

EXPATRIATE NEWSLETTER

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AUSTRALIA

FRINGE BENEFITS TAX ON TRAVEL EXPENSES FOR 'FLY-IN-FLY-OUT' ARRANGEMENTS

Australian industry is heavily reliant on mining operations which are often located in remote areas. As a result Fly-in-Fly-out ('FIFO'), also known as rotational arrangements, is widely adopted in Australia as a method of enticing people to work, by flying them periodically on a roster basis between the work site and their usual place of residence. It is also not uncommon for the travel to be international.

A common practice in a FIFO arrangement involves the employer arranging and paying for the employees transport from 'home-to-work' such as flights. The transport will be considered benefits provided to employees.

In Australia, tax is levied on the employer for provision of benefits to employees under the Fringe Benefits Tax ('FBT') legislation. Therefore, instead of the employees being liable to tax, employers who provide such benefits are generally subject to FBT. Where the employment is in a remote site or on an oil rig or other installation at sea however, a tax exemption is available to the employer for providing employees with 'home-to-work' travel. This is on the basis that transport is provided from the employee's usual place of residence.

As Australia's resource industry continues to grow, work sites continue to expand towards 'non-remote' areas, putting this exemption into question. As a result, employers are seeking alternatives for relieving themselves of the potential additional liability of tax.

As an alternative whereby an FBT exemption is unavailable, in some circumstances, the FBT obligation for an employer can be reduced to nil if the employee would have otherwise been entitled to a work-related tax deduction, had he/she incurred the costs themselves. This is known as the 'otherwise deductible' rule.

Applying this to the FIFO arrangements above, 'home-to-work' travel has historically always been viewed as a non-deductible expense for individual taxpayers. A recent case heard by the Federal Court has reaffirmed this clarifying that the 'otherwise deductible' rule cannot be applied to negate the FBT obligation arising on the travel expenses incurred on 'home-to-work' travel for FIFO arrangements. It had stated that the character of the outgoing reflected journeys to and from work, despite the fact that the employees travelled during their designated work hours and, as such, were paid for this time. It reasoned that the travel expenses were merely 'incidental and relevant', to the derivation of income which remained at the work site. The primary purpose of the transport was to enable employees to live in one place and work in another.

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EDITOR'S LETTER

Expatriate tax updates provide a brief overview of issues affecting international assignees, predominantly, but not exclusively, from a tax and social security perspective.

This newsletter brings together individual country updates over recent months. As you will appreciate, the wealth of changes across multiple jurisdictions is significant so to provide easily digestible information we have kept it to the key developments that are likely to affect your business and international assignees.

For more detailed information on any of the issues or how BDO can help, please contact me or the country contributors direct.

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The articles contained in this newsletter have been prepared for your general information only and should not be acted or relied upon without first seeking appropriate professional advice for your circumstances.

It was, as a result, determined that the expenses were not necessarily incurred in the course of gaining or producing income and not 'otherwise deductible'. As a consequence provision of the transport gave rise to an FBT obligation to the employer, which reinforces the normal position of 'home-to-work' travel.

This decision is increasingly relevant given an expanding mobile and flexible work force. It should however have no direct impact on employers providing home to work transport to FIFO employees who work in remote areas. Nevertheless, employers should remain prudent and ensure that their position taken in respect to the 'remote area' is documented and retained.

BDO comment

Currently, the deductibility of travel expenses is under consideration at the Australian Tax Office. It is also important to note that the case referred to above has been appealed to the Full Federal Court, and therefore, there is a possibility that the court ruling may be overturned.

In light of the above, employers, both local and overseas, should remain vigilant of their obligations with respect to any work transportation arrangements they organise and provide to Australian employees. Whereby transportation is provided in the context of enabling the employee to travel to and from work, the employer may be liable to FBT.

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INTERNATIONAL

COUNTRY AGREEMENTS REGARDING EXCHANGE OF INFORMATION AND AVOIDANCE OF TAXES

The drive by tax authorities around the world to exchange information and help prevent avoidance and evasion of taxes continues. Examples of recent agreements signed and actions include the following:

- **Italy** has signed agreements with both **Liechtenstein** and **Switzerland**
- **Seychelles** has signed a multilateral tax cooperation treaty
- **US & Dominican Republic** are in discussions to exchange tax information
- **Singapore & France** have signed a double taxation agreement which includes anti-abuse provisions
- **Greece** is to crackdown on tax evasion as part of the agreement with its international creditors
- **Ireland** has collected over EUR 1 billion in tax since 2001 from Irish residents holding offshore bank accounts.

BDO comment

Expect to see further steps to provide quicker, automatic, exchange of tax information between global tax authorities and a further crackdown on those who evade taxes. This is long overdue.

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BELGIUM AND LUXEMBOURG

BILATERAL AGREEMENT BETWEEN BELGIUM AND LUXEMBOURG ON TAXATION OF CROSS BORDER WORKERS

Most double tax agreements (DTA) which are based on the OECD Model Tax Convention (OECD MC) include an article on the allocation of taxing rights regarding income from employment (article 15 OECD MC). The same can be said for the DTA between Belgium and Luxembourg with its article 15.

The rule mentioned in article 15 specifies the following:

- The resident state is authorised to tax all components of income from employment earned worldwide by its inhabitants, except for when the activity is physically performed in the other contracting state;
- The resident state however continues to be allowed to tax income from employment earned by its inhabitants when all three of the following conditions are met:
 - The individual has spent less than 183 days in the other contracting state during a 12 month period ; and
 - The salary earned by the individual is not paid by or on behalf of an employer in the other contracting state ; and
 - The salary earned by the individual is not borne by a permanent establishment which the employer has in the other contracting state.

If any of the three conditions mentioned in the second paragraph above is not met, the other contracting state is allowed to tax any and all income which corresponds to professional activity physically performed on its soil by the individual concerned.

