

#29: The proceeds of tax fraud

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. One of the main goals is to confiscate illegally obtained profits. One important legal exception is that the Public Prosecutor cannot confiscate profits gained through tax fraud. Article 74 of the State Taxes Act holds this prohibitions since these proceeds should be recovered by the tax inspector by imposing a(n additional) tax assessment. But what if the tax authorities do not have the means to impose a tax assessment? For instance because the recovery period elapsed?

Since 1993 the Dutch Criminal Code law states that the Court may impose an obligation to pay the State Treasury an amount that equals the financial gain obtained through the commission of criminal offences: this is the confiscation procedure. This measure was introduced in order to improve the fight against organized crime such as drug trafficking, fraud, environmental crime and money laundering. This measure is dealt with in a separate procedure under the criminal code. This procedure can take place during or after the main criminal procedure.

This confiscation measure is a non-punitive measure and can be imposed if the following conditions are met:

- The convict has benefited 'by means or from' the offence for which he or she has actually been convicted;
- The convict has benefited 'by means or from' other criminal acts of which there are sufficient indications that the convicted person also committed these acts;
- The conviction was based on a serious offence on which a fine of the fifth category could be imposed. The height of the category of fines has been varying over the years.

Following the example of the UK Drug Trafficking Offences Act 1994 article 36e of the Dutch Criminal Code was amended in 2011. This amendment made it possible to confiscate conform all expenditures done by the defendant up to six years prior to the date when the crimes were committed. Based on the conviction it is assumed that the expenses are illegally obtained profits. This assumption can be refuted by making it sufficiently plausible that the spent money has a legal source. The same applies for assets obtained in the six years prior to the criminal offence as described in article 36, subsection two, part b.

Article 74 of the State Taxes Act states clearly that section 36e of the Criminal Code shall not apply to any criminal acts under the Tax Legislation. The question if article 74 also applies to tax proceeds that cannot be recovered by the tax authorities?

In our opinion these proceeds cannot be recovered by the public prosecutor. The rationale behind article 74 is that a confiscation by the public prosecutor would intervene with the States Taxes Act. Since this Act has explicit time limits to impose an additional tax assessment a confiscation of tax proceeds beyond this time limit would also intervene the States Taxes Act.

The Dutch Supreme Court did not explicitly rule about this matter. However, in a judgement of 1996 we see a lead that the public prosecution cannot confiscate tax proceeds that cannot be recovered by the tax authorities. In this case the tax collector tried to recover taxes while no tax assessment was imposed. The tax collector stated that the tax payer committed an unlawful act and should pay compensation for damages due to irreconcilability of tax debts. The Supreme Court judged that only tax debts could be claimed for which taxes an assessment was imposed. This judgement shows that it is up to the tax inspector to claim taxes through tax assessments. No other judicial means can be imposed to collect taxes. For this

reason we believe the public prosecutor does not have the right to collect taxes.

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 and boer@hertoghsadvocaten.nl.