GLOBAL MOBILITY ALERT

September 2017

About Mazars

Mazars is an international, integrated and independent organisation. Globally we specialise in audit, accountancy, tax, legal and advisory services. We rely on the skills of more than 18,000 professionals in the 79 countries that make up our integrated partnership.

Mazars Global Mobility Services have a long history. For many years we have been building a worldwide group of international advisors, specialising in advising employers on the international mobility of their employees. Our services include global tax compliance and optimisation, international payroll services, social security administration, shares schemes planning, immigration services etc., including global mobility policy advice and the management of global mobility.

INTRODUCTION

We gladly present you a new issue of our Global Mobility Alert.

Tax and compliance regulations are almost as volatile as international employee mobility. Both adapt quickly to changes in markets and in the political and economic landscape. This requires HR and Global Mobility managers, their Tax and Legal teams to be flexible in their Global Mobility approach.

We wish to help you staying up-to-date and meeting the next cross border challenge. In the edition please find updates on relevant changes in Belgium, Ireland, South Africa and USA. We hope you find the selected topics interesting.

If you are looking for more information on regulations in specific countries or regions, do reach out to us. Do keep an eye out for our international conferences, regional and local global mobility workshops.

As ever, we welcome your feedback, ideas and questions.

Kind regards,

Alexander Rasink

SECONDMENT OF EMPLOYEES: CONVERSION OF EU-ENFORCEMENT DIRECTIVE IN BELGIAN INTERNAL LAW

On December 20, 2016, Belgium has converted the European Enforcement Directive (Directive 2014/67/EU) into internal law. This Directive concerns the secondment of employees, in particular employees sent by their foreign employer to another EEA Member State or Switzerland to work there on a temporarily basis.

This regulation is important in the following cases:

- Belgian clients who outsource work and services to foreign contractors or service providers with seconded employees;
- Foreign contractors and service providers who second employees to Belgium to perform certain works or render services in Belgium.

Based on the former Posted Workers Directive of 1996, posted workers were entitled to a number of mandatory provisions as foreseen by internal law of the country in which the work was carried out. Examples of these are minimum wages, minimum paid holidays, provisions on safety at work, … For all the other provisions, the labour law of the home State should in principle continue to apply.

In 2014, a new directive was adopted by the European Union: the Enforcement Directive. This directive included new provisions to avoid circumvention and abuse of legislation. In practice, it was often noticed that the principles as laid down in the Posted Workers Directive were not always correctly applied. Consequently, the implementation of this new directive into Belgian internal law entails a number of changes which entered into force on December, 30, 2016. The most important of these will be discussed hereafter.

Criteria

In order to avoid abuse, two lists of factual criteria have been drafted, based on which the validity of the secondment will be assessed.

The first list sets some criteria to assess the temporary nature of the secondment. The purpose of this is to detect and exclude the secondments that in reality are not concluded on a temporary basis. Hereby one takes amongst other the previous periods into account in which the same or other seconded employees were employed on the same assignment, the starting date of the secondment, which party bears the housing and accommodation costs, etc. In this respect, we remark that the period of 24 months may not be exceeded.

The second list sets out some criteria in order to determine whether the company who employs seconded employees indeed performs substantial activities in the country where the company is established. Through this assessment, one wishes to avoid the use of the so called mailbox companies.

Assignment of a liaison officer

Furthermore, the employer who has the intention to second employees in Belgium, is obliged to appoint a liaison officer and to disclose this person to the Belgian inspection services.

The liaison officer is responsible for ensuring that the foreign employer is in contact with the Belgian inspection services and can be contacted to provide them with any advice or document with respect to the employment of the seconded workers in Belgium.

In particular, the following documents must be submitted by the liaison partner (in Dutch, French, German or English):

- A copy of the employment agreement of the seconded employee or a similar document;
- The time-sheets indicating start, end and duration of daily working time of the seconded employees;
- Proof of payment of the wages of the seconded employees;
- Information regarding the foreign currency that has been applied for the payment of the remuneration, the benefits in cash or in kind connected with the employment;
- The conditions of repatriation of the seconded employee.

Joint and several liability for wage debts

Finally, a provision has been made regarding the extension of the joint and several liability with respect to the wages in the construction sector, by virtue of the client in the host country, who has professional activities being performed by seconded employees.

This liability is in addition to the existing general liability for wage debts and applies to the activities and services included in the Joint Labour Committee applicable to the construction company.

