Global Taxation Update

BELGIUM

What does 'Temporary' Mean when Applying for Belgian Special Tax Status for Foreign Executives?

In Belgium, qualifying foreign individuals can benefit from a special tax status for foreign executives. In order to apply the special tax status, an official request needs to be submitted to the Belgian tax authorities. When the expat status is granted, the individual is automatically considered as a non-resident of Belgium and can claim two tax deductions:

- Allowances considered to be a reimbursement of costs incurred on behalf of the employer are treated as tax free, limited to either 11,250 EUR or 29,750 EUR per year;
- Income relating to foreign activities, based on business days spent abroad, qualify for a travel exclusion.

To be eligible for the special expat status, the foreign executive as well as the employer/company needs to meet certain conditions. The employer (Belgian branch or company) needs to be part of an international group. The individual concerned must not have Belgian nationality, must have kept the centre of their financial, economic and social interests in their country of origin and the employment in Belgium must be temporary.

In the past the notion of temporary was not defined and once the special tax status was granted, the Belgian tax authorities rarely performed tax audits to verify whether the conditions were still being met. Recently, however, the tax authorities announced that with immediate effect foreign executives who benefit from the special tax status will be systematically audited once their presence in Belgium exceeds 10 years.

For foreign executives who have been present in Belgium between 10 and 20 years, all facts and circumstances will be taken into account to determine whether the employment in Belgium can still qualify as temporary and whether the foreign executive has maintained the centre of their social, personal, financial and economic interests outside Belgium. If the Belgian tax authorities determine that the conditions are no longer met then the expat status will no longer apply.

Where the foreign executive has been present in Belgium for more than 20 years, the special expat status will be denied without any further investigation.

BDO comment

Do review your assignees to Belgium to see whether they continue to qualify for the tax breaks and be prepared for questions from the Belgian authorities for those who have been present in Belgium for more than 10 years as more regular tax audits will be performed.

Reform of Belgium Government Impacts Taxation of Non-Residents with Belgian Source Income

Since its creation, Belgium has evolved into a complex government structure with a Federal level, 3 communities (Flemish, French and German speaking community) and 3 regions (Flanders, Wallonia and the Capital Region of Brussels). Despite several 'reforms' to date, individual income tax has remained almost exclusively a federal issue.

The sixth reform however, has now changed this. Entering into force on 1 January 2014, the individual income tax for residents of Belgium has been largely transferred by the Federal Government to the three regional governments. They are now authorised to determine which fiscal benefits, reductions to the tax rates and credits Belgian residents are entitled to.

Although the taxation of non-residents in Belgium principally remains a strictly federally organised concept, the transfer of competencies does impact those non-residents who are (partly) taxable in Belgium, as the fiscal benefits, reductions and credits they are entitled to will in future be determined by the region they will be deemed to earn the most income in. This will be determined by a number of factors (e.g. where they normally work, if this cannot be determined, where they receive their instructions from, or the amount of days physically worked and finally where the seat of their employer is). This new aspect of the taxation of non-residents already applies to income received during 2013 (assessment year 2014).

Before the reform, four categories of 'non-residents' existed within Belgian tax legislation:

- Non-residents with a habitual abode in Belgium ;
- Non-residents from within the EEA who do not have an abode in Belgium but who earned more than 75% of their income in Belgium ;
- Non-residents from outside the EEA who do not have an abode in Belgium but who earned more than 75% of their income in Belgium ;
- Other non-residents who do not qualify for any of the categories above.

The first category has been removed from the Belgian legislation with respect to the taxation of non-residents from 1 January 2014. Only the last three categories remain in force and only the category of non-residents from within the EEA who do not have an abode in Belgium but who earned more than 75% of their income in Belgium will continue to be entitled to the (now) regional fiscal benefits and credits available to Belgian residents.

As most of the non-residents with a habitual abode in Belgium are actually expats who have been granted the benefits of the Belgian expatriate regime (and are therefore considered to be non-residents only taxable on their income sourced in Belgium for fiscal purposes), this change in legislation will primarily have an impact on this category of people living and working in Belgium.

Those of non EEA-origin will lose all rights to the regional fiscal benefits and credits.

