Consultancy services were not international hiring-out of labour

TAX:WATCH NO. 9
28-09-2018

In a recent case, the National Tax Tribunal ruled in favour of the taxpayer that subcontracted consultancy services were not international hiring-out of labour. Thereby, the National Tax Board's decision on the matter was reversed.

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The case concerned a non-Danish subcontractor's work in Denmark for a Danish consultancy business.

The National Tax Tribunal ruled that the Danish consultancy business' 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 subcontracted consultancy services comprised an area of expertise not covered by the Danish consultancy business. Hence, the Danish consultancy business was unable to render the subcontracted services on its own.

The services rendered by the subcontractor were clearly defined and separated from the consultancy services rendered by the Danish consultancy business, the subcontracted services were outside the normal scope of operation of the Danish consultancy business, and the subcontractor was subject to independent economic liability.

Under these conditions, the National Tax Tribunal ruled that the subcontracted services were not international hiring-out of labour, as the work was not an integral part of the Danish consultancy business.

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

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 earned by employees of non-Danish subcontractors for work performed in Denmark. In lack of information hereof, Danish 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.

CONTENT

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 after 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.

The ruling of the National Tax Tribunal in the case described above likely reflects this, where as the reversed decision of the National Tax Board was made before the guidelines were issued in 2014.

The tax minister appeals a high-stake TP case to the Supreme Court

Despite being defeated in a high-stake TP case before the National Tax Tribunal and subsequently the High Court, surprisingly, the tax minister has appealed to the Supreme Court.

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As described in the July 2018 issue of tax:watch, earlier this year, the High Court ruled in a high-stake transfer pricing case initiated by the tax minister.

The High Court clearly ruled in favour of the taxpayer as did the National Tax Tribunal before it.

The case primarily concerned, whether the fact that a Danish company had not properly and timely prepared documentation of its intra-group transactions, gave the Danish tax authorities the right to estimate the taxable income of the company.

In other respects, the case concerned the issue of, whether the Danish company had received a suitable intra-group payment for its marketing of the group's products in Denmark. The Danish tax authorities did not concur. Consequently, the company's taxable income for several years was increased by a total of more than DKK 300,000,000.

The question of the consequences of lack of timely prepared, adequate transfer pricing documentation is important to many companies.

Consequently, the ruling of the Supreme Court will be met with considerable interest.

The fact that the tax minister chose to appeal the ruling of the High Court to the Supreme Court after being clearly defeated twice, shows that the case is considered of utmost importance to the Danish tax authorities.

Once the Supreme Court has ruled, the case will likely have been ongoing for a total of more than 10 years.