



Individual tax alert

Belgium

Dutch 30% facility: update on the 150 km limit

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The European Court of Justice recently ruled that the 150 km limit, which excludes certain employees from the application of the 30% facility, corresponds with EU law. However, it could still be possible that the 150 km limit is found incompatible with the European free movement of workers if the 30% facility would lead to a systematic overcompensation of the actual territorial costs incurred.

Therefore, it remains advisable to join the instituted proceedings for the following groups:

- employees who came to work in the Netherlands after 1 January 2012 and who do not fulfil the 150 kilometre test; and
- employees who have applied the 30% facility for less than 5 years until 1 January 2012 and who will no longer be able to apply it because they failed to pass the interim 150 kilometre test.

Background & introduction of the 150 km limit

Based on Dutch tax law, living expenses for employees working in the Netherlands and living temporarily outside their home country can be reimbursed untaxed, as they would not have incurred these costs if they continued working in the home country. In principle, the compensation for these so-called extra-territorial expenses is based on the actual costs made by the expat.

For a specially defined group of employees, the 30% facility was introduced. This rule consists of a tax-free allowance of 30% of the taxable salary of such employee. The 30% tax-free amount is considered to cover extra-territorial expenses regardless of the actual costs incurred.

As the Dutch legislature wanted to eliminate any anti-competitive effects in the border regions, it amended the 30% facility on 1 January 2012. As from that date, if employees had lived within a distance of less than 150 kilometers from the Dutch border in the 24 months before their employment in the Netherlands for more than two thirds (16 months) of that period, they would no longer be eligible for the 30% facility.

No unjustified difference...

The experts at Deloitte Netherlands believe that the 150 km limit is incompatible with the European free movement of workers. Based upon this, the Supreme Court had requested a preliminary ruling with the European Court of Justice.

The ECJ pronounced sentence on 24 February 2015 (C-512/13 – Sopora – [Dutch](#) | [French](#) | [English](#)) and ruled that there is no unjustified difference in treatment between employees who lived within the 150 km limit before their employment and those who did not.

The ECJ found its ruling in the objective of the 30% facility.

Employees meeting the conditions of Dutch tax law can always be reimbursed for the actual extra-territorial expenses, regardless of whether the 150 km limit conditions are met. The objective of the 30% facility is only to have a simple method in place for establishing a fixed allowance for the extra-territorial costs.

In other words, the introduction of the 150 km limit has not limited the reimbursement for actual extra-territorial expenses, but has only limited the use of the simplified method.

... unless systematic overcompensation

When qualifying for the 30% facility, the lump sum is applied regardless of the actual extra-territorial costs. In other words, these employees can be overcompensated.

According to the ECJ, infringement of EU law could still occur if the application of the 30% facility for employees living beyond the 150 km limit were to lead to systematic overcompensation of the extraterritorial costs actually incurred. The ECJ has instructed the Supreme Court to examine whether or not this is indeed the case. A ruling by the Supreme Court in this regard will now have to follow.

Contacts

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