It also applies to the activities and services included in the following Joint Labour Committees, to the extent that they are considered to be immovable property within the meaning of Article 20, § 2 Royal decree No. 1 VAT:

- Joint Labour Committee for Metal, Machine and Electrical Construction (JLC 111);
- Joint Labour Committee for Cleaning (JLC 121);
- Joint Labour Committee for Upholstery and Woodworking (JLC 126);
- Joint Labour Subcommittee for Electricians (JLC 149.01).

This means that the principal or contractor can be held jointly and severally liable in case the subcontractor, to whom he appeals, does not pay or only partially pays the wages of his employees and this for both the seconded as the non-seconded employees.

The liability applies to the part of the work performed by the employees in relation to the client. As soon as the subcontractor employs a seconded employee with the principal, the principal will be held liable for the wages of all the employees of the (sub)contractor, under the condition that they relate to activities carried out for the principal.

The new rule with respect to the joint and several liability for wage debts shall apply immediately. It is therefore not necessary for the client or contractor to receive a prior notification in this respect.

Furthermore, please note that the liability is for an unlimited period of time and will apply to the full wage of the employees, including all additional wage components.

At last it is important to remark that the client or contractor can only be exempted from the joint and several liability of the wage debts in case he holds a statement from the employer in question, confirming that he has paid the wages that were due. Another possibility could be to include an exemption clause in the contracting agreement.

How can Mazars help?

If you are seconding foreign workers to Belgium or using foreign seconded workers, it is recommended that you or your contracting party comply with the new regulations.

In case you would solicit subcontractors who employ seconded employees, it could be useful to consider an adjustment of your contracting agreement or to ask a statement of the (sub)contactor regarding the proof of payment of the wages towards the employees.

Please do not hesitate to contact Stijn Sablon (stijn.sablon@mazars.be, +32 9 2658320) to verify or discuss in further detail which possibilities would be preferable in your specific case in order to comply with the new regulations.

UPDATE IRISH PAYROLL WITHHOLDING TAX SYSTEM

The Irish Revenue Commissioners has recently updated its Statement of Practice (SOP - IT/3/07) with respect to the operation of the Irish payroll withholding tax system (PAYE system) for foreign employees who exercise the duties of their foreign employment in Ireland.

The updated SOP reflects Revenue's current interpretation of Article 15 (the Employment Article) of the OECD Model Tax Convention on Income and Capital. In this alert, we have outlined the changes which are contained in Revenue's updated publication.

Historic position

From 2006, the income of a foreign (non-Irish) employment attributable to the performance in Ireland of the duties of that foreign employment is taxable in Ireland and liable to Pay As You Earn (PAYE) withholdings by the foreign employer.

Under rules outlined in the original SOP – IT/3/07 (published in 2007), Revenue did not require an employer to operate Irish PAYE withholdings in circumstances where an overseas employee or short-term business visitor was ultimately relieved from the charge to Irish tax on their employment income by reference to the terms of a Double Tax Agreement (DTA) that Ireland had with their home country.

Updated position

The Irish Revenue will no longer accept that employees can be exempt from Irish tax under a DTA if the employee is:

- working for an Irish employer where the duties performed by the individual are an integral part of the business activities of the Irish employer, or
- replacing a member of staff of an Irish employer, or
- gaining experience working for an Irish employer, or
- supplied and paid by an agency (or other entity) outside of Ireland to work for an Irish employer.

Revenue has also confirmed that they will not grant an exemption to employers from the obligation to operate the Irish PAYE system:

- simply because the remuneration is paid by a foreign employer and charged in the accounts of a foreign employer; or
- where the remuneration is paid by a foreign employer and the cost is then re-charged to an Irish employer.

In effect, a PAYE withholding obligation will likely exist if an employee spends more than 30 days working in Ireland in a calendar year. Previously, the requirement was 183 days.

Conclusion

As a result of this update, the following consequences will arise for foreign employers who have employees working in Ireland:

- Foreign employers will have limited ability to avoid operating the Irish PAYE system in respect of their short term business travellers who work in Ireland.
- Foreign employers will have increased administrative burden associated with operating an Irish payroll;
- Foreign employers may incur increased costs in operating payrolls in two locations, which may also result in additional cash flow issues if taxes need to be paid in both the home location and Ireland at the same time.
- Foreign employers will need to ensure that their employees who are working in Ireland accurately record their travel days to Ireland;
- Foreign employers may need to review their internal tax processes and procedures in relation to their short term business travellers.

How can Mazars Help?

If you would like Mazars to advise you on the implications of this updated guidance by the Irish Revenue, please contact Ken Killoran (kkilloran@mazars.ie, +353 1 449 4451).

REPEAL OF FOREIGN EMPLOYMENT EXEMPTION AVAILABLE TO SOUTH AFRICA TAX RESIDENTS WORKING IN FOREIGN COUNTRIES

South African tax residents are taxed on their worldwide income in terms of a residence-based system of taxation.