In other words, when Belgian residents perform professional activities in Luxembourg for a Luxembourg employer, Luxembourg will be entitled to tax that income. Conversely, the income related to working days that are not spent in Luxembourg (but in Belgium or in third countries) will be taxable in Belgium, without a 'de-minimis' rule applying. So even if a Belgian resident only works one or two days in Belgium, the Belgian tax authorities will have the right to tax the income received for those days, resulting in the employee potentially becoming liable to tax in both countries except for when the individual concerned can provide proof for every day that he physically worked in Luxembourg in order to be able to claim an exemption in his resident state Belgium. Failing to do so often results in the Belgian authorities taxing the income received for all days for which no such proof is available.

In the event that Belgium exercises its right to tax, the employee concerned will most likely be taxed twice because in most cases the Luxembourg employer will already have withheld income tax at source when paying the monthly income. As a result, the employee would need to initiate a procedure in Luxembourg to claim a tax refund of all excess taxes unduly withheld in Luxembourg, an often burdensome and lengthy procedure.

The above rules cause a considerable administrative burden for cross border workers who live in Belgium but close to the border with Luxembourg and work for an employer resident in Luxembourg (or the other way round, live in Luxembourg but close to the border with Belgium and work for a Belgian employer). Such cross-border workers have become audit-targets for the tax authorities when for example employees have been allowed to work from home on occasion.

To alleviate this administrative burden, Belgium and Luxembourg have agreed on a tolerance period of 24 days for cross border workers.

For example, the introduction of this tolerance period means that someone who lives in Belgium, but is employed by an employer who is resident of Luxembourg, and who habitually works full time in Luxembourg, is allowed to work up to a maximum of 24 days ('less than 25 days') in his or her home country Belgium, without becoming liable to income tax in Belgium (and vice versa for someone who lives in Luxembourg but is employed by a Belgian employer). Time spent in third countries is not covered by this tolerance period and the income received for those activities will remain taxable in the state of residency.

This administrative agreement will apply to income earned as of 1 January 2015.

The tax authorities of both countries also intend to publish a joint statement on how they will audit the files of cross-border workers in future in a further attempt to alleviate the administrative burden that the present existing allocation rules for the right to tax income from employment, result in.

BDO comment

This common sense approach adopted by the Belgian & Luxembourg authorities is welcomed. Ideally other tax authorities should take note and follow this act. This would help to alleviate the administrative burden on taxpayers but still ensure payment of the correct tax.



CHINA

NEW DOUBLE TAX TREATIES WITH FRANCE AND SWITZERLAND

France

The new treaty between China and France took effect from 1 January 2015. It features changes in the following areas:

- Permanent Establishments
- Dividends
- Capital Gains.

Switzerland

The revised treaty signed with Switzerland also came into effect from 1 January 2015 and focusses on the following articles:

- Permanent Establishments
- Dividends
- Capital Gains
- Royalties.

BDO comment

Tax treaties and OECD commentary is an ever evolving area. It is important to keep up to date with these changes.

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GERMANY

STRICTER REGULATIONS REGARDING VOLUNTARY SELF-DISCLOSURE TO AVOID PENALTIES EFFECTIVE FROM 1 JANUARY 2015

From 1 January 2015, there are some important new regulations regarding the possibility to avoid a penalty by self-disclosing in relation to German taxes. Self-disclosing means the reporting of false or incomplete tax returns to the tax authorities.

Please see below for the most important amendments effective since 1 January 2015.

10-year-period

Unaffected by the period of limitation according to criminal law (generally five years), it is now necessary to declare all evaded taxes for the last 10 calendar years. This is the most serious amendment of the new regulation.

Marginal amount

Since 2011, avoiding a penalty by self-disclosing was only possible if the amount of evaded taxes did not exceed EUR 50,000 in the respective tax period. If it did, prosecution could be abandoned by paying an additional 5% of the evaded taxes within a certain timeframe.

The marginal amount of EUR 50,000 has now reduced to EUR 25,000 per tax period and per tax. Conversely, the additional penalty amount payable of 5% has increased to 10% for evaded amounts between EUR 25,000 and EUR 100,000, 15% for evaded amounts of EUR 100,000 to EUR 1,000,000 and 20% for any evaded amounts in excess of EUR 1,000,000.

Tax evasion interests

Furthermore it is not sufficient anymore to pay back only the evaded tax, but an evasion interest rate of 6% per year has to be paid additionally within the same deadline to avoid penalty and – as the case may be – also other interests.

Tax inspections and audits

The rules which avoid a self-disclosure are much stricter than before. It has been regulated that also special inspections regarding VAT or payroll tax – and not only real tax audits – avoid a later self-disclosing. The same pertains in case of a tax audit notice which is only announced to another person involved in the respective tax evasion, and not to the self-disclosing person himself.

BDO comment

It is a lot harder to avoid penalties now as a result of the new regulations than it was until the end of 2014. It is also a lot more expensive to self-disclose as the costs have significantly increased, however it remains the only way, other than prosecution, to clear taxes which were previously evaded.

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HONG KONG

CAPITAL INVESTMENT ENTRANT SCHEME SUSPENDED

The unexpected suspension of the Capital Investment Entrant Scheme (CIES) was announced by Mr CY Leung, the Chief Executive of Hong Kong during his Policy Address on 14 January 2015. The CIES was suspended with immediate effect.

The sudden suspension of the CIES is aimed to match the government's new policy on attracting overseas talent working in Hong Kong in the hope of easing the issue of population ageing and boosting the economy of Hong Kong. Mr Leung also added that Hong Kong does not have a pressing need for inward investments at the moment but instead, an imminent need for talent here and now.

