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Expenses paid by a company for the defense of one of its employees sued for actions carried out in the exercise of his/her duties: business expenses or personal expense of the employee subject to social-related contributions?

In a decision dated October 18, 2006 (decision n° 04-48.612), the *Cour de Cassation* (French Supreme Court) established the principle that an employer has the obligation to provide legal protection to an employee who had to defend himself/herself in proceedings initiated against him/her for facts or actions related to the performance of his/her professional duties.

Because of a case that we have recently handled, the *Cour de Cassation* will undoubtedly shortly be requested to rule on the question of the social treatment of such expenses.

During an inspection carried out at one of our clients, the *Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales* (i.e. the body responsible for collecting social-related contributions, hereinafter "URSSAF") ordered an adjustment on the sums paid to US lawyers who had defended two

employees of our client involved in a cartel case, as it considered that these sums were personal expenses of the employees, and therefore, subject to social-related contributions.

In the explanatory press release issued by the *Cour de Cassation* in the wake of its October 18, 2006 decision, it was specified as follows *“The Labor Chamber bases its decision on that text [Article 1135 of the French Civil Code] from which it infers that **the employer**, vested by law with the power to manage and to control the employees legally placed under its subordination, **is bound to guarantee such employees against the consequences of all actions or acts made or accomplished in the performance of their employment contract**. It rules, therefore, that the employee must be **indemnified for the fees and expenses** that he/she had to incur for his/her defense in a litigation, the subject of which is related to the performance of his/her contractual duties.”*

In that specific case, the claims brought against the employee were dismissed.

Concerning our client, the specificity of the case – in addition to the huge amount of fees paid to the employees’ attorneys – was that the employees had pleaded guilty, were sentenced to a prison term and ordered to pay a fine which they personally paid. As the company was *de facto* the co-perpetrator of the offense, it had to make sure – for the purpose of its own defense – that the two employees would be defended in the best conditions, which implied the assumption of the fees of the attorneys of their employees, who were different from its own attorneys.

The company challenged the adjustment ordered by URSSAF and brought the matter before the Social Security Court, and then before the Court of Appeals.

URSSAF developed a series of arguments to justify the fact that the attorneys’ fees were to be regarded as personal expenses: that type of expenses was not listed in the Ministerial Order of December 20, 2002 on professional expenses, the facts that led to the expenses were contrary to the company’s interests as they were contrary to the law, the offense had been committed intentionally and, therefore, was separable from the performance of the contractual duties, etc.

Yet, our own argumentation to have the assumption of the attorneys’ fees considered as business expenses – and thus not subject to social-related contribution – was first approved by the Social Security Tribunal, and then confirmed by the Court of Appeals on February 10, 2015.

Based on the information that has been given to us, URSSAF will reportedly appeal against the judgment before the *Cour de Cassation*. We should therefore know the exact position of the Labor Chamber on this issue within the coming months, hoping of course that such position will confirm our approach.

1. Article 1135 of the French Civil Code: *“Agreements are binding not only as to what is expressed therein, but also as to all the consequences which equity, usage or statute gives to the obligation according to its nature.”*

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