

The rules on hiring-out of labour have been adjusted significantly

SKAT went too far in their previous interpretation!



Information from Deloitte

June 2014

The binding instruction has now been released in its final version

Now the Central Tax Authority (SKAT) have released the final binding instruction on the hiring-out of labour rules. The final version is broadly identical with the version that was put up for hearing in March. However, the final version contains elements that try to specify and tighten up a little bit compared to the hearing version. It is, however, still a clear retreat for SKAT.

What was the problem with SKAT's former practice?

Deloitte have in general been critical of SKAT and the National Assessment Council's (Skatterådet) interpretation of the new rules on hiring-out of labour that were introduced as of the 19 September 2012. We were of the opinion that the interpretation was contrary to the double taxation treaties. Pursuant to the new rule we have a hiring-out of labour situation when a foreign employee works in Denmark in such a way that the work has been "an integrated part of the Danish company's business area". Deloitte's approach has been that the tax authorities have interpreted the new rule far too widely and thus wrongfully affected the employees of foreign companies that have operated 100% independently in Denmark.

Therefore Deloitte agree with SKAT, when SKAT specify the following in their new binding instruction:

"The underlying basis is no longer that it is a hiring-out of labour situation solely in consideration of the foreign companies' employees working within a Danish company's business area. This interpretation of the hiring-out of labour rules will cease. This means that it will be recognized that the companies can – according to the circumstances – use subcontractors, also within the same line of business, without the employees being taxed pursuant to the rules on hiring-out of labour."

A significant change; the former main rule that per definition it is a hiring-out of labour situation when foreign

employees work within a Danish company's business area has thus been annulled.

When is it a hiring-out of labour situation according to the new interpretation?

SKAT specify that it is not a hiring-out of labour situation, when the work that is performed in Denmark by the foreign employees/the foreign company:

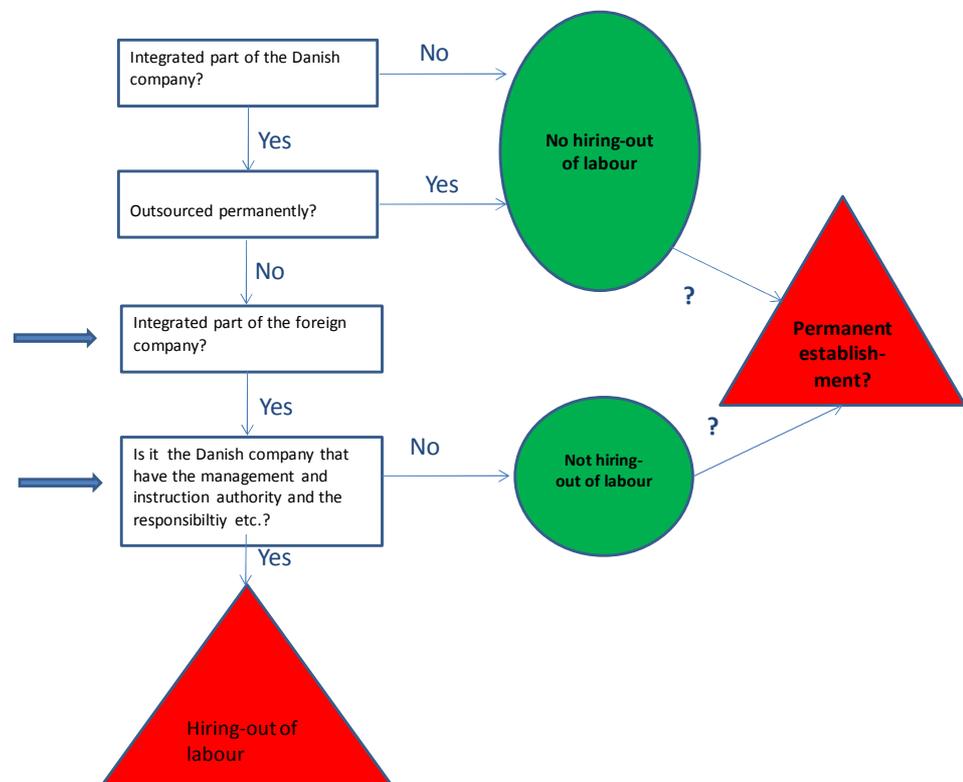
1. is not integrated in the Danish company's business area or
2. is sufficiently separated in an independent foreign business enterprise.

When evaluating whether the work is sufficiently separated in an independent foreign business enterprise SKAT will in future emphasize whether the work is sufficiently limited and the tasks are individualized compared to the tasks that the employees of the Danish company perform.

In that respect it is important to determine whether the foreign or Danish company bear the major responsibility and the financial risk of the work performed and therefore the work is an integrated part of the foreign company's business area. If the Danish company bear the major part of the responsibility and the financial risk, it will be a hiring-out of labour situation, whereas it will be a contract in the reverse situation.

SKAT review the various elements of their evaluation with a number of examples which clearly illustrate the elements that are included in the evaluation. We want to emphasize that SKAT state that certain industries and work functions that are not so complicated do not require a high degree of knowledge – for instance certain functions within garden centres – will involve a higher risk that the hiring-out of labour rules will be applied. Contrary to these highly specialized employees with special competences will speak in favour of a contract.

Deloitte agree with SKAT's revised interpretation. We have previously illustrated the correct interpretation in this way:



So far SKAT have not related to the activity in the foreign company; can the activity also be considered as an integrated part of the foreign company's business area? If this is the case it is necessary to evaluate which company – the Danish or the foreign company – exercise management, have responsibility etc.

In particular concerning hiring-out of labour within groups

In relation to the employees within the same group SKAT state the following guidelines:

1. If a concrete function (e.g. finance or HR) is gathered in a foreign company, the hiring-out of labour rules will not be applied, when the employees from this function work in Denmark.
2. When implementing a group internal strategy in a Danish company, foreign specialists who consider implementation in Denmark will not be comprised by the hiring-out of labour rules.
3. Participation in a Danish parent company's meetings in Denmark does not imply hiring-out of labour for foreign management provided that the participation attach to their job in the foreign companies and that they are not included in the Danish parent company's management team.
4. Group internal courses and training the purpose of which is to learn about the group culture, administrative procedure, introduction training etc. for up to 2-3 months cannot be considered hiring-out of labour.
5. However, foreign employees' participation in a management team closely linked with the Danish parent company can trigger Danish tax liability through the rules on hiring-out of labour.

Commencement date and resumption

- The binding instruction becomes effective on 20 June 2014.
- SKAT will review all previous rulings of the National Assessment Council and according to the inquirer's consent present the cases for resumption, if it is estimated that the case will have a different outcome, if the decision was made according to the guidelines of the binding instruction.
- The citizens and companies can ask for a resumption, when SKAT's new guidelines will result in looser result.
- Please note that the ordinary rules on resumption apply the 1 May in the fourth year after the expiry of the income year.

Please contact us, if you have any questions

We will, of course, be of assistance with a concrete evaluation or other questions on handling hiring-out of labour. If you are in doubt about the rules, you are most welcome to contact Jesper Demming, tel. +45 2126 7119, Richardt Tabori Kraft, tel. +45 2961 7393 or Mette Behrmann Lamp, tel. +45 2220 2533.

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