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Global Employment Solutions

Global InSight

7 June 2013

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Australia:
Reforms to the Temporary Work (Skilled) (subclass 457) program

Background

Following the recent announcement by the Australian Government regarding the 457 visa reforms, further detail has been released by the Department of Immigration and Citizenship (DIAC) regarding aspects of the 457 program and processing.

The "Subclass 457 Temporary Work (Skilled) Visa" is designed to enable businesses to sponsor a skilled overseas worker if an appropriately skilled Australian cannot be identified to fill a skilled position. The program aims to ensure that the working conditions of sponsored visa holders are no less favorable than those provided to Australians and that overseas workers are not exploited.

The following measures have been proposed by DIAC, to take effect on July 1, 2013:

Measure	Issue	Proposed action
Strengthening the employer attestation provision	Under the current regulations, there is no provision for DIAC to exercise any power to take action if a sponsor is found to be discriminating in favor of overseas workers. Additionally, there are no grounds for DIAC to refuse subsequent business sponsorship applications.	Strengthen the current attestation to make it an ongoing binding commitment that requires employers to demonstrate that they do not discriminate in favor of overseas workers. This requirement would apply at the time of approval and for the duration of the sponsorship. Sanctions will be imposed for noncompliance.

Measure	Issue	Proposed action
Training benchmarks	There is currently no specific requirement for the sponsor to keep any records to evidence its commitment to training. Furthermore, a sponsor seeking ongoing approval is not required to demonstrate that they met their commitments to training Australians throughout the term of their previous sponsorship(s).	Strengthen the provisions that relate to training benchmarks, both at approval and postapproval stages, to make them a binding requirement rather than a commitment. Sanctions will be imposed for noncompliance.
Genuineness criterion	There are concerns that the duties of some positions have been modified to appear more skilled than what they actually are, and that the program is being used to secure visas for family members or personal associates, rather than to fulfill a genuine skill shortage.	Amend the nomination requirements to ensure: • The tasks of the nominated occupation correspond to the tasks of the position; • The position is genuine; • The terms and conditions of employment are sufficient to attract a qualified person locally; and • The position fits broadly within the scope of the activities and the scale of the business. Further assessment to be given to nominations of family members or personal associates of the sponsor. Introduce provisions for a nomination to be refused where there are integrity concerns.
Amendments to the terms of an approved sponsorship	Under the current regulations, there is no capacity for DIAC to request an explanation for the number of 457 workers an employer intends to sponsor. This measure would not cap a sponsor's use of the program, but rather, limit the terms of a sponsorship to an approved level.	Sponsors will be required to request a certain number of nominations (positions) when applying for a business sponsorship. DIAC will have discretion to approve a lesser number, or to refuse the application where the requested number is not justified by the sponsor. A sponsor may apply to exceed the level of nominations by varying the terms of their sponsorship, or through a new application.
Strengthening assessment of generalist occupations	Occupations including program or project administrators (ANZSCO 511112) and specialist managers (ANZSCO 139999) have been identified as occupations of "integrity" concern in the Subclass 457 program.	Impose a requirement to request a skills assessment or limit the use of these occupations to certain industries.

Measure	Issue	Proposed action
Strengthening the market-rate provisions	Under the current regulations, there is the potential for employers to create their own market rate through sourcing just one Australian worker willing to work for a particular wage. For example, conditions in the domestic labor market could also be undermined in cases where an occupation commands a market salary greater than AUD180,000 and employers reduce their costs by engaging foreign workers willing to work for AUD180,000.	Expand the assessment beyond the particular workplace to that workplaces' regional locality. Increase the market salary assessment exemption threshold to AUD250,000 to ensure senior executives will continue to be exempt.
Undesirable employment relationships	There is no scope to prohibit sponsors from establishing undesirable employment relationships, such as on-hire arrangements and independent contractor arrangements (unless in a specified occupation).	Tighten the regulations by: • Prohibiting on-hire arrangements that fall outside approved labor agreements; and • Preventing sponsors from engaging visa holders under arrangements that resemble independent contracting arrangements.
Strengthening the obligation not to recover certain costs	Under the current regulations, sponsors can circumvent the obligation by requiring the visa applicant to make a prepayment of costs, and as a result, DIAC cannot evidence the act of "recovery."	Strengthen this regulation to ensure that sponsors do not pass these costs, in any form, onto a sponsored person.
Preventing potential for misuse of the English-language salary exemption	When a visa holder transfers sponsors, English-language skills are not reassessed. For example, a visa holder earning over AU$92,000 who was exempt from evidencing English language is not reassessed when transferring sponsors, despite the new position offering less than the exemption level of AUD92,000.	A new regulation will be introduced at the nomination stage requiring the visa holder to have met the English-language requirement or satisfy the exemption.
Terms of sponsorship amendments for overseas business sponsors and start-up businesses	Currently, overseas business sponsorships are granted for a period of three years, and there is no option for DIAC to reduce this term to coincide with the genuine purpose of sponsoring foreign workers.	Additional terms of sponsorship approval will be introduced: • The sponsorship term for an overseas business will be for the term of the project (up to three years) or 12 months, whichever is more; • The sponsorship term for a start-up business will be 12 months. Start-up businesses would be able to apply for a three-year business sponsorship after the completion of their first one-year term; and • The validity of any Subclass 457 visa granted in association with an overseas business sponsor or a start-up business would be limited to the same period.

