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The Supreme Court renders a landmark decision: are benefits granted by entities related to the employer subject to social security contributions?

The definition of “remuneration” used as the basis for the calculation of social security contributions in Belgium, goes all the way back to 1965. More than half a century later, practice shows that the definition is still under discussion.

According to Belgian social security law, “remuneration” is defined as *“(i) the salary or the benefit (in cash or in kind) (ii) to which the employee is entitled (iii) by virtue of his/her employment (iv) chargeable to the employer”.* This definition covers four conditions which must be fulfilled cumulatively in order for salary or benefits to be subject to social security contributions.

On 10 October 2016, the Belgian Supreme Court rendered a landmark decision about the question how the fourth condition *“chargeable to the employer”* should be interpreted *(“ten laste van de werkgever”/ “à charge de l’employeur”*). The Supreme Court stated that the mere fact that a benefit is financially paid by a third party ‘as such’ does not imply that a benefit is exempt from social security contributions.

This decision may have an impact on your compensation and benefits offering in case your company belongs to a group of companies where certain benefits (incentives, stock-options, trips abroad, tickets, group or product reductions, etc.) are offered to the employees by a parent company of the employer, sister company or another entity of the group that is not the formal employer.

We analyse the decision and the implications in more detail below.

The decision of the Belgian Supreme Court

The case handled by the Supreme Court related to free or discounted subscriptions to magazines offered to the employees by a sister company of the employer belonging to the same group. The sister company did not charge the employer for the free/discounted subscriptions. The employer had the opinion that the employees were not entitled to this benefit “at his expense”. The National Social Security Office claimed that the benefits were “chargeable to the employer”, a concept that should be interpreted broadly.

In this case, the grant of benefits was confirmed in the employment contract with the employer, whereas the financial burden thereof was borne by the sister company. The Supreme Court decided that in such a case the benefit was chargeable to the employer, qualifying as “remuneration” and thus subject to

social security contributions. The position of the National Social Security Office was thus followed by the Supreme Court.

Conclusions

For a long time, a number of legal scholars have interpreted the concept "chargeable to the employer" in its financial meaning as *"being directly or indirectly at the expense of the employer"* (i.e. financially (re)charged to the employer).

The Supreme Court now has decided that the mere fact that the financial cost of a benefit is not directly or indirectly recharged to the Belgian employer is not sufficient for the benefit to be exempt from social security contributions.

Therefore, this decision makes it clear that the question whether the benefit is recharged to the employer (or not) is no longer sufficient in order to determine whether the benefit is exempt from social security contributions. The analysis should now be made whether the Belgian employer is / can be seen as *legally liable* towards the employees in relation to a benefit being granted.

In order for an employer not to be legally liable, the employees concerned may not have any claim whatsoever on their employer regarding the benefit. The employer should not make any undertaking towards the employees in this respect.

We have set out some of the practical steps employers should consider in response to this decision below.

Key take-aways

The analysis should be made whether the Belgian employer is / can be seen as financially *and* legally liable towards the employees in relation to a benefit being granted in order to avoid that such benefits are subject to social security contributions. In this respect, it must be made sure that:

- the employer is not contractually liable for the granting of the benefit; and
- the employer is not directly involved in the grant, the distribution, administration or financing of the benefit.

In practice, the following questions should at least be asked when a group entity is offering a benefit to the employees:

- Is the benefit financially recharged to the employer?
- Is there a reference to the benefit being granted in the employment contract between the employer and employee?
- Are there any other contractual engagements in writing taken by the employer or references by which the employer can be seen as the person to whom the employees can turn when they have not received the benefit (e.g. policies, offer / notification letters, etc.)?

- Does the employer and the group entity granting the benefit belong to a group of employers that forms a "technical operating unit"[1], a concept known as part of the social elections procedure *("technische bedrijfseenheid/unite technique d'exploitation")*.

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[1] A TOU is determined based on economic and social criteria, which indicate a certain *economic* and *social* independence. The TOU is certainly not always the same as the legal entity. Various legal entities can form one TOU.