According to Immigration Department records, since the scheme was launched in October 2003, it attracted around 40,000 people of whom more than 90% were from mainland China. The CIES provided an effective channel for thousands of mainland millionaires to migrate to Hong Kong and some of them had already gained the right of residence in Hong Kong after having resided here for seven consecutive years since the CIES visa was granted.

The transitional arrangement after the suspension of the CIES

With reference to the latest CIES rules, applications will be accepted if applicants have invested HKD 10 million or more in permissible investment assets (which include equities listed on the Hong Kong Stock Exchange in HK dollars; debt securities, certificate of deposits, subordinated debts and eligible collective investment schemes denominated in HK dollars and issued/guaranteed by various Hong Kong authorised institutions/authorities) within six months immediately before the application date and such applications are made within six months of the investment. To align with the above suspension of the CIES, and as a transitional arrangement, applications will still be accepted after 15 January 2015 if they have invested HKD 10 million or more within a six month period immediately before the suspension date and if these applications are made within six months of the investment, depending on whether the applicant meets with the other requirements under CIES.

The suspension of CIES at such a short notice has ruined the plans of thousands of potential Hong Kong immigrants, and particularly those who have already started making investments in Hong Kong before the suspension but only managed to complete the threshold of investment after the CIES cessation date.

Applicants who have completed the threshold of investment before the CIES cessation date should take the opportunity to gain residence in Hong Kong through the scheme by submitting their applications to the Immigration Department. An Immigration Department spokesman said a large number of eligible applications would be submitted before and after the suspension date and it is expected that the length of processing of the applications would inevitably be prolonged.

New schemes for attracting talents and professionals from overseas countries

As the CIES has now been suspended, the government will take a more proactive measure to attract high-quality talent and professionals as well as entrepreneurs from overseas countries by introducing the following new schemes:

- (i) To set up a pilot scheme to encourage second generation Hong Kong Chinese permanent residents who have emigrated to overseas countries to return to Hong Kong and reside here;
- (ii) To invite entrepreneurs to come to Hong Kong by loosening the residence arrangements under the General Employment Policy, the Admission Scheme for Mainland Talents and Professionals and the Quality Migrant Admission Scheme;
- (iii) To adjust the General Points Test under the Quality Migrant Admission Scheme to attract young talent with excellent educational background and sound financial standing or with international work experience, to live in Hong Kong;
- (iv) To state clearly the factors to be considered when processing applications for residence in Hong Kong for investment under the General Employment Policy, to attract more entrepreneurs from overseas to establish their businesses in Hong Kong; and
- (v) To learn from overseas countries on the feasibility of setting up a talent list to attract high-quality talent to support Hong Kong's future development, in an efficient and effective manner.

The government anticipates that the introduction of above new schemes can seek the return of expertise, new technology and new capital investments from these new entrants and with their contributions, to steer the economy and the best overall interest of Hong Kong.

Unsuccessful CIES applicants, who possess the above-mentioned requirements under the new schemes introduced by the government, may find it easier to obtain the visa for staying and working in Hong Kong under the updated Admission Scheme for Mainland Talents and Professionals and the Quality Migrant Admission Scheme. Applicants who wish to invest in Hong Kong may carry out their investment under the General Employment Policy and their investment activities will not be affected by the new schemes.

BDO comment

This was clearly an unexpected move from the Hong Kong authorities which will impact both those individuals who were making an application via the CIES and those who may now look to move to Hong Kong.

Any qualifying applications still to be processed via CIES must be done so as soon as possible to ensure deadlines are met. Those who no longer qualify under the old rules should consider whether the new schemes being implemented will still allow them right of residence.

The changes to the rules should also see an influx of new talent to Hong Kong and companies taking advantage of these revisions should be aware of the application process.

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2015/2016 BUDGET HIGHLIGHTS

On 25 February 2015, the Financial Secretary delivered the eighth Budget Speech for 2015/16.

The estimated consolidated budget for 2014/15 is expected to be a surplus of HKD 63.8 billion, instead of an original forecast surplus of HKD 9.1 billion.

The 2014/15 estimated surplus is significantly higher than last year, and Hong Kong's fiscal reserves will reach HKD 819.5 billion by 31 March 2015.

The forecast for 2015/16 is a surplus of HKD 36.8 billion with estimated fiscal reserves of HKD 856.3 billion by 31 March 2016, representing 36.8% of GDP and equivalent to 23 months of government expenditure.

Despite last year's attempt to start gradually withdrawing sweeteners, the issue of giveaways is still the main concern for many to allay their burdens. Apart from typical sweeteners like tax rebates, waiver of rates, child allowance increase, extra allowance to CSSA/old age/disability, rental waiver in public housing; the Budget introduces short-term relief measures like waivers of license fees/vehicles examination fees for the catering/hotel/hawkers/travel agent/transport industries to help businesses hit by the occupy movement earlier. This year's sweeteners cost HKD 34 billion, compared to HKD 20 billion last year.

Hong Kong is famous for its simple and low tax system. But the price it is paying for it due to the ageing population and rapid changes of global fiscal policies is increasingly acute. There are repeated calls for broadening Hong Kong the tax base and to ensure its international competitiveness.

Only a very small portion of the working force is paying tax in Hong Kong: 40% of the working population pays salaries tax, 10% of registered corporations pay profits tax, the top 5% of payers of salaries tax and payers of profits tax generate 60% of salaries tax revenue and 80% of profits tax revenue respectively.

A consultation on the introduction of a Goods and Services Tax was conducted in 2006 and the community did not support the new tax. The Budget reinforced the need to explore again the feasibility of broadening the tax base.

The Budget has addressed the repeated calls to increase Hong Kong's competitiveness in attracting multinational conglomerates to establish their corporate treasury centres in Hong Kong to manage their global or regional treasury functions. Under the tax symmetry treatment of Section 16(2) of the Inland Revenue Ordinance (IRO), while interest income derived by Hong Kong in-house finance companies can be taxable as being income from the carrying on of money lending business in Hong Kong, the interest expense they paid to group companies (especially overseas companies) can be non-deductible. The IRO will be amended to allow, under certain conditions, interest deductions for corporate treasury centres and reduce profits tax for specified treasury activities by 50%.