Measure	Issue	Proposed action
Mandatory e-lodgement of Subclass 457 applications	The Subclass 457 program is the only skilled visa program that is not wholly e-lodged.	The introduction of mandatory e-lodgement will require legislative change.
Increase in visa application charge for the Subclass 457 visa	This follows the 'user pays' approach previously announced by the government.	From 1 July 2013 the visa application charge for the Subclass 457 visa will increase from $455 to $900 per application. At this stage, there has been no advised increase in the application charge for the nomination application.

Deloitte's view

The Australian government has stated that for genuine users of the 457 program, the proposed changes will not affect their ability to sponsor foreign labor to meet the demands of local business.

Deloitte observes that the changes will provide the Department of Immigration and Citizenship with further discretion to exercise its power in areas where there is noncompliance, particularly with regard to business sponsorship obligations. This additional scrutiny and evidentiary requirement has the potential to delay the processing of 457 visa applications, which, in turn, could affect employers needing to deploy skilled foreign labor in short supply to project locations.

Detailed consultation with your immigration adviser is recommended to inform and equip your business to manage the additional information and documentation required by DIAC as a result of the changes. Furthermore, the Australian Taxation Office and DIAC have advised that they will be conducting a more targeted approach to reviewing immigration and tax information of visa holders in Australia. The review will include data matching between the two authorities to identify tax noncompliance. The review could also bring to light instances of possible immigration noncompliance as a result of the findings.

This increased data-matching activity heightens the need for employers to remain aware of their immigration obligations, including the need to retain appropriate records when employing foreign workers.

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Luxembourg:
Tax regime for highly skilled workers: attractive

The Luxembourg tax authorities introduced at the end of 2010 a special tax regime for highly skilled workers applicable from 1 January 2011 (circular LIR n°95/2 dated 31 December 2010).

This circular has now been amended (circular LIR n°95/2 dated 21 May 2013). The changes mainly focus on relaxing the conditions to benefit from the favorable tax treatment. Here is an overview of the main changes:

- The criterion of significant contribution of the employee's activity to the Luxembourg economy is removed.
- The threshold of annual base remuneration has come down from EUR 112.000 (social security ceiling) to EUR 50.000.
- The criterion of having a diploma of higher education is removed.

- For entities established in Luxembourg for at least 10 years, the maximum percentage of employees who can use the regime has increased from 10% to 30%.

These changes are very attractive as they significantly expand the scope of the regime.

No changes were brought to the benefits of this special tax regime. However, the procedure to obtain it underwent a radical change since the regime now applies without prior agreement of the Luxembourg tax authorities.

The new regime applies to employees arriving in Luxembourg as from January 1, 2013. We have summarized below the conditions and benefits of the scheme.

- General conditions for all employees:
    - Qualify as an "impatriate"; impatriates mean employees who are part of an international group and who are seconded to a Luxembourg company of the group and employees directly recruited abroad by a Luxembourg company.
    - Become a tax resident in Luxembourg.
    - Have not been a Luxembourg tax resident, have not lived a distance less than 150 km from the Luxembourg border, and have not been subject to Luxembourg income tax on professional income for the five years before start of the activity in Luxembourg.
    - Undertake the local employment as primary employment and pass on knowledge to local personnel.
    - Earn a base salary of at least EUR 50.000 and must not replace another non-impatriate employee.
- Additional conditions in case of an intra-group secondment:
    - Have at least five years of seniority in the international group or five years of experience in the economic sector.
    - An employment relationship exists between the sending company and the employee.
    - The secondee must be granted a right to return to the home company.
    - A contractual arrangement exists between the home and host companies with respect to the secondment.
- Additional conditions in case of a recruitment abroad:
    - Have acquired a depth specialization in a sector or profession characterized by difficulties of recruitment in Luxembourg.
- Conditions relating to the employer:
    - The Luxembourg entity must employ or commit to employ at least 20 full-time employees in Luxembourg in the mid-term.
    - If the entity has been established In Luxembourg for at least 10 years, it can have a maximum of 30% impatriate employees who benefit from the regime.

