GLOBAL MOBILITY ALERT
July 2016

INTRODUCTION

Welcome to the July issue of our Global Mobility Alert.

We are very pleased to include items from Asia, Western Europe and South America. We hope you enjoy reading the contributions from Akram Khan of our India office on PE risks, Alexander Rasink of our Netherlands practice on changes to regulations about independent contractors, a reminder of important filing deadlines by Omar Garcia from our Mexican firm and the shared based remuneration in Ireland from Ken Killoran from Ireland.

As ever we welcome all feedback, ideas and questions.

Kind regards,

Steve Asher
Head of Mazars Global Mobility Services

About Mazars
Mazars is an international, integrated and independent organisation, specialising in audit, accounting, and tax, legal and advisory services. We rely on the skills of more than 15,000 professionals in the 73 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.
SECONDMENT OF EMPLOYEES AND RELATED PE ISSUES IN INDIA

Due to globalization, secondment of employees by MNCs to their Indian affiliates is a common practice. In case of secondment of employees, generally the arrangement is that the remuneration in respect of the seconded employee is paid by the foreign entity directly in the home country and thereafter the same is reimbursed by the Indian entity to the foreign entity. The other secondment structure which is being adopted is to transfer the employment of the seconded employee to the Indian company. In all cases the expat retains a lien over his employment back home.

Secondment of employees to Indian affiliates has been the subject matter of considerable litigation as the tax authorities in India have been raising various contentions:

(a) The foreign company (home company) is the real employer of the seconded employee and therefore the work performed by the seconded employee in the host country is an extension of the home company in India and therefore the secondment constitutes either a Fixed Place PE or Agency PE (Dependent Agent PE) or Service PE in India.

(b) The seconded foreign company is the real employer as:
   - The seconded employee is working under the supervision and control of the foreign company.
   - Remuneration of the seconded employee, including bonus, increments, etc. is decided by the foreign company.
   - The right to terminate the employment rests with the foreign company.
   - The seconded employee has lien over his employment with the foreign company.

(c) Reimbursement of salary of seconded employee by the Indian affiliate to the foreign company constitutes fees for technical services.

Courts in India have taken divergent views. Also, each case has some peculiar facts. Some of the rulings by Indian Courts are very briefly discussed hereunder.

A foreign company had set-up an Indian company to carry out support functions, and wanted to depute some of its employees to India as stewards or deputationists in the employment of the Indian Company.

The Supreme Court held that where the activities of a MNC entailed it being responsible for the work of the deputationists and the employees continued on the payroll of the multinational enterprise or have their lien on their jobs with the multinational enterprise a service PE emerged.

The Supreme Court held that there was no need for attribution of profits to the PE of the foreign company, where the transaction between the foreign company and the Indian company was held to be at arm’s length.\(^1\)

In another case, the Delhi Court held that presence of employees within India is relevant for Article 5(2)(l) (Service PE) of the DTAA between India and USA, however, employee should render services and those services should not be merely stewardship services. The Court further held that where the seconded employees were working under the control and supervision of the Indian entity, there would be no service PE on account of the presence of seconded expats in India.\(^2\)

In another case, a UK company had set-up subsidiary in India to act as service provider to the overseas entities. The seconded employees were paid their remuneration overseas, and the Indian company reimbursed the same. The Court held that the overseas company is the real employer though the seconded employees worked under the directions and supervision of the Indian company as the seconded employees retained their entitlement to participate in the overseas entities’ retirement and social security plans. The Court observed that Indian subsidiary could only terminate the secondment agreement but not the employment of the secondees. Accordingly, secondment arrangement resulted in a Service PE. Additionally, it held that the overseas entities provided technical services to the Indian subsidiary.\(^3\)

In case of another assessee, the Court has held the reimbursement of salary and related employment cost of the seconded employee was on a cost-to-cost basis and did not involve any element of profit and since the services of the seconded employee were fully at the discretion of the Indian entity, no tax is to be deducted from the reimbursement of salary cost to the foreign entity.\(^4\)

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\(^1\) Director of Income-tax (International Taxation) v. Morgan Stanley and Co. Inc.(2007) (292 ITR 416)(Supreme Court)
\(^2\) Director of Income-tax v. E-Funds IT Solution (2014)(364 ITR 256)(Delhi High Court)
\(^3\) Centrica India Offshore Pvt. Ltd. v. Commissioner of Income-tax (2014) 364 ITR 336(Delhi High Court)
\(^4\) Director of Income-tax v. HCL Infosystems Ltd. (2004) 274 ITR 261 (Delhi High Court)
In yet another case, the Tax Tribunal held that employees seconded by a foreign company constituted its service PE and the reimbursement of salary cost of the seconded employees will have to taxed under Article 7 – Business Profits of the DTAA between India and USA.\(^5\)

Where the Indian company entered into an agreement with its parent, an Austrian company to provide services of qualified technical personnel employed by it and the Austrian company has to pay salary, bonus and other benefits and the Indian company reimbursed the costs incurred on such employees, the Authority for Advance Ruling held that the reimbursement of costs made to the Austrian company constitutes fees for technical services and therefore would be subject to withholding tax.

