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EXPATRIATE NEWSLETTER

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AUSTRALIA
FOREIGN RESIDENTS AND CAPITAL GAINS TAX (CGT)

If you have left Australia and kept your home as an investment, you may now be hit with CGT.

The recent announcement in the Federal Budget has delivered another blow to foreign residents with the removal of the Main Residence Exemption for foreign and temporary residents of Australia, which took effect from 7:30 pm (AEST) on 9 May 2017.

As a general rule, your home will cease to be your main residence when you stop living in it. There are however, circumstances where you can choose for it to continue to be treated as your main residence for CGT purposes.

More specifically, if you do not use the dwelling to produce income, it can be treated as your main residence for an unlimited amount of time, for example, where it is left empty or a relative is living there rent free. If you use the dwelling to produce income (e.g. lease the home or list the home on Airbnb), the dwelling can continue to be treated as your main residence for a period of up to six years from the date the property begins to derive income.

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EDITOR'S LETTER

The BDO Expatriate Newsletter provides a brief overview of issues affecting international assignees, predominantly, but not exclusively, from a tax and social security perspective.

This newsletter brings together individual country updates over recent months. As you will appreciate, the wealth of changes across multiple jurisdictions is significant so to provide easily digestible information we have kept it to the key developments that are likely to affect your business and international assignees.

For more detailed information on any of the issues or how BDO can help, please contact me or the country contributors direct.

ANDREW BAILEY
andrew.bailey@bdo.co.uk
+44 207 893 2946

www.bdo.global

What this means from a tax perspective is that when you decide to sell the dwelling, the sale may not attract CGT i.e. you will not pay tax on any gains made on the property in relation to the period that the dwelling is taken to be your main residence.

The new measure introduced in the 2017 budget will disallow a main residence CGT exemption for foreign and temporary residents of Australia. It is common for Australians working overseas to keep their home in Australia for when they eventually move back from assignment or as an investment, often renting the property out in the meantime for additional income and taking advantage of the 6 year rule mentioned above. Now, where these taxpayers cease to be Australian residents, they will attract CGT on the sale of their Australian real property on the gains made from the date they became a non-resident.

However, there are grandfathering rules for any gains on properties that were already owned as at 7:30 pm 9 May 2017 and were currently being treated as the owner's main residence, will continue to be exempt from CGT under the existing provisions until 30 June 2019. However, if the dwelling is sold after 30 June 2019 CGT will apply in relation to the capital gains accruing after that date, so there is only limited grandfathering relief available.

BDO comment

What we expect to see from individuals who are becoming non-residents of Australia is either disposal of their former Australian residence before they permanently depart Australia, or the obtaining of a market valuation as at the date of departure to help identify any main residence exempt part of any future capital gains on disposal of the dwelling.

Alternatively, we may see an increase in Australians who have departed the country, exploring ways to remain a resident of Australia for tax purposes; however this may have other negative tax implications as they may then become taxable on their non-Australian sourced income.

If you have any concerns or questions regarding the CGT changes for foreign and temporary residence, we strongly suggest contacting the BDO Global Expatriate Services Team to discuss your situation.

KUMAR KRISHNASAMY
kumar.krishnasamy@bdo.com.au

BELGIUM

STOCK OPTIONS GRANTED TO THE DIRECTOR OF A MANAGEMENT COMPANY

The tax regime in Belgium with respect to stock option plans (SOP) depends on whether the plan has been offered and accepted in writing within 60 days of that offer or not.

If these basic terms and conditions are met, the value of the taxable benefit in kind equals 18% of the market value of the underlying shares at the date of grant which will also be the point of taxation.

If an extra set of terms and conditions is met – amongst which the condition that the stock option plan relates to shares of a company on behalf of which the professional activities are directly carried out or shares of the holding (or parent) company – the amount of the taxable benefit is calculated as only 9% of the market value of the underlying shares at the date of grant.

Discussion

The discussion arose where stock options were granted to the director/manager of a management company the issuing company had a professional relationship with. In view of the different treatment between SOP granted to (management) companies and SOP granted to the individual behind that company, the practice had grown that when a manager performed duties as a director or manager of a company by means of a personal management company, the options were granted to the individual/natural person. The question then was whether the valuation at 18% of the market value of the underlying shares applied or whether the individual could enjoy the reduced valuation of 9% of the market value of the underlying shares.

Clarification

The Belgian authorities have now clarified their position. The valuation at 18% of the market value of the underlying shares at the date of grant is only accepted in the case where shares are granted by the managed company to the director of the management company, since the manager/director of the management company cannot be considered to have a direct professional relationship with the issuing company.

BDO comment

Equity can be an immensely effective tool to reward and encourage your workforce. It is however important that you get all the details right as the tax position can be complex.