To further enhance Hong Kong's competitiveness for developing it as a premier intellectual property (IP) hub providing high value-added IP services in the region, the Budget considers extending tax deduction for capital expenditure incurred on purchase of IP for more types of IP rights.

Currently, tax deduction of capital expenditure is allowed on the purchase of patent, rights to any know-how, copyrights, registered designs and registered trade-marks. There are also anti-avoidance provisions, for example, denying a deduction where the IP is used wholly or principally outside Hong Kong by a person other than the taxpayer. Many considered this anti-avoidance provision as unwarranted and not practical in that Hong Kong IP owners often contract with manufacturers outside Hong Kong to manufacture goods with the use of IP outside Hong Kong when the manufacturer affixes the mark to the goods ordered by the owner. Others considered the restrictions in allowing only "registered" trade mark or design as an unrealistic step to screen out those without genuine commercial value as it is quite feasible to register a valueless trade mark or design, but valuable trade mark or design may not be registered for various commercial reasons.

The related bill to extend the profits tax exemption for offshore funds to private equity funds will soon be tabled to the Legislative Council. Currently, profits tax exemption is not available to offshore funds transacting in shares of private companies to avoid non-residents dealing in underlying assets of a private company (such as landed property). While the 2013 Budget has mentioned to extend the profits tax exemption to include transactions in private companies which are incorporated or registered outside Hong Kong and do not hold any Hong Kong property nor carry out any business in Hong Kong, the exact content of the proposed bill is yet to be seen. Legislative proposals will also be formulated to provide legal framework for introducing an open-ended fund company structure.

IMF's May 2014 report acknowledged Hong Kong's financial sector is one of the largest and most developed in the world. As a responsible member of the international community, Hong Kong will step up efforts in combating cross-border tax evasion in accordance with the latest global standard. Consultation will be done with the financial service industry for introducing an amendment bill in 2016 to enact the requirement of financial institutions to report specified financial account information to the Inland Revenue Department on a regular basis.

BDO comment

Hong Kong continues to look at ways to make it attractive to new investment and align it more closely with the international business community. The 2015/16 Budget has started to address these issues and further changes are on the agenda.

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ITALY

ITALIAN STABILITY LAW 2015

On 23 December 2014, the Italian Parliament gave definitive approval to the Budget Law for 2015. Amongst the many new provisions, please see below for information with regards to those concerning employment and the labour market.

Social-Tax relief for new hirings

Tax relief measures have been adopted for companies that hire new people on open-ended contracts (excluding apprenticeship and domestic work contracts) during the period from 1 January 2015 to 31 December 2015.

This relief will be guaranteed for a period of up to 36 months and an amount of up to EUR 8,060 on an annual basis, and it will not affect INAIL insurance premiums.

In order to be able to benefit from this measure, the people hired must not be:

- Workers employed on an open-ended contract with any employer during the six month period preceding their hiring;
- Workers for whom the tax relief measure has already been taken previously in connection with an earlier open-ended hiring contract;
- People employed under an open-ended contract during the three-month period preceding the law coming into effect, either with the same employer or with subsidiaries or companies associated or connected with the same entity, whether directly or through intermediaries.

This facility cannot be combined with other exemptions or reductions in the rates provided for by the applicable regulations.

On the other hand, tax relief provisions for companies hiring on open-ended contracts workers who are unemployed, have been laid off on a temporary basis or have been drawing on the Cassa integrazione (Wages Guarantee Fund) for at least 24 months (as provided for by law 407/90), have been cancelled.

80 Euros bonus

The tax credit provision for income levels below EUR 24,000, the so-called "80 Euros bonus" has been confirmed on a definitive basis. It will add up to EUR 960/year.

IRAP

The ordinary 3.9% IRAP (regional tax on company's income) rate has been reinstated with retrospective effect from 1 January 2014.

Total deductibility of the cost of labour from the IRAP taxable base for workers employed on an open-ended contract has been introduced which is effective in 2015. Please note that this change is only relevant to for-profit companies, with not for profit entities being unaffected.

A tax credit for self-employed workers having no employees is provided at a flat rate of 10%.

Employee Severance Indemnity (TFR) in the pay-slip

On a trial basis, during the pay period from 1 March 2015 to 30 June 2018, private sector employees may request their employers to include quotas from their accumulated TFR in their monthly pay.

The TFR amounts paid on a monthly basis will be taxed according to the ordinary tax rates, instead of the more favourable separate taxation rates applied to end-of-contract indemnities.

BDO comment

These measures bring some welcome relief to employers and employees to help try and stimulate the labour market.

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SINGAPORE

2015 BUDGET

Tax rates in Singapore are increasing for higher earners with a marginal rate increase proposed in the 2015 Budget from 20% to 22% for YA 2017.

