KPMG Meijburg & Co Tax & Legal

Supreme Court renders judgment on the standard practice criterion in the work-related costs rules

On November 12, 2021 the Supreme Court rendered judgment in the proceedings initiated by KPMG Meijburg & Co concerning whether net share bonuses can qualify as part of the final levy for the purposes of the work-related costs rules (*werkkostenregeling*). Please also refer to our previous memorandum about these proceedings. The Supreme Court has declared the appeal in cassation against the judgment of the Court of Appeals in The Hague unfounded. This conclusion by the Supreme Court brings to an end these lengthy proceedings.

The legal proceedings dealt with the following case: an employer had for several years been offering a share plan to members of the Group Council, whereby they were given the opportunity to use their gross bonus to buy shares in the company. If the employees who had taken advantage of this opportunity 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 it treated 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. This, because they were of the opinion that the awarded shares could not pass the standard practice criterion (*gebruikelijkheidstoets*) of the work-related costs rules, particularly in view of the amount of the provisions.

In earlier court proceedings, the North-Holland District Court had ruled in favor of the taxpayer, while the Amsterdam Court of Appeals had ruled that any interpretation of what is standard practice under the work-related costs rules must take account of generally accepted common standards. The taxpayer appealed the Court of Appeals judgment before the Supreme Court. The Supreme Court formulated a framework for ensuring compliance with the burden of proof, and referred the case back to the Court of Appeals in The Hague. In its judgment, the Court of Appeals assessed the case against the framework in the Supreme Court judgment. The Court of Appeals ruled that the standard practice criterion did not apply and that the way in which the Dutch tax authorities had requested information from comparable taxpayers pursuant to Section 53 General Taxes Act (GTA) was correct. The taxpayer again appealed this judgment before the Supreme Court.

Scope

The Supreme Court has now concluded that the request for information made by the tax inspector pursuant to Section 53 GTA is permitted. The text and the legislative history of Section 53 GTA do not offer any reference points for limiting the circle of persons with an obligation to keep records from whom the tax inspector may request information. Furthermore, the requested information falls under the information obligations of Section 53 GTA. The request for information thus falls within the scope of Section 53 GTA.

According to the Supreme Court, in requesting information from external parties the tax inspector did not make improper use of the authority given to him under Section 53 GTA. The taxpayer failed to convincingly demonstrate that the tax inspector obtained the information in a way that runs so counter to what may be expected from an authority acting appropriately that this use must always be regarded as inadmissible.

After this judgment by the Supreme Court, it will remain difficult for employers to determine whether a particular reimbursement or provision falls within the bounds of what is standard practice under the work-related costs rules. If you are unsure whether a particular 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, we recommend that you contact one of the professionals of KPMG Meijburg & Co.

Meijburg & Co
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