INCREASE OF THE TAX-FREE AMOUNT FOR CHILDREN AT CHARGE

Every taxpayer has the right to a tax free amount for Belgian personal income tax purposes. This tax free amount increases when the taxpayer has children or other dependents at charge. When the taxpayer is married or legally cohabits, the increase of the tax free amount for children at charge automatically goes to the partner with the highest taxable income. Actual cohabitants can choose which partner takes the children at charge for tax purposes.

When the partner with the highest taxable income also has foreign income that is exempt from taxes, it is possible that they cannot claim the whole tax free amount for children at charge. The Court of Appeal in Antwerp judged in September 2015 that the principle of equal treatment is not respected when legal cohabitants and married couples, in contrast to actual cohabitants, cannot choose which partner takes the children at charge.

BDO comment

The Belgian Government is working on a proposal to eliminate the above mentioned discrimination. The expected entry into force is 1 January 2017.

KIM DE MEYER
kim.demeyer@bdo.be

CHILE

EXPATRIATE VISAS IN CHILE

The different visa possibilities available for expatriates that are assigned to work in Chile are not widely known. We are therefore taking this opportunity to provide an update regarding the basic information for current visa options.

The most common visa applied for by expatriates in Chile is the 'Labour Contract Subjected Visa'. This visa seeks to authorise expatriates appointed to work in a domestic entity for a maximum term of 2 years. After that term, the expatriate can apply for the Permanent Residence Visa. The disadvantages of this visa are that the employer must have residence in Chile and the mandatory inclusion of the following clauses in the labour contract:

- The employer shall answer on behalf of their employee about the workers' due income tax related to the work they carry out for that employer;
- The employer shall cover the returning travel expenses of the employee and employee's relatives to their home country (obligation that endures even after the labour contract ends);
- The contract shall only take force after the employee obtains the visa; and
- An option regarding whether the employee will continue paying into their home country social security system or start contributing to the Chilean social security system.

The lesser known visa for foreign workers is one that allows working in Chile under a foreign employment contract with salaries paid from abroad, named as 'Temporary Visa for Interests in the country'. This visa enables the expatriate to work in Chile, based on the usefulness to the country of the activities performed therein. If the visa does not specify the duration, the law understands that its duration will be of 2 years. Towards the end of this term, the expatriate can apply for a 'Permanent Residence Visa'.

The general rule to obtain this visa is the compliance of two requisites:

a) The foreigner must have the purpose to reside in Chile; and

b) Be in one of the following situations:
   - Prove to have relatives in Chile;
   - Prove interests in Chile; or
   - Their residence in Chile is useful or advantageous.

Particularly, and in order to be in the second situation, the administrative law recognises four categories for proven interests, which are:

- Business: Entrepreneurs, investors, merchants, renters and in general, business persons located in Chile for more than 90 days, because of their activities and interests in the country;
- Journalism: Journalists, media communicators allocated into Chile because of their activities, previously accredited before the Social Communication National Division;
- Religion: Church ministers, orders and congregations recognised in Chile, located in Chile because of their religious, educational or assisting activities; and
- Health: People located in Chile because of special health treatments.

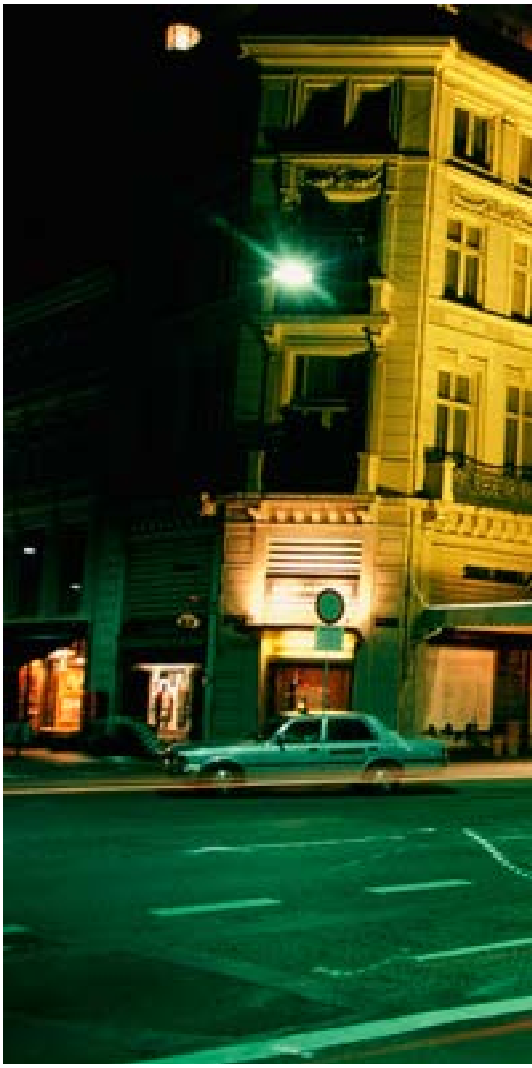
This particular visa has been extended by the Migration Authority not only to business persons but also to professional and technicians of superior level, in an intention to include a broader spectrum of workers and business persons into Chile to develop their work for foreign or domestic employers, as a formal employee or as a freelance contractor.

