

Supreme Court: a 'solidarity' levy is negative income

8 February 2010 – When employees have to surrender part of their income as part of a corporate social plan, this contribution is deductible as negative income. No employee insurance scheme premiums are therefore due in respect of this 'solidarity' levy. This has been decided by the Dutch Supreme Court. This ruling is relevant for companies that are in severe financial difficulties and considering imposing pay restraints. In this case, the employer was advised by Hans van Ruiten, tax adviser and partner at Loyens & Loeff.

Supreme Court ruling

If an employer sets up and implements a corporate social plan as part of a reorganisation, and employees are obliged to surrender part of their income to help finance this plan (a so-called 'solidarity' levy), their payments are deductible as negative income. This applies even when the social plan is carried out by a third party, for example, a foundation set up for this purpose, and the employer transfers payments to this party. The Supreme Court made a ruling on this on Friday 5 February in court proceedings conducted by Loyens & Loeff.

Charity or social plan?

In these proceedings, the employer was assisted by Hans van Ruiten, tax adviser at Loyens & Loeff: "The difficulty in this case was in the transfer to a third party, the foundation. The Supreme Court does not acknowledge there is a difference in these circumstances whether transfer is done to the employer or to a third party, since payment is employment-based and not voluntary. If an employee chooses to donate part of his income to a third party – for example, to a charity – his *entire* income, including the part that is surrendered, is subject to tax and social security contributions. However, if a contribution is paid in favour of a third party as part of a social plan, this does lead to a lowering in the tax and social security contributions, since paying this contribution constitutes economising on employment conditions, meaning it cannot be said that the employee has the income at his disposal. As a result of this ruling, employers may from now on allow an independent foundation to carry out their social plan, which safeguards employees' contributions on the one hand while retaining tax deductibility on the other."

The case

This case concerned an employer who was forced to carry out a major reorganisation because of the grim financial situation. As part of the social plan, a foundation was set up whose goal was, among other things, to top up employee benefits for those employees that had lost their jobs due to the reorganisation. A solidarity levy was imposed on the incomes of the remaining employees for a period

of five years and this levy was transferred to the foundation. The arrangement was agreed in a collective agreement. The income prior to imposition of the solidarity levy formed the base for determining the amount of vacation allowance, pension, and other benefits. While performing an audit, the Employment Insurance Schemes Implementing Body (*UWV*) took the view that the employee insurance contributions were due on the solidarity levy. An additional assessment then followed. In an appeal, the Rotterdam District Court and the Central Appeals Tribunal ruled against the employer. The Advocate Generale advised the Supreme Court to dismiss an appeal in cassation. The Supreme Court has, however, now ruled in favour of the employer. (*LJN: BH9189, Hoge Raad , 07/13543*)