

Tax-Free Allowance Excludes Housing Benefit, Court Rules

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COUNTRY DIGEST

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In a decision published August 28, the Tax Court of The Hague ruled that the tax-free allowance for foreign employees temporarily assigned to the Netherlands does not apply to those employees' housing benefits.¹

Facts

During the years 1999 through 2003, a Dutch resident company (the taxpayer) belonging to an international operating group employed foreign employees who were assigned to the Netherlands. The taxpayer had rented approximately 10 apartments for employees assigned to the Netherlands. Those apartments were placed at the disposal of the employees during the first two months after their arrival in the Netherlands. This would enable them to find their own apartments. The employees did not have to pay for the apartments or utilities. If they stayed longer than two months in the apartments, they would have to pay the actual rent and utility charges to the employer. The taxpayer also provided free housing to a number of management- and board-level foreign employees who were assigned to the Netherlands.

The employees all benefited from the 30 percent ruling that allows a Dutch employer to give a tax-free allowance to foreign employees temporarily assigned to the Netherlands (see below).

The tax inspector believed that in view of the tax-free allowance already received under the 30 percent ruling, the free-housing benefit was part of the taxable salary of the employees concerned. Accordingly, this benefit should be subject to Dutch wage tax. The taxpayer believed the free housing should have been treated as a tax-free allowance and was not already covered by the allowance received under the 30 percent ruling.

¹Tax Court of The Hague, Case BK-07/00205, dated June 27, 2007.

The Law

According to the Wage Tax Act, all benefits derived from employment are part of the taxable wage. Certain allowances that aim to compensate for expenses incurred in connection with the employment can be given tax free. For example, a compensation for temporary double housing costs incurred in connection with the employment can be given tax free for a period of two years.

These tax-free allowances also include those given to foreign employees temporarily assigned to the Netherlands for additional costs relating to their temporary stay outside their country of origin (extraterritorial costs), provided certain conditions are met (the 30 percent ruling). The maximum tax-free allowance for extraterritorial costs is 30 percent of the aggregate amount of the salary and the allowance itself. The costs actually incurred do not have to be substantiated.

Decision

The court argued that costs that already belong to the extraterritorial costs covered by the 30 percent ruling cannot be separately compensated tax free in addition to the allowance received under the 30 percent ruling. Based on the parliamentary history, the court found that double housing costs are part of the extraterritorial costs. Accordingly, no separate allowance can be given in addition to the 30 percent ruling.

The taxpayer's arguments that this would lead to a different treatment of foreign employees compared with resident employees, thereby violating the International Convention of Political and Civil Rights and the European Convention of Human Rights, were not held valid.

This decision is helpful for clarifying the extraterritorial costs covered by the 30 percent ruling and is in line with a statement of practice issued by the Dutch Ministry of Finance.² ♦

♦ *Eric van der Stoep, Otterspeer, Haasnoot & Partners, Rotterdam*

²Statement of Practice of Feb. 11, 2004, nr. CPP2003/641M.