BDO comment

The Chilean authorities are actively encouraging an increase in skilled labour coming into the country. It is important that the correct visas are in place however.

RODRIGO BENITEZ
rbenitez@bdo.cl

GONZALO MANZANO
gmanzano@bdo.cl



DENMARK

PERMANENT ESTABLISHMENT – HOME OF A SALES MANAGER

The presence in Denmark required for the Danish tax authorities to conclude that a permanent establishment is created when a foreign enterprise hires a Danish resident sales person seems to be ever diminishing.

Over the past few years, in several cases the Danish tax authorities have ruled formation of a permanent establishment in Denmark of a foreign enterprise by virtue of an employee's work in Denmark from their home office.

This practice has affected foreign enterprises seeking to establish their businesses on Danish territory, initially applying a tentative approach – for instance by hiring a salesperson to work from his home without authority to conclude contracts on behalf of the enterprise.

However, based on a recent binding ruling by the National Tax Board, the presence in Denmark required for the Danish tax authorities to conclude that a permanent establishment is created when a foreign business hires a Danish resident sales person seems to be ever diminishing.

Definition of a permanent establishment

The primary definition of a permanent establishment entails a fixed place of business through which the business of an enterprise is wholly or partly carried on.

A secondary definition exists entailing that an agent of a dependent status is acting on behalf of an enterprise and has – and habitually exercises – authority to conclude contracts in the name of the enterprise.

The definitions are unlimited as the term does not include business solely for the purpose of carrying on activity of a 'preparatory or auxiliary character'.

Often, the activity of a salesperson will be considered part of the core business of the enterprise in spite of the fact that the salesperson is not authorised to conclude contracts independently.

Consequently, a home office often constitutes a permanent establishment and the enterprise must register for corporate tax in Denmark from the first day of business.

The binding ruling by the National Tax Board

According to the binding ruling, a Danish resident employee's work in Denmark as a sales manager would constitute a permanent establishment in Denmark for the foreign employer.

The sales manager shall visit clients, business associates and suppliers in Denmark and other Scandinavian countries.

The sales manager will not be authorised to conclude contracts on behalf of the foreign employer independently.

The foreign employer does not have an office or store etc. at its disposal in Denmark and the employee is not expected to or required by the employer to work from their home.

However, the employee will in fact carry out administrative work and occasional paperwork from their home to a minor extent.

As stated above, a home office often entails a permanent establishment. However, in this case there is no actual home office and the employee will only perform work from his home to a minor extent – work that could likely be characterised as being of a preparatory or auxiliary nature.

Nevertheless, the National Tax Board ruled that the Danish resident employee's work in Denmark as a sales manager would constitute a permanent establishment in Denmark for the foreign employer.

BDO comment

The ruling serves to show how insignificant a presence in Denmark is required according to the current administrative practice before a permanent establishment is created.

Hence, foreign enterprises should be aware of the consequences when initiating business activities in Denmark.

THE COURTS ARE UNCOMPROMISING WHEN IT COMES TO FORGOTTEN TAX DEDUCTIONS

The Supreme Court has clearly stated that the taxpayer is responsible for a proper tax assessment. The limitation period is 3 years and 4 months – even if the taxpayer ends up paying taxes on income the taxpayer has not earned.

In case of forgotten deductions, a reopening of old tax assessments may be requested until 1 May of the fourth year after the end of the income year.

Reopening of tax assessments subsequent to the general limitation period can be allowed in cases of 'special circumstances', but this does not usually include cases of forgotten deductions.

Case law is very rigid as illustrated by a recently published ruling of the Supreme Court.

The case concerned an individual who had paid back social security in 2004 amounting to just over DKK 300,000. There was no doubt that he was entitled to a deduction for the amount, because he had been taxed on the amount upon receiving it.

The municipality did not report the repayment to the Danish tax authorities as required by law. Consequently, the deduction did not appear on the taxpayer's tax assessment for 2004.

The general limitation period for reopening the tax assessment for 2004 expired on 1 May 2008. However, the taxpayer did not apply for resumption until 2012. At that time, however, it was too late according to the Supreme Court.

This was due, inter alia, to the fact that the rules on reopening tax assessments subsequent to the general limitation period under exceptional circumstances have a narrow scope, and that the taxpayer in all the years possessed the necessary information to detect the error.

Further, the missing deduction could not be attributed to errors committed by the tax authorities. Thus, there were no 'special circumstances'. The taxpayer's private circumstances could not be considered important.

BDO comment

The verdict is a very clear indication that taxpayers are fully responsible for a proper tax assessment. This is the case regardless of the taxpayer's sense of tax law and the fact that the taxpayer – as in this instance – ended up paying tax on income not received.

