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Australia: Australian Taxation Office guidance on Single Touch Payroll reporting for employees under mirror or shadow payroll arrangements

Overview

The new reporting framework known as Single Touch Payroll (STP) has been enacted with the majority of employers commencing to report certain payroll information via Standard Business Reporting during the 2018 – 19 tax year.

The ATO has recognised the complexities and challenges faced by employers with respect to their mobile employees and has provided new guidance.

Announcement

The ATO has announced that they will be allowing an exemption from reporting payments to foreign employees for the 2018 – 19 tax year if all of the following criteria apply:

- The employee is employed by an offshore entity, *i.e.*, an entity that is non-resident for Australian taxation purposes;
- The employee is seconded to Australia;
- All or part of the employee's base salary and other remuneration is paid by an offshore entity; and
- You maintain a shadow payroll arrangement for the employee, *i.e.*, a notional payroll for the purposes of tax and social security obligations, and internal tax equalisation and protection policies.

The ATO has indicated that they may provide a further extension for the 2019 – 20 and ongoing income tax years to reconcile and complete STP finalisation for these employees. More information will be made available as these details are released to us.

The ATO has also confirmed that in order to apply this exemption for the 2018 – 19 tax year, employers are able to self-assess as to whether this exemption applies on an employee by employee basis. However, employers must maintain a record of their decision.

The ATO has also determined that for those employees who are subject to a PAYG withholding variation, rather than a mirror/shadow payroll arrangement, employers are not required to report details of these employees through STP reporting may continue with current reporting arrangements as previously agreed with the ATO.

Deloitte's view

Deloitte has been involved in a working group liaising closely with the ATO to determine the best way forward with tackling STP as it applies to employees under mirror/shadow payroll arrangements due to the unique challenges faced by employers to report the details with respect to these types of employees in a real time basis. Deloitte welcomes the exemption from STP reporting for these employees through the end of 2018 – 19 and will continue to work through the specifics of these arrangements with the ATO to ensure that practical and realistic solutions are available for employers, where possible.

Furthermore, in light of recent announcements of data matching programs between the ATO and the Department of Immigration and Border Protection (DIBP), we recommend that employers take this opportunity to review their processes to ensure they are fulfilling all of their employment tax obligations in relation to their mobile employees (including PAYG withholding, Fringe Benefits Tax, superannuation guarantee, payroll tax, workers compensation and employee share scheme reporting). Employers should specifically focus on those processes associated with identifying when employees are located and working in Australia, and also quantifying remuneration (cash and non-cash benefits) provided both in Australia and from overseas entities.

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Czech Republic:
Amendment to the agreement between the Czech Republic and Japan on social security

Overview

The protocol amending the agreement between the Czech Republic and Japan on social security has come into force as of August 1, 2018. According to the protocol, those employees posted from Japan who concluded an employment contract with the receiving company in the Czech Republic are entitled to be exempt from the application of the Czech social security and health insurance legislation (under Article 7.1(b) of the Amended Agreement). A necessary condition for this is that the individual remains *under the direction of the sending (Japanese) employer*. Determining the substance of the relationship between the sending employer and the employee falls under the responsibility of the social security authority of the sending state (Japan). Every Certificate of Coverage issued before August 1, 2018, remains valid also after that date.

In relation to the protocol, an employee who has already been working in the Czech Republic under the Czech employment contract, but still under the direction of the Japanese employer, shall now be granted the Japanese Certificate of Coverage as of August 1, 2018, as the posted employee provided such a posting does not exceed five years. An additional three-year prolongation is possible based on administrative arrangement for the implementation of the social security agreement. For cases in which an individual had already applied for the exemption from the Czech legislation under Article 10 of the agreement, but no decision was made by August 1, 2018, such an individual shall be issued the Japanese Certificate of Coverage under Article 7.1(b) of the amended agreement (*i.e.* upon request, without any approval process by the Czech authorities) for the period as of August 1, 2018. At the same time, the Japanese authority shall consult with the Czech Social Security Administration regarding the issuance of the Certificate of Coverage under Article 10 covering the period prior to August 1, 2018.

