

# HR & Tax Alert

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## **Belgium – Tax on Tax - Decision of Court of Appeal**

September 2006

### **Executive summary**

On 28 June 2006 two decisions were made by the Court of Appeal of Liège. They addressed the situation where Belgian income taxes are due in respect of an expatriate after his departure from Belgium and are paid by a Belgian company with costs being cross-charged to the foreign parent company subsequently.

In line with the position of the Belgian tax authorities, the Court decided that the post departure tax payments made by the Belgian company represent taxable income of the expatriate for the year of payment and are chargeable to Belgian income tax. This creates an individual reporting obligation as well which will in turn likely generate additional tax charge and possibly a snow ball effect.

### **Belgian income tax code and the opinion of the Belgian tax authorities**

Under Belgian tax law post departure expatriate employee remuneration is taxable in Belgium if one of the following two conditions is met;

- Remuneration is borne by a Belgian resident employer or by the Belgian establishment of a foreign employer.
- Remuneration which is borne by a foreign employer relates to a professional activity performed in Belgium by a recipient who was present in Belgium for more than 183 days in a calendar year.

The recent decisions relate to the scenario in which payment is made by (or charged to) a foreign company without a Belgian branch office. The point at issue was whether the 183 day test applies to the year in which the professional activity which gave rise to the remuneration was performed, or the year in which the remuneration was paid.

The Court of Appeal of Liege have confirmed the opinion of the Belgian tax authorities that an individual is taxable in Belgium if they were present for more than 183 days in the taxable period in which the professional activities were carried out even though the remuneration (in this case income taxes paid by an employer on behalf of the employee) is not paid until a later year during which the individual is present in Belgium for less than 183 days.

However it is not certain whether other Courts of Appeal will interpret the law in the same way. Furthermore, one or both of these decisions could be submitted to the Belgian Supreme Court where the decisions of the Court of Appeal of Liege could either be confirmed or overturned.

### **Considerations**

Companies may need to review the consequences of their payment of Belgian income taxes on behalf of expatriates after the end of a Belgian assignment.

Those who had been tempted in the past to challenge the position of the Belgian tax authorities and who had decided not to report post departure income in a Belgian income tax return, may need to reassess the exposure associated with the Court's decisions. It is indeed certain that the Belgian tax authorities will use the argument of the Court's decision to strengthen their arguments and chase even more aggressively post departure income.

Finally multinational employers will need to decide on their approach to the 2005 tax return (due by the end of 2006) and for future years. If exemption continues to be claimed, the tax return (or absence thereof) would be even more likely than in the past to be challenged by the authorities. Alternatively if the tax payments are treated as new taxable income, planning will be required to avoid income taxes rolling over into future years.

For further information please contact your local Ernst & Young Human Capital professional, or in Belgium:

Jean Nicolas Lambert	Tel: +32 2 774 92 64	E-mail:jean-nicolas.lambert@be.ey.com
Steven Van Laer	Tel: +32 2 774 93 39	E-mail:steven.van.laer@be.ey.com
Herman Schepers	Tel: +32 2 774 93 68	E-mail:herman.schepers@be.ey.com
Werry de Backer	Tel: +32 2 774 93 97	E-mail:werry.de.backer@be.ey.com
Raymond Decuypere	Tel: +32 2 774 93 27	E-mail:raymond.decuypere@be.ey.com
Robin Collard	Tel: +32 2 774 93 28	E-mail:robin.collard@be.ey.com

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