Global Tax Update

AUDIT CONFLICTS IN A GLOBAL MOBILITY CONTEXT

Review of the audit market by regulatory authorities and the potential knock-on effect on choice of global mobility advisers.

Historically, it was often the case that when expanding overseas companies merely asked their auditor for guidance on the tax and mobility issues arising. After all, who should know more about the company than the existing auditor?

Those working in global mobility will have long been aware of the potential for conflicts of interest where the same firm is both the auditor and the global mobility adviser. The risk of a conflict and the possibility of prohibition on the provision of certain services is rapidly increasing.

Within the mobility arena, we have often had to address how to deal with those individuals in Financial Reporting Oversight Roles (FRORs). The term "financial reporting oversight role" means a role in which a person is in a position to, or does exercise influence over the contents of the financial statements or anyone who prepares them, such as when the person is a member of the board of directors or similar management or governing body, chief executive etc. The US led PCAOB (Public Company Accounting Oversight Board) rules applying since the Sarbanes-Oxley Act of 2002 have meant that you cannot deal with such individuals as auditors.

EU legislation requires mandatory audit tendering after 10 years and enforced audit rotation after 20 years. Longstanding audit relationships need reviewing and in some cases will need to be changed. If the auditor has to change then at least two audit firms may be conflicted from undertaking international assignment services and the others may want to keep themselves clear of potential conflicts in order to challenge for future audit work.

European Union Rules in relation to Public Interest Entities (PIE's) came into effect after 2016. The meaning of a PIE has been redefined to include all companies listed on an EU regulated market and in addition, unlisted banking and insurance companies and groups, unless they are small. There is a limit in that non-audit services may not exceed 70% of the average group statutory audit fees over the previous 3 years for certain types of services, and total prohibitions apply to selected services, for example, payroll services – a feature of many international assignments. As these rules do not use retrospective data, this provision will not fully apply until three years of audit fee data from 17 June 2016 are available.

The above rules will limit choice of adviser for international assignee work. Which firms do you turn to when conflicts of interest present a restricted choice? The position may well become even more restrictive given further initiatives and public reviews occurring in the UK.

In October 2018, the Competition and Markets Authority (CMA) launched a review to consider and investigate whether the audit sector is working as it should for the economy and investors. In essence it will review whether there is sufficient competition given the significant market share of the four largest audit firms? The market study will consider choice and switching, resilience in the market given the market share of the biggest four firms, and the potential risk if they are considered too big to fail. The review will also consider incentives with auditors being chosen by companies not the investors – is there insufficient challenge?

A separate, but additional, independent Financial Reporting Council (FRC) review led by Sir John Kingman is already in progress and to add to matters, on the 12 November 2018, the Business Energy and Industrial Strategy (BEIS) Committee Chair, Rachel Reeves MP, launched a new inquiry examining the future of audit saying:

"Misleading audits have been at the heart of corporate failures over recent decades. Recent accounting scandals at BHS, Carillion, and at Patisserie Valerie have shown accounts bearing closer resemblance to works of fiction than an accurate reflection of the true financial performance of the business. Repeated accounting failures have contributed to the collapse of major businesses and undermined public and investor confidence".

"The audit market is broken. The Big Four's overwhelming market domination has failed to deliver audits which are fit-for-purpose. The lack of meaningful competition has bred conflicts of interest at every turn. The dice are loaded in the Big Four's favour, as they snap up audit contracts while pocketing huge fees for consultancy work and providing advice on recovering failing businesses. A host of solutions are now proposed to boost competition and improve audit quality. It's important that all options are on the table, including measures to break the stranglehold of the Big 4".

"The current inquiries by the CMA and Sir John Kingman are welcome and necessary. But, too often in the past corporate and regulatory failures have been followed by reviews which have been left to gather dust rather than result in concrete action. Our Committee's inquiry on the future of audit seeks to ensure these reviews are acted upon swiftly and effectively and that they genuinely deliver the improvements to audit quality and corporate governance which businesses, investors, pension-holders and the public expect".