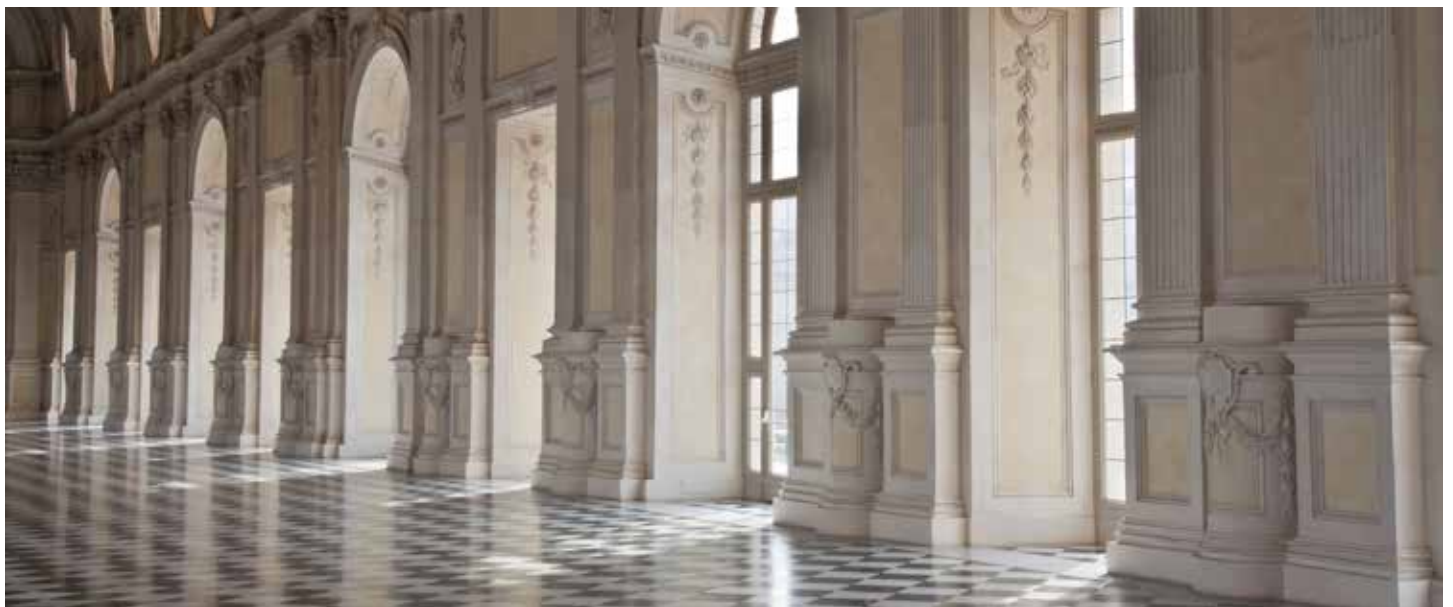
Additionally to celebrate Singapore's 50th jubilee year falling in 2015 there will be a personal tax rebate of 50% capped at SGD 1,000 per tax resident individual taxpayer.

BDO comment

Despite the rate increase Singapore remains a low tax jurisdiction in comparison with other international destinations. The rebate is a modest token of appreciation from the Singapore Government to all taxpayers – if only other tax authorities were as appreciative or efficient!

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SWEDEN

CONSULTANT OR EMPLOYEE – ACCORDING TO SWEDISH TAX RULES AND PRACTICE

Generally, the Swedish Tax Agency has a strict interpretation regarding client/consultant relationships versus employer/employee relationships and there is sometimes a thin line between the two.

The distinction is of significant financial importance since employer social security charges of 31.42% is payable by the client/employer on the gross reimbursement paid to the consultant should the Swedish Tax Agency be of the opinion that the relationship between the client and consultant is actually an employment relationship rather than a consultancy agreement.

The determination on the actual relationship is based on a number of factors and it is therefore important to look at every case independently.

The criteria below should be taken into consideration when determining if there is a consultant-client relationship or an employer-employee relationship:

- What are the terms of the contract between the consultant and the client?
- To what extent is the consultant dependent on the client, is it similar to an employer-employee relationship?
- Is the consultant more or less part of the client's business?
- Who has the control of the work that should be performed, who is managing the consultant and who has the authority to decide the working hours and where the work should be performed?
- Is there a possibility for the consultant to have a number of different clients at the same time or does the agreement between the parties restrict the consultant from taking on other clients?
- Who bears the financial risk?
- The length of the agreement between the parties.
- Who is responsible for bearing any expenses during the performance of work?
- Is the reimbursement for work dependent on the financial performance by the client?

It is important to look at the parties' actual relationship and the intent of the collaboration between the parties when determining if the consultant is independent or should be considered as an employee. For example, is there a possibility for the consultant to have a number of different clients at the same time or does the agreement between the parties prevent the consultant from taking on other clients? A consultant who performs work for only one client may be considered to be an employee as this implies that the consultant is dependent on the client.

The length of the agreement between the parties should also be taken into consideration when determining the parties' actual relationship, i.e. if the agreement states that the work relationship should be continuous for a longer period of time and the consultant does not have the possibility to work with other clients, the parties may be considered to be in an employment relationship.

A consultant could be considered to be part of the clients business if the consultant does not have the authority to decide when and how the work should be performed. If the client has full control of the work that should be performed, manages the consultant and has the authority to decide the working hours and where the work should be performed, this indicates that the consultant should be considered as an employee.

The relationship between the parties should also be characterised by how the risks are divided between the parties. If the client bears the full risk of the work performed, the client is most likely to be considered as an employer.

The Swedish Tax Agency looks at the whole relationship between the parties when determining if there is a consultant-client relationship or an employer-employee relationship. This implies that the client could be considered as an employer even if only one of the above criteria is fulfilled.

In December 2014 the Administrative Court of Appeal ruled in favour of the Swedish Tax Agency's interpretation of a consultant/client relationship and came to the conclusion that there was an actual employer/employee relationship. The ruling was based on the fact that the consultant was not considered to be independent from the client. One determining factor was the limitation for the consultant to provide consultancy services to the client's competitors. The outcome was that the client should pay full social security fees of 31.42% on the reimbursement paid to the consultant. Furthermore, penalty fees were imposed on the unpaid social security charges.

BDO comment

In summary, from a Swedish tax perspective it is difficult to argue that there is a client/consultancy relationship if the consultant is not truly independent from the client. All uncertain situations should be investigated in order to avoid penalty charges should the position be reviewed by the Swedish Tax Agency.

