Luzern Wording of court decisions, IATJ 4 September 2015

Issue 1: What should be the function and structure of a court decision?

General remarks

The function of a court decision is in any case: to inform the parties about the decision made in their case, and about the reasons on which this decision is based.
Especially for higher courts, the decision can also have the function to give information about the legal criteria which the court will (probably) use to decide other, more or less similar conflicts. This is information which will especially attract the attention of legal professionals.
And third, the function of the decision can be to inform the general public, in so far as this public is interested in the outcome of the case and the criteria the courts use for deciding cases. This function can also, in many cases even better, be fulfilled by a press release containing a summary of the most interesting aspects of the decision. But in order to prevent misunderstanding and to give more extensive information to members of the general public (and the media) with a deeper interest in the decision, it can be useful make the complete text of the decision publicly available as well.

a) Should the decision be self sufficient?

In my view, as a general rule it is desirable that the document containing the court decision is self sufficient, in the sense that parties and other persons interested in the reasons on which the decision is based will be able to find these reasons in this document, and are not required to searches and to find the content of these reasons elsewhere.
This does not mean, however, that a court should never make references in its decisions. The Dutch Supreme Court sometimes refers for the reasons of its decision to specified sections of the opinion of the advocate general. This is efficient for the court, and when reading the decision as published on the internet, the opinion of the advocate-general is just one mouse click way. Similarly, the Dutch Supreme Court sometimes refers to the reasons given by the lower court, and merely says that this court has made the right decision, and that the Supreme Court accepts the reasons given for that decision by the lower court. [1]This technique is acceptable, as the decision of the lower court is attached to the decision by the Supreme Court. What I would find doubtful is a reference to the arguments given by the tax inspector in his note of defence, if these arguments have not been mentioned or summarized in the court decision itself, and the note of defence has not attached to the court decision. The parties can be expected to be aware of the content of these arguments, but other persons interested in the reasoning of the court don't have access to the documents in the case file, and therefore will not understand the reasons on which the court based its decision.[2] However, this does not seem to be an issue in the Netherlands: this technique of formulating a court decision is not the practice in our country (I did not see an example since many years).
It also happens frequently in Dutch practice that the courts refer to earlier court decisions on legal questions, especially decisions by the Supreme Court and European Courts, without repeating the grounds on which the earlier decision was based (see also Issue 2, section c). In my view, this practice is acceptable for efficiency reasons, as long as the decision referred to is reasonably accessible. The Supreme Court decisions referred to are to be found in legal

[1] Supreme Court 21 June 2013, BNB 2013/187, ECLI:NL:HR:2013:CA3934.
[2] But it might be acceptable when the decision is very case specific and no one else than the parties can be expected to be interested in the reasons given by the court.

journals (but that may be unpractical for the general public); at present they are also made available on the internet, and when referring to its own case-law, the Supreme Court mentions the ECLI-number under which he text can be found on the internet.

If the court decision is so extensive that a summary may be useful for readers lacking the time to read the full text, I think it is not a task for the court itself to give such a summary in its decision. It may be helpful to formulate a summarizing conclusion at the end of the judgment, but that is not a general practice in the Netherlands. More frequently, a summary of the decision for those interested in its essentials is given by the press officer of the court. And the court itself when publishing its decision on the internet, usually adds a summarizing paragraph to the publication, indicating the essential aspects of the decision.

b) Should the decision be a sober legal statement or should it provide a comprehensive discussion of issues?

In Dutch practice, the legal reasons for a court decision are not necessarily limited to a sober legal statement ("this is the law …"). Sometimes the legal grounds in the decision are very limited. For instance: "The Court of Appeal rightly decided that a telephone is not an auxiliary for a disabled person, not even when he is blind." [3] Sometimes the court has to cut a knot and there is no more to say than that the answer is yes or no. Sometimes the judges in the panel agree about the outcome of the legal interpretation, but are divided as to arguments why the law his to be interpreted in this way. As there is no possibility to publish dissenting opinions in the Netherlands, such a disagreement often leads to limited argumentation as to the reasons why the court chose this interpretation.
But there is no general conviction that the legal reasons for a court decision should be sober by way of principle. Especially the Supreme Court has a role in order to safeguard unity in the interpretation of the law and to develop the law. The last few decades, there is a tendency in our Supreme Court to give more extensive reasons for our legal interpretation. Giving such reasons can make the decision more convincing, and may also give more clarity as to the way in which the court will decide in comparable legal questions. A more extensive legal explanation can also give the court the possibility to sketch a legal framework which is broader than necessary to deal with the present case, if the court feels that this may be useful for legal practice and if the judges agree on the content of the framework. Compare the judgments of the ECHR, which often start with a general descriptions of the legal views of the court on issues of this kind (or a broader group of issues), and only then focuses on the application of these principles in the present case. The Dutch Supreme Court has gradually adopted such preceding considerations in more and more cases; sometimes these sections of the decisions of our court are pages long, and they may cover a complete legal theme (like summoning witnesses, or undue delay).[4]
The lower courts in the Netherlands also frequently give ample reasons for their legal interpretation, if this interpretation is subject to dispute. Thereby, they justify their choice to the parties and to the public, and their reasoning can give inspiration to a higher court if the decision is challenged in appeal.

