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Danish Tax and VAT News in English

International hiring-out of labour tax - foreign truck drivers

In a recent ruling, the Danish National Tax Tribunal determined that a Danish haulage company was obligated to withhold taxes from remuneration paid to foreign resident truck drivers for work performed in Denmark.

By Anders Kiærskou, aek@bdo.dk

As described in the February 2015 issue of tax:watch, the Danish tax authorities have generally relaxed their initially very rigid interpretation of the Danish tax rules concerning international hiring-out of labour subsequent to the issue of new general guidelines last summer. These guidelines where issued subsequent to guidelines from October 2013 specifically targeted the interpretation of the rules in relation to haulage contractors.

Recalling the scope of the rules, Danish businesses are required to withhold international hiring-out of labour tax at a rate of 35.6 pct. from payments to foreign businesses when the services rendered in Denmark by a foreign business constitutes an "integral part of the Danish business".

In situations where the rules apply, the Danish business is liable for payment of the international hiring-out of labour tax if no tax has been withheld at source.

In spite of the relaxed interpretation, a recent ruling (SKM2015.209.LSR) by the National Tax Tribunal shows that the rules concerning international hiring-out of labour still applies – also in relation to haulage contractors - under certain conditions.

The case concerned a Danish-based international haulage company with activities in most of Europe having approximately 300 trucks registered in Denmark.

The company engaged approximately 700 drivers of different nationalities. However, they were all formally employed with a foreign subsidiary from which they received their salary. The Danish company paid the non-Danish subsidiary for utilising the truck drivers.

The issue was whether the Danish company was obligated to withhold taxes on the part of the remuneration paid to the subsidiary which could be allocated to the transport operations carried out in Denmark. This was imposed by the Danish tax authorities with effect from 20 September 2012.

The Danish tax authorities argued that the situation was governed by the Danish tax rules concerning international hiring-out of labour and that the foreign truck drivers were liable to Danish tax on their salary for work performed in Denmark from day one. Inter alia, the Danish tax authorities stated that there was a significant correlation between the remuneration paid by the Danish company to the foreign subsidiary and the truck drivers' wages.

The Danish company argued that the Danish tax rules concerning international hiring-out of

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labour only applied if utilisation of truck drivers constituted an integral part of the business of the Danish company. Arguably, this was not the case as the group had been divided into different functions since 2004. Consequently, transport operations were handled by the foreign subsidiary.

Further, the Danish company stated that the foreign subsidiary by the district court as well as by the labour court had been considered an independent employer in relation to the foreign drivers in respect of criminal and labour law.

However, the National Tax Tribunal ruled in favour of the Danish tax authorities. The ruling stated that the core activity of the Danish company was to transport goods. Hence, truck drivers were a necessity. The transports simply could not be completed without drivers and employing truck drivers for the transports therefore constituted an integral part of the activity of the Danish company. The fact that the foreign subsidiary was considered employer in other contexts was – in the opinion of the National Tax Tribunal - irrelevant for the tax assessment.

An international anti-abuse clause has been adopted in DK tax law

In a new bill passed by the Danish parliament, an international anti-abuse clause has been adopted in Danish tax law. The clause takes effect from 1 May 2015.

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As described in the March 2015 issue of tax:watch, the Danish government recently presented a draft bill seeking to implement an international anti-abuse clause in Danish tax law. On 21 April 2015, the bill was passed by the Danish parliament.

Based on recently introduced EU legislation, the international anti-abuse clause will prevent tax payers from benefitting from Danish double tax treaties and several EU-directives concerning international taxation with respect of company reorganizations, payments of dividends, interests and royalties if the main purpose or one of the main purposes of the arrangement is to achieve a tax advantage contrary to the purpose of the EU-directive or double tax treaty.

Concern has been expressed by many that the international anti-abuse clause in the draft bill was phrased quite vaguely making it uncertain to what extent, the clause will be applied by the Danish tax authorities. Neither the comments to the draft bill provides much guidance.

Any hope that the legislative process in the Danish parliament would shed some much appreciated light on the scope of the anti-abuse clause was hardly fulfilled in spite of several efforts by industry associations, law firms etc. to address the issue and make the Danish Minister of Taxation elaborate on the application of the clause.

Unfortunately, rule of law does not seem to be very important to the Danish government when it comes to taxation and it remains to be seen how the international anti-abuse clause will be applied by the Danish tax authorities and subsequently by the courts. However, this will likely take years leaving tax payers with considerable uncertainty in the meantime.

Nevertheless, the bill adds further uncertainty by amending the rules concerning binding rulings issued by the Danish tax authorities.

According to the bill, a binding ruling issued on 1 July 2015 or later concerning the value of an asset shall only bind the Danish tax authorities for 6 months. Further, a binding ruling on this issue shall not bind the Danish tax authorities if it can be substantiated - based on a subsequent sale of the asset or from the size of return from the asset - that the actual value of the asset at the time the binding ruling was issued diverged at least 30 pct. and at least DKK 1,000,000 from the value in the binding ruling.