



Newsflash

Constitutional Court rules on Income Tax and VAT dawn raids

Summary

In a decision issued on 12 October 2017, the Constitutional Court ruled on the topic of dawn raids carried out by the tax authorities, following a preliminary referral. The Constitutional Court was asked whether the tax authorities' broad interpretation with regard to dawn raids could be reconciled with the right to privacy and the "inviolability of the home", as protected by articles 15 and 22 of the Belgian Constitution and article 8 of the European Convention on Human Rights.

The Constitutional Court ultimately decides that the relevant legal provisions (i.e. article 319 of the Belgian Income Tax Code and article 63 of the VAT code) do not violate the right to privacy and the inviolability of the home. The Court does however set out some boundaries, making it clear that the tax authorities do not dispose of an unconditional and unlimited right to access and search the professional premises of a taxpayer.

Legitimate interference with fundamental rights

The Court recalls that the right to privacy and the inviolability of the home are fundamental rights that apply to both individuals and legal entities.

Furthermore, the Constitutional Court accepts that a dawn raid constitutes an interference with these rights. However, such interferences are allowed when they have a sufficiently clear legal basis, respond to a pressing social need and are proportionate to the aim pursued.

The preliminary question raised was whether these conditions are fulfilled when the right of the tax authorities to perform a dawn raid is interpreted broadly. In such an interpretation, the tax authorities would dispose of almost unlimited power to access professional premises, search these premises without the taxpayer's prior consent, and proceed with other actions resembling house searches by the criminal authorities; all of which is with a view to examine the books and documents present in the premises in question.

Legitimate aim

According to the Constitutional Court, dawn raids are aimed at ensuring compliance with tax law and the correct collection of taxes. This constitutes a legitimate aim.

Clear legal basis

The rules with regard to dawn raids are set out in article 319 of the BITC and article 63 of the VAT code. However, the mere fact that there are formal legal provisions does not suffice. The legal provisions themselves also have to be sufficiently clear.

The Court determines that the relevant provisions clearly state the purpose of dawn raids. Furthermore, the provisions also clearly determine the object of a dawn raid, the premises to which free access must be granted and the applicable time constraints.

The Constitutional Court does however clarify that, although **the taxpayer or his representative** is obliged to grant free access, the **tax authorities do not have the right to enforce access *manu militari***. If the legislator would have intended such a form of enforceability without taxpayer consent, this should have been explicitly foreseen in the law – *quod non*.

The same goes for the examination of the books and documents. To a certain extent, the Constitutional Court seems to accept the **active search right** of the tax authorities, stating that they have the right to determine which books and documents are present in the premises without the taxpayer's prior consent. The tax authorities should not accept the taxpayer's choice to show only certain documents; the taxpayer should thus cooperate and open (e.g.) any locked cabinet or safe. However, if the taxpayer resists, the tax authorities do not have the right to singlehandedly enforce the inspection of the books. The law clearly does not give such power to the tax authorities.

Proportionality

Finally, the Constitutional Court rules on the proportionality of dawn raids vis-à-vis the legitimate aim. The presence of sufficient safeguards is particularly important in this respect.

The Court distinguishes several safeguards. For one, tax inspectors must be in possession of a certificate of appointment, which must be presented upon the taxpayer's request. The tax authorities also cannot force the taxpayer to violate his professional secrecy. Furthermore, the law foresees in the possibility of a *post factum* judicial review of the dawn

raid. A misuse or abuse of power by the tax authorities could potentially lead to the nullity thereof.

Finally, the Constitutional Court points out that a dawn raid and a criminal investigation house search have a fundamentally different purpose. Although the tax authorities will notify the criminal authorities about criminal tax offences, the dawn raid is essentially aimed at ensuring the correct levy of taxes. As such, a taxpayer cannot invoke the right to remain silent or not incriminate himself unless an actual charge, within the meaning of article 6 ECHR, has been brought against him.

Conclusion

Although the Constitutional Court determines that a dawn raid does not constitute an infringement of the taxpayer's fundamental rights, the judgment does outline some interesting guidelines to help determine the boundaries of the tax authorities' powers. The decision also demonstrates that taxpayers have rights, and practice shows that these rights can be better safeguarded when one is well prepared for an unannounced visit by the tax authorities.

Laga's Tax Controversy Solutions Team has broad experience in assisting taxpayers who are or have been the subject of a dawn raid. The team therefore possesses the required knowledge to put the recent judgment in the right perspective and advise clients on the subject. Laga is readily available to answer any questions and provide assistance where needed.

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