Questions and Answers for Extraterritorial Employees

Tax Authorities/Centre for Process and Product Development, Tax on Labour and Property Domain

Decree of 26 November 2001, no. CPP2001/2970M

The Director-General of the Tax Authorities has decreed on behalf of the State Secretary of Finance the following.

Introduction

The Tax Revision of 2001 brought with it a number of changes for employees who work for an employer outside the Netherlands or are seconded by their employer outside the Netherlands. Experience has shown that a number of questions are asked in this connection. These questions and their answers are given below. The questions that are asked and discussions with representatives of employer organisations indicate that the new regulations contain several bottlenecks. In this connection, the answers below provide for a certain approval. The following general approval is concerned:

- In anticipation of changes of the 2001 Income Tax Implementation Decree (hereinafter referred to as 'Uitv. besl. IB 2001') a request for opting for partial foreign taxation or a review of this choice as provided in Article 11, section one, Uitv. besl. IB 2001, shall be made no later than with submission of the tax return (see Question 1).
- The rule of evidence can on conditions be adapted to the extent this decree shall have retroactive force (see Question 31).
- In anticipation of the change of the Uitv. besl. LB 1965 (1965 Implementation Decree, Wage Tax Act), the basis of the rule of evidence can be the wages for present employment instead of the wage regularly enjoyed (see Question 22).

In addition, I have ordered the following transitional regulations.

- Advantage can be taken of the retroactive force of a decree to 1 July 2002 at the latest by applying the rule of evidence through an administrative division of the wage in accordance with the regulation to 1 January 2001 (see Question 13).
- Pension arrangements can remain unchanged for the remaining duration of decrees (and any extension thereof) with a starting date of 1 July 2002 (see Question 15).

Questions and Answers

Article 11 Uitv. besl. IB 2001

1. *When can you opt for partial foreign taxation and how should this be done?*

   Answer. The choice can be made for the period in which the taxpayer is considered under application of Uitv. besl. LB 1965 as an incoming employee or as a new employee for part of this period. The partial foreign taxation terminates:
   - as soon as the period terminates for which the choice was made for partial foreign taxation;
   - as soon as the period terminates in which the taxpayer is considered under application of Uitv. besl. LB 1965 as an incoming employee;
   - if the taxpayer reviews the choice for partial foreign taxation, the choice and the review of the choice are effected through the submission of a request with the tax inspector. He decides on the request by a decree that is eligible for objection. This request should, pursuant to Article 11, Uitv. besl. IB 2001, be made no later than 31 December of the year in which the partial foreign

taxation is to be applied. Experience has shown that there is a need to make the decision at a later time. In this connection I have resolved to augment the aforementioned Article 11 with retroactive force to 1 January 2001. In anticipation of this change I approve with retroactive force to 1 January 2001 of the request to opt for partial foreign taxation or a review of this choice that can be effected no later than submission of the tax return.

2. *Can an employee who is designated before the year 2000 as an imaginary foreign taxpayer review his choice as at 1 January 2001?*

   Answer. The point of departure here is that the imaginary foreign taxpayer is designated in the year 2001 as a partial foreign taxpayer. This implies that the choice can be reviewed. The review of the choice is effected through the submission of a request to the inspector. He decides on the request by a decree that is eligible for objection.

3. *Can an employee who makes use of the right of option for foreign taxation under Article 2.5 Wet IB 2001, also still make use of the right of option for experts recruited abroad (Article 2.6 Wet IB 2001)?*

   Answer. Yes.

4. *An employee lives in the Netherlands and has not opted for application of the old 35% reimbursement regulation (see the Decree of 29 May 1995, no. DB95/119M, BNB 1995/243) for imaginary foreign taxation. Can this employee opt as from the start of 2001 for application of partial foreign taxation?*

   Answer. Yes.

5. *Partial foreign taxation terminates, among other things, as soon as the period ends in which the taxpayer is considered for application of Section 3 of the Uitv. besl. LB 1965 an incoming employee. Can the partial foreign taxation continue after conclusion of the period to which the rule of evidence applies?*

   Answer. No, in such a case Section 3 of the Uitv. besl. LB 1965 is no longer applicable.

