Brexit may trigger US withholding tax on payments to Danish companies after 31 January 2020

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When the UK leaves the EU on 31 January 2020, some Danish companies in groups including UK companies may experience that payments received from the US are subject to US withholding tax.

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Some Danish companies in groups including UK companies may not be able to comply with the provisions of the double tax agreement between Denmark and the US concerning limitation on benefits based on the owners being resident in the EU, once the UK has left the EU.

Consequently, payments received by such Danish companies from payers in the US may be subject to US withholding tax at rates up to 30 pct.

Background

When a Danish company is to receive a payment from a payer in the US, the company will often be asked to submit a signed US form W-8BEN-E to the payer in the US.

Thus, the US payer can either completely avoid withholding tax on the payment or withhold tax at a lower rate.

On the form, the Danish company must, among other things, tick one of several possible provisions or tests of the double tax agreement between Denmark and the US according to which the company adheres.

Adhering to one of the tests enables the company to benefit from the double tax agreement.

According to one test, it is a condition that the company's owners are resident in the EU.

When the UK leaves the EU on 31 January 2020, the US is no longer required to consider the UK a part of the EU, although many EU rules are expected to continue to apply to the UK for a transitional period until the end of 2020.

Consequently, some Danish companies, which are part of groups including UK companies, no longer pass the test and may therefore not benefit from the double tax agreement between Denmark and the US.

As a result, payments from the US may be subject to US withholding tax.

Danish companies in groups including UK companies, which have previously submitted a form W-8BEN-E to a payer in the US and expect to receive additional payments from the same payer in the US, should check if the form is still valid after 31 January 2020.

CONTENT

Owning a home in Denmark – When do you become a tax resident?

A recently published ruling by the National Tax Board shows that not all work performed in Denmark triggers tax residence even though you own a home in Denmark. However, the rules can be difficult to navigate.

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Due to the high Danish tax rates, foreigners and Danish citizens living abroad are naturally often reluctant to become residents in Denmark for tax purposes. However, avoiding this may be tricky for non-residents acquiring a home in Denmark without taken up residence here at the same time - depending on the activities engaged in while staying in Denmark.

Unfortunately, the rules determining when individuals become resident in Denmark for tax purposes under these circumstances seem complicated for many and the issue has in the past let to several high-profile cases involving professional athletes, musicians and fashion models.

The question of tax residence often arises when a home in Denmark is acquired by an individual who remains – perhaps for the time being – residing abroad.

In such cases, tax residence can be triggered unintentionally depending on the amount of time spent in Denmark and the kind of activities engaged in while staying in Denmark.

Generally, owning a home in Denmark severely limits work-related activities that can be performed in Denmark without triggering tax residence. However, holidays can be spent more extensively in Denmark without triggering tax residence.

According to current practice, up to 10 workdays in Denmark in any 12-month period can be accepted without triggering tax residence when owning a home in Denmark. As a main rule, more than 10 workdays in any 12-month period will trigger tax residence.

There are, however, severe restrictions on the kind of activities that can be performed in Denmark without triggering tax residence. Ordinary work must be isolated incidents of a sporadic nature and work pertaining specifically to Denmark is not allowed. Therefore, work will trigger tax residence if it is of a continuous, regular nature. Work during longer stays in Denmark is not allowed because the stay will – in the opinion of the Danish tax authorities – loose its nature of holiday.

In a recently published binding ruling, the National Tax Board allowed a professional athlete who contemplated acquiring a home in Denmark to participate in training camps and matches in Denmark and abroad for the national team 4-6 times per year of approx. one week's duration without becoming resident in Denmark for tax purposes. Simultaneously, the athlete would continue to be employed by and play abroad for a foreign team.

The ruling is in line with a similar ruling from 2015 and it may be useful for professional athletes and other individuals where similar arguments about the nature of the activities performed in Denmark can be made.

Because of the large number of workdays allowed and the nature of the work performed in Denmark, the ruling is quite specific and as such it may not be a precedent ruling for many others.

The case serves – as so many before it - to demonstrate the complexity of the rules regarding tax residence. Foreigners and Danish citizens living abroad should be aware of these rules when acquiring a home in Denmark and seek professional advice in order to avoid unpleasant surprises.