.

But why is article 225, sub 1, DCC not included? Case-law on the scope of article 69, sub 4, GCGT is divided. Could the first section of the article – the making of false documents – also be excluded from prosecution via the Dutch Criminal Code? A higher court in [2015](#) annulled the inadmissibility of the prosecution in a case where the suspect was prosecuted for ‘ordinary’ forgery when he allegedly intentionally made up false tax returns. The regional court of Amsterdam decided differently in a similar situation. The court declared the prosecution inadmissible for prosecution on the basis of article 225, sub 1, Dutch Criminal Code. The Court states that prosecution in principle is a possibility, but this might be different if the factual acts of the suspect are the same as the factual act which can be qualified under section 2 of the article and are excluded from prosecution.

In this case the suspect is accused to have made *and filed* a false tax return. These tax returns are made with the only goal to be filed at the tax authorities. This was done digitally and therefore with the same push of a button the document was made and filed. Therefore the acts as qualified under the first section of the forgery provision – making the document – and under the second section – using the document – were done at the same time. Therefore the court adopts the specialty of the GCGT also for making the allegedly false tax return.

In our opinion this verdict is in line with the purpose of the exclusion provision of article 69 GCGT. Tax offenses should only be prosecuted on the basis of the specifically designed laws.

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](mailto:boezelman@hertoghsadvocaten.nl) and [boer@hertoghsadvocaten.nl](mailto:boer@hertoghsadvocaten.nl).