6. *What consequences are associated with use of the right of option for experts recruited abroad by a resident of the Netherlands (Article 2.6 Wet IB 2001)?*

   Answer. Pursuant to Article 11, Uitv. besl. IB 2001, the incoming employee who lives in the Netherlands, who makes use of the right of option for experts recruited abroad can opt in boxes 2 or 3 to be taxed according to the rules that apply to foreign taxpayers. For the rest, for example, the ascription for the partner arrangement of income components etc., the incoming employee who lives in the Netherlands can be taxed as a foreign taxpayer. A resident of the Netherlands who makes use of the right of option for experts recruited abroad does not therefore stop being a domestic taxpayer through this choice.

7. *Are American experts who are seconded to the Netherlands, who opt for partial foreign taxation designated a resident of the US for application of Article 4, section one of the Netherlands-American Tax Convention (Bulletin of Acts, Orders and Decrees 1993, 612)?*

   Answer. Yes, someone who opts for partial foreign taxation is not subject to Dutch taxation for his full international income and for application of the Netherlands-American Tax Convention, is not therefore designated a resident of the Netherlands. This point of view matches the standpoint that was taken for application of the old 35% reimbursement regulation (see the appendix to the letter of 20 July 1994, IFZ94/769, VN 1994/2367, point 2).

Article 15a, section one, part k, 1964 Wages and Salaries Tax Act (hereinafter 'Wet LB')

8. *Should a salary agreed between the employer and employee as stipulated in the rule of evidence, be laid down in writing?*

   Answer. The explanation of Article 9 of the Uitv. besl. LB 1965 states that the reimbursement must be agreed separately from the wage. This can be laid down in writing (which is usual for employment conditions) but it may be also done in another way (also see Question 14).

9. *Should the reimbursement stipulated in the rule of evidence at the time of the joint request referred to in Article 9, section one, Uitv. besl. LB 1965 be agreed on?*

   Answer. No, this can also happen later, for example, after receipt of the decision. A reimbursement as stipulated in the rule of evidence can be ascribed under certain circumstances with retroactive force (see Questions 4 and 14).

10. *According to Article 15a, section one, part k of the Wet LB, there must be a situation of a temporary stay. Does the 30% arrangement for incoming employees also apply to persons who meet all the conditions but become permanent residents?*

    Answer. Yes, for the period in which Section 3 of the Uitv. Besl. LB 1965 applies to an employee, he is considered to stay in the country concerned temporarily.

11. *Is it possible to divide up the wage into a part that is wage and a part that is a free reimbursement for extraterritorial costs?*

    Answer. No, only an administrative division of the wage is not possible. A division in the sense that the wage is lowered according to employment law with simultaneous granting of a free reimbursement is possible (compare the decree concerning Changes in Wage, of 21 December 2000, no. CPP2000/2942M). The free reimbursement should be granted along with the salary agreed.

12. *Should the free reimbursement be paid with every salary reimbursement, or can an extra 'salary run' take place within the calendar year or before the closure of the wage bookkeeping to determine exactly the maximum amount of the untaxed reimbursement?*

    Answer. It is possible to determine within the calendar year the exact maximum amount of the free reimbursement. This amount can then be paid out as a free reimbursement. If reimbursement is made after the end of the calendar year concerned, the reimbursement can be a free reimbursement providing an unconditional right exists to this at the end of the calendar year.

13. *Since 1 January 2001 the wage can no longer be divided administratively into a part that is wage and a part that is a reimbursement (compare the explanation to Article 9, section one, Uitv. besl. LB 1965). How should cases be dealt with in which the consequences of this change are not recognised in time?*

    Answer. In view of the manner used before 1 January 2001 I consider it reasonable to grant on this point a transition period for adapting existing situations to the new regulations. To make possible a smooth transition I permit in this connection application of the rule of evidence until 1 July 2002 in the case of an administrative division of the wage in accordance with the rule until 1 January 2001. This approval, however, does not go any further back than the decree stipulated in Article 9h, section one, Uitv. besl. LB 1965.