Whilst Double Taxation Agreements (DTAs) prevent double taxation under certain circumstances, the South African tax legislation currently provides for a foreign employment exemption in the form of section 10(1)(0)(ii) of the Income Tax Act, 1962, e.g. an exemption that limits South Africa's right to tax foreign employment income provided that specific requirements are met.

The foreign employment exemption currently exempts employment income received by a South African tax resident during any year of assessment in respect of services rendered outside South Africa for or on behalf of any employer, if that individual was outside South Africa:

- for a period or periods exceeding **183 full days in aggregate** during **any twelve-month period**; and
- for a **continuous period** exceeding **60 full days** during **that twelve-month period**.

The exemption is only available to employees of private-sector companies. There is currently no requirement that tax is payable in another country for this exemption to apply.

As a result, it is possible that in certain circumstances, no tax is paid anywhere, in respect of periods worked outside of South Africa.

According to National Treasury, the exemption of foreign employment income appears excessively generous, particularly in instances where the individual worked in a foreign country with a low or zero personal income tax rate and during the 2017 Budget Review it was proposed that the exemption be amended so that foreign employment income will only be exempt from tax if it is subject to tax in a foreign country. Accordingly, it was expected that there would be some modification made to section in this year's legislative cycle in order to prevent double non-taxation.

Surprisingly, however, the Draft Taxation Laws Amendment Bill published on 19 July 2017 for comment by 18 August 2017, repeals the exemption and if enacted will result in South African tax residents being subject to tax on foreign employment income earned with effect from 1 March 2019.

The individual will have to rely on claiming a foreign tax credit in respect of foreign taxes already paid when submitting his or her personal tax return in South Africa.

In the draft Explanatory Memorandum (released with the Draft Bill), National Treasury draws attention to the less extensive treaty network available to South Africa at the time of the introduction of the exemption. National Treasury also states that the exemption is creating opportunities for double non-taxation where remuneration is neither taxed in South Africa nor in the relevant foreign country.

Should the exemption ultimately be repealed, employers will need to ensure that the full impact hereof is communicated to employees timeously and that any additional tax costs are factored into the cost of doing business.

What is important to note is that repeal of the foreign employment exemption will not affect an individual who has broken tax residency in South Africa, either in terms of domestic legislation or in terms of a DTA.

Mazars will continue engaging with National Treasury as part of the process of public consultation.

How can Mazars help ?

For a detailed discussion of how this issue might affect you or your business please contact: Elzahne Henn (elzahne.henn@mazars.co.za, +27 21 8185057).

PFICS AND OVDI

The passage of the Foreign Account Tax Compliance Act (FATCA) in 2010 signaled a renewed focus by the Internal Revenue Service (IRS) on non-compliance of U.S. taxpayers with ownership of foreign accounts and assets. As part of an initiative to encourage taxpayers with undeclared foreign assets to come forward, the IRS instituted Offshore Voluntary Disclosure Programs (OVDPs). The program offers protection from criminal penalties and reduced civil penalties in exchange for taxpayers who file past due or amended tax returns to disclose their foreign assets and pay the tax & penalties on any unreported income.

A commonly held foreign asset is an interest in a foreign mutual fund or an exchange traded fund (ETF). A foreign mutual fund is generally considered to be a Passive Foreign Investment Company (PFIC), subjecting the taxpayer to severe tax and reporting requirements. As part of the disclosure program, the IRS provides relief for taxpayers failing to make timely elections through an alternative method for reporting PFICs.

What is a PFIC?

The IRS defines a PFIC as a foreign corporation that meets one of the following:

1. 75% or more of the corporation's gross income for its taxable year is passive income (Income Test).
2. At least 50% of the assets held by the foreign corporation are assets that produce passive income or are held for the production of passive income (Asset Test).

The term "passive income" means any income which would be considered foreign personal holding company income as defined in section 954(c). This generally includes interest, dividends, capital gains from the sale of stock, royalties, and rental income (unless part of an active trade or business).

Under this definition, assets producing passive income such as cash (interest) and securities (interest, dividends, capital gains) would be included in the Asset Test.