Those of EEA-origin may also be impacted, as one of the benefits the Belgian expatriate regime provides, is the so called foreign travel exclusion. This means that any and all days spent outside of Belgium for professional purposes are not taxable in Belgium. As soon as the percentage of time worked outside of Belgian exceeds 25% the non-residents of EEA origin will lose all entitlement to the regional fiscal benefits, reductions and credits.

For expatriates working in Belgium under a tax equalisation policy, the change in legislation will result in an additional cost to be borne by their employer. Non-residents on a gross based salary will see their net income decrease.

BDO comment

Again, do review assignees to Belgium to see how they will be impacted by these government reforms.

Reporting of Foreign Bank Accounts to the National Bank of Belgium (NBB) is now Mandatory

For a number of years Belgian resident taxpayers, whether Belgian nationals or not, have been obliged to indicate in their annual income tax return whether they own bank accounts abroad.

The Belgian Government recently voted to change the current legislation. On 1 April 2014, the practical arrangements regarding the mandatory reporting of foreign bank accounts to the National Bank of Belgium (NBB) were determined.

As of 1 November 2014, each Belgian resident taxpayer who indicates in their income tax return that they are the holder of one or more foreign bank accounts will receive a request from the Belgian tax authorities to report the details of their foreign bank account(s) to the NBB.

For each foreign bank account reported in the income tax returns over the years of income of 2011 through 2013, the following information will have to be sent to the NBB:

(1) The account number ;
(2) The name of the bank or financial institution ; and
(3) The country where the bank or financial institution is situated.

Belgian resident taxpayers with foreign bank accounts will have a period of two months as of the third business day following the date on which the request was sent, to respond to the request (i.e. at the earliest the first replies will have to be submitted by 31 December 2014).

It will be possible to report foreign bank accounts to the NBB either electronically or on paper by using a special form. The precise formalities will be communicated at a later time through a Royal Decree.

As of assessment year 2015 (reporting of income of 2014), the Belgian resident tax return form will include a box, which will have to be ticked when the details of the foreign bank accounts have been reported to the NBB.

BDO comment

It is clear that many of the expatriates living and working in Belgium will be affected by this additional reporting obligation as many of them have kept bank accounts in their country of origin. Expatriates benefiting from the special tax regime for foreign executives and specialists are not obliged to comply with these new formalities since they are considered non-residents of Belgium for tax purposes.

Do note that increasingly tax authorities are enquiring about the existence of funds outside the relevant country. Automatic exchange of information between authorities is becoming far more prevalent and failure to report existence of funds/income is likely to lead to investigation/audit.

INDIA

Secondees and Potential Creation of a Permanent Establishment (P/E)

The Delhi High Court recently dismissed a taxpayer's claims that seconded employees were 'economically' employed by the Indian affiliate company, thereby avoiding the creation of a Service Permanent Establishment (P/E) for their UK and Canadian employers and instead ruled that the seconded employees continued to be employees of the UK and Canadian entities. Since the seconding employers were receiving payments from the Indian affiliate company for the services performed in India, it was ruled that a Service P/E was created, which resulted in these payments being taxable in India and liable to Indian tax withholding.

The case did not address the tax position of the seconded employees but it is likely that relief under the relevant treaty will not be available as the seconding employers have established a P/E in India.

BDO comment

The structure of employee secondments to India needs to be carefully considered, with close attention paid to the interaction between the seconding employer and the receiving Indian entity. The structure and interaction between the seconding and receiving entities will determine not only whether the presence of the seconded employee will create a P/E but also whether or not the seconded employee will become subject to tax in India with the resultant Indian wage tax withholding requirements. The Indian tax authorities do not always apply the rules consistently, which makes this whole area even more confusing.

When sending employees to India, please be aware that it is very dangerous to take the Double Taxation Agreement at face value and assume that the treaty conditions are met just because the seconded employee has a home country contract and will spend 183 days or less in India. Employers also need to consider whether the presence of the seconded employee will create a P/E as it is very easy for the unwary to establish a P/E in India. Having the right paperwork clearly documenting the arrangements between the seconding employer, the seconded employee and the receiving Indian entity is vital.