LIMITATION – REOPENING OF OLD TAX ASSESSMENTS

The High Court assessed whether two taxpayers intentionally or with gross negligence caused the tax authorities to make tax assessments on an incorrect basis, thus allowing resumption of the taxpayers' old tax assessments.

In a recent ruling, the High Court prohibited the Danish tax authorities from reopening two individual taxpayers' tax assessments for income years subject to limitation according the ordinary limitation period, which ends on 1 May in the fourth year following the income year.

The Danish tax authorities tried evoking a rule allowing resumption of older tax assessments in cases where the taxpayer or someone on his behalf intentionally or with gross negligence had caused the tax authorities to make a tax assessment on an incomplete or incorrect basis.

The ruling serves to show that there are limits to what extent the Danish tax authorities can reopen older tax assessments based on the notion that the taxpayer or someone on his behalf intentionally or with gross negligence has caused the tax authorities to make a tax assessment on an incomplete or incorrect basis.

Not only must the tax authorities observe the tax rules on limitation. Similarly, as described in the April 2017 issue of tax: watch regarding a ruling from the Supreme Court, a taxpayer must observe the limitation rules – even when the result of not doing so is paying taxes on income not received.

Background

The case before the High Court concerned whether a married couple was resident in Denmark for tax purposes during the income years 2003-2007.

Further, the case concerned whether there was a basis for extraordinary resumption of the tax assessments for the income years 2003-2006, which were subject to limitation as the ordinary limitation period, as stated above, had expired. It was undisputed that the Danish tax authorities amended the tax assessments for the income year 2007 in a timely manner.

The High Court found that the taxpayers had not terminated their Danish tax residence for the income years 2003-2007.

Further, the court found that the taxpayers were in fact residing in Denmark, regardless of registration etc. in Switzerland and submitted declarations of stay in Switzerland.

Hence, the High Court concluded that the taxpayers were resident in Denmark for tax purposes.

However, the majority of the judges did not find that the taxpayers intentionally or with gross negligence had provided incorrect information to the Danish tax authorities for the use of tax assessments.

The taxpayers had filed Danish tax returns as non-residents for the income years in question and it was noted by the court that the taxpayers had followed advice from their lawyer.

Hence, the majority of the court did not find that the conditions for extraordinary resumption of the tax assessments for 2003-2006 were met, as the taxpayers had not intentionally or with gross negligence provided incorrect information to the Danish tax authorities for the use of tax assessments.

A minority of the judges voted to uphold the verdict of the district court thereby allowing resumption of the tax assessments for 2003-2006.

NEW POLITICAL AGREEMENT AGAINST INTERNATIONAL TAX EVASION

All political parties represented in the Danish parliament stand behind a new agreement that seeks to strengthen the efforts against international tax evasion.

According to the agreement, a new centre is to be established that shall bring together and focus efforts on international tax evasion. Other main elements of the agreement are further resources for tax control related to tax havens, increased transparency concerning tax advice and a continued offensive effort from the Danish authorities.

According to the Minister of Taxation, it damages the common sense of ordinary Danish tax payers when they see fraudsters move money across national borders to flee from the searchlight of the tax authorities. Everything must be done to stop this. Former governments have already created a good foundation in this area, according to the minister, who is pleased that this foundation can be built upon and the efforts further strengthened.

The new centre for combating international tax evasion shall bring together efforts, such as making it easier to coordinate information and data and thus identify new fraud patterns. At the same time, the centre will serve as a collective entrance and exit for exchange of information internationally.

With the new political agreement, it has been decided to allocate DKK 25 million annually up to and including 2021. The funds stem from the resources already allocated to the subject.