14. How can a wage be determined or changed so that an extraterritorial reimbursement is enjoyed along with the wage?

Answer. These matters should be agreed under employment law. This can be done, for example, by including the following text in the employment contract.

a. If, and in so far as the employee, pursuant to Article 9 of the 1965 Wage Tax Implementation Decree can receive a free reimbursement of extraterritorial costs, the wage agreed with the employee for present employment shall be reduced in accordance with employment law such that 100/70 of the wage thus agreed for present employment is equal to the wage originally agreed from present employment.

b. If, and in so far as section *a*. is applied, the employee shall receive from the employer a reimbursement for extraterritorial costs, equal to 30/70 of the wage from present employment thus agreed.

c. The employee is aware of the fact that an adjustment of the wage agreed in accordance with section *a*. can, in view of the rules, have consequences for all compensation and payments related to the wage, such as pension and social security payments.

Explanation. The 'wage agreed from present employment' stipulated under *a*. concerns all the wages to be paid or made available from present employment, as stipulated in the 1964 Wage Tax Act and the related provisions (in this connection also see the answer to Question 22).

15. Is it possible to build up a pension on the extraterritorial reimbursement?

    Answer. No, it is not possible to build up a pension on the extraterritorial reimbursement in the same way that it is not possible to do so on other free compensation or free provisions. Under Decree BNB1995/243 it was possible to build up pension on the 35% reimbursement. For existing cases, I consider it therefore reasonable to take into account a transitional period. I approve of the pension commitment remaining unchanged for the remaining duration of the decrees (and any extension thereof) with a starting date before 1 July 2002. In other situations the consequences of the replacement of the 35% rule by the 30% rule for the basis of pension can be limited by utilisation of one or more of the following possibilities:
    - Full utilisation of the space that the Witteveen Framework offers (including percentage, franchise and basis of pension).
    - Utilisation of the space offered by Article 19 Wet LB; Article 19 of the Wet LB provides space to build up pension on the usual wage if the actual wage is lower than usual, but does not differ here by more than 30%. This 30% margin is the interpretation of the term used in this provision, 'substantially lower.' For determination of the usual wage the wage paid to employees in the same job who do not fall under the 30% rule is important. If necessary, a comparison may be made with the wage that is enjoyed in the period prior to the seconding. Should the actual wage - excluding the reimbursement for extraterritorial costs - be 70% or more of the usual wage determined in this way, pension may be built up on the usual wage. If the difference between the usual wage and the actual wage is greater than 30%, no use may be made of this option.
    - Utilisation of the option provided in the Decree of 22 May 1996, no. DB96/841M to build up pension unchanged for secondings of no more than five years according to the foreign pension scheme that was participated in before the seconding. This decree is also currently being reviewed.

16. *Can an exceptional free reimbursement be given for double accommodation costs while maximum use is already being made of the 30% rule?*

    Answer. No, as given in the Explanation Memo on the Revision Decree of 20 December 2000 for adjustment of certain implementation decrees (*Bulletin of Acts*, Orders and Decrees 640), the costs of double accommodation have a predominantly extraterritorial character and for this reason are entered under the most specific entry for extraterritorial costs. The costs concerned therefore fall within the 30% rule of evidence. This does not necessarily mean that such reimbursement is taxed.

Should it be demonstrated that the total extraterritorial costs exceed 30% so that no use need to be made of the rule of evidence, the actual costs of double accommodation can be reimbursed (without a limitation to two years).

17. *The explanation of the Revision Decree in which the new 30% rule in the Uitv. besl. LB 1965, is included concerns not only the costs of double accommodation as designated as extraterritorial costs, but also any extra costs of (initial) accommodation. How should such situations be dealt with in practice?*

    Answer. For the question of what extent there are extra accommodation costs, it is obvious in my opinion to compare the situation of the extraterritorial employee with what is usual in the Netherlands and - in the case of incoming employees - in the country of origin. From the point of view of efficiency, there is no objection, however, to assume without further evidence that accommodation expenditure for an extraterritorial employee does not exceed the sum (hereinafter the 'savings amount') of 18% of the wage for present employment (excluding a possible addition for accommodation). This means that for the accommodation provided or for reimbursed accommodation, at least the savings amount should be for account of the employee, whether in the form of an individual contribution or by designating the savings amount as wage (or a combination of the two equal to the savings amount). Any remainder is considered extraterritorial costs. It should be pointed out here that, if use is made of the rule of evidence, no space will exist to grant in addition a (partial) free reimbursement or to grant a provision for these accommodation costs.

