

## **Court of Appeals: bonus shares do not fall under the fixed exemption of the work-related costs rules (standard practice criterion)**

On January 25, 2018, the Amsterdam Court of Appeals rendered judgment in a case litigated by Meijburg & Co concerning the question whether the allocation of bonus shares can be placed under the fixed exemption of the work-related costs rules. The Court ruled that, for the purposes of the work-related costs rules, the allocation of bonus shares to a select group of employees is generally considered unusual.

The legal proceedings dealt with the following case: an employer had for several years been offering a share plan to some board members, whereby they could buy shares in the company. If these employees were still employed after three years, they were awarded a number of shares for a nil consideration. The tax on these shares for a nil consideration was paid by the employer. As of 2012, the employer switched to the work-related costs rules and in 2012 and 2013 regarded the benefit arising from the shares awarded for a nil consideration as part of the final levy for the purposes of the work-related costs rules. Various other salary benefits, such as Christmas gifts and staff activities, were also treated as part of the final levy in 2012 and 2013. To the extent that the fixed exemption in the work-related costs rules, of 1.5% and 1.4% respectively, was exceeded, the employer reported and remitted a final levy of 80% in 2012 and 2013. The Dutch tax authorities disagreed and imposed supplementary assessments because in its opinion the awarded shares could not pass the standard practice criterion (*gebruikelijkheids criterium*) of the work-related costs rules, particularly in view of the amount of the provisions.

In the proceedings before the District Court Noord-Holland, the Court had ruled in favor of the employer. In short, it ruled that the mere fact that this concerned provisions with a 'substantial' value was insufficient to not place the provisions under the work-related costs rules. The Dutch tax authorities appealed this judgment.

### **Amsterdam Court of Appeals**

The Amsterdam Court of Appeals ruled however that commonly held views must be taken into account when interpreting whether a reimbursement and/or provision should be designated as taxed or exempt salary under the work-related costs rules.

The work-related costs rules must be interpreted in such a way that only reimbursements and provisions of a purely business or mixed nature ('*zwak loon*': 'weak wages') can be included under the rules. The Court further concluded that the efficiency threshold (*doelmatigheidstoets*) of EUR 2,400 per employee, as applied in practice by the Dutch tax authorities, is in line with the basic assumptions of the standard practice criterion.

The Court ruled that, for the purposes of the work-related costs rules, the allocation of large bonuses, i.e. bonus shares to a select group of employees, is generally considered unusual. According to the Court, this involves wages of a purely remunerating nature, which are not only substantial but are also not reimbursements or provisions of a purely business or mixed nature. The combination of these factors

means that there is an unusual designation, according to generally accepted standards, for the purposes of the work-related costs rules.

### **Practical consequences**

With this judgment, the Court clarifies when a reimbursement or provision is customary or unusual and whether the reimbursement or provision can be designated as part of the final levy under the work-related costs rules.

In its interpretation, the Court refers back to provisions that were removed from the Payroll Tax Act 1964 when the work-related costs rules were introduced, more specifically: 'commonly held views'. The Court also limits the designation under the work-related costs rules to reimbursements or provisions of a purely business nature and 'weak wages', i.e. wages with a recognizable private element. However, the latter conflicts with statements found in legislative history and statements by the Dutch tax authorities indicating that also 'hard wages' ('*sterk loon*'), i.e. wages of a purely remunerating nature, may be placed under the fixed exemption of the work-related costs rules. According to the Court, the efficiency threshold of EUR 2,400 maintained by the Dutch tax authorities is in line with the standard practice criterion. The Court's conclusions are derived in part from the amendment of the law that changed the standard practice criterion as of 2016. However, this should not affect the years in question.

The standard practice criterion has been wrongly subjected to a very restrictive interpretation in this Court judgment and will thus be appealed before the Supreme Court.

If you are unsure whether a certain reimbursement or provision paid to your employees would pass the standard practice criterion so that it can be designated as part of the final levy under the work-related costs rules, please contact one of the professionals of Meijburg & Co.

Meijburg & Co  
January 2018

*The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.*