TAX:WATCH
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The Danish tax rules on international hiring-out of labour still lack predictability

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A recent ruling by the Danish National Tax Board serves to show that caution should still be exercised when non-Danish subcontractors conclude contracts with Danish businesses to perform work in Denmark.

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The Danish tax rules on international hiring-out of labour and the development of administrative practice in relation to these rules have frequently been a topic of discussion in tax:watch and in other tax related publications in recent years.

The main reason that these rules have attracted considerable attention is the ever-changing administrative practice of the Danish tax authorities and the following uncertainty associated with interpreting the rules.

The administrative practice subsequent to the publishing of guidelines by the Danish tax authorities in 2014 promising a less rigid interpretation of the rules did, however, seem to settle at a more predictable level where the word of the law seemed to be twisted less than previously when the Danish tax authorities interpreted the rules.

However, a recent ruling by the National Tax Board serves to show that caution should still be exercised when non-Danish subcontractors conclude contracts with Danish businesses to perform work in Denmark.

The ruling concerned seasonal work performed in Denmark by non-Danish subcontractors for a Danish nursery garden. Based on an assessment of the intended contractual terms, it seems natural to conclude that this would not constitute international hiring-out of labour. For example, the Danish business did not employ workers able to perform the same kind of work. Further, economic risk was associated with the contract for the non-Danish subcontractors depending on their performance. However, the National Tax Board concluded otherwise.

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

CONTENT

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.

Tax residency for foreign students

A new administrative practice adopted by the Danish tax authorities mean that it will be easier for foreign students to stay in Denmark for longer periods of time without becoming resident in Denmark for tax purposes.

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A fundamental part of determining the Danish tax position of an individual coming to Denmark is to assess whether the individual becomes resident in Denmark for tax purposes. Being resident in Denmark for tax purposes implies that an individual is subject to Danish taxes on his worldwide income according to Danish national tax law.

An individual who is not resident in Denmark for tax purposes is only taxed in Denmark, if he obtains certain types of income stemming from Danish sources. For example, an individual is taxed as a non-resident on salary for work performed in Denmark for a Danish employer or on rental income from real property located in Denmark.

Tax residency is associated with having a home available in Denmark combined with taking up residency here. Danish tax residency can also be induced by a stay in Denmark lasting at least 6 consecutive months including shorter trips abroad for holiday purposes etc. even though the individual does not have a home available in Denmark – i.e. if the individual stays at hotels etc. in Denmark.

A special rule applies for foreign students and tourists allowing them to stay in Denmark for up to a total of 365 days within any 2-year period without becoming resident in Denmark for tax purposes provided that they continue to be resident for tax purposes in their home country and provided that they do not work as self-employed in Denmark during their stay here.

So far, this rule has only been applied to individuals without a home in Denmark. However, in a recent ruling by the National Tax Board, it was determined that the application of the rule should be extended to individuals with a home in Denmark. Otherwise, the scope of the rule is very limited as most individuals staying in Denmark for up to 365 days within a 2-year period will likely acquire a home in Denmark.