



## **Laga Newsflash**

### **Benefit in kind for housing: Constitutional Court asked to rule on admissibility of ex officio relief request**

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On 7 October 2019, the Antwerp Court of Appeal referred a question to the Constitutional Court regarding the application of ex officio relief on the benefit in kind amount for housing. If the Constitutional Court were to rule in favour of the plaintiff, this would effectively confirm that taxpayers can reclaim overpaid taxes on the benefit in kind for housing from the previous five years.

#### **Context**

The Royal Decree on the Income Tax Code (RD) applies a “lump sum” benefit in kind valuation resulting from the free provision of housing by a company to an employee or a director. In its previous version, the RD distinguished situations where housing was provided by a physical person from those where it was provided by a company. A benefit in kind for an employee or director was deemed to be higher if it was provided by a company.

The Ghent and Antwerp Courts of Appeal ruled this different benefit in kind calculation (i.e. higher amount for housing provided by a company) as unconstitutional. Consequently, the RD was amended, with the tax administration publishing a circular letter stating that this case law would be followed. The circular also added that all appeals lodged on these grounds would be granted, while requests for ex officio relief would be dismissed.

# Antwerp Court of Appeal's 7 October 2019 judgment

The Antwerp Court of Appeal was asked by a taxpayer to grant ex officio relief based on the latter case law and the circular letter.

Technically, the Court had to rule whether the aforementioned judgments and circular letters can be considered as a "new fact" allowing ex officio relief, as opposed to "a new remedy or a change in case law", which is explicitly disallowed as grounds for ex officio relief requests. The Court of Appeal decided to refer this issue to the Constitutional Court. The former wants the latter to confirm that the tax administration's interpretation of the rules, which would effectively exclude the application of ex officio relief to the many taxpayers challenging the benefit in kind amount for housing, does not constitute a violation of the constitution.

The Constitutional Court's ruling will be much anticipated as it will impact all pending ex officio relief requests on the application of the benefit in kind for housing.

**Annick Visschers, Advocaat-vennoot/Avocat associé, Tel: + 32 2 800 70 72, Email: [avisschers@laga.be](mailto:avisschers@laga.be)**

**Filip Smet, Avocaat/Avocat, Tel: + 32 800 70 64, Email: [fsmet@laga.be](mailto:fsmet@laga.be)**

**Liesbeth Saelen, Avocaat/Avocat, Tel: + 32 56 59 43 71, Email: [lsaelen@laga.be](mailto:lsaelen@laga.be)**

**Helena De Coninck, Avocaat/Avocat, Tel: + 32 800 70 95, Email: [hdeconinck@laga.be](mailto:hdeconinck@laga.be)**



Laga  
Gateway building  
Luchthaven Brussel Nationaal 1J  
1930 Zaventem  
Belgium

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