c) Should the decision follow a straight line between a starting point (e.g. applicable law) and the outcome of the case?

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[3] Hoge Raad 13 November 1974, BNB 1974/302.
[4] In tax cases e.g. Supreme Court 22 April 2005, BNB 2005/337, ECLI:NL:HR:2005:AO9006 and Supreme Court 20 March 2015, ECLI:NL:HR:2015:643.

In general, Dutch court decisions follow a line of reasoning which leads to the final decision, without treading side paths. These decisions don't have a story-telling quality. This is partly a question of tradition and culture. This style is also influenced by the collective process of decision making without a possibility to publish dissenting opinions. It can be explained by reasons of efficiency and can make the decision more convincing.
This does not mean that Dutch courts never add sections to their decision which are not an essential part in their reasoning. For instance, when describing or summarizing the dispute and arguments of the parties, the courts sometimes also mention arguments and issues which in the end they don't use for their decision. By mentioning them, the courts can show to the parties that they have taken notice of all issues and arguments, and mentioning them may be helpful for a higher court in case an appeal is lodged.
Nor does it mean that the legal reasoning of the court is always limited to considerations which are necessary to deal with the present case. As mentioned before (under b), especially higher courts can have good reason to illustrate their legal view on a broader scale. In the interest of legal practice, the Dutch Supreme Court from time to time uses obiter dicta, e.g. about the way in which a similar the issue should be dealt with under new legislation [5] or about the merits of a case although the appeal is inadmissible.[6]

d) Should special blocks be used, e.g. for facts and law?

A distinction between special blocks can make the decision easier to read and understand.

In Dutch procedural law, there is a general distinction between facts (which have to be proved, in most cases by the parties) and the application of the law to these facts. This is also expressed in the limited powers of the Supreme Court, which can, in principle, only decide whether the lower court was wrong on a point of law.[7] When the lower court does not make sufficiently clear if its decision was based on a judgment about the facts or about the law, the Supreme Court cannot exercise this function, and that is a reason for the Supreme Court to annul such unclear decisions of the lower court. The Supreme Court will also annul the decision of a lower court if the relevant facts have not been described sufficiently clear in that decision.[8]
In the light of this background, it can be understood that Dutch court decisions usually make a clear distinction in sections about the establishment of the facts and the legal aspects of the case (interpretation of the law and application of this law to these facts.[9] Usually Dutch tax courts don't use citations of the applicable legal rules in their decision. The Supreme Court makes an exception for rules of local governments, because these are not so easily accessible for the public.
Sections about the legal aspects of the case will usually go into the interpretation of the law and application of this law to these facts. In passages of the last kind, it will often be necessary to go into the facts of the case, as the facts of a case and application of the law to these facts are often mingled. But for the sake of clarity, it is in my view preferable that a distinction in section (or subsections) will be made as far as reasonably possible. Whether all

[5] Supreme Court 13 August 2010, BNB 2010/305, ECLI:NL:HR:2010:BN3862.
[6] Supreme Court 10 September 2010, BNB 2010/309, ECLI:NL:HR:2010:BM3087.
[7] In addition the Supreme Court has a – limited – possibility to evaluate the reasoning on which a lower court has based its decision about the facts.
[8] Comparable to "défaut de base légale" in French law.
[9] See e.g. Rechtbank Zeeland-West Brabant 24 June 2015, ECLI:NL:RBZWB:2015:4323, and Gerechtshof 's Hertogenbosch 2 July 2015, ECLI:NL:GHSHE:2015:2518.

legal and factual sections of the decision are put together in one block, is another question. That is more a matter of technique.

Issue 2: How deep should we go into the details?

a) Is there a duty to describe the whole judicial procedure?