To avoid administrative burden for the social security authorities, employers, and employees involved, the Czech social security authorities, in mutual agreement with the Japanese authorities, recommend not applying for the Certificate of Coverage under Article 7.1(b) (*i.e.* automatic coverage by the Japanese system) in cases where a detached individual working under the Czech employment contract already holds a Certificate of Coverage under Article 10. Also, it is unnecessary to apply for the new Certificate of Coverage, either under Article 7.1 (a) (*i.e.* without any legal contract with the Czech receiving entity) or (b) when switching between the regimes with or without the Czech employment contract. Since the effect of the Certificate of Coverage issued under Article 7.1 (*i.e.* posting in general) is the same for both groups of employees, the employee or his/her employer should not request the social security authority to issue a new Certificate of Coverage.

As for the possibility of extension of the Certificate of Coverage, the length of the extension depends on the Article based on which the Certificate of Coverage has been issued. If an individual holds the Certificate of Coverage issued under Article 10, a further extension will be possible under the same article which, in practice, means that no limitation is stipulated by the agreement. On the other hand, if an individual holds the Certificate of Coverage issued under Article 7.1 (*i.e.* posting), further exemption from the Czech social security scheme is possible in the length of three years (based on the administrative arrangement for the implementation of the agreement).

Concerning an important group of employees detached to the Czech company who undertake the position of director (“jednatel”) of the Czech company, the Czech social security authorities are of the opinion that such a position does not necessarily contradict the posting provision (Article 7.1 of the amended agreement). Cases like these always require a detailed analysis on an individual basis; however, the fact that the purpose of an individual’s detachment to the Czech company was to undertake the position of director (“jednatel”) might be considered a decisive factor.

Deloitte’s view

In most cases, the situation will not change for Japanese individuals working in the Czech Republic. The protocol changes are aimed only at the very narrow group of Japanese individuals working in the Czech Republic who have concluded a Czech employment contract.

It is unclear how the Japanese authorities will approach the determination of the substance of the relationship between the employee and the sending company (*i.e.* being under the direction of the Japanese employer while having a Czech local employment contract).

Therefore, we recommend that, in nonstandard situations, a more conservative approach should be taken and the Certificate of Coverage be issued under Article 10 (exemptions) of the social security agreement.

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India:
Nonresidents not taxable on salary earned for rendering services outside India even if taxes have been withheld in India, says Appellate Tribunal

Background / facts

Avdesh Kumar (the individual), an Indian citizen, moved to Korea for the purpose of employment during the India tax year 2012 – 13 and worked in Korea for more than 182 days during such period.

The individual received a salary in Korea from his foreign employer. However, the employer withheld taxes in India on the entire income (salary received in India, as well as in Korea).

The individual, while filing his return of income in India as a resident, did not declare the salary received in Korea.

The jurisdictional tax officer, in the course of assessment proceedings, added back the salary income received in Korea. This addition was upheld by the first-level appellate authority on the grounds that the individual was not a nonresident and taxes have been deducted on income received in Korea.

The individual had put forth the contention before the first-level appellate authority that he had left India for the purpose of employment during the year, and his stay in India was less than 182 days. Hence, he was a nonresident in India and the salary received overseas for services rendered outside India was not taxable, despite the fact that taxes had been deducted on such income in India. The matter was further referred to the Income Tax Appellate Tribunal (second-level appellate authority).

The matter put up before the Tribunal was to decide whether the individual was a nonresident, and whether the salary received in Korea was exempt from taxes being received for services rendered overseas.

Ruling of the tribunal

The Tribunal dismissed the ruling of the first-level appellate authority and held that the individual was a nonresident for India tax purposes for the relevant year. Hence, salary income he received in respect of foreign employment was not taxable in India even though taxes had been deducted in India.

Principles derived by the Tribunal from the income tax law and earlier decisions:

- If an Indian citizen has left India for employment abroad and his or her stay in India is less than 182 days in a given tax year, the individual would be treated as a nonresident regardless of his or her stay in India in the preceding years; and
- Income received by a nonresident for services rendered outside India cannot be said to accrue or arise or be deemed to accrue or arise in India. Hence, this income cannot be taxed in India notwithstanding the fact that the salary is credited into an India bank account or taxes have been deducted on such income. Receipt of salary or deduction of taxes in India cannot be a criteria for deciding on the taxability or otherwise in India of such income.