Furthermore, it is of importance for foreign companies who are considering using a consultant on the Swedish Market to take the above factors into consideration as an actual employer/employee relationship may result in the foreign company being considered to have a permanent establishment in Sweden. This would result in a full corporate tax liability and reporting requirements arising in Sweden, in respect of the business conducted in Sweden.

It should be noted that the above relates to the tax definition of the employer/employee status. It should be acknowledged that a separate evaluation can also be made from a labour law perspective and though similar the assessments may not be the same.



2015 BUDGET

The Swedish Budget recently proposed a number of changes but of more interest were some of the matters suggested that were not supported by the parliament. These include:

- Reducing the tax reduction on income from labour
- Limited enumeration of the lower threshold for state income tax
- Abolishment of reduced employer social security fees for employees under 26 years of age
- Special payroll tax for the elderly (above the age of 65)
- No right for deduction of administrative bank fees
- Changes in the RUT deduction, i.e. tax deduction for cost related to homework help is not abolished.

The government is also to revert with proposals for 2015 regarding:

- Changes concerning the reduction of employer social security fees for employees under the age of 26. The reduction should be abolished for people who reached the age of 25 years but the reduction will be increased for employees under the age of 23, so that only age pension fee of 10.21% on the gross income is to be paid by the employer (compared to 31.42% for people above the age of 23).

BDO comment

As always, companies and individuals need to keep up to date with changes in tax legislation arising from Budget announcements.

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SWITZERLAND

ADJUSTMENT OF THE EXPATRIATE ORDINANCE WITH EFFECT FROM 1 JANUARY 2016

In January 2015, the Swiss Federal Department of Finance (FDF) published a revised wording of the Expatriate Ordinance. This new version will become effective on 1 January 2016 and aims to promote public acceptance of these deductions, after two parliamentary motions had previously demanded to abolish this ordinance. It has been stated by some that the special deductions are only granted to a limited group of people and it is therefore doubtful if the current Expatriate Ordinance is in conformity with the Swiss Constitution.

The FDF decided to enforce an adjusted wording of the ordinance, which intends to be more precise regarding the eligibility of the employees who qualify as expatriates and concerning possible deductions.

The adjustment mainly affects the group of expatriates with special professional qualifications. Contrary to the previous wording, it is now required that the employee is effectively seconded from the foreign employer to Switzerland. This applies to both categories of expatriates, executives as well as specialists. Only in certain rare cases employees with a limited local contract can qualify as an expatriate. The authorities will only accept such cases if the employment is transferred within the group for a fixed period and the home country employer guarantees re-employment after the stay in Switzerland. It is therefore important to consider such a clause in the secondment agreement.

The terms executive and specialist are still not defined in a precise manner. Therefore we expect, that in practice the same principles will continue to apply as under the current rule. Today a general acceptance exists that an executive is a director (or an employee with similar senior function), is temporarily seconded because of a specific professional reason. Specialists are typically defined as employees who are seconded to Switzerland because of their specific particular professional qualifications. Their specific and unique skills are required for a defined project and typically not available everywhere.

In principle, the existing and so far practicable tax deductions remain the same. Nevertheless, the new wording has some important consequences regarding the deductibility of housing costs. The new ordinance clearly stipulates that a deduction is only possible if the expatriate keeps a dwelling for his personal use permanently available in the home country. If the apartment or house in the home country is (temporarily) rented out during the secondment to Switzerland, no housing deduction is possible in Switzerland. This is a significant change because, in the past, some cantons accepted housing deductions based on the difference between the cost of reasonable housing in Switzerland and the rental income from abroad.

In general, expatriates can additionally deduct all costs that are directly linked with their secondment to Switzerland provided that the avoidance of these costs is not feasible.

Expatriates who are seconded to Switzerland only for a very limited period and do not take up residency in Switzerland, in particular commuters, are generally allowed to deduct the following costs:

- Appropriate travel expense for the journey between the foreign domicile and Switzerland
- Reasonable housing costs in Switzerland, if the accommodation in the expatriate's home country is kept permanently available for personal use.

Expatriates who are seconded to Switzerland for a longer period and therefore move their residency to Switzerland are allowed to deduct the following costs:

- Relocation costs, if they are in direct connection with the assignment.
- Reasonable housing costs in Switzerland, if the accommodation in the expatriate's home country is kept permanently available for personal use.
- Private school tuition costs are deductible for children, with a foreign mother tongue attending a foreign language private school, if public schools cannot provide adequate tutoring in the child's native language. However, cost relating to food, transport and supervision before and after the classes are not deductible.

Individuals, who at the time of the entry into force of the revised Expatriate Ordinance qualified as expatriates, will benefit from a transitional period until the end of their assignment, which can last up to five years. However, for this group of employees the revised rules regarding the deductibility of costs will also apply.

BDO comment

We strongly advise employers to review existing contracts and policies as to whether they are in line with the new Expatriate Ordinance. Furthermore it is important to inform expatriates who might be affected by these changes. All new assignments to Switzerland should carefully be examined to determine whether and how the new Expatriate Ordinance will apply in each individual case from 1 January 2016 onwards.

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SPECIAL INSERT – INDIA

EMPLOYEE SECONDMENTS – TAXING BEYOND BORDERS

As foreign multi-national companies expand their operations globally, they are often required to send key people overseas. This special Indian insert considers the implications arising in the hands of foreign enterprises sending their employees to India.

Deputation/secondment arrangements

Generally, employees go to India on a deputation or a secondment. Deputation is usually for a temporary period, whereas a secondment is for a longer period of time.

In some cases, the expatriates maintain dual employment, i.e. while being employed with the Indian enterprise, the employment with the foreign enterprise is retained to safeguard certain social security and other benefits.

At the commencement of the assignment in India, ideally an agreement is entered into between two enterprises. The agreement would cover aspects such as roles and responsibilities of the employee, right of control, direction and supervision over the employee, risks and rewards of the work performed, payment of salary by the foreign enterprise, recharge/recovery thereof from the Indian enterprise, etc. A separate employee agreement/contract may be executed between the Indian enterprise and the expatriate.

