

The 'crisis levy': recognition, allocation, presentation and disclosure

On 18 July 2012, the Budget Agreement 2013 Tax Measures Implementation Act¹ came into effect. This Act amended a number of tax laws as of 1 January 2013. One of the amendments concerns a one-off 'crisis levy' over 16% of the wages from current employment (including any bonuses) that employers paid their employees during 2012, insofar such wages exceeded EUR 150,000. This crisis levy is laid down in a new article 32bd of the Wages and Salaries Tax Act 1964². The question has been raised as to how the crisis levy should be recognised and disclosed under Dutch GAAP. To this end, the Dutch Accounting Standards Board has published DASB statement 2012-5. This statement was finalised by means of the issuance of DASB statement 2013-1 on 7 January 2013, taking into account the comments received on DASB statement 2012-5.

Background

Three accounting questions with respect to recognition, allocation, presentation and disclosure of the crisis levy are relevant in practice:

1. In which year should the crisis levy be accounted for under Dutch GAAP (recognition)?
2. How should allocation to periods take place (allocation)?
3. Should the crisis levy be presented and disclosed as part of the directors' remuneration and supervisory directors (presentation and disclosure)?

The Dutch Accounting Standards Board (DASB) answered these questions in the DASB statement 2012-5 'Draft - Application Standard 252 Provisions regarding the crisis levy and amendment of Standard 271.6 Employee benefits - Remuneration of directors and supervisory directors' (hereinafter: DASB statement). DASB statement 2013-1 finalises statement 2012-5, taking into account the comments received. These DASB statements (hereinafter: the statement) are the key topic of this article. With respect to points 1 and 2 referred to above, the DASB statement merely provides an interpretation of the existing standards. This interpretation does not constitute an amendment of existing standards and applies both to large and medium-sized legal entities (DAS 252) and to small legal entities (DASs³ B10). With respect to point 3, the DASB statement amends DAS 271.6 'Remuneration of directors and supervisory directors'.

DASB statement

We will now elaborate on the abovementioned three points discussed in the DASB statement. We conclude this article with a brief analysis of the answers to the three questions on the basis of IFRS.

1. Recognition

After 18 July 2012, pursuant to DAS 252.201 and DASs B10.105, respectively, a liability must be recorded as of each balance sheet date until the crisis levy has been paid:

- The legal entity has a liability as of the 2012 year-end balance sheet date. Although the 'Wages and Salaries Tax Act 1964' was not amended until 1 January 2013, it already constituted a present (legal) obligation prior to that date (DAS 252.201a/DASs B10.105a). The aforementioned obligation resulted from a past event (the 'Budget Agreement 2013 Tax Measures Implementation Act' coming into effect), and will continue to exist irrespective of any future actions of the legal entity (DAS 252.204). The triggering event which gave rise to the obligation is an excess of wages earned over the calendar year 2012 and exceeding the EUR 150,000 threshold.

¹ 'Wet uitwerking fiscale maatregelen begrotingsakkoord 2013'.

² 'Wet op de loonbelasting'.

³ DASs: Dutch Accounting Standards for small legal entities.

- The settlement of the obligation is likely to result in an outflow of cash (DAS 252.201b/DASs B10.105b).
- The amount of the obligation can be reliably estimated (DAS 252.201c/DASs B10.105c). Wages from employment earned over the calendar year 2012 were known on 31 December 2012. Wages can therefore be reliably estimated in the event of an earlier balance sheet date. Any bonuses that may still be treated as wages over 2012 can be estimated reasonably and reliably.

2. Allocation

The levy must be recognised in proportion to time and in proportion to the wages earned (and, thus, not just from the months in which the cumulative wages have exceeded EUR 150,000). This is due to the relationship between the levy and the wages earned and the employee performance over the year as a whole. A best estimate needs to be made of the obligation as of the balance sheet date, for each balance sheet date after 18 July 2012. This estimate should take into account expectations regarding people commencing and people terminating their employment.

3. Presentation and disclosure

The notes to the financial statements should disclose information on directors' remuneration. Under article 2:383(1) of the Netherlands Civil Code (NCC), a legal entity shall disclose the remuneration charged to the legal entity during the financial year, including the pension costs and the other benefits for the joint directors and former directors and, separately, for the joint supervisory directors and former supervisory directors. Under article 2:383c NCC, a public limited liability company (NV⁴) shall disclose, amongst other items, the remuneration paid for each individual director. This amount is broken down into periodically paid remuneration, remuneration payable in the future, termination benefits and profit-sharing and bonus payments, insofar as these amounts have been charged to the legal entity in the financial year.

According to the DASB, two views are possible as to whether the crisis levy charged to the legal entity should be part of the directors' remuneration. The crisis levy is either part of the directors' remuneration (view A) or not (view B). The DASB has no preference for either of the views. An analysis of both views is included in the textbox on the next page of this article.

