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Dutch Supreme Court 150 km criterion decision: more details

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Dutch 30% facility update

On 4 March 2016, the Dutch Supreme Court ('Hoge Raad') issued its judgment on whether the 150 km criterion for the Dutch 30% facility is justified.

Judgment

The Dutch Supreme Court passed its judgment stating that the 150 km criterion for the 30% facility is justified and not incompatible with the European free movement of workers.

As a result, an employee would only be eligible for the Dutch 30% facility if he or she lived at a distance of more than 150 km from the Dutch border during the 24 months preceding his or her employment in the Netherlands, for more than two thirds (16 months) of that period. Apart from this condition, the employee will also have to fulfill the regular conditions as foreseen in Dutch tax law.

Background

The 30% facility has been introduced for a specifically defined group of employees and consists of a tax-free allowance, at 30% of the employee's taxable salary, which is considered to cover extra-territorial expenses regardless of the actual costs incurred.

As of 1 January 2012, the 30% facility was amended to introduce the 150 km criterion. Due to this criterion, employees from certain parts of Belgium, Germany, France and the United Kingdom were no longer eligible for the 30% facility.

The Dutch Supreme Court had requested a preliminary ruling with the European Court of Justice to verify whether the 150 km criterion was incompatible with the European free movement of workers. The European Court of Justice 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, unless the application of the 30% facility for foreign employees were to lead to systematic overcompensation of the extraterritorial costs actually incurred.

The Dutch Supreme Court has now ruled that there is no clear systematic overcompensation with respect to the extraterritorial costs incurred. According to the Supreme Court, sufficient research has been done in this regard.

Practical consequences

The Dutch Supreme Court's judgment has the following consequences:

1. The employee who started his or her first employment in the Netherlands in 2012 or later and has lived for too long within a 150 km zone before his or her Dutch employment: given the recent Supreme Court judgment, the employee will no longer be eligible for the 30% facility.
2. The employee living in the 150 km zone and benefitting, for less than 5 years, from the 30% facility on 1 January 2012: the employee will no longer be able to apply the 30% facility from the beginning of the sixth year since he/she no longer passes the interim 150 km test held at that moment.
It can however still be argued that employees, who have initially been formally granted the facility beyond the moment of the interim test, can continue to rely on the end date as foreseen in the initial decision. Further case law can still be expected on this point.

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