There is no legal obligation for the Courts in the Netherlands to describe the whole judicial procedure in their decision. Nevertheless it is usual that the courts add such a section to their judgment. For the parties, this may prevent the impression that the court has not taken notice of some of their filings. And for a higher court, such a section can make it easier to check whether the lower court followed the right procedure.

b) How extensively should the facts be described?

In general, the Dutch courts only establish the facts in so far as they are relevant for the outcome of the case. When irrelevant facts are hotly disputed by the parties, that is in itself not a compelling reason for the court to establish these facts. In such cases, the court will generally state in its decision that these facts were in dispute, and why these facts are not relevant for the outcome. That is its decision on the dispute about these facts. It should be mentioned in this context that Dutch courts in tax cases have to indicate the points of dispute in their decision in a clear and complete manner, although this may be by way of a summary, and its decision on these points. And more in general can it be useful for legal practice to know which categories of facts are irrelevant in a certain context. As a consequence, for the predictability and development of the law, it can be useful that the courts, especially higher courts, indicate which categories of facts are irrelevant.
The Dutch Supreme Court cannot establish the facts. In it judgments , it only describes the facts which have been established by the lower court and which the Supreme Court must use as basis for its decision. The Supreme Courts makes a selection fort his purpose, and usually only mentions the facts which are relevant for its decision.

A broader description of the facts may sometimes be used to give the reader, for instance the general public, an impression of the atmosphere, the taste of the case. The taste may also have its influence on the decision of the court, so it is not always easy to say whether such additional facts were irrelevant. More in general, I would like to remark that there is often a grey zone where the judges themselves may discuss and even not agree whether certain facts had an influence on their decision or whether they were superfluous. Within our Supreme Court, we often have debate on the question which facts, as established by the lower court, should be mentioned in our decision as a starting point for our legal views.

The extent to which facts are described in Dutch court decisions also depends on the circumstances of the case. Sometimes the relevant facts can be described in a few sentences.[10] But in complex cases, e.g. disputes about the fiscal implications of extensive contracts, a useful description of the facts may be extensive as well, including quotations from these contracts.[11] When the facts are disputed, the court also has to establish to what extent the facts have been proved. That may also require an extensive description, e.g. of declarations made

[10] See Supreme Court 22 November 2013, ECLI:NL:HR:2013:1206 (English translation available), sections 3.1.1 and 3.1.2 (merely two sentences).
[11] See e.g. Gerechtshof Amsterdam 2 July 2015, ECLI:NL:GHAMS:2015:3101.

by witnesses. But in general, my impression is that the courts try not to be extensive. This may be based on considerations of efficiency, but a more extensive text may also be more difficult to read, understand and analyse its implications. The District Court of Rotterdam has a project in administrative cases in which the judges try to limit the text of there decision to 4 pages A4 format (the project 4A4).

c) *How extensively should the reasons of law be explained?*

In the Netherlands, there are no legal rules on this subject. The law only says that the decision of the court should be reasoned. And when a court annuls a decision of the tax authorities, it should mention the section of the law or the legal principle on which this is based. The Supreme Court can only annul the decision of a lower court concerning on points of law if that decision is wrong, not on the ground that the reasons of the lower court for its legal interpretation were wrong or insufficient.

In Dutch tax cases, the courts have to decide on all points of dispute between the parties. But that obligation does not imply a rule on the extent to which the court should motivate its legal opinions. According to the Supreme Court, the courts are not obliged to address every factual argument used by a party to strengthen its point of view on an issue which is in dispute. And the legal argumentation by the lower courts is in itself not subject to review by the Supreme Court. Nor the lower courts, nor the Supreme Court are obliged to address every argument used by the parties in order argue their point of view on points of law. And the Dutch courts don't have to mention all the legal arguments used by the parties in their decision. They only have to indicate the points of dispute in their decision and this may be by way of a summary. The Supreme Court normally adds the notice of appeal to its decision, but does not repeat all the arguments in its decision. Sometimes the Supreme Court gives a brief summary of the legal point of view expressed in the appeal, and sometimes it merely says that the party concerned attacked a certain decision of the lower court. The Supreme Court usually does not mention the point of view of the defendant.
It is up to the court how far it will go with its motivation on points of law. In many cases, the Dutch courts will respond on specific legal arguments which have been put forward by the parties, especially if the argument has been the point of focus of the debate. This can be seen as courtesy towards the parties. It can also have a function to justify and explain the decision to the parties and public. And a legal response on such arguments, especially by a higher court, can clarify the law: if it was a serious argument and the court rejects it, parties in future cases will know that and why they will not have a chance of success if they invoke the same argument. And the argumentation may also make it clear how the reasoning of the court will be on comparable, although legally somewhat different questions.