BDO Comment

The above comments specifically from the BEIS Chair will undoubtedly be challenged and strongly refuted. Regardless of such representations, potentially the BEIS review could link in with the CMA and Kingman reviews and enforced changes to the market could occur. Naturally, where choice is being restricted it is incumbent upon others to step up, improve their offering and fill any gaps in the market. If you are working within global mobility and are selecting firms of advisers, are you aware of such potential changes to the market? Do you know who your auditors are and when audit rotation will be enforced? Do you know about all potential conflicts of interest? Are you aware of the restrictions that may apply to certain companies regarding the provision or limitation of non-audit services? Do you know about all alternative advisers in the market that could readily provide you with the service you seek?

The only certainty is that some changes to the market are likely. BDO will keep you updated on such changes.

AUSTRALIA

Proposed overhaul of tax residency rules for individuals

Tax residency has long been an area of confusion for people entering and departing Australia, even more so since the increase in global mobility in the modern working environment.

Australia's tax residency rules have remained unchanged since 1936, and most residency cases now rely heavily on case law to guide determinations. This situation was made more complex with the restriction of the foreign services exemption from 1 July 2009, which provided a tax exemption for foreign service income where the foreign service period exceeded 91 days. Prior to 2009, the question of tax residency was not so important where the individual's foreign income was mainly from the foreign service.

The current rules to determine residency comprise four tests that depend not solely on time spent in Australia, but the nature and substance of the individual's connections to Australia.

The current four tests are:

1. The Resides Test

This a rather subjective test that takes into account a holistic review of the individual's circumstances and gives weight to various factors such as:

- Intention and purpose of their presence in Australia
- Family and economic ties
- Location and maintenance of assets; and
- Social and living arrangements.

2. The Domicile Test

If the individual does not 'reside' in Australia according to the first test, but is nonetheless domiciled in Australia, e.g. domicile of origin (usually the place the person's father has his permanent home) or their domicile of choice, they are still considered a resident of Australia for tax purposes unless their 'permanent place of abode' is outside of Australia.

3. The 183-Day Test

An individual is assumed to be a tax resident if they are physically present in Australia for 183 days or more and their 'usual place of abode' is not outside of Australia.

4. The Superannuation Test

An individual is an Australian resident if they are a member of certain Government public service superannuation funds. The test also extends to treat the spouse and children under 16 as residents.

The current rules often prove difficult to navigate and the contradictory judgements in the AAT and courts provides inconsistent guidance as to what factors should be given more weight than others. Recent case law has also placed significant emphasis on the concept of 'permanent place of abode' and has thrown doubt on situations that most would previously have considered fairly straight forward.

The Board of Taxation in Australia has made suggestions to the Government to overhaul the old rules in favour of a less complex system. Simplification will improve certainty, reduce compliance costs and remove a potential barrier from Australia's attractiveness as an investment location.

The Board has proposed the following two test system:

1. Primary Test

This test will automatically determine the residency status of the majority of individuals. The test is designed to provide a bright-line for individuals to be able to conclusively determine their residency status, based on time spent in Australia. The day-count system will likely differ depending on whether the individual is inbound or outbound.

The Board's preferred model is as follows:

Scenario	Description
Previously a resident of Austrailia	An individual that was previously a resident of Australia is a non-resident if they spend less than X number of days in Australia in any 12-month period.
Previously not a resident of Australia	An individual that has never been a resident of Australia is a non-resident if they spend less than Y number of days in Australia in any 12-month period (where Y is greater than the X number of days required for those previously a resident).
Working overseas	An individual that works full-time overseas is a non-resident if they spend less than a certain number of days working, or a larger number of days in total, in Australia in any 12-month period.

2. Secondary Test

This test will be used for more complex situations and will take into account the individual circumstances. It may also apply differently to inbound and outbound individuals. The proposed test will have a clearer weighting system for the relevant factors to ensure greater certainty in determining residency than under the current rules.

The Board considered the following factors crucial to determining residency:

> It may also apply differently to inbound and outbound individuals

Factor	Description
Time spent in Australia	This factor is satisfied if a certain amount of time is spent in Australia, as per the primary test.
Immigration status	The factor is satisfied if the individual is an Australian or permanent resident.
Personal relationships	This factor is satisfied if the individual's family is largely located in Australia.
Accommodation	This factor is satisfied if the individual has readily accessible accommodation (rented or owned) that they use regularly.
Economic ties	This factor is satisfied if the individual has substantial economic ties to Australia, such as employment, business interests, assets etc.