18. *Employees perform work abroad for several months and for this purpose stay at a fixed residence there. In connection with the stay abroad employees incur extra costs. The employees are not eligible for the rule of evidence. Can the employer give a free reimbursement for the extra costs incurred by the employees?*

    Answer. Yes, this is possible. The employer can give a free reimbursement for the extra costs incurred for the temporary stay abroad (compare Article 15a, section one, part *k*, Wet LB). What are concerned here are extra costs actually incurred. The employer must demonstrate the extra costs incurred by the employees.

Article 8, Uitv. besl. LB 1965

19. *An incoming employee is recruited by an employer from another country, or an employee sent to an employer in the sense of Article 2 of the Wet LB, with a specific expertise that is scarce or unavailable on the Dutch job market. Is an employee sent to an employer required to be seconded from another country?*

    Answer. Yes, the rule does not apply to employees that are sent from the Netherlands to an employer abroad.

20. *Does the 30% rule apply to incoming employees also with respect to the managing director of a company registered in the Netherlands who lives in Belgium?*

    Answer. Article 16 of the treaty between the Netherlands and Belgium provides that bonuses, attendance fees and other remuneration obtained by a resident of Belgium who is a supervisory director or managing director of a public limited liability company that is registered in the Netherlands may be taxed in the Netherlands. The border employment rule does not apply to these persons. If the managing director meets the other conditions he can be eligible for the 30% rule.

21. *When is there question for incoming employees of an international school or an international department of a non-international school?*

    Answer. There is a question of an international school or an international department of a non-international school if the following conditions are met:

1. The education is based on a foreign system.

2. The school or department is in principle only available to children of employees working in a country other than the country of origin.

Article 9, Uitv. besl. LB 1965

22. *Article 9, section one, Uitv. besl. LB 1965 states that the basis is the sum of the wage regularly enjoyed for the stay outside the country of origin to the extent the incoming or seconded employee has no right to prevent double taxation, and remuneration for extraterritorial costs. What does 'wage regularly enjoyed' mean?*

    Answer. The concept 'wage regularly enjoyed' is explained in accordance with this concept in Article 10b. section two, Uitv. besl. LB 1965 (pensionable wage). The wage regularly enjoyed includes non-incidental (special) payments, such as bonuses, option rights, token money, obligatory premiums, etc. A fixed fee or bonus guaranteed in the employment contract, for example, is part of the wage regularly enjoyed. In practice application of this concept can form an obstacle to making wage payment more flexible. Upon further consideration, the 'wage regularly enjoyed' forms, particularly in these situations and in view of the average duration of the seconding, a less effective basis than the wage from present employment, in connection with which I have resolved to replace with retroactive force to 1 January 2001 the 'wage regularly enjoyed' as stipulated in Article 9, section one, part *a*, Uitv. besl. LB 1965, with 'wage from present employment.' In anticipation of this change, I approve with retroactive force to 1 January 2001 that application of the rule of evidence is based on the wage from present employment, instead of the wage regularly enjoyed. I want to point out here, for example, that pension instalments do not belong to the wage from present employment.

Article 9a, Uitv. besl. LB 1965

23. *Does evaluation of the scarcity and specific expertise requirements remain the same as under the old 35% reimbursement rules?*

    Answer. Yes, it remains the same.

24. *For evaluation of the scarcity and specific expertise requirements, account is taken in mutual consultation with three factors. One of these factors concerns the experience relevant to the job of the employee (Article 9a, section one, part b, Uitv. besl. LB 1965). Is it important which period the employee has gained this experience in?*

    Answer. The amount of experience that is required depends on the actual job. If experience is required and an employee has worked more than 2.5 years in a comparable job, it may be assumed that the employee has gained the experience necessary for the job.