Procedure

By January 31 of each year at the latest, the employer is required to provide a report of the employees benefiting from the special regime.

Benefits of the regime

If the conditions are met, it is possible to obtain tax relief for certain expenses that fall under the following categories:

- Relocation – Tax-exempt amounts include costs of moving to Luxembourg and similar repatriation costs at the end of the secondment. Costs to make the Luxembourg home suitable to live in (defined in the circular) and costs for emergency travel can also be exempt from taxation.
- School fees – A deduction is available for school fees associated with primary and secondary education.
- Lump sum for recurring expenses – To cover cost of living allowances and miscellaneous expenses associated with the expatriation, a capped lump-sum deduction is available.

The following combined costs are also eligible to tax relief, subject to an overall cap:

- Rent/Utilities – Qualifying costs depend on whether a home is maintained in the home country or not.
- Home leave – One trip per year per family member can be exempt from taxation.
- Tax equalization – Costs associated with the difference in taxes between Luxembourg and the home country can be exempt from tax.

The impatriate can benefit from the regime for up to five calendar years following the year of arrival, provided the conditions continue to be met.

Deloitte's view

These changes in the circular are great news since they significantly expand the scope of the favorable tax regime.

The removal of the prior agreement of the tax authorities, however, requires that employers ensure that all the conditions laid down by the circular are met before applying the regime.

Indeed, employers now retain the full responsibility as to the correct application of the tax circular. It is therefore recommended that they keep necessary information and documents to sustain their positions in order to prevent any further questions in the annual reporting or a wage tax audit. At this stage, however, the consequences of the annual audit performed by the tax authorities are not known.

As a reminder, please note that this special regime can significantly reduce the costs of what is widely known to be an expensive way to bring a necessary workforce to Luxembourg. To illustrate the level of savings involved, an expatriate who is married with two children who earns a base salary of EUR 200.000 with a typical expatriate package can save taxes in the region of EUR 50.000 per annum.

By moving swiftly to implement the benefits from the changes, companies will maximize tax savings for impatriates. Deloitte has developed a range of services to assist companies:

- Assessment of eligibility – An initial assessment to establish whether or not the regime will be applicable for a particular expatriate.
- Package design – Design/review of expatriate packages and contractual arrangements to maximize tax savings available through the regime.
- Assistance with payroll and annual reporting – Assistance with the payroll to ensure a correct reporting of the impatriate's package and applicable tax reliefs and preparation of the annual reporting including confirmation that conditions continue to be met.
- Tax return services – To ensure correct reporting of income of impatriates.

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People's Republic of China: New and Revised IIT Returns and Forms Enhance Information Reporting

Summary

China's State Administration of Taxation (SAT) issued a bulletin (Bulletin 21) on April 27, 2013 in which it released nine new and revised individual income tax (IIT) returns and associated forms. Bulletin 21 will become effective on August 1, 2013.

Key implications

With the implementation of Bulletin 21, the number of IIT returns/forms is reduced to 12, nine of which are new or revised and three of which are unchanged. No changes have been made to the following returns:

- Annual Individual Income Tax Return (for individuals with annual income of RMB120,000 or more);
- Individual Income Tax Withholding Return on Income from the Transfer of Restricted Shares; and
- Individual Income Tax Consolidation Return on Income from the Transfer of Restricted Shares.

The new and revised returns and forms can be categorized as follows:

Category 1. Basic information registration forms – The two new forms (i.e., Forms A and B) are mainly for collecting basic information on a taxpayer when the withholding agent submits the withholding return (Form A) or when an individual taxpayer self reports (Form B). The information to be disclosed on the forms includes the length of the secondment/assignment, the individual's Chinese and overseas positions, the source of the payment, the individual's work permit number, and information on whether the individual is a tax resident of a country/region that has concluded a tax treaty with China.

After the initial submission of Forms A and B, only subsequent changes in the taxpayer's information would need to be reported in the future.

Category 2. IIT withholding returns – Under this category, the two withholding tax returns to be filed by the withholding agent (i.e., one for monthly withholding and the other for the annual adjustment of monthly withholding applicable to certain specialized industries, such as mining, marine transportation, deep-sea fishing) are revised slightly by including a section for the breakdown of tax deductible items and amounts, etc.

