

Supreme Court changes its mind concerning deduction of professional expenses not falling within the scope of the corporate purpose

All income of a company, also these coming from outside its corporate purpose, is taxable professional income. Professional expenses are deductible if they comply with the conditions of article 49 Income Tax Code 92 (ITC92). Recently the Supreme Court came back on its earlier case law. The deduction of professional expenses would (no longer) depend on the condition that they would have to be linked with the activity of a company, as laid down in its corporate purpose.

Conditions for the tax deductibility of professional expenditure

According to article 49, section 1 of ITC92 the expenses made by the tax payer during the taxable period in order to obtain or keep professional income are tax deductible.

Since time immemorial expenses are only deductible for a company when they have a link with the company's activity as described in the articles of association and/or with the actual (main) activity (causality condition). These expenses should necessarily show causality with or be specific to the professional activity. This vision of the Supreme Court has been supported by the Constitutional Court which judged that the equality principle is not infringed if the deduction of expenses is refused because they have no causality with the activity of the company "or" its corporate purpose.

The causality theory was the cause of a lot of legal uncertainty since it was not clear whether corporate activity referred to the corporate purpose (description of the goal of the company) or its actual activity.

In the first hypothesis, expenditure relating to activities exceeding the corporate purpose (purpose exceeding expenditure) would not be tax deductible.

Purpose exceeding expenditure nevertheless deductible

Recently the Supreme Court stated that the deduction of professional expenses in the hands of a company cannot be subject to the condition that they should be inherent to the corporate activity of a company as shown in its corporate purpose. The Court adds that it comes back to its earlier case law, but does not provide an explicit explanation for its change of mind. The Court however refers to the rule that for a company all income is in principle professional income. Literally article 49 of ITC92 does not say anything about the causality between expenditure and the corporate activity or corporate purpose. For the deduction it suffices that there is a link between the expenses and income (e.g. rental income of an appartement, interest of foreign bonds, ..).

The consequences of the new view of the Supreme Court

It seems that we can no longer see the causality condition as a separate condition for the deduction of expenses in the hands of companies. However for private individuals it remains in place (based on article 53 1^o in fine ITC92).

The tax authorities will however not have to accept all expenditure of a company. Exaggerated expenses are and remain non-deductible (e.g. deduction of an expensive race bike). But for active companies with e.g. (im)movable goods in full property or usufruct which are whether or not used for private purposes, the case law of the Supreme Court opens perspectives. Therefore, to be continued. Naturally the articles of association should

be carefully drafted and non-fiscal motives for the set up structures should be well documented.

See a.o. Supreme Court:

- Saint-Gobain case on Korean FBB-constructions (F.14.0080.N) d.d. 12 June 2015
- Wattex case on Uruguayan FBB-constructions (F.13.0163.N) d.d. 12 June 2015
- Group Terryn on the qualification of assets (F.14.0212.N) d.d. 12 June 2015
- concerning Italian FBB-investments (F.13.0069.N) d.d. 19 June 2015