Article 9b, Uitv. besl. LB 1965

25. *The maximum duration of the rule of evidence for incoming employees is ten years. If the employee thereafter continues to be employed by an employer, can use then be made of the option to reimburse free extra costs reasonably incurred for a temporary stay outside the country of origin?*

    Answer. On the basis of Article 15a, section one, part *k* of the Wet LB, the reimbursement of extra costs incurred during a temporary stay outside the country of origin belongs to the free reimbursements. The extent a situation obtains for an employee whose stay is of temporary duration depends on the facts and circumstances of the case. It is not generally acceptable, however, that after the lapse of ten years there is still a situation of a temporary stay or of extra costs that are associated with such a stay (in this connection also see the answer to question 10).

Article 9c, Uitv. besl. LB 1965

26. *Do specific rules apply to persons who in connection with a change of function are seconded to the Netherlands?*

    Answer. An employee of middle management or higher of an international concern with at least two and a half years experience in that concern who is seconded to the Netherlands in connection with a change of function is considered to possess specific expertise that is scarce or not available in the Netherlands.

27. *Should there be a question of a change of employer as stipulated in Article 9c, Uitv. besl. LB 1965, should a new application be submitted?*

    Answer. Yes, if the incoming employee obtains another employer during the period concerned, the rule of evidence remains in effect at the joint request of the employee and the new employer, providing the period between the end of the first job and the start of the new job is no longer than three months. For such a request the new employer is obliged to demonstrate anew that the employee can be designated an incoming employee.

28. For application of Article 9c, Uitv. besl. LB 1965, must there be a situation of dismissal?

    Answer. No.

Article 9e, Uitv. besl. LB 1965

29. *Article 9e, section one of the Uitv. besl. LB 1965, states that, should the incoming employee prior to the start of employment be employed as incoming employee by the employer or stay in the Netherlands, the period concerned is reduced by the periods of previous employment and residency. Does this mean a change in content with respect to the old 35% reimbursement rule?*

    Answer. Yes, the rule has been expanded on this point. Incoming employees who were not eligible for the 35% reimbursement rule because they were seconded by their employer outside the Netherlands can still be designated an incoming employee if the other conditions are met. The time that the employee has stayed or worked in the Netherlands is subtracted from the period.

Article 9h, Uitv. besl. LB 1965

30. *Is an incomplete request also a request?*

    Answer. Yes, this is considered a request pro forma. A request for the 30% rule that is signed by an employer and employee is enough to be considered a request.

31. *Pursuant to Article 9h, Uitv. besl. LB 1965, a decree can be issued that has retroactive force to the start of employment as extraterritorial employee. How should the rule of evidence be applied until the time of issue of the decree?*

    Answer. For practical reasons I approve that the employer, in anticipation of the decree is granted the free reimbursement for extraterritorial costs in accordance with the rule of evidence. If it later emerges that the decree is not granted, no tax need to be levied if it is demonstrated that a free reimbursement of extraterritorial costs is concerned or that the reimbursement is paid back immediately. If the (taxed part of) the reimbursement is not repaid, the employer is obliged to pay the wage tax - if necessary as gross - with the next tax return.

Article 12c, Uitv. besl. LB 1965

32. *Does the new 30% rule for incoming employees also apply with respect to employees who made use of the old 35% rule on 31 December 2000?*

    Answer. Yes. For persons for whom tax is levied for the year 2000 with application of the old 35% reimbursement rule there is no transition arrangement. They can only make use of the 30% rule if they meet the new conditions. On the basis of Article 12c, Uitv. besl. LB 1965, no request need to be made in such a case for the continued application of the rule of evidence as at 1 January 2001. In that case:

- the maximum term of the rule of evidence (ten years) is reduced by the period during which the 35% reimbursement rule is applied for the employee;
- the date 1 January 2001 applies as the time when the incoming employee is employed by his employer;
- discounts continue to be applied for the term; and
- the condition is considered to be met at the time, of specific expertise and scarcity on the job market.

33. *Does a discount which is applied before 1 January 2001 also remain applicable for the rule starting 1 January 2001 in connection with previous periods of employment by the domestic employer outside the Netherlands?*

    Answer. Yes. Article 12c, Uitv. besl. LB 1965, states explicitly that discounts applied to the term remain in force. The remaining term after 1 January 2001 is therefore not extended.