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Australia: ATO clarifies superannuation guarantee treatment of annual leave loading

Overview

Many awards, industrial agreements, and policies entitle employees to annual leave loading but do not explicitly state the reason for the entitlement.

The Australian Taxation Office (ATO) Superannuation Guarantee Ruling (SGR) 2009/2 has been consistent. However, in light of recent changes to general guidance materials to better reflect SGR 2009/2, there has been much confusion as to whether annual leave loading should be considered part of an employee's ordinary time earnings (OTE) and, therefore, be subject to superannuation guarantee.

SGR 2009/2 provides that annual leave loading can only be excluded from an employee's OTE if it is "demonstrably referable to a notional loss of opportunity to work overtime," which is arguably its traditional intention.

On March 12, 2019, following a consultation process, the ATO articulated its expectations for the first time with respect to evidentiary requirements, as well as its intended actions with respect to historical positions.

URL: <https://www.ato.gov.au/Business/Super-for-employers/In-detail/Ordinary-time-earnings/Ordinary-time-earnings---annual-leave-loading/>

A summary of the key points in the ATO's clarification is as follows:

URL: <https://www.ato.gov.au/Business/Super-for-employers/In-detail/Ordinary-time-earnings/Ordinary-time-earnings---annual-leave-loading/>

- In the absence of written evidence (*i.e.*, a stated intention), the ATO does not accept that annual leave loading is demonstrably referable to a notional loss of opportunity to work overtime (*i.e.*, excluded from OTE).
- However, given the prior uncertainty surrounding leave loading, the ATO will not apply compliance resources to investigate earlier periods in which employers self-assessed whether or not annual leave loading was demonstrably referable to a notional loss of opportunity to work overtime, if no evidence to the contrary exists (*e.g.*, a loading paid to employees who cannot work overtime or a policy that prohibits overtime work).
- To support future periods, employers must obtain written evidence.
- If an employer does not obtain such written evidence, then annual leave loading will need to form part of an employee's OTE.

Deloitte's view

The expectations regarding annual leave loading have been uncertain since the introduction of SGR 2009/2. We welcome the ATO's clarification, as well as its pragmatic approach to historical compliance for prior instances in which no evidence existed to indicate annual leave loading was paid for a contrary reason.

Given the prevalence of leave loading, we recommend all employers consider the impact the ATO's clarification will have on their business and their employees.

Even though the ATO has stated it will not investigate earlier periods, employers should be aware that this will not prevent the possibility of an audit or investigation should an employee lodge a complaint or query to the ATO.

This is also a key reminder that general guidance is not binding, and attention should be paid to legislative and other precedential advice.

The impact

In line with the ATO's position, we recommend employers consider the following questions to understand the potential impact of the ATO's clarification:

1. Do you pay annual leave loading?
 - a. If yes, go to question 2.
 - b. If no, the ATO's clarification should not affect your business.
2. Do you currently pay superannuation on annual leave loading?
 - a. If yes, the ATO's clarification should not affect your business.
 - b. If no, go to question 3.
3. Are all employees that receive annual leave loading entitled to work overtime?
 - a. If yes, go to question 4.
 - b. If no, you may have a historical exposure. We recommend a review to determine whether remediation is required.
4. Does a relevant award, industrial agreement, or policy explicitly state that it is for a notional loss of opportunity to work overtime?
 - a. If yes, the ATO's clarification may not affect your business. We recommend a review to ensure this is the case.
 - b. If no, the ATO's clarification will affect your business. We recommend a review to determine whether you should obtain written evidence or whether superannuation should be payable for future periods.

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Belgium: New withholding and reporting obligations with respect to offshore remuneration (including awards over shares in a non-Belgian company)

Overview

The Belgium GES tax alert, January 28, 2019, covered the amendment submitted to Parliament with regard to the draft law on the new tax reporting and withholding obligations. The revised draft law has since been approved by Parliament on 31 January 2019.