See about the degree of justification given for a certain interpretation of the law also Issue 1, sub a). In general, it can be observed that in Dutch court decisions, there is no direct link between the debate between the parties and the extent of legal justification by the court. The degree of justification, especially by higher courts, depends more on the nature and importance of the legal question to be decided. The Supreme Court is aware that its decision on legal issues is in many cases important for hundreds or even thousands other persons in comparable situations, and therefore does not accommodate its legal reasons merely to the arguments of the parties in this case. The decision is also written for a broader group of readers and users.
There is also a practical aspect: lawyers can imagine a multitude of arguments for their legal point of view, and the Supreme Court has a limited number of judges to deal with a multitude

of cases. We usually don't respond to weak arguments, and are more succinct in our argumentation if the legal question is not of a great theoretical or practical importance. If the decision does not raise a question in the interest of legal unity or development of the law, our Supreme Court can even deal with the case without motivation if the appeal is unfounded. We do that in a majority of the tax cases.[12] That gives us room to give more extensive reasons in cases that really matter from a point of view of legal unity or development of the law.

Arguments for a certain legal interpretation by the court can be diverse: the text of the legal provision is often invoked, but not decisive in itself, and not necessarily dominant if it conflicts with other means of interpretation. There is no legal hierarchy between different methods of interpretation in our country. In tax cases, legal history is often invoked, in order to demonstrate the intention of the legislator. The system of the law can also be an argument for the interpretation. Legal doctrine in itself is practically never used as an argument for a certain interpretation of the law, and almost never cited in Dutch court decisions. But the courts read their literature and the arguments used therein can influence and convince them.

The reasoning of the court on a legal issue is not always built up as a strict syllogism. Where several interpretations are possible and defendable, it is a question of choice, of legal policy which interpretation the court will follow. In such cases, I think Dutch courts often choose for the interpretation which in their view is the most reasonable. It is a step which, in the end, cannot be explained by pure logic. There are cases in which the Dutch tax courts reveal in their decision why such a choice has been made. Thus, sometimes the court uses the reasonableness of the interpretation as an argument in its decision.[13] There are also other, not typically legal arguments which may influence the decision, e.g. the practical consequences of a certain interpretation. Sometimes the Dutch Supreme Court uses such practical arguments for its interpretation.[14] It also happens that the (supreme) court not only argues why it has chosen for a certain interpretation, but also why it rejected other interpretations. [15]

Dutch tax courts frequently refer to previous decisions of the Supreme Court. The Supreme Court also refers frequently to its own decisions, a practice that started in the eighties of the last century. The decisions of the Supreme Court are not formally binding in future cases, but the court very seldom changes its views on a legal issue, so these views in practice have great authority. Referring to such previous decisions can be an efficient method if the applicable legal rule in the new case is exactly the same. And if our decision in the present case contains new elements, reference to previous decisions can give a perspective in which the new decision should be seen. This can also make it easier to predict how the Supreme Court will decide comparable but not identical legal questions. And for the court itself, this style of motivating its decisions can contribute to their internal consistency.
Thus, it also can occur that the Supreme Court explains why a rule formulated in a previous decision is not applicable in the present case, a technique described as "distinguishing". [16]
There are also decisions in which the Supreme Court clarified that an interpretation of a previous decision in legal literature was not correct.[17]

[12] See e.g. Supreme Court 14 August 2015, ECLI:NL:HR:2015:2184.
[13] Supreme Court 1 February 2013, BNB 2013/104, ECLI:NL:HR:2013:BW8359 (section 5.2.2).
[14] Supreme Court 22 November 2013, BNB 2014/52, ECLI:NL:HR:2013:1125.
[15] Supreme Court 3 October 2014, BNB 2015/36, ECLI:NL:HR:2014:2872.
[16] Supreme Court 22 November 2002, BNB 2003/36, ECLI:NL:HR:2002:AF0960.
[17] Supreme Court 14 September 2012, BNB 2013/12, ECLI:NL:HR:2012:BX7157.

Dutch courts also frequently refer to decisions of the European Court of Justice and the European Court of Human Rights, where they follow and have to follow these decisions. [18] We also refer to decision of other highest courts in administrative cases in the Netherlands, e.g. the Dutch Council of State. We are not bound by them, but we attach great value to legal unity, so we try as much as possible to prevent a difference of interpretation of the same rule between our Supreme Court and other supreme administrative courts in our country.

d) Should the outcome of the case be stated concisely?