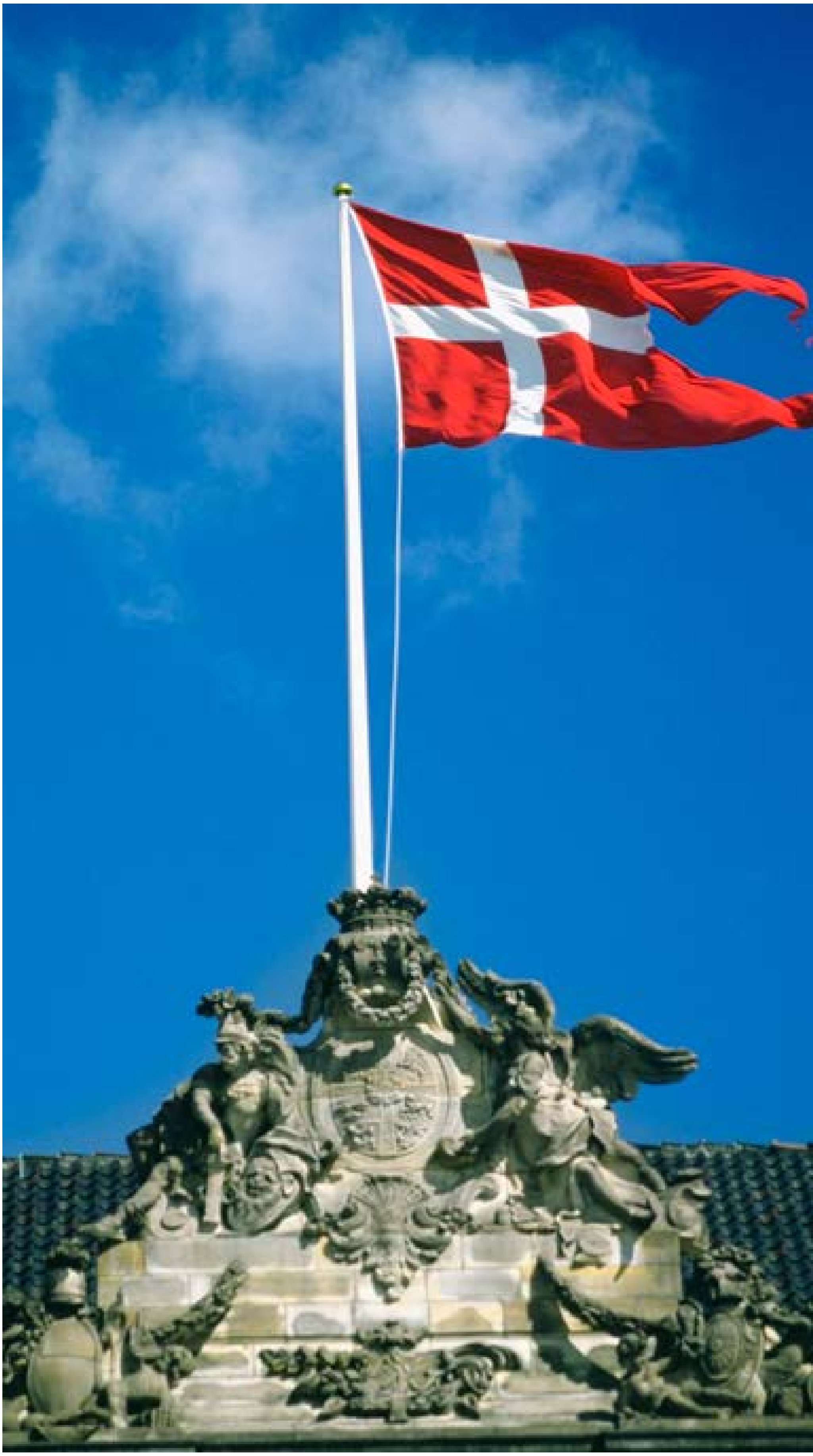
The parties also agree to focus on tax advisors' responsibilities when advising on business models using tax havens abroad. Therefore, the possibility of introducing an obligation to disclose information in order to increase the risk of discovery through a greater degree of transparency should be considered.

At an international level, more extensive agreements have been concluded in recent years, for example regarding exchange of information across countries. Within the next year, more agreements are under way within the framework of the EU and the OECD.

With the agreement, Denmark will continue to play an offensive role and to maintain its current momentum in international cooperation, according to the minister.

It will be interesting to observe whether the endeavour – admirable as it is – will manage to live up to the expectations of the minister.

ANDERS KIÆRSKOU
aek@bdo.dk



INDIA

CLARIFICATION ISSUED REGARDING TAXABILITY OF NON-RESIDENT SEAFARERS RECEIVING REMUNERATION INTO AN INDIAN BANK ACCOUNT

There has been considerable litigation in Indian courts of law regarding taxability of remuneration of non-resident employees. In our earlier issue of BDO Expatriate Newsletter (Issue 24 of December 2016), we had briefly discussed the aspects considered for taxation of salary income of non-residents. We had also discussed one of the recent Indian rulings which held that salary received in India by a non-resident taxpayer would be treated as taxable in India.

Generally, income received in India by a non-resident is treated as taxable in India. However, the tax treatment of employee's salary income needs to be considered based on several factors including place of rendition of services.

The Central Board of Direct Taxes (CBDT) in India has received representations that salary income received by non-resident seafarers for services rendered outside India on-board foreign ships is subjected to tax in India. The reason for taxation of such income was that the salary was received by the seafarer into his Non-Resident External (NRE) account maintained in India.

Owing to the representations received by the CBDT, it has examined the matter and has issued a clarification. It has clarified that salary accrued to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) shall not be taxable in India merely because the salary is credited into the seafarer's NRE account in India.

