



A new kind of mobility

*Economic employer approach
in the CEE Region*

Global mobility trends have been changing in recent years. Whereas earlier assignments meant a three to five-year relocation followed by a return home, more recently global mobility has developed differently in response to business demands and employee preferences. Focus is more on short term assignments and various new forms of mobility such as business travellers, project-based assignments, commuters, ‘backpacker’ arrangements and ‘global nomads’.

For many years employees could travel on short-term assignments without having any tax liabilities in the host locations. Provisions of double-tax treaties ensured treaty protection to them if the conditions of the double tax-treaties were met. In an era of increasing globalization and fast-growing cross-border employee mobility, the interpretation of double tax treaties is also changing.

In 2010 the OECD revised its commentary relating to Article 15, which is decisive in determining the taxation of employment income.

As a general rule, under Article 15 of the OECD tax treaty, employment income is taxable in the country where the employment is actually exercised.

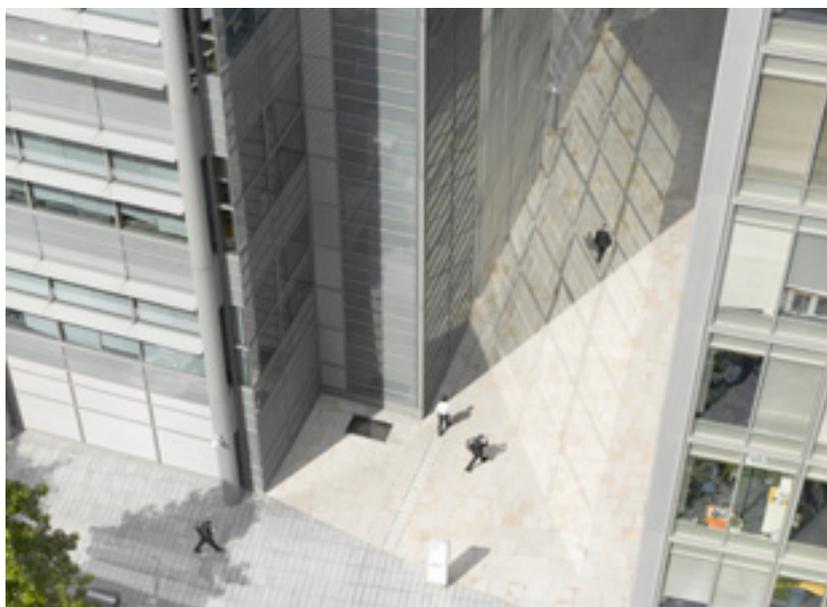
However, paragraph 2 of Article 15 provides exemption to the general rule, and employment income may be taxable in the country of residency if the following three criteria are met at the same time:

- » the employee is present in the other State for a period or periods not exceeding in the aggregate the 183 days in the relevant treaty period (e.g. calendar year, fiscal year, any twelve month period), and
- » the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
- » the remuneration is not borne by a permanent establishment which the employer has in the other State.

For many years double tax treaties gave protection to employees working on a short-term basis in countries other than their home countries, provided they were paid by their home location and their stay in the host location did not exceed 183 days in the relevant period. Under this rule, employers and employees did not have to count with additional administration and tax cost resulting from their activities in that other state.

In recent years more and more discussions involve the question which entity should be considered an “employer” under the provisions of the double-tax treaties. Is it the entity with which the employee has his/her employment contract or should other aspects be considered as well?

Based on the OECD Commentary, substance should prevail over form, which means that the term employer should be considered in a broader sense and the whole context of the employment should be reviewed to determine which entity is the “economic employer” of the employee under the provisions of the treaty and to be able to decide whether exemption under Article 15 can be granted to avoid host country taxation.



For this purpose, the key consideration is which entity bears the responsibility or risk for the results produced by the individual's work. If the risk and responsibility does not lie with the formal employer, additional factors may be relevant to determine which entity will qualify as "economic employer" under the treaty:

- ✓ who has authority to instruct the individual regarding the manner in which work has to be performed;
- ✓ who has control and has responsibility for the place at which the work is performed;
- ✓ the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided;
- ✓ who puts the tools and materials necessary for the work at the individual's disposal;
- ✓ who determines the number and qualifications of the individuals performing the work;
- ✓ who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;
- ✓ who has the right to impose disciplinary sanctions related to the work of that individual;
- ✓ who determines the holidays and work schedule of the individual.

The OECD Commentary proposes only guidelines to determine which company should be considered the economic employer, however countries might have different interpretation of the "economic employer" principle, or some of the countries might not even use this approach but stay with the formal employer concept.

Why is the "economic employer" important?

Both companies sending their employees short term to various locations, and individuals travelling to various projects mostly believe that they will not have a tax obligation in the host country because they spend only a couple of days, weeks, months there and they are protected by the provisions of the relevant double-tax treaty. These employees may not even be on an official short-term assignment but they might only travel around, working on different projects. If they are going to a country that uses the "economic employer" concept, depending on the characteristics of the employment, taxation might arise in the host country as of day one. This would require appropriate treatment from both HR and Finance perspectives at the home company, so that the employee is not in a worse situation and also tax administration and tax liabilities must be completed by the host.