In it pertinent to note that the DTAA between India and Austria does not have a Service PE clause in Article 5 and the Revenue Authorities did not contend that the rendering of services in India by employees of the foreign company constitutes PE in India.\(^6\)

From the above, one can observe that there are different views on the issue of secondment of expats to the Indian entity. Therefore, MNCs need to carefully structure their secondment arrangements in order to mitigate the risk of a PE in India. Ideally, the employment of the expat should be transferred to the Indian entity for the period of when the employee is India and the Indian company should have complete rights over the employment of the expat, including the right to determine the remuneration, increments and bonuses of the employee. The employee should work for the Indian company and not provide services to the Indian company on behalf of the foreign company. And finally, adequate documentation should be maintained to demonstrate the above arrangement.

**How can Mazars help?**

If you would like to know more about the tax issues arising out of secondments please contact your local advisor or Akram Khan, (akram.khan@mazars.in, +912261586252).

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\(^6\) AT&S (P.) Ltd. (2006) 287 ITR 421 (Authority for Advance Ruling)
Furthermore the DTA has made a list of model-contracts that companies and individual contractors can use to make sure their relationship cannot be seen as a (fictitious) employment. The articles highlighted in yellow must be included in the contract used by the company. If not, the model contract will not provide any certainty. We note that companies can only rely on the certainty if the contractor and the company effectively operate as stipulated in the contract.

The wage tax specialists of Mazars in the Netherlands can assist companies and independent contractor in setting up contracts and can assist with getting authorization from the DTA.

How can Mazars help?

If you want an independent contractor in setting up contracts and can assist with getting authorization from the DTA please contact your local advisor, Alexander Rasink (alexander.rasink@mazars.nl, +31882771615), or Renee Pauli (renee.pauli@mazars.nl, +312772438).

MEXICAN ANNUAL INCOME TAX RETURN DATE

Individuals that are residents of México are subject to Mexican Income Tax on their worldwide income regardless its origin.

Non-resident individuals, on the other hand, are subject to pay taxes on income derived from a source of wealth located in Mexico. Also, non-resident individuals that conduct business activities or render independent services in Mexico are subject to Mexican tax with respect to the income attributable to the activities in Mexico.

The gross income of resident individuals includes all income whether received in the form of cash, kind, credit, services or any other type of income received during the tax year. The concept of income is very extensive, includes items of income, such as fees, salaries, dividends, interest and benefits in kind.

To the extent that an individual has loans denominated in a foreign currency, exchange gains are included in taxable income. Individuals also are subject to tax on inflationary gains related to certain debts.

Under this definition of gross income, most payments made by employers in Mexico or, in the case of expatriates that are residents, in the home country, would be considered income. In this regard, salary income includes any payment received as a result of a labour relationship with the employer. Thus, profit-sharing contributions and severance payments also are treated as salary income.

Individual Income Tax Returns must be filed not later than April 30th of the year following the year in which the income was earned. If their annual income not exceeds $400,000 Mexican pesos there isn’t obligation to file this return; otherwise the withholding tax payments made by the employer are considered to be final payments. In this regard, employers must provide employees with annual statements of taxes withheld. (Constancia) before January 31st of the year following the tax year in which the income was earned.

The above mentioned Tax Return must be file via electronic means but that fails to do so commit a violation and is subject to fines ranging from $10,030 to $20,070 Mexican pesos. Taxpayers filing incomplete tax returns or returns containing errors, or filing returns not in the required way, are subject to fines ranging from $3,000 to $10,300 Mexican pesos.

How can Mazars help?

If you want to know more about lump-sum taxation please contact your local advisor, Omar García (omar.garcia@mazars.com.mx, +52 81 8100 98 48).

SHARE BASED REMUNERATION IN IRELAND

The Irish Government is committed to exploring mechanisms through which Small to Medium sized enterprises (SMEs) in Ireland can reward key employees with share options in a tax efficient manner. In addition, share-based remuneration was highlighted as a specific area of interest in many responses to a consultative process undertaken by the Department of Finance last year to consider options for changes to the Irish tax system to more effectively incentivise entrepreneurship.
Multinational companies with a presence in Ireland are also keen to see a reduction in the Irish tax due by their employees and executives on share options and other share awards in Ireland, in order to increase foreign direct investment in Ireland.

Public consultation

The Department of Finance launched a public consultation in relation to the tax treatment of share based remuneration and invited submissions from interested parties on this issue by 1 July 2016.

Please click here for a link to the submission made by Mazars, Dublin.

Policy rationale

In relation to the Irish system, in 2014, officials from the Department of Finance took part in a European-wide project on “Promotion of Employee Ownership and Participation”. During the course of the project it was identified that Ireland compares very favourably with other European countries in terms of the supports it offers to encourage Employee Financial Participation (EFP).

International research has shown that EFP can be effective in fostering partnership and increasing competitiveness and helping companies to attract and retain staff in a competitive international labour market. Improved competitiveness of companies supports the creation and maintenance of employment. This in turn supports economic growth which benefits the economy as a whole. Therefore, it is important to have sufficient supports in place for share-based remuneration through the tax system.

As regards Brexit, the full ramifications for Ireland are still unknown. However, the Irish Government recognises that Brexit could mean lower economic growth in Ireland; therefore, it is exploring mechanisms which will help to stimulate growth for SMEs in Ireland and keep Ireland competitive with its European neighbours. The Irish Government has highlighted share-based remuneration as a specific area of interest.

How can Mazars help?

If you would like more information about share incentives in Ireland, please contact Ken Killoran (kkiloran@mazars.ie or +353 1 4494451).
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