

Supreme Court judgment on bonus shares and fixed exemption in the work-related costs rules (standard practice criterion)

On July 12, 2019, the Supreme Court published the 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. In this judgment, the Supreme Court formulated reference points for applying the standard practice criterion (*gebruikelijkheidstoets*).

The case dealt with in these proceedings was as follows: an employer had for several years been offering a share plan to board members, whereby they could use their gross bonus to purchase 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 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 of the work-related costs rules, particularly in view of the amount of the provisions.

In earlier court proceedings, the District Court had ruled in favor of the taxpayer, while the 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.

Practical consequences

The Supreme Court has now ruled that the starting point is that all reimbursements and provisions are part of the salary and that the type of salary component is irrelevant. Also a benefit that may not customarily be perceived as salary, is in principle part of the salary and thus falls under the scope of the work-related costs rules.

Furthermore, it is then up to the tax inspector to convincingly demonstrate that the designation of the reimbursement or provision is not customary, with the aim being to limit abuse and avoid extreme situations. According to the Supreme Court, legislative history offers hardly any leads as to how this burden of proof can be met. The Supreme Court thus formulated a number of reference points. According to the Supreme Court, the reference points from the tightened legislation on the work-related costs rules from 2016 can also be relevant for the years before 2016. The Supreme Court also referred to whether the designation as final levy is customary, comparisons with the work-related costs rules for other employees of the same employer, and comparisons with

the work-related costs rules for colleagues of the employee in the same position at the same employer and for employees at other employers.

In this respect, the Supreme Court also noted that the tax inspector's evidential burden will not be met if the tax inspector only refers to the efficiency threshold (*doelmatigheidstoets*) of EUR 2,400 per employee per year applied by the Dutch tax authorities.

The Supreme Court has referred the case back to the Court of Appeals in The Hague, thereby directing it to give parties the opportunity to adjust their positions to the reference points formulated for applying the standard practice criterion.

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
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