This is a welcome clarification issued by the CBDT. Employees working in international waters generally have arrangements to receive salary income into their home country bank account. Such income was also claimed as exempt in India. They took shelter under the contention that the nature of income (being salary income) needs to be taxed in the country of accrual of income i.e. outside India. However, the Indian tax authorities brought such income under the Indian tax ambit since the income was received in India. This conflict leads to several cases being tried in the Indian courts of law especially involving seafarers.

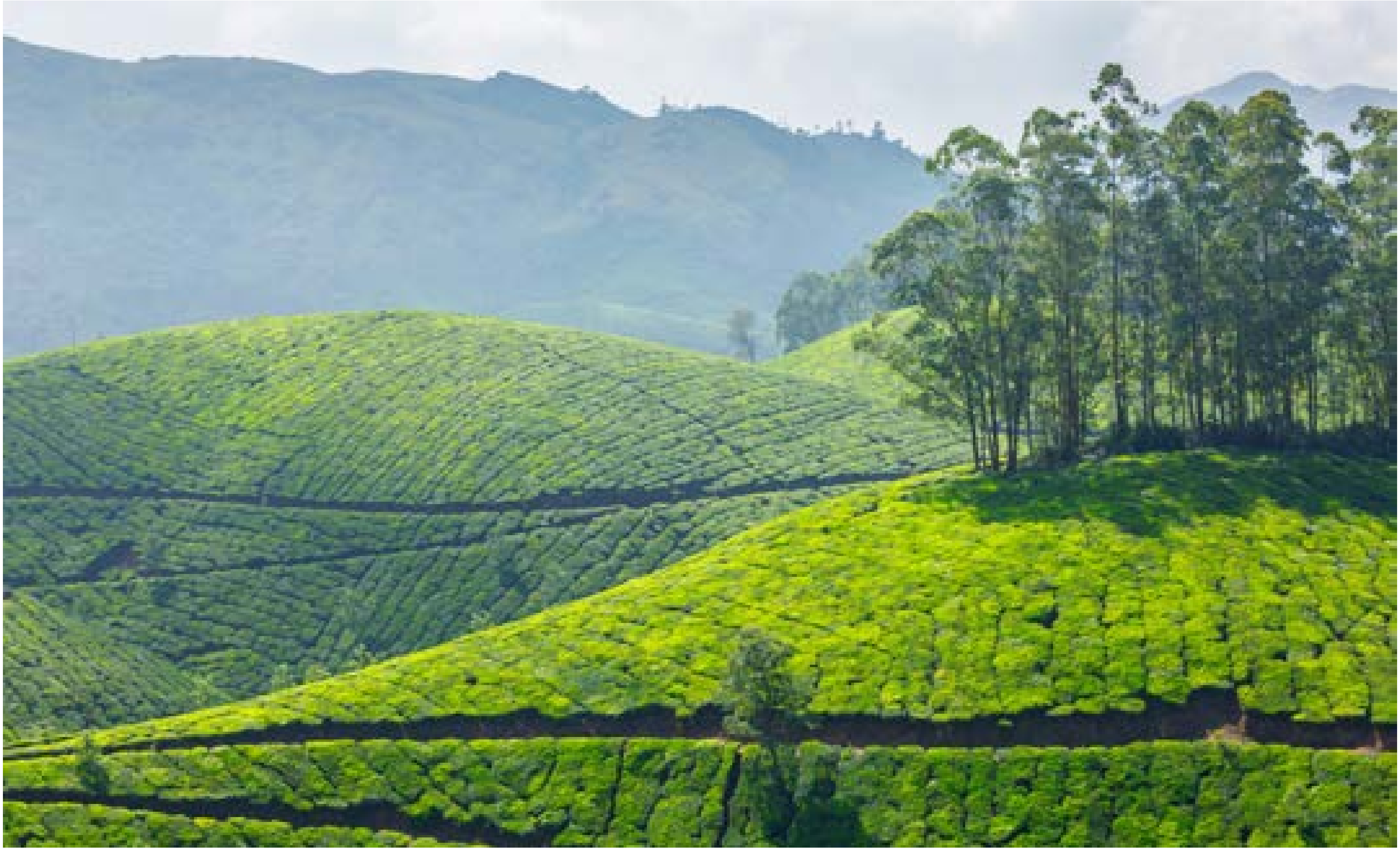
The recent Circulars in this matter are a welcome clarification regarding taxability of salary income of non-resident seafarers. Similar treatment for other employees would have brought parity in taxation of salary income of non-residents with that of seafarers and reduced the double taxation burden.

BDO comment

The Circular puts to rest the argument of taxation of salary income of non-resident seafarers. A beneficial tax position for such expatriates could be considered in their annual tax return keeping in mind the recent clarification.

JIGER SAYA
jigersaiya@bdo.in

DEEPASHREE SHETTY
deepashreeshetty@bdo.in



THE NETHERLANDS

INTERNATIONAL SEVERANCE PAYMENTS THAT HAVE BEEN PUT IN A DUTCH B.V. – WHICH COUNTRY HAS THE RIGHT TO TAXATION?