Source: I.T.A. No. 747/Del/2018

Deloitte's view

This Tribunal ruling reaffirms the principles laid down in previous decisions that salary received by a nonresident in India is exempt from taxes if it is for services rendered overseas. The ruling further affirms that the income will stay not taxable even if taxes have been deducted in India.

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Global Rewards Updates:
Tax reporting and withholding in Belgium – Update

Are your equity plans still audit proof? Update on the latest developments in Belgium

As covered by Belgium Global Reward Update, 27 October 2018, the Income and Social tax reporting and withholding landscape has shifted for local Belgian subsidiaries, leading to an increasingly narrow view of historical Belgian guidelines upon audit. The audits by the Special Tax Inspection office have been focused on nondeclared foreign equity incentives while Social Security Inspection audit findings have been very critical on benefits granted by a 'third party'.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-rewards-update-belgium-27-october-2017.pdf

Income tax

Belgium Global Reward Update, 27 October 2018 informed of an ongoing audit campaign by the Special Tax Inspection targeting local Belgian employers with employees who receive equity awards from a foreign (non-Belgium) parent company.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-rewards-update-belgium-27-october-2017.pdf

It's clear from the audits that the inspection's focus is to, where applicable, collect personal income taxes from these companies' employees. However, even though the tax liability remains the obligation of the individual, when no withholding was originally operated by the employer, the employer itself can also be held liable if the tax authorities are unable to be collect taxes due from the individual. Of note, these audits have shown an enhanced focus on US-based companies (both large and small).

Where employees fail to accurately report the equity income on their individual tax filings, the tax authority has begun to impose increases in taxes owed. The imposed increase in taxes may differ, depending on the employees' behavior and intentions:

- If there was no intent to commit fraud, a tax increase of 30% is applied to the unreported equity income from the past 3 years; or
- If there was an intent to commit fraud, a tax increase of 50% is applied to the unreported equity income from the past 7 years.

An unwillingness to collaborate with the tax authorities during the regularization process, or a failure to register a foreign brokerage account with the National bank, where necessary, are both grounds for a taxpayer's actions to be considered as fraudulent.

The employer's communications on plan features and related compliance has become an important factor in promoting and documenting that employees are aware of the correct reporting rules. This is an area specifically emphasized during the audit process.

Social security

Following the Supreme Court's October 2016 decision (see previous Belgium Global Reward Update, 27 October 2018), the social security authorities have recently confirmed that it is possible to trigger the application of Belgian social security simply by having performance based equity grants, where the performance metric is lodged by the Belgian local employer into the global HR ERP systems.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-rewards-update-belgium-27-october-2017.pdf

The social security authorities consider that if grants made by a foreign parent company to employees of a Belgian subsidiary company, are determined based on performance evaluations lodged in a global HR ERP systems by the local Belgian employer, then such grants should be considered as being impacted by "local intervention" of the Belgian subsidiary. This determination of local intervention is regardless of whether there is a legal commitment by the Belgian local employer or if there is any recharge back to the foreign parent company for the costs of the awards. If local intervention exists, then any equity received by the employee would then be subject to Belgian statutory social security contributions.

Although the position taken by the social security authorities does not appear to be in alignment with the legal provisions or with Supreme Court rulings, Deloitte strongly recommends performing an in-depth assessment of your company's equity processes. Should the social security authorities enforce regularization of this position, a company could face an incremental cost of 60% or more.

Deloitte's view

Employers are encouraged to consider a re-alignment or revision of current practice, with all concerned stakeholders. With the audit activity in Belgium changing and the tax authorities taking an active interest in this issue, it can be very challenging in practice to demonstrate that there is no involvement in the equity plan from the Belgium subsidiary, and clients are advised to carefully review and consider withholding taxes in the interests of prudence.

As recommended in our previous alert, companies relying on the "no intervention" principle, are encouraged to test the local level of intervention and to consider conducting a mock audit. Employers that conclude to continue to operate no PAYE are encouraged to carefully document the basis of their decision making, to test that conclusion periodically, and to make sure employees are fully aware of their personal tax obligations.

Deloitte's Global Employer Services team is readily available to help make sure employers are fully compliant and that their employees are fully informed of their obligations.