The Board has proposed that:

- If the individual was previously a resident of Australia, X number of factors must be satisfied; or
- If the individual was not previously a resident of Australia, Y number of factors must be satisfied.

The Board has looked at other residency systems around the world, including the OECD standards, in designing the proposed new rules.

They have also addressed potential concerns regarding a person being a 'resident of nowhere' and are considering only allowing the change in status from resident to non-resident if the individual can demonstrate that they have established residency elsewhere.

If the proposed residency rules are legislated, it is intended that there will be clear outcomes for the majority of individuals, and a structured process to determine the more complex cases, resulting in a decreased need to apply for private rulings.

BDO Comment

Public comments were invited up to October 2018, after which the Government will consider the Board's recommendations. We will provide a further update if any changes to the rules are legislated.

BELGIUM

Belgian administration takes new position in the social security treatment of equity incentive plans

Many companies now give their employees equity incentives, such as restricted stock and restricted stock units. Recently, the Belgian administration took a new position concerning the social security contributions that may apply to equity incentive plans.

Previous Position

According to the administration's previous position, equity incentives were subject to Belgian social security contributions if the incentives were granted by the Belgian employer. If the incentives were granted by a foreign company the administration still considered them as being granted by the Belgian company if the latter actively intervened in the stock allocation process, or if the costs related to the equity incentive plan were charged by the foreign entity to the Belgian company.

Very often, these conditions were not met. Foreign companies often did not charge the costs related to the plan to the Belgian company. As a result, in many cases the equity incentives were not subject to Belgian social security contributions.

New Position

In the instructions to employers, the Belgian administration changed its position. As of now, the equity incentives will be subject to Belgian social security contributions if they are granted for services provided by an employee in the context of his/her employment contract or if they are related to the employee's function with his/her employer.

As a result of this new position, equity incentives will almost always be subject to Belgian social security contributions for employers and employees. This will result in an extra cost for the employer of 25%.

Another outcome of this new position is that the equity incentives will also have to be included in the base for calculation of the holiday pay on the variable wage. This will result in an extra cost of more than 15% for employers.

It is important to note that the above mentioned is not a change in Belgian legislation but a change in position of the Belgian administration. One can raise the question of whether this new interpretation of the law by the social security administration is still in line with the text of the law itself. However, until this position has been successfully challenged before a Belgian court it is advised to follow it.

On a final note, it is important to mention that the Belgian government is also working on a new legislative proposal concerning withholding taxes. Income taxes must be withheld by the Belgian employing company if the local employer grants the awards or is involved in the administration of the plan. In the government's legislative proposal, the equity incentives granted to Belgian employees by foreign companies will also most likely become subject to Belgian withholding taxes. Details of these grants will have to be reported in the monthly wage income tax return and annual summary statements. This proposal however, is not yet final.

BDO Comment

Considering the new stance adopted by the Belgian administration foreign companies who want to implement an equity incentive plan for Belgian employees are advised to consider the extra costs that may now arise.

NETHERLANDS

Maximum term of 30% ruling reduced

As you may be aware, changes will be coming into place as of January 2019, regarding the maximum period the 30% ruling can apply. This maximum of 5 years will apply to both existing cases as well as new cases. There will be no transitional provisions for existing cases.

This change extends to the scheme opting for partial non-resident taxpayer status for income tax purposes, since the right of option can only be applied during the term of the 30% ruling.

The Cabinet has decided to introduce transitional provisions for tuition fees payable for international schools with effect from 1 January 2019. Under these transitional provisions, once the term of the 30% ruling has been reduced, the tuition fees payable for international schools for the 2018/2019 academic year can still be reimbursed or defrayed, provided these tuition fees are reimbursed or defrayed before the end of the original term of the 30% ruling.

Interestingly, the existing transitional provisions for employees subject to the 30% ruling on 31 December 2011, under which the maximum term of 10 years applies, will also end. This is because it is an established fact that the maximum term for these employees will have ended by 1 January 2019.

In June 2018, the Dutch tax authorities sent the affected employees and withholding agents a letter containing information about the planned change. No substantive changes are envisaged for employees who are posted abroad.

BDO Comment

There have been many changes to the 30% ruling since its introduction. The facility has been very effective in reducing the effective rate of tax applying in the Netherlands. The only certainty is that further tinkering to the ruling may occur in future years. BDO will keep you updated on any such developments.

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