Newsletter – special issue for secondment cases
New withholding tax obligations & VAT

Belgian withholding tax obligations

April 27, 2020

In a previous newsletter, we have drawn the attention to new legal provisions according to which any Belgian taxpayer subject to Belgian company income taxation, Belgian individual income taxation, or Belgian non-resident income taxation will be fictively considered as having paid or attributed remunerations paid by a related foreign company to an employee who performs professional activities to the benefit of the Belgian taxpayer.

In an administrative circular dated 7 April 2020, the Belgian tax authorities have provided guidance on the scope of application of the above-mentioned fiction.

According to the Belgian tax authorities, it is not necessary that the employee has an employment contract with the Belgian taxpayer subject to Belgian income taxation. It is necessary and sufficient that the remunerations relate to professional activities falling within the daily activities of the Belgian taxpayer as set out in its bylaws. The fiction may therefore apply to remunerations paid in accordance with a secondment contract.

This position is in clear contradiction with the *ratio legis* of the fiction, as set forth in the *travaux préparatoires* of the law. Nevertheless, it does generate new withholding tax obligations – and hence individual tax form (« Fiche 281.10 » or « Fiche 281.20 ») obligations – within international groups of companies.

Should this new position be applied as it stands by the Belgian tax authorities, we recommend to do a case-by-case study and, more particularly, to look at the intra-group allocation of salary costs as well as re-invoicing methods.

We are currently in contact with the Belgian tax authorities to get confirmation of their interpretation.

Secondment of staff: The Court of Justice of the European Union takes a position on VAT matters

April 27, 2020

According to a judgement published on March 11, the Court of Justice of the European Union confirmed that the re-invoicing of the costs of an employee that a company places at the disposal of one of its subsidiaries in capacity of “manager” has to be considered as a transaction subject to VAT.

In accordance with the VAT legislation, the secondment of a director to a subsidiary in return for payment of an amount of money is considered to be a legal relationship in which reciprocal services are exchanged. The Court consequently states that this transaction is taxable from a VAT perspective, first, even if local VAT or local tax legislation might suggest a different rule

and, second, even if the amount of the amount paid is equal to, greater than or less than the costs incurred.

Limited to the request of the applicant, the Court does not rule on the question of the retrocession of remuneration of a member of the boards of directors. This is the case when, for example, an individual is appointed director in another company or subsidiary. Although similar in appearance, the situation is nevertheless (totally) different since the legal relationship is no longer between two companies but between an individual and a company. The retrocession of the remuneration of the members of the boards of directors would therefore not be subject to VAT, considering this transaction as outside the VAT scope. Based on the legal doctrine, arguments exist to defend the position that such a retrocession is not subject to VAT.

Furthermore, even if the question is not covered by the judgment either, the Court seems to defend *de facto* the existence of fixed establishment for subsidiaries and, potentially, for foreign branches. In other words, such entities should have their own existence from a VAT perspective in the countries where they are located.

In conclusion, this judgment, which is by no means insignificant, suggests important consequences in terms of optimization and more particularly in terms of cash flow. On the one hand, the secondment of a person within a subsidiary, in an appropriate manner, could make it possible to avoid pre-financing VAT by considering this transaction outside the scope of the tax. On the other hand, the existence of a permanent establishment abroad could also avoid pre-financing of VAT on cross-border transactions.

As with any optimization measure, a study of the context and the situation in each individual case is necessary to define as accurately as possible the advantage which the company could enjoy.
We therefore remain at your disposal to foresee any measure that could be valuable to your company's cash flow.

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