Up until 2014 it was possible to defer taxation of severance payments in The Netherlands. Where the severance payment was paid directly into a private (pension) company, the so-called Stamrecht B.V., no Dutch wage tax was withheld at that point. However, the Stamrecht B.V. would be liable to wage tax withholdings at the time of pay out to the employee. Usually, this happened at the time the employee retired. Instead of receiving the severance payment in one lump sum the employee received it periodically from the Stamrecht B.V.

This can lead to a tax benefit for the employee as the severance payment is not taxed all at once against the highest applicable tax rates, but in portions at the time of payout. Furthermore, in most cases the employee would then also benefit from lower social security premiums applicable to pensioners. This structure could also be set up by Dutch residents who worked outside The Netherlands and received a severance payment from either a Dutch or foreign employer. In this case the (foreign) employer could also transfer the severance payment to the Stamrecht B.V. without taxation at the time of the dismissal.

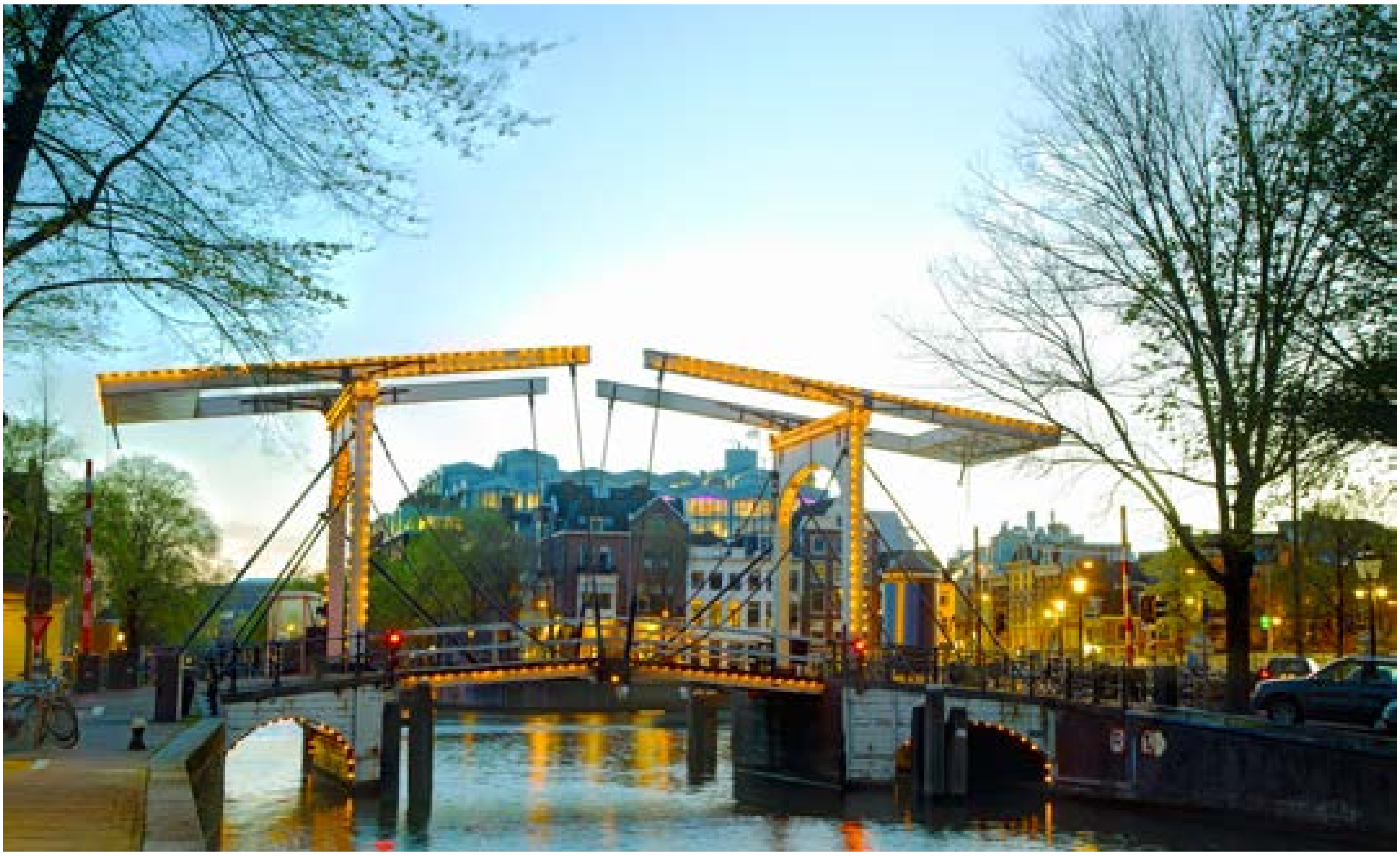
On 19 May 2017 the Dutch Supreme Court ruled with regard to such a case. In this case a (Dutch) employee worked for several years in the United States for an US employer. One year before the employment contract was terminated, the employee returned to The Netherlands to work for a subsidiary company in The Netherlands and became a Dutch tax resident. The employee set up a Stamrecht B.V. into which the Dutch employer paid the severance payment in 2012. In 2014 the employee decided to have the remaining amount that was placed with the Stamrecht B.V. paid out at once. As a result of this redemption, the total sum was included in the Dutch wage tax. The question that arose was whether or not The Netherlands had the right to tax the total sum that resulted from this redemption with the Stamrecht B.V. The Dutch Lower Court ruled that in this case the payment from the Stamrecht B.V. should not be included in the article of the tax treaty between The Netherlands and the United States relating to employment income, as according to the Lower Court this concerns a strictly national situation. Therefore, The Netherlands would have the right to tax the total sum of the redemption.

