



Meijburg & Co
Tax & Legal

Why is a good lawyer indispensable in tax disputes?

KPMG Meijburg & Co
Tax Controversy & Litigation

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Organizations are increasingly involved in tax disputes with tax authorities. This happens in the Netherlands but also elsewhere.

Why is a good lawyer indispensable in tax disputes?

We are independent from our auditors and together with our lawyers constitute a really good team of specialists. We thus offer the best of both worlds: we have the global KPMG network, but also our lawyers who are more specialized in legal dispute resolution.

Legal approach

A dispute requires a different approach to that of an advisor. Rian Waaijer, lawyer and Director at Meijburg: "Ultimately our common goal is to avoid legal proceedings. That's why we want to prepare ourselves as best as possible at an early stage. As lawyer your focus is more on things such as the burden of proof. Are our facts correct? How would a court look at such a dispute? In any discussion, that's what we're involved with right from the start."

"Lawyers are used to working with an opposing party. In our case, that's always the tax authorities. That requires another way of thinking", adds Aldo Mariani, lawyer and partner at Meijburg. The burden of proof largely determines the strategy that you, as lawyer, adopt in legal proceedings. That begins in the first stage of a dispute, because it defines how strong the client's case is. Aldo Mariani: "If we have compiled a very solid file in terms of factual evidence, we are far more convincing in a dispute than if we just base ourselves on a story."

Challenges

Rian Waaijer and Aldo Mariani see that in many transfer pricing disputes the Dutch tax authorities place the burden of proof on the client. Rian Waaijer: “If the burden of proof does indeed rest on you, as taxpayer, then it can be quite difficult to argue such a case before the courts. That’s why it’s important to find out whether you are indeed the party on whom the burden of proof rests. Does the burden of proof rest on us, or can we improve our position, and is it right what the Dutch tax authorities contend? That makes a dispute more honest and less complex in terms of content.”

Authorized representatives who are not trained in these more evidentiary aspects, tend to focus more on the substantive discussion. “For example, if this concerns transfer pricing, there is a huge emphasis on: is it then more A or more B? Aldo Mariani explains: “There is little added value to a substantive discussion if the Dutch tax authorities ultimately manage to put you in a bad evidentiary position and you’re not alert to that.” In that case, there’s a good chance that the courts will set aside your arguments, because they believe those arguments have not been sufficiently demonstrated. Lawyers are trained to be much more aware of this.

Quicker to apply the brakes

Fact-finding is also extremely important to lawyers during a dispute. Aldo Mariani: “You don’t rely on what your client tells you, but use the documents to familiarize yourself with the file. You then review those documents. At the same time, you also try to collect as much documentation as possible. This will allow you, for example, to defend a different thesis. As lawyers we are used to really investigating this. A tax advisor is used to looking at the interpretation of the law and then discussing that. However, those discussions are often initially about the facts – the legal interpretation comes later.

In addition, partisanship is important. Rian Waaijer: “It’s easier for us to apply the brakes if we believe that we don’t have to provide certain documents. We always try to maintain a good relationship with the Dutch tax authorities, but we stand by our rights. This means you sometimes seek out confrontation, but then only in the interests of your client. That happened recently in a dispute. We entered into discussions with the Dutch tax authorities, but there were entire calculations of which they said: we want to receive them beforehand. A lawyer is quicker to apply the brakes and is probably not afraid to be the first to say: we will only provide them when the time is right. That results in a better position and thus you sometimes come out on top in such discussions.

Attorney-client privilege: *a safe haven*

All correspondence with a lawyer is confidential. Rian Waaijer explains: “Attorney-client privilege means that everything that a client tells a lawyer, and vice versa, is confidential. Therefore, it doesn’t have to be handed over. Sometimes a dispute can end up as a criminal investigation. Because you never know how a dispute will proceed and whether it will become a criminal file, it’s important to engage a lawyer from the start.”

Aldo Mariani: “In ordinary tax disputes the rule that correspondence with an advisor does not have to be provided to the Dutch tax authorities also applies. But that’s not the case in criminal law: informal attorney-client privilege doesn’t apply then. The Dutch tax authorities and the Public Prosecutor’s Office can unilaterally decide that the dispute will become a criminal case if they suspect a criminal offense has been committed. That can become a major problem if the documents are included in a criminal file all at once. If this happens while a lawyer is dealing with the matter, then there are strict conditions that must be met before that is allowed to be done.”



Rian Waaijer: "Attorney-client privilege is a constitutional principle enshrined in our law. There must be a safe haven between a lawyer and a client where they can talk freely about matters."

Personal drive

Danique Nijhuis, Tax Manager at Meijburg and recently admitted to the Dutch bar: "At present I work with family businesses and high-net-worth individuals. You see there that the relationship between the Dutch tax authorities and the taxpayer is hardening. As a result, it seems more difficult to reach an amicable settlement. What I really like about the legal professional is the dynamic between the human aspect and the expertise, because I can imagine that legal proceedings or a conflict can have quite a personal impact on director-major shareholders who are individuals. I enjoy helping clients and protecting their rights against the powerful government. Rian Waaijer concurs. "Sometimes a client may feel as if they're being treated unfairly. That makes such a dispute very intense."

For all three the human aspect is clearly a driver. As Aldo Mariani knows: "Legal proceedings can take years. You indeed see that sometimes clients lose sleep and are terribly worried. Ultimately it remains a people-thing; you are regularly called on to also help the client mentally. Although many decisions have rational grounds, they are decided based on emotions. Responding to this is a subtle exercise, requiring other skills from you as professional."

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The Tax Controversy & Litigation practice of KPMG Meijburg & Co is made up of a specialist and international team of tax professionals and lawyers. Together, they combine their expertise to find the most appropriate approach for their clients.

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