Category 3. IIT self-declaration returns – There are five self-reporting returns that must be used by individual taxpayers and taxpayers engaged in production and business operations, sole proprietorships, or partnerships. These returns have been revised slightly to require more detailed information, such as a breakdown of deductible contributions to China's mandatory social security schemes.

Deloitte's view

The issuance of Bulletin 21 highlights the increased scrutiny on income reporting, information collection, and the administration of IIT compliance for all taxpayers, especially nondomiciled individuals working in China.

When a withholding agent prepares the initial IIT filing for a nondomiciled individual, it must include the taxpayer's 18-digit registration ID, the length of the secondment/assignment, the expected departure date, the individual's domestic and overseas positions, and the source of the payment (i.e., from which country or area the salary will be paid) on Form A. Affected companies should consider implementing a tracking system or seeking professional assistance to properly track information on expatriates who are working in China to ensure compliance with the information-reporting requirements.

When a nondomiciled individual self reports for IIT purposes in China, he or she must include the work permit number on Form B. This required inclusion represents the first time the work permit number has been linked with IIT reporting. Companies should ensure that work permit applications for expatriates working in China are submitted on a timely basis.

A nondomiciled individual also must indicate whether he or she is a tax resident of a country that has concluded a tax treaty with China, which signals SAT's increasing scrutiny of claims for benefits under tax treaties. It is important for affected companies and individuals to ensure that proper documentation is maintained to support any claims for treaty relief.

The amount of tax-exempt income still must be provided in the monthly IIT withholding return, which can help the tax authorities in reviewing the reasonableness of the tax-exempt benefits (e.g., qualified housing rentals, meals, laundry) claimed by expatriates. Employers should take steps to ensure that tax-exempt benefits are structured properly to differentiate them from cash allowances and that the application of such benefits complies with the prevailing tax regulations and local practice. Meanwhile, relevant internal administrative procedures should be well documented and strictly followed to sustain eligibility for tax-exempt status.

The SAT is likely to be scrutinizing IIT returns and forms more closely. Companies with expatriate individuals working in China should review their current IIT compliance and take any steps necessary to ensure compliance and reduce any risk of noncompliance.

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Global Rewards Updates: Canada: Stock-Settled Awards

Employer Deduction for Stock-Settled Awards

Under Canadian tax law, a corporate income tax deduction is not permitted when an employer agrees to sell or issue treasury or newly issued securities to employees. When an employer has the discretion to settle the award in either stock or cash, the issue becomes whether an agreement to issue stock was in effect at the time the employer decided to settle the award in shares, thus eliminating the corporate income tax deduction.

The long-standing position of the Canada Revenue Agency (CRA) is that when an employer elects to settle an award in stock, an agreement to issue securities arises at that point, and a corporate income tax deduction will therefore be denied. This position was recently rejected in the case of *Transalta Corp. v. R [2012] 3 C.T.C. 2186*, (the "*Transalta* case").

Impact of the *Transalta* Case

In the *Transalta* case, the tax court of Canada ruled that the employer was entitled to claim a corporate income tax deduction for the fair market value of the stock issued under a deferred bonus plan if the employer retained the unilateral discretion to distribute cash or issue stock. The Canadian tax authorities have indicated that they will not appeal the case, but that its application will be restricted to similar situations.

While the *Transalta* case confirms the employer's ability to claim a corporate income tax deduction if the employer retains the unilateral discretion to distribute cash or issue stock to settle an award, employers should be aware that certain restrictions apply even in this situation:

- The fair market value of the shares issued to employees under these arrangements will be taxed at the recipient's marginal tax rate rather than the preferential tax rate available for certain stock option benefits.
- The Canadian tax provisions regarding salary deferral arrangements, which can result in accelerated taxation of employees, restricts the design of these types of plans. In general, tax acceleration rules can apply when the payment of an employee's salary is deferred beyond the end of the year in which employment services were rendered, unless the plan satisfies certain exemptions. Subject to certain stringent requirements, deferred bonus programs may be suitable plans to which the decision of the court in the *Transalta* case can be applied.
- Income taxes, and in some situations, social security taxes, must be collected when the shares are issued. Ideally, there will be a market on which sufficient shares can be sold to satisfy the withholding tax obligations. However, the employer must anticipate this withholding obligation and establish a tax collection mechanism.

Action

- Companies should review their existing incentive programs to determine if they currently operate a deferred bonus plan for employees of their Canadian operations to which this case might apply.
- Companies should consider the accounting and legal implications of establishing a deferred bonus plan under which the employer retains the unilateral discretion to distribute cash or issue stock to settle awards.

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