

**Euro Tax Flash**

**Issue 246 – February 24, 2015**

## **Euro Tax Flash from KPMG's EU Tax Centre**



### **Court of Justice of the European Union issues decision on whether the 150-kilometer criterion in the Dutch 30% ruling violates EU law**

[Payroll Tax – the Netherlands – 30% ruling](#)

On February 24, 2015 the Court of Justice of the European Union (CJEU) issued its decision on whether the 150-kilometer criterion in the Dutch 30% ruling violates EU law. The CJEU ruled that this is not the case, unless it appears that the flat-rate 30% reimbursement were systematically to give rise to a net overcompensation in respect of the extra expenses actually incurred by the foreign employees. The Dutch court must examine this.

#### **The 150-kilometer criterion in the 30% ruling**

Employees from abroad with specific expertise that is scarce on the Dutch labor market are eligible for tax relief. This tax relief is subject to conditions i.e. the 30% ruling. If the 30% ruling is applicable, 30% of the employee's salary can be paid as a tax-free allowance to cover extraterritorial expenses (the additional expenses incurred as

the employee is temporarily living and working outside his or her home country). The remaining 70% is treated as taxable salary.

However, as of January 1, 2012, only employees who resided more than 150 kilometers from the Dutch border during two-thirds of the 24 months preceding the commencement of their employment or secondment in the Netherlands, are eligible for the 30% ruling.

### **Legal proceedings on measures violating EU law**

Legal proceedings on this measure are currently pending. In these proceedings taxpayers have taken the position that the 150-kilometer criterion violates EU law, as it excludes employees who resided less than 150 kilometers from the Dutch border from the 30% ruling. Moreover, they claim that the measure is discriminatory as it restricts the free movement of workers within the European Union – a restriction that is explicitly prohibited under EU law. The Dutch tax court had previously ruled that this restriction does not violate EU law; this was also the position taken in the Opinion issued by the Advocate General at the Dutch Supreme Court. Both the tax court and the Advocate General concluded that employees who live close to the border can easily commute and will therefore not incur extraterritorial expenses, or do so to a significantly lesser degree.

### **Proceedings before the CJEU**

In 2013, the Dutch Supreme Court referred this case to the CJEU for a preliminary ruling on whether the 150-kilometer criterion violates EU law and, if so, whether this violation is justified, i.e. the public interest justifies treating like cases differently.

The CJEU has now ruled that the Dutch legislation is compatible with EU law, unless it appears that the flat-rate 30% reimbursement were systematically to give rise to a net overcompensation in respect of the extra expenses actually incurred by the foreign employees. The Dutch court must examine this.

### **EU Tax Centre comment**

The final outcome of the case is now in the hands of the Dutch courts who will be faced with the difficult task of interpreting what amounts to a 'systematic' overcompensation. At a different level, the decision is significant in that it clearly endorses the most favored nation principle within EU law and thus opens the door to possible claims

against Member States' legislation that does not comply with this principle.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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