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Global Employer Services | October 2017

Global Reward Update

Tax reporting and withholding in Belgium

Background

Recent audit activity and a recent Supreme court case have shifted the landscape for Income and Social tax reporting and withholding for local Belgian subsidiaries.

Historically, many non-Belgian parent companies, offering equity incentives in Belgium, structured administrative practices to eliminate income and social tax reporting and withholding. We have observed the Belgian tax authorities have been taking an increasingly narrow view of the associate guidelines upon audit.

Income Tax

The Belgian tax authority has recently been targeting for audit local Belgian employers with employees who receive equity awards from a foreign (non-Belgium) parent company.

When a non-Belgian parent company grants equity to the employees of the local Belgian subsidiary, if the local Belgian entity is not actively involved in the administration of employee equity, then no income reporting or PAYE withholding would be required. If no reporting is made in Belgium, the equity income would not appear on a Belgian wage certificate and no PAYE withholding would be applied. Employees would still be responsible to report the income from the equity in their personal tax return.

Where employees fail to accurately report the equity income on their individual filings, the tax authority has begun to more closely examine the income reporting and PAYE operations of the Belgian entity and specific attention is being paid to the level of intervention made by the Belgium subsidiary of a foreign parent company.

Recent audits have resulted in a number of Belgian subsidiaries failing the “no local intervention” test. “Intervention” for this purpose is broadly defined, and outlined in the existing Belgian regulations. Determination of an employer’s “active intervention” is based on multiple administrative and decision-making guidelines, most of which are subjective in nature. In practice, it can be very difficult to demonstrate zero intervention from the Belgian entity and companies are encouraged to carefully review their actual practices.

Authorities have the ability to look back up to 5 years in an audit. While the tax liability remains the obligation of the individual, the employer is also held liable when no withholding was originally operated (noting that it is easier to pursue the entity for all employees than to pursue each individual).

Social Security

The Belgium Supreme Court issued a ruling in 2016 which was only recently published in late 2017, which held that income received as a result of services performed a Belgian entity is considered wages for social security purposes (regardless of any intervention by the local entity or serving as point of contact for plan operations questions) and accordingly such income is subject to Belgian social security contributions.

This substantially changes the reporting and taxation landscape in Belgium. The Court’s ruling determined that as soon as the employer has committed to grant a benefit (such as equity), the employee is entitled to receive this benefit as part of the terms of their employment.

Based on this new case law, the social security authorities may argue that equity granted by a foreign parent company to employees of a Belgian subsidiary company (even in absence of a recharge or any level of intervention by the local subsidiary) qualifies as salary if the employee is entitled to this benefit as terms of their employment. Any equity received by the employee would then be subject to statutory social security contributions.

It is important to note that social tax regulations are unchanged and state that in the absence of local intervention no social taxes are due. Despite this, there remains the very real risk that the position that employee and employer social taxes are not due will be challenged by auditors as a result of this Supreme Court case; as the Court ruling conflicts with local regulations, the reaction of auditors remain uncertain at this time.

Note: at the time of this update, the employee and employer social tax rates are uncapped at 13.07% and 30% respectively.

Deloitte's view

Employers are encouraged to carefully consider the new audit environment and considering reporting and withholding on long term incentive plans in Belgium.

In particular, companies relying on the "no intervention" principle, are encouraged to test the local level of intervention and to consider conducting a mock audit. Employers that conclude to continue to operate no PAYE are encouraged to carefully document the basis of their decision making, to test that conclusion periodically, and to make sure employees are fully aware of their personal tax obligations.