URL:
<https://www2.deloitte.com/content/dam/Deloitte/be/Documents/tax/TaxAlerts/IndividualTaxAlerts/Individual%20tax%20alert%20-%20Reporting%20obligations%20and%20withholding%20taxes%20update%20-%2028%20Jan%202019.pdf>

The changes below are focused on the position where the Belgian entity does not currently “actively intervene” in the arrangements, such that income tax withholding is not currently due.

Remuneration paid in 2018: No change in legislation

The draft proposals originally contained provisions that would have imposed additional reporting and withholding obligations for remuneration paid outside of Belgium in 2018. (Remuneration paid outside of Belgium includes awards over shares in a non-Belgian company.) However, these proposals were not approved.

Where appropriate, the employee or company director remains obliged to report his or her foreign remuneration (*i.e.*, equity gains in a non-Belgian company) in his or her individual income tax return.

Remuneration paid in 2019: Tax reporting and withholding

Transitional measures for January and February 2019: Within the context of the new legislation, foreign remuneration paid/equity gains realized during the period from January 1, 2019, until February 28, 2019, must be reported on salary statement, which must be filed electronically with the Belgian authorities by 1 March 2020 at the latest. Further information on the format of the reporting will be provided through a Royal Decree.

Incompleteness or late filing will lead to a penalty (on top of the usual sanctions) of 10 percent of remuneration attributed/paid, unless the employer can prove that the remuneration was correctly reported in the individual's Belgian or foreign individual income tax return.

The additional tax-withholding obligation does not yet apply to foreign remuneration paid/gains realized during this period.

Remuneration paid from March 2019 onwards: From March 2019, the additional reporting and withholding obligations, within the context of the new legislation, both become applicable.

The new withholding obligation will be contained within the general rules currently applicable to wage withholding taxes. The standard rules will thus apply to applicable withholding rates, filing and payment deadlines, penalties, etc.

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India: Supreme Court Ruling interprets pay for computing social security contributions

Background and facts

Indian Social Security regulations are governed by the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (the "EPF Act"). The EPF Act mandates that employers must make Provident Fund (PF) contributions at 12 percent of defined pay ("PF wages") for eligible employees, and the employees must make matching contributions.

PF wages (*i.e.*, for purposes of determining PF contributions) comprise basic wages (encompassing all emoluments earned by employees in accordance with the terms of contract paid or payable in cash, but exclude house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee), dearness allowance (including cash value of food concessions) and retention allowance.

Since the phrase "any other similar allowance" is part of the exclusions of the wage definition, there has been ambiguity on what constitutes wages for the purposes of determining the quantum of PF contribution and whether the allowances can be excluded for this purpose.

The Supreme Court recently pronounced its verdict on a batch of appeals filed by multiple establishments regarding the "allowance" aspect of PF wages. The issue raised before the Supreme Court both by companies and the department was whether certain allowances such as travel allowance, medical allowance, canteen allowance, management allowance, special allowance etc. would fall within "basic wages," as defined in the regulations, when determining monthly PF contributions.

Ruling of the Supreme Court¹

The Supreme Court confirmed the allowances in question are part of PF wages and need to be included when determining monthly PF contributions. The Supreme Court relied on its earlier rulings in which it held that all emoluments provided "universally, necessarily, and ordinarily" should be considered basic wages. Further, since the EPF Act is a social welfare legislation, it must be interpreted as such.

The key influencer on the Supreme Court's decision was the lack of evidence on record to prove the allowances were:

- Variable or linked to productivity; and
- Not paid across the board to all employees in a particular category; or
- Paid especially to employees who avail themselves of the opportunity.

The Supreme Court also determined that in order to be excluded from basic wages, employees should have become eligible to receive extra amounts beyond the normal work they are otherwise required to perform. In the appeals under question, there was no material to substantiate this claim.

The Supreme Court relied on the veracity of the factual examination conducted by the lower courts in concluding that the allowances in question were essentially part of basic wages, but camouflaged as allowances to avoid PF contributions.

