

Benefit in kind for the use of a home: case law considers the rules unconstitutional

Whoever gets a home for free from his employer, obtains a taxable advantage. The value of the advantages is calculated differently depending on whether it is put at the disposal by a natural person or a legal person. The advantages can be four times as expensive when provided by a company. This difference can be a problem. Case law recently judged twice that this is in breach with the constitution.

What is this about?

An employee or a director, who obtains an immovable property for free from his employer or company, obtains a benefit in kind, which is taxed. The value of the benefit in kind is calculated as a lump sum. Which formula is used depends on who puts the immovable property at the disposal:

- the good is put at the disposal by a natural person = indexed cadastral income (CI) of the building x 100/60.
- the good is put at the disposal by a legal body (e.g. a company) = indexed cadastral income (CI) of the building x 100/60 x 3,8. If the CI of the immovable property is lower or equals 745€, it should only be multiplied with 1,25.

The law mitigates these rules in case the immovable property clearly exceeds the personal needs of the occupant. Therefore the social position and the composition of the family of the employee are taken into consideration. The calculation of the benefit in kind is only based on the CI of an immovable property following the needs of the occupant.

In case the building is furnished, the calculated benefit in kind is increased with 2/3. In case an unbuild immovable property is concerned (only land), the multiplier is 100/90 instead of 100/60.

A director which obtains a building (with a CI exceeding 745€) from a company pays almost four times as much as whom obtains the building from a natural person.

Example

Jan obtains a house from Bert. The indexed CI of the house amounts to 1.000€. The value of the benefit in kind = 1.666,66€.

If Jan obtains the same house from his company (bvba Jan), the value of the benefit in kind = $1.000 \times 100/60 \times 3,8 = 6.333,33€$.

What is the problem?

It is clear that tax payers obtaining a house are treated differently depending on from who they are obtaining it. It is clear that directors obtaining the house from their company feel discriminated by the valuation rules.

The question occurring is whether the difference in treatment is justified. After all, the constitution prescribes the equality principle. This means that equal situations should be treated equally. A difference in treatment is only allowed when it is 'justified'. Applied to this problem the following questions arise: is it relevant who puts the house at the disposal? And can the legal form of the person providing the house have an influence on the value of the benefit in kind? Or should the benefit in kind always be calculated in the same way?

These questions were recently submitted to the courts twice, both to the court of appeal in Ghent as in Antwerp. The tax authorities argued that the difference is justified, a.o. because a director (of his own company) has an influence on the management of the company and can decide which house he obtains. We do not go into detail on all arguments of the tax authorities and the response of the courts. It suffices to mention that the arguments of the tax authorities were not accepted. The courts of appeal found that the difference was not justified.

And now?

It is clearly to soon to be crowing victory. For all parties involved in both cases this means that the relevant provisions cannot be applied. The value of the benefit in kind should be calculated according to the natural person formula. So no multiplication with 3,8. Others feeling treated unjustly can still file an appeal with the tax authorities, provided that the objection period has not expired.

Why not crowing victory?

- The tax authorities can still file an appeal against the Antwerp judgment with the court of cassation, which can judge differently.
- This is no judgment of the Constitutional Court: the legal provision is not nullified and still exists.
- No legal amendments are currently foreseen to modify the provision.
- In case the rules were adapted, it could be that all benefits in kind should be calculated following the 'most expensive' formula (indexed CI x 100/60 x 3,8), also for who obtains the house from a natural person.

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