Sometimes, at the end of a long decision, the court adds a summary (see Issue 1, general remarks). This may be helpful for the reader to understand the decision. More frequently, the court limits the final paragraph of its reasoning to a statement about the fate of the appeal.

The decision of a Dutch tax court should make sufficiently clear what will happen with the disputed tax assessment. If the assessment is, in the view of the court, too high, its decision should clarify what the right amount should be. In almost all cases, the court re-establishes the assessment tot that amount. For most taxes, this will mean that the court establishes the amount in Euros. Income tax is more complicated, and there the court can limit itself to establishing the taxable amount. The computers of the tax authorities will do the rest.
The interest to be paid can not be established by the court in the same decision. This amount depends on the – future - day on which the tax is paid or refunded. In addition, according to Dutch tax legislation the amount of interest due has to be established separately by another authority, the tax collector, and can lead to separate proceedings.

As a service to the parties and to prevent future proceedings, the tax courts in the Netherland sometimes give as obiter dictum a decision about related tax issues, e.g. the implications for the taxpayer in a following year or the tax implications for third parties who entered into a transaction with the taxpayer.[19]

Issue 3: What kind of style should be used?

a) Should the style be standardized, detached and dry, or more personal

Traditionally the style of court decisions in the Netherlands, also in tax cases, is detached, business-like and without emotional touches and personal observations. This is also partly a question of tradition and culture. It is also influenced by the by collective process of decision making without possibility to publish dissenting opinions. The underlying idea is also that judicial decisions are the decisions of an institution, and not of an individual with his or her personal preferences. In the Supreme Court, the effect is even stronger because the important decisions are made collectively by a panel of five judges, and all other judges in the tax chamber can interfere in the discussion for the sake of legal unity within the court.

For standard issues, courts often use standard texts. Our Supreme Court has a book with many standard formulations for standard situations. This increases efficiency, and prevents discussions in literature whether a different formulation by the Supreme Court implies a different appreciation, whether there is a new line in our case-law.

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[18] See e.g. See Supreme Court 22 November 2013, ECLI:NL:HR:2013:1206 (English translation available).
[19] Supreme Court 22 November 2002, BNB 2003/34, ECLI:NL:HR:2002:AD8488.

But to a certain extent there is freedom for the individual judge who writes the text of a (draft) decision. Especially in simpler cases where a lower court decides by a single judge, the style is sometimes (slightly) more personal. Thus, sometimes a court shows in its decision that it strongly disagrees with the position of a party, or that it is irritated by the processual behaviour of a party. But such expressions are rather exceptional in the Netherlands.

b) Should we use ordinary words as much as possible?

There is no uniform line in Dutch tax decisions in this respect. But the tendency is to write decisions that can be understood by persons with sufficient general knowledge, preferably by the parties although it will not always be realistic to expect that the taxpayer will understand all considerations of the court. In addition, from research in Dutch criminal cases it turned out that most individuals concerned were only interested in the outcome and not oi the reasons on which the court based its decision, and therefore did not read the decision.

The Supreme Court also tries to formulate its decisions in tax cases as clearly as possible. When agreement has been reached about the text of the decision, one of us reads the legal part of the decision aloud before we establish the text definitively. This clearly helps to check whether the language is understandable. If sentences are too long, this is also a good litmus test. To prevent very long sentences, we dropped the "considering that" style decades ago. We try to avoid foreign and Latin words, and use technical terms only if they have a specific legal meaning or if there is no adequate alternative in day to day language. We also try to avoid old fashioned expressions and pompous language.

c) Presentation techniques

Decisions of Dutch courts are usually divided in sections with underlined titles, and within these titles there are sometimes also subtitles, underlined or in italics.[20]
In many decisions, you will find titles about (a) description of the judicial procedure (b) the facts (c) dispute and arguments of the parties (d) opinion of the court about the dispute (e) opinion of the court on additional questions such as court fees and costs of the proceedings (f) decision of the court.
Usually, the (sub)titles are divided in numbered sections and often in numbered subsections.

Our Supreme Court has been advised by a language and communication expert, and we were advised that insertion of recognizable titles is very useful to prevent long uninterrupted texts in which the reader could lose his orientation.

[20] Supreme Court 22 April 2005, BNB 2005/337, ECLI:NL:HR:2005:AO9006 and Supreme Court 20 March 2015, ECLI:NL:HR:2015:643.