Tax implications for the foreign enterprise

The deputation/secondment arrangements have tax implications for foreign enterprises in India. The tax implication for the foreign enterprise depends upon the arrangement between the enterprise and the employee, the roles and responsibilities of the employee, the enterprise exercising control and supervision, commercial arrangement for the services provided or the employee seconded etc.

As regards the commercial arrangement; the foreign enterprise may charge a service fee to the Indian enterprise for the activities to be performed by the expatriate in India. Alternatively, the foreign enterprise may recharge or recover actual salary paid by it to the expatriate (with or without mark-up) along with other benefits provided to the employee while in India. The question arises as to whether the payment received by the foreign enterprise would qualify as fees for technical services or business profits or mere reimbursement of the costs incurred by it. Also, it is necessary to review whether the presence of the expatriate in India triggers a permanent establishment (PE) of the foreign enterprise in India.

The determining factor for characterisation of income as business profits or fees for technical services and for ascertaining whether the foreign enterprise has a PE in India will be whether the arrangement constitutes a contract of service (deputation/secondment agreement) or a contract for service (service agreement). The question is, whether the services of the expatriate will be rendered in a contractual employment relationship or under a contract for service agreed between two enterprises.

Contract of service vs. contract for service

Generally, a person who is employed by another for a specific salary in consideration of performing specific duties is said to be under a contract of service. Conversely, if a person offers or provides services in consideration for a fee or service charge, it is considered a contract for service.

With a service agreement the expatriate continues to work under the control and supervision of the foreign enterprise. In a secondment arrangement the Indian enterprise may have control and supervision over the expatriate and may bear the associated risk and responsibilities. However, as the expatriate remains on the payroll of the foreign enterprise, enjoys the employment related rights arising from employment, has a lien on the employment with the foreign enterprise, the real challenge is to determine which enterprise (foreign or Indian) is the real employer.

Legal employer vs. real employer

Which enterprise should be considered as employer? Is it the enterprise with which the employee has an employment contract (legal relations) or should other aspects be considered as well? Various Courts and OECD Commentary have considered the following key guiding principles to determine the employment relationship. For example which entity:

- Has the authority to provide instructions regarding the manner of performance of work
- Controls and supervises the work (including review and appraisal)
- Puts in place the necessary tools and materials for the work at the individual's disposal
- Determines the number and qualifications of the individual performing the work
- Has the right to select the individual who will perform the work
- Bears the risks, costs and responsibilities of the work of employee
- Has the right to terminate the contractual arrangement or impose disciplinary sanctions related to the work of the individual
- Determines the holidays and work schedule of the individual.

The question of who is the real employer has been contested in various rulings. Having distinguished between the legal and economic employer (control over employee and risks of activities are borne by employer), some Courts have decided that the Indian entity is the real employer.

However, the Delhi High Court in the case of Centrica India Offshore held that overseas entity continues to be the real employer of the employee seconded to the Indian entity, after considering the following factors in relation to the employment contract/arrangement:

- The expatriates continued to retain right to participate in retirement and social security plans of the overseas entity (parent entity)
- The expatriates had no right to sue the Indian entity for recovery of salary
- The expatriates continued to have an employment relationship with the overseas entity and the right to terminate the employment vested with overseas entity
- Right to return to the original employment after completion of the assignment.

Also based on the above, the Delhi High Court had concluded that overseas entity had a Service PE in India.

It needs to be noted that the Supreme Court has rejected the Special Leave Petition filed by the taxpayer against the above decision of the Delhi High Court.

Permanent Establishment of the foreign enterprise

Taxation of the payments to (or attributable profits of) the foreign enterprise also depends on whether the foreign enterprise has presence in the form of a Permanent Establishment (PE) in India. In some cases, the presence of the seconded employee in India may itself constitute a PE for the foreign enterprise in India and thus requires consideration.

The clause of a Service PE contemplates 'furnishing of services' within the country by a foreign enterprise through its employees (or other personnel engaged by the enterprise) provided that the activities of that nature continue for more than a specified number of days.

Three broad tests emerge:

- (i) The employee of a foreign enterprise is present in India
- (ii) The foreign enterprise is furnishing services to another entity through its employees present in India
- (iii) Such activity must continue in India for periods aggregating to more than the specified number of days/months.

Employee of foreign enterprise is present in India

It becomes relevant to determine whether the seconded to India could be considered as an employee of the foreign enterprise. The principles mentioned above to determine the real employer are relevant here. The Supreme Court in the case of Morgan Stanley & Co observed that an employee of an overseas entity, when deputed to an Indian entity, does not become an employee of the Indian entity, thus the seconded person cannot be considered as an employee of the Indian entity. The Court observed that when the activities of a multinational enterprise entail it being responsible for the work of deputed employees and the employees continue to be on the payroll of the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service PE can emerge.

Similarly, the Delhi High Court in the case of Centrica India Offshore held that employees seconded to overseas group entities in India did not become employees of the Indian entity during the secondment period. The Court concluded that the overseas entity created a Service PE in India by virtue of rendering of services in India. Though the control and supervision rested with Centrica India and they bore all risks in relation to the work of the employees; there was no purported relationship between Centrica India and the deputed employees. The employees were entitled to participate in the overseas retirement and social security plans and other benefits. No powers were vested with Centrica India to terminate the ultimate contract between the overseas entities and the deputed employees. The real employer of the seconded employees continued to be the overseas entity concerned.

Recently, the Mumbai bench of the Appellate Tribunal in the case of Morgan Stanley International Inc relying on the Supreme Court judgment in the case of Morgan Stanley & Co (supra) and the Delhi High Court in the case of Centrica India Offshore held that if deputed employees continued to be on the payroll of the overseas entity or continued to have lien on jobs with overseas entities and are rendering service in India, a service PE will emerge.

