Work for nursery garden was not international hiring-out of labour

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Contrary to other recent rulings and guidelines issued by the Danish tax authorities, in a recent case, the National Tax Tribunal ruled that work for a Danish nursery garden was not international hiring-out of labour.

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The case concerned a non-Danish subcontractor's work in Denmark for a Danish nursery garden. Among other things, the work involved grafting of roses.

The National Tax Tribunal ruled that the Danish nursery garden's agreement with the non-Danish subcontractor was not covered by the Danish tax rules on international hiring-out of labour.

The ruling was based on the assumptions that the work, which was predominantly carried out during the month of August, was of a specialist nature requiring experienced workers. A supervisor of the subcontractor was present during the work, and the supervisor kept records of the performed work. He was responsible for the work and partial payments were withheld in order to cover potential compensation claims.

The assistance had been provided for a number of years, and it was the only way to carry out grafting of the many plants. The subcontractor brought tools, and the Danish nursery garden did not instruct the workers. The expense of the workers was only a proportionate part of the total costs of the business.

Under these assumptions, the National Tax Tribunal ruled that the work was not international hiring-out of labour. Consequently, the Danish nursery garden was not held liable for omitting withholding of taxes when paying the non-Danish subcontractor.

One dissenting member of the National Tax Tribunal ruled in favour of deeming the contract international hiring-out of labour thereby following other recent rulings concerning work performed by non-Danish subcontractors for Danish nursery gardens.

The ruling shows that cases concerning international hiring-out of labour are determined by individual assessments of a multitude of specific circumstances in each case.

Background

The Danish tax rules on international hiring-out of labour stipulate that Danish businesses are obligated to withhold Danish taxes at a level of 35.6 pct. when paying non-Danish subcontractors according to contracts that are deemed international hiring-out of labour by the Danish tax authorities. The rules apply to all kinds of businesses.

The withholding obligation comprises remuneration obtained by employees of non-Danish subcontractors for work performed in Denmark. In lack of information hereof, Danish

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businesses are required to withhold taxes based on all payments to non-Danish subcontractors.

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

Following a bill adopted by the Danish parliament in 2012 that tightened the rules considerably, contracts between Danish businesses and non-Danish subcontractors concerning work performed in Denmark became subject to the rules on international hiring-out of labour when the work performed in Denmark by the non-Danish subcontractor constituted an "integral part" of the Danish business.

According to the Danish tax authorities, this was usually the case and it proved very difficult to avoid pursuant to the administrative practice that developed subsequent to the tightening of the rules in 2012.

However, much political pressure was exerted by the Danish business community ultimately resulting in new guidelines being published by the Danish tax authorities in 2014 promising a relaxation of the initial very rigid interpretation of the rules concerning international hiring-out of labour.

Nevertheless, according to the guidelines from 2014, work performed by non-Danish subcontractors for Danish nursery gardens was still likely to be deemed international hiring-out of labour based on the notion that such work requires few skills, little instruction of the workers, simple tools and limited responsibility and risk for the non-Danish subcontractors.

In accordance with the guidelines from 2014, a few subsequently publicised rulings by the Danish tax authorities deemed work for Danish nursery gardens performed by non-Danish subcontractor to be international hiring-out of labour. However, the case described above differed from these cases.

Tightened rules on transfer pricing documentation

Insufficient transfer pricing documentation can result in significant fines.

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The Danish rules on transfer pricing documentation from 2006 has been replaced by new rules, which entails significant changes in the requirements for the preparation of transfer pricing documentation.

It is necessary to compile an entirely new transfer pricing documentation, and the company cannot rely simply on updating the transfer pricing documentation of previous years, that has been prepared according to the old transfer pricing documentation rules.

Inadequate transfer pricing documentation can result in significant fines in the order of at least DKK 250,000.

Depending on the size of the business, it may be very comprehensive to prepare transfer pricing documentation according to the new rules. The documentation must be prepared in accordance with the new rules for income years commencing January 1, 2017 or later, and the documentation must be available no later than the deadline for filing the tax return, which for companies with a financial year following the calendar year is July 1, 2018.

Work should begin now to ensure that the business complies with the rules and avoids fines.