¹ The decision of the Supreme Court is dated February 28, 2019 and is related to Civil Appeal Nos. 6221 of 2011, 3965 3966 of 2013, 3969 3970 of 2013, 3967 3968 of 2013, and Transfer Case No. 19 of 2019.

Deloitte's view

Companies are advised to review their provident fund compliances relating to foreign nationals (international workers) as well as domestic employees whose basic wages are lower than the statutory limit of INR 15,000 p.m.

In the event of a retro remediation, companies may also have to factor in additional considerations revolving around personal and corporate taxes as accounting and cash flow aspects.

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Global Reward Updates: Singapore, Ukraine, and Denmark

Key points to know:

- Recent regulatory updates in Singapore, Ukraine, and Denmark have resolved some outstanding issues affecting the operation of share plans in these jurisdictions.
- From 1 April 2019, companies in Singapore may no longer need to seek Ministry of Manpower approval before making payroll deductions for purchased shares.
- Replacement of the license system with new exchange control rules in Ukraine should make it easier for companies to operate share plans in Ukraine.
- Changes to employment law in Denmark should make it easier for companies to enforce their good/bad leaver provisions.

Singapore: Simplified payroll deductions

Presently in Singapore, local rules require that a company obtains prior written consent from the employee and approval from the Ministry of Manpower before it makes a payroll deduction for the purchase of shares under an employee share plan. This rule applies to all employees, with the exception of those in executive or managerial roles earning above \$4,500 a month (approximately €2,920).

From 1 April 2019, the Employment (Amendment) Act 2018 will abolish the requirement to seek ministerial approval. Deductions will then be permissible provided the employee has given prior written consent and may withdraw their consent (without penalty) at any time before the deduction is made. The Employment Act has removed the salary threshold, meaning that all employees in all capacities will be subject to the new system. This change should greatly simplify the process of operating employee share purchase plans in Singapore, and in practice it is not expected that many (if any) employees would withdraw consent.

Ukraine: Relaxed exchange controls

Prior to 7 February, Ukrainian residents were required to obtain an individual license before purchasing shares in a non-Ukrainian legal entity. In practice, individual licenses were very rarely granted by the National Bank of Ukraine. Similarly, Ukrainian companies required a license in order to remit contributions and recharge costs in respect of incentive plans. This made operating share purchase plans very difficult and meant that recharging costs was often impossible in practice.

As of 7 February 2019, the requirement to obtain a license has been abolished. Ukrainian residents are now able to transfer foreign currency (up to a limit of €50,000 per year) to make investments, including to purchase shares in non-Ukrainian companies. In addition, Ukrainian companies now have free use of their foreign bank accounts and can transfer foreign currency (up to €2,000,000 per year) abroad to facilitate business activities.

The recent changes should make it much easier for companies to offer share plans in Ukraine. Although there are still numerical limits on transfers, these are sufficiently high that they are unlikely to present a barrier for the vast majority of share plans.

Demark: Employment law changes for termination claims

Danish employment law has historically had various mandatory leaver rules that were applicable to employee share plans. Danish employees whose employment was terminated by the company generally remained entitled to the entirety of their share awards regardless of the plan rules. Additionally, an employee could be entitled to an award after leaving employment (which in practice would often be provided as a cash compensation).

For share awards granted on or after 1 January 2019, these mandatory rules have been relaxed. This change should generally permit companies the flexibility to enforce their own leaver provisions in respect of their Danish employees, potentially saving costs for companies and ensuring greater consistency across multiple jurisdictions.

The newly amended legislation (Danish Stock Option Act) does not apply to cash/phantom awards. Therefore, leaver provisions in respect of cash-based awards may still not be fully enforceable for Danish employees.

Deloitte's view

These are all welcome relaxations to the previous regimes which may have discouraged companies from operating their share plans in Singapore, Ukraine, and Denmark.

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