The home company should be prepared to deal with these situations from legal, immigration, tax and social security points of view as well. Policies for how to deal with host country liabilities gain importance.

As a result, monitoring international assignments both long- and short term, business travellers and commuters will be more important in the future.

We have prepared a summary and a short overview about how the "economic employer" concept is used in the countries of the CEE region and which factors are the most important in deciding about the economic employer and establishing taxation under Article 15 of the Double Tax Treaty.

The summary contains information with respect to 2013.

Country	Does the country use the economic employer approach?	OECD member state
Albania	-	
Belarus	-	
Bulgaria	✓	
Croatia	-	
Czech Republic	✓	✓
Estonia	-	✓
Hungary	✓	✓
Kazakhstan	✓	
Lithuania	✓	
Macedonia	-	
Poland	✓	✓
Romania	✓	
Russia	-	
Slovakia	✓	✓
Slovenia	-	✓
Ukraine	✓	

Countries that do not use the economic employer concept in determining the taxation under Article 15 (Dependent Personal Service Clause) of the Double Tax treaty mostly grant treaty exemption once the three conditions set in Article 15 (2) are met, and they only look at the 183 days of physical presence, the formal employer and payout made from the home location and no PE bearing cost in the host.

However, there are some countries that do not use the economic employer approach in a boarder sense but they are looking whether the costs are born by the host company and if yes they would like to tax the income as they do not see the conditions set in Article 15 (2) fulfilled and as such will not grant exemption from taxation.

From the countries mentioned above, Russia is an exception. Formally, Russia does not adopt the economic employer approach. Russia is not an OECD member, although, most of the double-tax treaties are based on the OECD model and the tax authorities often refer to OECD commentary when issuing clarifications. Therefore, the tax authorities may adopt this approach if asked. At the same time, there are two important considerations for practical implementation of Article 15 exemption in Russia.



- ✓ A Russian working visa for a foreign national intending to work in Russia (even on a short-term basis) can only be obtained based on a local contract with a Russian entity/registered presence of a foreign entity in Russia. This contract should provide for a payment of salary in Roubles and operation of a tax withholding. Therefore, an exemption based on the double tax treaties, being available in theory, is hardly achievable in practice.
- ✓ Technically, an exemption from Russian taxation could be provided only by the tax authorities on the basis of a claim. A claim presupposes tax return filing. It is difficult to provide the document supporting a double tax treaty claim that satisfies the authorities, which subsequently leads to the claim being disregarded and, therefore, to double taxation.

The countries that use the concept in the CEE Region interpret the principles in different ways, the steps to be followed are different.

The different interpretations of the guidelines might cause conflicts between these countries. For example, the Austrian Supreme Court issued a ruling which is not consistent with internationally accepted interpretation of economic employment. Slovak and Austrian ministries of finance are working on resolving the conflict.

Another example in which there were conflicts between the German and the Ukrainian authorities related to the interpretation of the economic employer concept. Germany exempts income paid by a German entity for work in Ukraine, if the costs are recharged to the Ukrainian entity. In Ukraine it is possible to exempt such income from personal income tax, provided a properly worded service agreement is signed between the two entities. Usually, a Ukrainian tax return is prepared as Ukrainian tax rates are much lower than German. At the same time, Ukrainian tax authorities require that personal income tax be withheld from income paid to employees who are working outside the Ukraine, irrespective of their assignment duration. This issue has not been resolved yet; taxes are paid twice at the moment, in Ukraine and in the assignment country.

Bulgaria

The Bulgarian Authorities published an approach in 2008 related to the economic employer approach.

A company is considered and “economic employer” for Bulgarian tax purposes if an individual is assigned from his home company/ country to a Bulgarian host company on the basis of a Lease of Staff/ Personnel Agreement. In Bulgaria the following factors need to be researched to determine whether there is an actual lease of staff:

- ✓ whether the accepting Bulgarian company has direct controlling powers over the seconded employees in terms of ongoing / everyday work assignments and tasks;
- ✓ whether the direct result of the seconded employees’ work is for the benefit of the Bulgarian company;
- ✓ whether the employees’ activities contribute to the Bulgarian company’s own regular business activity and are not services provided on an ad-hoc, one-off basis;
- ✓ whether the remuneration costs are recharged by the foreign employer and finally borne by the Bulgarian accepting company.

A mark-up fee under Lease of Staff Agreement is usually not agreed and expected; only in very few cases it may also be agreed. Under a Lease of Staff structure there is no risk for creation of a permanent establishment in Bulgaria by the home company.

In Bulgaria the recharge is important, but is considered only one of the criteria to be considered.

It makes a difference whether the costs are charged as service fee based on a service contract or as wage costs. If the costs are charged as service fee under an inter-company Services Agreement this would presuppose that the purpose of the assignee’s stay in Bulgaria is to perform services on behalf of the home employer to the Bulgarian company. In this case, the benefit of his work remains for the home employer, as the employee executes the obligations of the employing company under the services agreement. In this case there is no “economic employer” in Bulgaria.

