KPMG Meijburg & Co Tax & Legal

Court of Appeals judgment on the standard practice criterion in the work-related costs rules

On August 11, 2020 the Court of Appeals The Hague rendered judgment in proceedings initiated by Meijburg & Co about whether net share bonuses can qualify as part of the final levy for the purposes of the work-related costs rules (*werkkostenregeling*; WKR). After the Supreme Court upheld the appeal in cassation in its judgment of July 12, 2019, the case was referred to the Court of Appeals The Hague. See our previous memorandum on these proceedings. In the order for reference, the Court of Appeals The Hague based its assessment on the framework set by the Supreme Court in its judgment.

Nature and size of the provisions
According to the Court of Appeals, in determining whether a provision is customary - also in 2012 and 2013, the years to which the dispute relates - both the nature and the size of the provision is central. Furthermore, it must also be standard practice that the employer bears the tax on the provision.

Standard practice and receiving information from colleague tax inspectors
An internal inquiry by a tax inspector within the Dutch tax authorities is not sufficient to determine whether a provision is customary. Even if this is otherwise not known within the Dutch tax authorities, companies may have share plans of which the benefits are designated under the WKR.

Standard practice to provide the same net salary component to employees within the group
According to the Court of Appeals, it was not convincingly demonstrated that, within its own organization, the taxpayer awarded the same net bonuses, in type and amount, to employees other than the members of the group council. The standard practice is thus limited to members of the group council.

Standard practice at other companies
In addition to internal inquiries, the Dutch tax authorities also made external inquiries to 88 companies. Although this information was not made fully available to the taxpayer, the Court of Appeals was of the opinion that the inquiries made by the Dutch tax authorities were sufficiently representative. The Court of Appeals allowed the Dutch tax authorities to use the authority to oblige companies to answer the Dutch tax authorities.

The Court of Appeals also ruled that the external inquiries made by the Dutch tax authorities were representative enough to be able to decide on the standard practice of net bonuses. Because the Dutch tax authorities did not limit their inquiries to the years 2012 and 2013, this increased the likelihood that the question whether bonuses were awarded in any year would be answered affirmatively. The result of the inquiries showed that more than half of the companies approached awarded bonuses, but not of comparable size. Furthermore, the bonuses were also not designated as part of the final levy. Only one company awarded a bonus that was designated as part of the final levy under the work-related costs rules. The amount of the net bonuses awarded under

the bonus scheme at the particular company (the bonus amounts were limited to EUR 500 - EUR 1,250) was not comparable to the shares awarded at the taxpayer.

No net benefit
In the years before 2012, the tax on the share bonuses was borne by the employer. The benefit was remunerated in the payroll records of the individual employee. The Court of Appeals ruled that that previous provision did not mean that the provision was standard practice under the WKR and for two reasons:

- it was remunerated in the payroll records of the individual employee;
- the employer derived a benefit if it was taxed at 80% instead of 108.3%.

The Court of Appeals dismissed the appeal against the 2012 supplementary assessment and upheld the 2013 supplementary assessment.

Practical consequences
The judgment by the Court of Appeals offers more clarity on some practical elements.

- In addition to the standard practice, the amount of the remuneration that is designated as part of the final levy for WKR purposes is also important.
- Information that is only available to the Dutch tax authorities because it is internal information is not sufficient as substantiation for determining whether a provision is standard practice or not.
- Even if a salary component has been provided or reimbursed to employees for years, this does not mean that it is standard practice to designate that salary component as part of the final levy.
- A salary component is more likely to be considered standard practice if all or large groups of employees at the withholding agent receive this salary component.
- An unlevel playing field has arisen between withholding agents and the Dutch tax authorities to substantiate the (non-)standard practice. The Dutch tax authorities can use legal powers to request external information from other comparable withholding agents and oblige them to answer questions. A withholding agent does not have this power.

If you are unsure whether a certain reimbursement or provision paid to your employees would pass the standard practice criterion (*gebruikelijkheidstoets*) 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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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.