

## TETRALERT – CORPORATE

### FREE PROVISION OF A BUILDING BY A COMPANY TO ITS DIRECTOR: WHERE ARE WE REGARDING THE THEORY OF REMUNERATION?

Any benefit received by director from its company constitutes remuneration. This will also be the case if the company pays for private costs. This benefit of any kind will therefore be taxed as such, in principle, on the basis of the actual value of the benefit thus granted or, when the Royal Decree implementing the Income Tax Code derogates from such, on a flat-rate basis. For instance, this will be the case for:

- Vehicle expenses;
- The provision of a building;
- The provision of heating and/or electricity;
- The provision of a PC and/or an Internet connection;
- Etc.

It is undeniable that this mechanism allows a reduction of the tax burden. The fiscal appeal of this optimisation, however, presupposes that the expenses incurred remain deductible to the company. It is on this basis that the administration has been fighting for many years against the structures it considers (excessively) abusive. This is particularly true for villa-houses and/or costs related to buildings (quasi-) exclusively used for the private use of the director(s).

After more than fifteen years of jurisprudence manifestly *contra legem* (contrary to the current state of the law) (point I & II below), the recent jurisprudence developed by the Court of Cassation, driven by the Courts of Appeal of Antwerp and Ghent, is even more worrying (point III below).

#### **I. FROM THE DERWA JUDGEMENT TO THE SO-CALLED THEORY OF REMUNERATION**

The Income Tax Code (CIR 92) has always provided [that an expense is deductible](#) so long as it:

- is related to the professional activity;
- has been granted for the purpose of acquiring or retaining income;
- was incurred during the taxable year;
- is based on documentary evidence.

As formidable as this provision is, which leaves the entire burden of proof to the taxpayer, it has not [prevented the Court of Cassation from further strengthening its strictness](#) by limiting deductible expenses to expenses "*inherent in the exercise of the profession, that is to say, those that necessarily relate to the corporate activity*".

By adding a condition to the law, this jurisprudence led to the practice of developing two counter-measures, particularly in the context of split-purchases of buildings used wholly or partly for the private use of the directors of the company:

- The first was to amend the articles of association of the company to include real estate transactions;
- The second was based [on the assimilation of company directors into employees for "the application of professional expense provisions"](#), which tended to confirm the deductibility of the costs incurred in remunerating such employees.

## II. WHEN THE COURT OF CASSATION BECOMES STRICTER AGAIN, THE GOVERNMENT GETS SCARED...

In two judgements rendered in June 2015, the Court of Cassation directly revisited this jurisprudence. It considered, in effect, that the administration added a condition to the law when it refused the deduction of an expenditure on the ground that the latter was solely intended to obtain a tax advantage and was therefore not linked to the corporate purpose of the company that has presented it.

This turn created a [certain emotion within the government which at the time advocated for a modification of the law](#) motivated, according to it, by the fact that *"constructions in which secondary residences have been integrated into a*

*company may be counteracted by rewriting Article 49 of the Belgian ITC"*.

This legislative amendment may not even be necessary...

## III. BACKLASH

In two judgements rendered on 14 October 2016 - [one confirming a judgment of the Antwerp Court of Appeal, the other confirming a judgment of the Court of Appeal of Ghent](#), the Court of Cassation came to strengthen the tools of the administration.

It now considers that costs borne by the company for its director and which constitute taxable remuneration for such a person are not automatically deductible by the company.

According to this jurisprudence, it is still necessary for the company applying for the deduction of those costs to be able to demonstrate that they were granted for the purpose of acquiring or retaining income and that compensate, as a result, the services actually provided by the director to the company and for which the company is capable of proving the evidence.

This new jurisprudence raises the question more particularly as one of those two judgements concerned a single-person medical practice whose building expenses, constituting remuneration for the director, were rejected on the grounds that the company did not establish



the reality of the services provided ... It is difficult to imagine how the company was able in this case to generate any income without these services.

#### IV. CONCLUSION

The circumstances in which these decisions were made are of concern.

The only way, in our view, of understanding these decisions without undermining [the principle of non-interference by the administration in the appropriateness of the management decisions](#) of a company, consists of making the connection with [the jurisprudence, otherwise remaining constant, of the Court of Cassation regarding management fees](#):

- the reality of the benefits can be established on the basis of a set of elements whereby only a contract and uncontested invoices are sufficient for this purpose;
- the administration may not, on that basis alone, call into question the level or structure of the remuneration;
- unless, of course, it can demonstrate that the costs incurred "[unreasonably exceed professional needs](#)", but this implies an entirely different approach.

Unfortunately, it is not the direction adopted in the two jurisdictions of the Court of Appeal that gave rise to this jurisprudence. A recent

judgement rendered by the Antwerp Court of Appeal on 28 March 2017 testifies to this.

We thus hope that the Court of Cassation will be (very) quickly called to clarify its jurisprudence, and this time with the rigour that is required.

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