Foreign enterprise furnishing services to another entity through its employees present in India

The Service PE clause contemplates that the foreign enterprise renders services to another enterprise through its employees present in India. Activities performed by employees of a foreign enterprise in India which do not result in providing services to another enterprise do not constitute a Service PE for the foreign enterprise in India.

In an Advance Ruling, the Authority rejected the argument of the Revenue and explained that in an ordinary connotation, the concept of 'furnishing of services' is a bilateral concept and necessarily requires the existence of at least two parties, service provider and service recipient. The Authority held that the taxpayer, merely organising a golf tournament which resulted in some income, was not in the business of the rendering of service. It also added that if it was assumed that the taxpayer was a 'service provider there was no recipient of services and hence the relevant clause of the Treaty would not apply.

In the case of Morgan Stanley & Co (supra) the Supreme Court analysed whether the stewardship activities would fall within the ambit of a Service PE. The Court considered that an overseas entity having world-wide operations is entitled to insist on quality control and confidentiality. In the instant case, stewardship activities involved briefing the staff of Indian entity to ensure that output meets the requirements of the overseas entity, with the objective of protecting interest of overseas entity. The stewards are not engaged in day to day management or in any specific service to be undertaken by the Indian entity. The stewardship activity is basically to protect the interest of the customer. The Court thus held that employees engaged in stewardship activities to protect the interest of the overseas entity in India would not constitute a Service PE.

Such activity must continue in India for specified periods

The activities of the employees of the foreign enterprise must continue for a period of more than the specified number of days. The treaties generally prescribe a period of 90/120/180 days.

There are issues and interpretations surrounding the counting of days, gaps in rendering services, services rendered over two financial years, etc.

Additionally, the Treaties may use different language and may thus have a different interpretation. Hence, one would need to examine the facts in great detail in light of the applicable Treaty before reaching any conclusion.

Taxability of the consideration received by the foreign enterprise

As mentioned earlier, the foreign enterprise may charge a fee or recharge the employment cost to the Indian entity. The characterisation of this charge as fees for technical services or business profits or pure reimbursement of salary costs has been a debatable issue.

Reimbursement of salary cost

If the arrangement constitutes a contract of service with the Indian enterprise, where the Indian enterprise is effectively the real employer of the seconded employee, the reimbursement of salary paid by the foreign enterprise to the employee does not give rise to any taxable income in the hands of the foreign enterprise.

The Bangalore bench of the Appellate Tribunal in a few cases examined situations where the Indian entity was held to be the real employer. In such cases, the Appellate Tribunal concluded that mere receipt of reimbursement of salary (which was already subjected to withholding in India) and other out of pocket expenses in relation to the seconded employee did not give rise to any income being taxable in India in the hands of the overseas entity. The Appellate Tribunal thus held that the Indian entity was not liable to withhold taxes while paying such reimbursements.

However, in cases of arrangements constituting a contract for service, the characterisation of a payment as FTS or business profits needs to be evaluated as the Indian entity would be under an obligation to withhold taxes.

Taxability as Fees for Technical Services ('FTS')

To evaluate whether a payment is FTS, the payment has to be a consideration for rendering managerial, technical or consultancy services.

One view is that where the charge to the Indian entity is mere recovery of salary paid to the employees, it cannot be treated as 'consideration' for the services and cannot be treated as FTS. Where secondment of employees has been considered to be a contract for services, it can fall within the expression rendering of services through technical or other personnel and thus payment can qualify as FTS.

The Delhi High Court in the case of Centrica India Offshore (supra) held that Centrica India and seconded employees were to oversee the quality of service rendered by vendors to overseas entities, which would fall within the scope of technical or consultancy services. It also satisfied the make available condition under the India/Canada tax treaty.

In the application by Verizon Data Services before the Authority for Advance Rulings, the overseas entity was held to be the real employer. In this case, it was held that:

- The services in India were performed by the employees on behalf of the overseas entity
- The nature of income in the hands of the overseas entity was for rendering services
- The amount which accrues and arises to the employees is by virtue of their employment with overseas entity
- The application of income by overseas entity while making payment of salaries to its employees has nothing to do with its accrual.

In light of the above, the AAR concluded that the payment made to the overseas entity would qualify as FTS subject to withholding as per the tax treaty.

Taxability as business profits

If the foreign enterprise carries on business in India through a PE and the FTS is effectively connected with such a PE they will be considered Business Profits; thus profits arising from the services effectively connected with the PE are subject to tax in India.

The Mumbai bench of the Appellate Tribunal in the case of Morgan Stanley International Inc, noted that the Delhi High Court in the case of Centrica India Offshore (supra) did not have an opportunity to discuss Article 12(6) of the tax treaty. After concluding that the income from technical services was effectively connected with the Service PE of the overseas entity in India, the Appellate Tribunal held that the payment received by the overseas entity will be considered business profits. The Appellate Tribunal further held that while computing the income of the overseas entity, salary cost incurred by the entity is to be allowed as deduction against the payment received from the Indian entity.

BDO comment

With the recent decisions by the Delhi High Court in the case of Centrica India Offshore followed by the decision of the Mumbai bench of Appellate Tribunal in the case of Morgan Stanley International Inc, it is certain that deputation/secondment arrangements are going to be minutely scrutinised by the Indian Revenue authorities.

With the intricacies revolving around taxability of deputation/secondment arrangements, it is important that they are carefully considered and appropriately structured. It would also be in the interest of the tax payers to document the terms of the arrangement.

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CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 17 March 2015.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Euro (EUR)	1.00000	1.05391
Hong Kong Dollar (HKD)	0.12216	0.12877
Singapore Dollar (SGD)	0.68209	0.71897

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