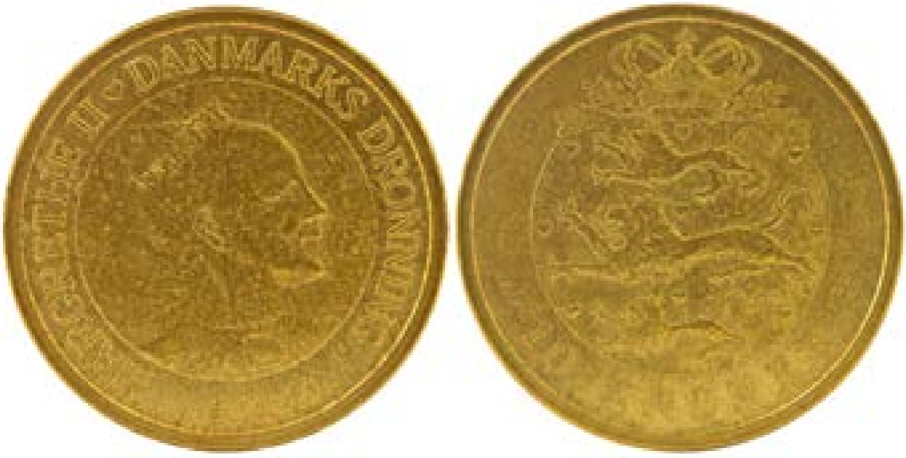
The Dutch Supreme Court ruled as follows. The Lower Court misjudged the fact that in this case it concerned a strictly national situation. The source of the income for the payment is certainly of relevance. In this case the redemption payment originated from a severance payment that partially resulted from employment activities performed in the United States. Therefore, it actually should be included in the article of the tax treaty between The Netherlands and the United States relating to employment income. In this specific case however, the Dutch Supreme Court ruled that The Netherlands would only be obliged to provide the employee with a prevention of double taxation for that part of the severance payment for which the costs have been charged to the entity (or a permanent establishment) in the United States.

In case you have any questions, please do not hesitate to contact:

ROBIN SCHALEKAMP
robin.schalekamp@bdo.nl

FREDERIEKE DEN HARTOG
frederieke.den.hartog@bdo.nl





CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 21 June 2017.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Danish Krone (DKK)	0.13444	0.14984

CONTACT PERSONS

The BDO Expatriate Services Centre of Excellence consists of the following persons:

Kumar Krishnasamy	Australia	kumar.krishnasamy@bdo.com.au
Peter Wuyts	Belgium	peter.wuyts@bdo.be
Cleiton de Santos Felipe	Brazil	cleiton.felipe@bdobrazil.com.br
Debra Moses	Canada	dmoses@bdo.ca
Jacques Saint-Jalmes	France	jsaintjalmes@djp-avocats-bdo.fr
Christiane Anger	Germany	christiane.anger@bdo-awt.de
Wolfgang Kloster	Germany	wolfgang.kloster@bdo.de
Jiger Saiya	India	jigersaiya@bdo.in
Gianluca Marini	Italy	gianluca.marini@bdo.it
Joelle Lyaudet	Luxembourg	joelle.lyaudet@bdo.lu
Shohana Mohan	South Africa	smohan@bdo.co.za
Pilar Espinosa	Spain	pilar.espinosa@bdo.es
Jessica Otterstål	Sweden	jessica.otterstal@bdo.se
Robin Schalekamp	The Netherlands	robin.schalekamp@bdo.nl
Andrew Bailey (Chair)	United Kingdom	andrew.bailey@bdo.co.uk
David Gardner	United Kingdom	david.gardner@bdo.co.uk
Donna Chamberlain	United States	dchamberlain@bdo.com
Mesa Hodson	United States	mhodson@bdo.com
Jessica Pancamo	United States	jschuster@bdo.com
Ronni Rizzo	United States	rrizzo@bdo.com

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