NETHERLANDS

Dutch Expat Ruling (30% ruling) – is the 150 Kilometre Condition In Line with EU-law?

From 2012, there had been a change in the legislation with regard to the 30% ruling. Employees living (for two-thirds of a 24 month period before the start of the activities in the Netherlands) within 150 km from the Dutch border were no longer entitled to the ruling.

The question arose as to whether this condition was in line with EU regulations. The Dutch Supreme Court submitted this question to the EU Court and recently, the European Commission provided advice to the Dutch Court, stating that it considers that the Dutch legislation is not in line with EU legislation. The difference in treatment between workers who have lived more or less than 150 kilometres from the Dutch border is a limitation of traffic according to the Commission and cannot be justified with the argument of challenging potential tax evasion. Furthermore, this legislation is not proportionally in accordance with EU legislation and the Commission is of the opinion that it is possible to take a less restrictive measure to achieve Dutch aims. A certain distance between the place of residence of the employee (before the start of the activities) and the place of work would be in accordance with EU legislation and is a possible alternative option.

BDO comment

Please note that European Commission's comments represent advice only. At present it is not clear whether the Dutch Supreme Court will follow their advice.

To avoid losing any possible entitlement to the 30% ruling, affected individuals should apply for this ruling and appeal against any refusal to permit it referencing the Commission's comments.

SWITZERLAND
Clarification of Social Security Consequences of Equity-Based Compensation for Assignees

The Federal Social Security Agency recently published updated guidelines relating to the treatment of equity-based compensation for social security purposes. These documents describe how equity-based compensation of expatriates is to be treated and in particular how assignments impact such compensation.

Equity-based compensation is now subject to both tax and social security contributions on a pro-rata basis, whereas previously social security law only allowed an 'all or nothing' approach. This often led to a situation where the same benefit from equity was subject to social security contributions in more than one country. The new rules aim to avoid double charging of social security contributions as they are now more aligned to the rules in other countries. However, double taxation or partial non-taxation, is still possible where the other country applies a different calculation method.

As a general rule, income from equity-based compensation is treated according to the same rules as those for tax purposes. However, there exists one key difference as according to the guidelines differentiation must exist between blocked and unblocked components of an employee's equity compensation plan. With unblocked components, social security contributions are due at the grant date and in the case of blocked components, contributions are due at vesting or at exercise.

Employees working in different countries during the vesting period are only subject to pro-rata taxation according to effective working days in each country. Tax law defines an individual's tax domicile or place of residence during the vesting period as the determining element, whereas social security law specifies that the state is relevant where the individual is subject to social security contributions during the vesting period. In practice this often leads to the same result. However, with secondments, a difference arises if an employee remains subject to social security contributions in their home country on the basis of a Certificate of Coverage/A1. In such cases, there is no similarity between tax and social security law.

The new rules are valid from 1 January 2014. However, for equity-based compensation granted from 1 January 2013, and those granted in previous years on which social security contributions have to be paid after 31 December 2012, (liability at vesting or exercise date) the changes described above will apply with retrospective effect.

Reporting obligations apply to equity-based compensation. Specific details must be shown in an attachment to the salary statement at grant and at realisation of the taxable benefit, even if taxation does not occur at grant. In cases involving foreign assignments, the pro-rata calculation must be disclosed in the attachments to the salary certificates. Employers have to provide copies of these reports directly to the tax authorities if the taxable benefits are realised after termination of employment and/or the person has left Switzerland.

BDO comment

This update is to be welcomed since this provides employees who are working internationally and their employers with legal certainty. However, it is important that companies examine their internal payroll and HR process to ensure that they take the new guidelines into account. It might also be worth checking existing employee equity compensation plans to see if they are in line with the new guidelines.

Andrew Bailey is global leader for BDO International's expatriate tax services and national head of human capital at BDO LLP. He has over 30 years' experience in the field of expatriate taxation. BDO is able to provide global assistance for all your international assignments. If you would like to discuss any of the issues raised in this article or any other expatriate matters, please do not hesitate to contact Andrew Bailey on +44 (0) 20 7893 2946, email Andrew.bailey@bdo.co.uk

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