

Legal Alert

The reversal of the burden of proof of the flat expenses in favour of the National Social Security Office (NSSO).

The employer will in the future be responsible for the proof of the legality of the flat expenses he repaid to his employees, due to the articles 64 and 65 of the programme law that are into force since 1 January 2010 (B.S. 30 December 2009).

Expenses inherent at the employer?

The concept “expenses inherent at the employer” is not defined in the (fiscal) legislation. Most of the time people refer to cassation arrests to define the concept. To shorten, we can define expenses inherent at the employer as expenses and costs made by the employee, for account of the company.

The settlement of the law of 23 December 2009

The NSSO has always accepted the repayment of on the one side the real made expenses (based on expenses notes) and on the other side the repayment of expenses on flat base.

About the repayment of expenses on flat base, they had to justify that the flat rate was in relation to the real expenses for account of the employer. They had to justify that the spending was plausible taking into account the activities of the employer and/or employee and the reasonable character of the amount of the flat rate remuneration. When this could not be justified, the NSS could see the remunerations

as a part of the loan and could charge social contributions on it.

Before the programme law of 23 December 2009, it was permanent cassation jurisprudence that the burden of proof to justify that the remunerations paid to the employee were no repayments of costs, felt upon the NSSO. Nevertheless the NSSO had another view¹. In this way the employer could relatively easy give an expense remuneration to his employees without the risk on requalification in loan.

This jurisprudence was in discrepancy with the fixed rules for the fiscal administrations, where it was the employer who had to prove to the authorized tax inspector that the given remuneration was intended to cover expenses that were owned to him and that the remuneration was actually spend to such costs.

The new settlement: clarity first

The new settlement, which is inspired on the fixed rules for the fiscal administration, brings clarity for the employers as well as for the NSSO. In opposite of this advantage there is now an important disadvantage for the employers.

¹ The NSSO has been declared to be right by the Cassation Court between 1989 and 2002. With a ruling dd. January 14, 2002 however, the Cassation Court returned to its prior rulings.

Before it was always the NSSO who had to prove the legality of the expenses, but now with two small articles of the programme law the burden of proof will shift to the employer.

In this way the employer will have to prove the reality of this expenses with supporting documents if they dispute the reality of the costs. If the employer does not dispose of the necessary documents, he may use all the pleas in common law to justify the reality of the expenses with the exception of oath.

If the employer doesn't succeed in giving probative information at the NSSO, the NSSO can decide to consider the remuneration as loan and can make an additional estimated NSSO-assessment, based on all the useful information they have.

In consequence of this new settlement, the stipulation of social- and fiscal law concerning the burden of proof of flat rate repayments of profession costs is synchronized.

The new settlement into force

This new settlement is into force since 1 January 2010.

In the future you, as employer, will have to prove the professional character as well as the reality of the flat rate repaid expenses for social security reasons. Hereby the editing of an underpinned file will be a must to avoid a requalification of (a part of) the flat rate remuneration in loan, with its consequences.

Contact

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