Reporting and Taxation

Taxpayers who hold an interest in a foreign company that meets the definition of a PFIC must file a Form 8621 as part of their U.S. income tax return. There are three methods that may be used to compute the tax applicable to PFICs:

<u>Section 1291 fund (the "code" method)</u>

This is the default taxation method absent an election to apply either of the two alternatives. Under the code method, shareholders are subject to tax when they receive a distribution and any part of that distribution which is deemed to be an "excess distribution" will be subject to special reporting requirements. An excess distribution is defined as distributions received in a tax year that is greater than 125% of the average distributions received during the 3 preceding tax years (if shorter than 3 years, then the amount of years in the holding period before the current tax year). Additionally, any gain from the disposition of a PFIC will be considered a 100% excess distribution. Any loss from disposition will be a capital loss in the year of disposition.

Excess distributions are considered to be earned evenly throughout the entire holding period of a shareholder. The portion of the distribution deemed to be earned in the current tax year is taxed as ordinary income. The portion deemed to be earned in prior years is subject to a separate tax and interest charge. This portion is taxed at the highest marginal rate in effect for each taxable year regardless of the taxpayer's level of income (meaning an individual paying a 10% tax rate on all other income would still be charged the highest rate of tax (39.6% since 2013)), plus an interest charge beginning on the original due date for each throwback year. Taxpayer's may avoid the punitive, complicated, and burdensome nature of a section 1291 fund by electing to be taxed under one of the other two alternatives.

Mark-to-Market election (MTM)

The first alternative available to taxpayers is the Mark-to-Market election as described in section 1296. This option is only available if the PFIC is a marketable stock. For purposes of this election, the term "marketable stock" is generally any stock that is regularly traded on a U.S. or foreign securities exchange.

By making this election, a taxpayer will mark-to-market the value of the PFIC stock at the end of each taxable year and report the increase as ordinary income. Essentially, a taxpayer is choosing to be taxed currently on any unrealized gains. In the case of any unrealized losses, a taxpayer can recognize an ordinary loss, but only to the extent that there have been gains previously recognized (unreversed inclusions); thus a taxpayer cannot mark-to-market a stock below its original cost. The gains and losses recognized will determine the taxpayer's adjusted basis in the stock. Upon disposition, gain or loss will be recognized as the difference between the proceeds and the adjusted basis.

QEF Election (Qualifying Electing Fund)

The other alternative available to taxpayers is the QEF election. Under this method, a taxpayer will annually report their share of earnings and net capital gain of the PFIC. The earnings will be taxed as ordinary income, while the net capital gains will be taxed as long-term capital gains. The income reported will increase the adjusted basis and upon disposition of the stock, the taxpayer will recognize a capital gain or capital loss. While this election is more favorable tax-wise, it is the least commonly seen of the three methods available. This is because in order to become a Qualifying Electing Fund, a foreign corporation must agree to supply statements for each U.S. shareholder stating their share of earnings & gains. Generally, it is only available for large funds with a substantial amount of U.S. based investors to become a QEF.

Coordination with the OVDP

Taxpayers entering into an OVDP must file eight years of past due or amended tax returns and Reports of Foreign Bank and Financial Accounts (FBARs) to disclose their foreign assets and pay tax & penalties on the unreported income. In order to utilize a MTM or QEF election, the election must have been made with a timely filed return.

As a result, these elections are no longer available. In response, the IRS began offering an alternative MTM method as a resolution.

Alternative MTM Method

Under the alternative MTM method, a taxpayer will calculate the amount of gains and losses in the same manner as the MTM method discussed earlier. When electing this method, the taxpayer applies this methodology to every PFIC held during the voluntary disclosure period.

The initial MTM computation will begin as of the first year of the OVDP period, meaning all unrealized gains in pre-OVDP years will also be included in this amount marked-to-market. Unlike the regular MTM method, this gain will not be reported as ordinary income on the tax return. Instead, the alternative method states that Regular and Alternative Minimum Tax are computed without regards to any MTM gain, MTM loss, or gain on disposition. A tax rate of 20% will be applied to the MTM gain and reported on the tax return as "other taxes". There will also be a charge of 7% on the calculated tax in the initial year only. MTM losses will still be limited to the extent of previously recognized gains, with the benefit being limited to the same rate of 20%.

The 20% rate will also apply to gains on the disposition of the PFIC stock. Losses on disposition in excess of previously recognized gains will be reported as capital losses in the year of disposition. At the end of the program, taxpayers who choose the alternative resolution will be required to continue using the regular MTM method on any PFIC investment that was part of the disclosure that is still held.

Also, unreversed MTM gains remaining with these investments are considered to be zero and the taxpayer can no longer take MTM losses against these amounts.

How can Mazars help?

Mazars USA can assist you with the analysis of PFICs and the OVDP. If you would like more information, please contact Richard Tannenbaum (richard.tannenbaum@mazarsusa.com, +212-375-6545) or Mark Tadros (mark.tadros@mazarsusa.com, +212-375-6830).

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