



Meijburg & Co
Tax & Legal

Tax controversy & Litigation

The role of the cassation lawyer and litigating about points of law

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Organizations are increasingly finding themselves involved in tax disputes with tax authorities. This is happening in the Netherlands, but also elsewhere.

Disputes often don't end up in court; in most cases they are resolved after consulting with the Dutch tax authorities. But sometimes a case is litigated up to the highest judicial body, especially if it concerns a genuine point of law. What is the added value of engaging KPMG Meijburg in cassation proceedings and how can we help during proceedings before the Court of Justice of the European Union?

Won or lost

Tax proceedings start before the District Court. Parties may appeal a District Court judgment before the Court of Appeals. Otto Marres, partner at KPMG Meijburg & Co, explains: "The Appeals Court looks at the law, but in particular also establishes the facts. In many cases, you've already won or lost the proceedings at this tribunal of fact. And if you don't agree with the judgment rendered by the Court of Appeals? Then you can appeal it before the Dutch Supreme Court, one of the highest courts in the Netherlands."

The Supreme Court looks differently at the case. It proceeds on the basis that the facts have already been established. The Supreme Court uses the established facts to review the case on the basis of two grounds: it examines whether the law has been breached and whether there have been procedural defects. If there are procedural defects, in practice this only involves a lack of substantiation. This means there not all the factual conclusions were substantiated or that the substantiation was unsound.

Cassation proceedings: worthwhile or not?

Otto Marres: "Over the years there have been more and more opportunities for the Supreme Court to reject a case without having to give clear reasons why the particular party is wrong. If it is clear that the appeal in cassation cannot succeed and it is otherwise not relevant to the development of law, then the law states that the Supreme Court may suffice with that observation." There is then no point in initiating an appeal before the Supreme Court. Otto Marres: "The cases our firm litigates are generally 'cases that matter', to quote the Supreme Court. That means that the Court will render a substantiated judgment."

Is it worth initiating cassation proceedings before the Supreme Court and will they be successful? These are questions often asked by clients after the proceedings have taken place. Gert-Jan van Norden, partner at KPMG Meijburg & Co: "I litigated 1 case where we didn't agree with the judgment but it was so factual that we advised the client to not appeal to the Supreme Court. Instead, it's then better to initiate new proceedings so that you can argue about the facts. On the other hand, it's sometimes clear that a case concerns a genuine point of law about which the tax authorities and the taxpayer disagree and where the facts aren't in dispute. In that case, it can be efficient to appeal directly to the Supreme Court via a leapfrog appeal, thereby skipping the Court of

Appeals. Our expertise and experience means we know exactly which step would make the most sense to take for the client, which saves them time and money."

Appealing before the Dutch Supreme Court

Cassation proceedings thus concern breaches of law and lack of substantiation, not the presentation of facts and evidence. That's why cassation proceedings before the Supreme Court are often 'proceedings on paper'. Although the Supreme Court is reticent in accepting new appeals, Otto Marres has appealed before the Supreme Court on several occasions. "Other firms that don't have tax lawyers who can litigate tax matters will be more likely to downplay the worth of appealing before the Supreme Court. Nevertheless there are cases where an appeal does indeed have added value."

For example, there was a case concerning the valuation of positions of market makers. Otto Marres: "According to the tax authorities there wasn't any foreign exchange risk, because all the risks were hedged. The spoils had already been claimed, so to speak. This market maker didn't agree and initiated legal proceedings. The point here was that although market makers try to manage their risks as much as possible, they can't eliminate them completely. This is such a technically complex story that it can only become clear if the approach used by those market makers is first properly explained, which we did before the Supreme Court."





Interpreter between court and client

Although you can no longer dispute the facts before the Supreme Court, it is possible to provide the Court with more insight. The Supreme Court judges listen to the debate between the lawyers of both parties. That gives them a better understanding of the case and insight into the context and consequences of the lower court judgments. Otto Marres: “I was able to convince the Supreme Court that it was wrong here to rule that the market makers barely ran any risks.”

Otto Marres continues: “For most judges such a case is quite exotic. Judges are generalists and have to deal with all kinds of cases. At the same time, you often see that it’s really difficult for professionals who aren’t lawyers to precisely explain the intricacies of something in terms that lawyers understand. As lawyer, you’re therefore more of an interpreter between the legal world and the client’s sector. Pleading a case is then useful. Not necessarily for the story you tell, but because of the questions and answers and the debate that arises during such a hearing. In that way KPMG Meijburg can provide a court with more insight. That increases the chances of a good outcome of the case.”

Court of Justice of the European Union

For Dutch taxpayers, legal proceedings follow the route of District Court, Court of Appeals and Supreme Court. European law also plays an important role in some tax areas. In those cases, the Court of Justice of the European Union plays a major role. Gert-Jan van Norden: “You especially see this with regard to VAT, but also for example with regard to Customs. If you have to interpret the national provision that has to be in accordance with the EU provision, then the EU provision carries the most weight. In these kinds of cases, a national Dutch court must ask itself: how does that EU law work?”

He continues: “As an intermediate step in your national proceedings, the national court can ask the Court of Justice of the European Union for a preliminary ruling on how a particular issue should be interpreted. The Dutch court will then incorporate the ruling by the EU court in its own judgment.

It’s then helpful if you know how such proceedings work. But above all: how do you get the national court to ask the EU court for a preliminary ruling?”

Tax stories

As example, Gert-Jan van Norden refers to the VAT position of pension funds – a major issue in the Dutch market. How do you treat this for VAT purposes? Gert-Jan van Norden: “Our most important point was: you shouldn’t decide this as national court, but should leave it up to the EU court. We made that point before different courts. Ultimately, we succeeded in getting the Gelderland District Court to request a preliminary ruling from the CJEU. The big advantage of this is that it will eventually be the turn of the Court of Justice of the European Union, which will provide clarity for the Dutch situation. That’s an important avenue: which questions are EU-relevant and how can I convince the national court that it must indeed ask those questions?”

The added value of our team is communicating complex tax matters and knowing how to interpret them properly. We do that in such a way that an EU court that also deals with migration law and phosphate emission problems is asked those questions and is presented with positions in a way that is understandable for them. The second challenge is to be able to explain your position in such a situation orally. One of the most important elements in these proceedings is clearly explaining why such a hearing is necessary. We succeeded in doing so in that situation.” For this hearing, you have to go to Luxembourg to explain your position. Gert-Jan van Norden: “This involves knowledge and experience of how court hearings work. A very formal methodology. We ensure that our experience with such proceedings is shared with everyone in our team.”

Priceless combination

Otto Marres spent eight years as a deputy-justice at the Court of Appeals in The Hague. "A lot of different taxpayers and legal counsels appear before you. I also saw a lot of people with knowledge of taxes, but who didn't know much about litigation. And conversely: litigators who were very good at litigating, but who didn't really have much knowledge about specific matters. In my opinion, a good litigator should be good at both. Someone who litigates a lot, knows when which legal steps should be taken, such as providing evidence. He also has in-depth knowledge of the matter at issue in the case." The Tax Controversy team offers exactly that priceless combination: knowledge of tax matters and experience in litigation.

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