A proposed amendment of DAS 271.6 requires the crisis levy charged to the legal entity in the financial year and relating to current and former directors and supervisory directors, to be disclosed separately for the joint directors and separately for the joint supervisory directors. The statement applies irrespective of whether the crisis levy is considered to be part of the remuneration or not. Please note that the DASB does not provide a definite answer as to whether the crisis levy is part of the remuneration or not. The DASB reaffirmed its position in statement 2013-1 in response to comments received on 7 January 2013. Due to the one-off nature, the disclosure should clarify whether the crisis levy charged to the legal entity has been considered part of the directors' remuneration or not.

The disclosure of the crisis levy referred to before solely applies when 'a statement should be issued under article 2:383(1) or 383c NCC'. The crisis levy is stated in totals for the joint directors on the one hand⁵ and for the joint supervisory directors on the other hand⁶. Hence, not separately per director or supervisory director, respectively. The latter applies to both article 383 and 383c NCC. Small legal entities are exempted from this disclosure (article 2:396 paragraph 5 NCC). The crisis levy may give rise to an exceptional item in the profit and loss account (as defined in DAS 940) which shall be disclosed (DAS 270.404). Finally, we note that presenting the crisis levy as an 'extraordinary item' (DAS 270.407) is prohibited.

4. IFRS

The Netherlands Authority for the Financial Markets (AFM) announced its view on whether the crisis levy is part of the employee benefits in their Activity Report 2012 (issued in January 2013). The AFM is of the opinion that the crisis levy is an employee benefit under IAS 19 (paragraph 7), since it is a payment in connection with services received. They state that listed companies (i.e. under IFRS as adopted by the EU) should present and disclose the crisis levy as employee benefits in their 2012 financial statements. In their opinion, the crisis levy should therefore be disclosed:

- as part of key management personnel compensation in accordance with IAS 24.17 (short-term employee benefits); and
- as part of the director remuneration in accordance with article 2:383c of the Netherlands Civil Code (note: for each individual director and for each individual supervisory director).

The AFM furthermore issued a strong preference to present and disclose the crisis levy as director remuneration under national laws (View B as mentioned above). They acknowledged the circumstances that the crisis levy does not benefit

⁴ With the exception of the public limited liability company whose articles of association solely include registered shares, share transfer restrictions, and which prohibit the issuance of bearer depositary receipts.

⁵ Current and former directors.

⁶ Current and former supervisory directors.

the employee in any way. They furthermore acknowledge the consequence of presenting and disclosing the crisis levy as employee benefits and the impact on the amount of remuneration, including the public opinion on the latter. According to the AFM, these circumstances do not impede on their opinion in this respect.

We believe that listed companies should take note of this announcement of the AFM and present and disclose the crisis levy as discussed above in their 2012 financial statements. We strongly advise other companies which apply IFRS also to apply the view of the AFM as expressed in their Activity Report 2012. However, we stress that it is the own responsibility of a company to choose an accounting treatment in this regard.

5. Final remarks

The abovementioned changes apply to financial years that include the period of 18 July 2012 through 31 December 2012, as well as to financial years which include part of that period. The crisis levy as initially set up by the legislation is basically a one-off crisis levy. Hence, the new article 32bd in the 'Wages and Salaries Tax Act 1964' will expire after one year. Therefore, the amendment of DAS 271.6 will expire too, for financial years starting on or after 1 January 2013 (one-off crisis levy).



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Analysis of view A (crisis levy forms part of the directors' remuneration)

The legislative history of article 2:383 NCC shows that disclosure of the remuneration costs of the directors and supervisory directors is mandatory. The objective is to provide insight into the remuneration costs of the board of directors and the supervisory board. The crisis levy is one of the wage tax and national insurance contributions levied over the 2012 salary. Hence, it should be included in the remuneration costs. View A is similar to social charges that are part of the directors' remuneration (for example 'employer-paid social charges', compare DAS 270, Appendix 3).

Analysis view B (crisis levy does not form part of the directors' remuneration)

DAS 940 defines remuneration as 'periodically paid remuneration, remuneration payable in the future, termination benefits and profit-sharing and bonus payments'. The concept of compensation has not been defined in Title 9 or in the Dutch Accounting Standards. The definition of 'compensation' in the Van Dale dictionary is 'that which is given as a reward'. A compensation or remuneration will thus always include an element of something being provided or paid for the benefit of the person being compensated. The crisis levy does not include a compensation element. Furthermore, the crisis levy is not a compensation for the governance duties of the board of directors or supervisory board. The Explanatory Memorandum states the crisis levy to be a one-off levy for reducing the government deficit. The Explanatory Memorandum states it concerns a levy aimed at employers and not at employees and entrepreneurs who are liable for personal income tax (the latter are not considered to be employers). Furthermore, this one-off levy was imposed when (mid-2012) it could not, generally, be taken into account upon determining the compensation level for 2012. View B thus concludes that the crisis levy does not form part of the directors' remuneration.