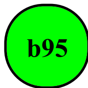

"*Protective Assessment*" and Dutch Pensioners in Portugal

Dutch nationals who lived and worked in the Netherlands were allowed to deduct on-going contributions to pension funds, thereby reducing their taxable income. This practice, while appearing to be a tax exemption, is, in fact, a tax deferral and not a fiscal benefit. Tax becomes due upon retirement and is normally spread out over a 10-year period. In theory, the benefit comes by assessing taxpayers when they are presumably in a lower tax bracket as pensioners.

"Protective Assessment"

If a Dutch taxpayer moves abroad and stops paying income tax on pensions in the Netherlands in accordance with the appropriate double tax treaty, the tax obligation does not go away, but rather is deferred. Special rules apply called *"Protective Assessment"* (in Dutch "*conserverende aanslag*"). In the case of pension rights, the tax liability is equal to the deductions made over the working career. This liability is spread out over a 10-year period following departure from Holland.

Who is liable for *"Protective Assessment"*

The liability to the *"Protective Assessment"* levy occurs under the following circumstances:

a) Accrued pension rights while living in the Netherlands;
b) Entitlement to annuity payments where the premiums were charged to past income;
c) Receipt of benefits from an endowment policy or homeowner capital sum insurance;

d) Holding a substantial interest in a company established in the Netherlands (e.g. share value in a company exceeding 5%). Tax is calculated as 25% of the difference between the fair market value of the shares at the time of emigration and the original acquisition price.

For most income sources, *"Protective Assessment"* applies over a 10 year period following emigration. While the tax debt is defined, it is often possible to avert collection. However, rigorous Dutch taxation rules apply which can trigger immediate liquidation of this tax. For example, redemption of an annuity or commuting of a pension can crystallise assessment.

"DGA" and the repeal of the 10-year waiver

In the case of emigrating directors and substantial shareholders of Dutch companies ("DGA"), *protective assessment* used to expire after the 10 years following emigration. As a result, an emigrated "DGA" could avoid payment of the deferred. To prevent alleged tax evasion, this provision was repealed in 2016. The tax liability can no longer be waived. In other words, *"protective assessment"* will be upheld even after the conclusion of the 10-year period for these individuals.

Deferred payment for *"Protective Assessment"*

Deferred payment of the *"protective assessment*" is usually available. This deferral is automatic when moving to another country within the European Union. If assessment is triggered, late interest penalties will also be due covering the suspension period.

When emigrating outside of the EU, a guarantee may be required to assure eventual payment of the tax. A number of options include:

- a bank guarantee
- a right of mortgage
- a pledge;
- pledging pension capital to the tax authorities.

These guarantees are not needed when emigrating within the EU.

Double Tax Treaties

There is a possibility that the new country of residence will also want taxation rights on pension benefits. To prevent double taxation, the Double Tax Treaty in force will determine which jurisdiction has the right to tax each source of income. In the event that there is no tax treaty in place, it may be possible to appeal to unilateral Dutch regulations for the prevention of double taxation.

"Protective Assessment" and Pensions in Portugal

Because *"Protective Assessment"* looms over Dutch pensioners after migrating to Portugal, the tax deductions which constitute the basis for this levy that were built up over an individual's working career should be deemed *taxable* to the individual and do not constitute a tax exemption as is sometimes alleged.

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