

April 8, 2016  
2016-050

**The Netherlands – High Court Rules on 150-Km Criterion for 30% Ruling**

by Anton Steijn, Meijburg & Co., Amsterdam (Meijburg & Co. in the Netherlands is a KPMG International member firm)

## flash Alert

A Publication for Global Mobility and Tax Professionals by KPMG's Global Mobility Services Practice

On March 4, 2016, the Supreme Court of the Netherlands ruled that the 150-kilometer criterion in the 30% ruling is not contrary to European Union (EU) law.<sup>1</sup> This definitively means that only employees who resided *more than* 150 kilometers from the Dutch border during at least two-thirds of the 24 months preceding the commencement of their employment in the Netherlands, are eligible for the 30% ruling.

### Why This Matters

For some time there has been uncertainty concerning the application of the 30% ruling to all cross-border workers in the Netherlands. A series of legal cases, which began in the Dutch local courts, have sought to clarify whether the ruling can be claimed by cross-border workers working in the Netherlands and who are living in another country -- but within 150-km (i.e., less than 150 km) of the Netherlands border -- during at least two-thirds of the 24 months preceding the commencement of their employment or secondment in the Netherlands; now it is clear, they cannot. Only cross-border workers working in the Netherlands who live farther than 150km from the Dutch border are eligible to claim the 30% ruling.

Cross-border workers who are affected by the ruling, their employers, and their tax service providers need to assess their situations in light of the ruling and take appropriate steps to establish proper compliance.

There may be scope for reimbursement, on a non-taxable basis, of extraterritorial costs incurred in respect of those cross-border workers no longer eligible for the 30% ruling.

### The 150-kilometer Criterion in the 30% Ruling

The 30% ruling involves a fixed allowance paid to compensate for the costs of a temporary stay outside the country of origin (extraterritorial expenses). As of January 1, 2012, only employees who resided *more than* 150 kilometers from the Dutch border during at least two-thirds of the 24 months preceding the commencement of their employment or secondment in the Netherlands are eligible for the 30% ruling.

### Legal Proceedings on Whether Criterion Is Contrary to EU Law

The taxpayers in the case heard by the Court had taken the position that the 150-kilometer criterion was contrary to EU law because there was a prohibited restriction of the free movement of workers within the EU. (For prior coverage, see [GMS Flash Alert 2015-031](#), 4 March 2015.)

This question was put to the Court of the Justice of the European Union ("CJEU"), which ruled in February 2015, that the 150-kilometer criterion in the current 30% ruling

**is not contrary to EU law.** Notwithstanding, the criterion would be contrary to EU law only if there was a systematic clear over-compensation of the actual extraterritorial expenses incurred by foreign employees.

### Supreme Court Judgment

The Supreme Court, known as the *Hoge Raad*, ruled that the application of the 30% ruling does not involve a clear systematic over-compensation of the extraterritorial costs actually incurred by the foreign employees who brought the case. According to the Supreme Court, this percentage is based on factual research and the Dutch legislature has tried to keep this percentage in line with the actual extraterritorial costs incurred by foreign employees. Therefore, the 150-kilometer criterion is not contrary to EU law and can be maintained.

### Meijburg & Co. Note: the Practical Consequences

Employees who resided no more than 150 kilometers from the Dutch border during more than one-third of the 24 months preceding the commencement of their employment in the Netherlands are definitely no longer eligible for the 30% ruling. It is therefore essential to check where a foreign employee resided, as due to the 150-kilometer criterion, citizens of Belgium, Luxembourg, and the German and French border regions are no longer eligible for the 30% ruling. However, the actual extraterritorial costs incurred, in that case, may be reimbursed untaxed.

#### Footnote:

1 Hoge Raad der Nederlanden, Derde Kamer, Nr. 12/05577bis, 4 maart 2016.

\* \* \* \*

This article is excerpted, with permission, from "[Supreme Court Judgment: 150-Kilometer Criterion in the 30% Ruling Is Not Contrary to EU Law](#)," (4 March 2016), published by the KPMG member firm in the Netherlands.

The information contained in this newsletter was submitted by the KPMG International member firm in the Netherlands.

The KPMG logo and name are trademarks of KPMG International. KPMG International is a Swiss cooperative that serves as a coordinating entity for a network of independent member firms. KPMG International provides no audit or other client services. Such services are provided solely by member firms in their respective geographic areas. KPMG International and its member firms are legally distinct and separate entities. They are not and nothing contained herein shall be construed to place these entities in the relationship of parents, subsidiaries, agents, partners, or joint ventures. No member firm has any authority (actual, apparent, implied or otherwise) to obligate or bind KPMG International or any member firm in any manner whatsoever. The information contained in herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

*Flash Alert* is a GMS publication of KPMG LLP's Washington National Tax practice. To view this publication or recent prior issues online, please click [here](#). To learn more about our GMS practice, please visit us on the Internet: click [here](#) or go to <http://www.kpmg.com>.