If the assignment is arranged under a Lease of Staff Agreement, then there is an “economic employer” for Bulgarian tax purposes.

However, if an inter-company agreement is only bears the title of “Services Agreement” but has elements of lease of staff, i.e. represents lease of staff in substance, the tax authorities may re-qualify the Services Agreement as a Lease of Staff Agreement with all respective consequences.



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Czech Republic

The Ministry of Finance in the Czech Republic issued an official ruling in 1997 (the official ruling contains only factors and conditions determining the economic employment concept).

The Czech Republic uses the economic employer concept in determining taxation under Article 15 of the double tax treaty. The following steps should be followed in determining the economic employer concept:

- ✓ assessment of factors determining whether conditions for economic employment are met
- ✓ if yes (foreign entity remains the legal employer, pays the salary of the economic employee, charges fees to the Czech company), the Czech company as an economic employer is obliged to run deemed (shadow) payroll for the hired employees and remit the Czech tax advances to the Czech Tax Office
- ✓ no regulations for the foreign company apply in the Czech Republic; the administrative burden is imposed on the Czech entity.

The Czech tax authorities see economic employment as a situation in which a tax non-resident (company) provides his employees to the Czech entity to work for it. The foreign company does not manage these employees, does not instruct them and does not bear responsibility for their work. The salary and usually all other costs connected with the employees are charged to the Czech entity, who is a tax resident in the Czech Republic (i.e. economic employer).

The most common factors and characteristics of economic employment are:

- ✓ economic employer orders total number, qualification and other requirements on the employees and the period in which these employees are needed (decisive factor);
- ✓ economic employer sets, directly or indirectly, tasks, manages and controls employees (decisive factor);
- ✓ work is performed at a place set up by the economic employer;
- ✓ the remuneration is calculated based on the length of working hours or based another way in which there is a link between the remuneration of legal employer and the income of the hired employee;
- ✓ economic employer provides tools and material.

There is no rule as to whether the costs should be recharged as a fee or wage costs. In practice, various types of charges are used by the companies. However, it is important to know that there are special rules for running a shadow payroll for hired employees, in which the payroll is linked to the charges from abroad (e.g. if not only wages are charged to the Czech Republic, at least 60% of the total payment abroad is treated as income of the hired employee).



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Hungary

The Hungarian Tax Authority issued a ruling related to the economic employer approach in Hungary on 31 October 2012.

According to the new rules, if the individual spends less than 183 days in Hungary in the relevant treaty period and is paid by the foreign company, first of all an integration test must be performed to identify which company is the economic employer. Integration in this sense means which company is responsible and bears the risk for the results of the employee's activities.

If the test shows that the legal and the economic employer are different, further examination of the employment will be required according to a complex set of criteria. The following criteria should be analysed:

- ✓ who is responsible for or bears the risk for the results produced by the individual's work;
- ✓ who has authority to instruct the individual regarding the manner in which work has to be performed;
- ✓ who has control and responsibility for the place at which the work is performed;
- ✓ the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided;
- ✓ who puts the tools and materials necessary for the work at the individual's disposal;
- ✓ who determines the number and qualifications of the individuals performing the work;
- ✓ who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;
- ✓ who has the right to impose disciplinary sanctions related to the work of that individual;
- ✓ who determines the holidays and work schedule of the individual.

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Based on the ruling, the above criteria have to be considered jointly and the cost recharge is only one of the factors in determining the economic employer. The employment should be looked at and investigated in its whole context and the "substance over form" principle should be followed.

There is a difference when the costs are charged as service fee (based on a service contract) or as wage costs. If the costs are charged as service fee based on a service contract between the two companies, the home company will remain the economic employer because the employee has the reporting obligation to his employer and he is working in the interest of his legal employer. If the costs are charged as wages, the host company might be considered an economic employer.

Kazakhstan



Kazakhstan uses the „economic employer” concept in determining taxation under Article 15 (Dependent Personal Service Clause) of the double tax treaty.

In order to determine the economic employer from a Kazakh point of view it is decisive for the benefit of which company the individual is working and paid in the respective period. Employment income is seen as originated in Kazakhstan irrespective whether it is paid directly by a Kazakh entity or indirectly, outside of Kazakhstan with subsequent recharge of costs to a Kazakh entity.

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Lithuania

In Lithuania the first economic employer concept-related comments by the Tax Authorities are dated to 2009.

Lithuania generally uses the economic employer approach, however this concept is not clearly defined in the local legislation, but there are some official explanations issued by the Lithuanian Tax Authorities with respect to the economic employer approach.

According to the most recent official explanations of the Lithuanian Tax Authorities, in those cases in which a foreign company sends its employees to a Lithuanian company, the Lithuanian company could be considered an economic employer if the work is performed on its behalf. There are certain criteria which should be considered when analysing if the concept of economic employer could be applicable. The official explanations do not except one or another factor, thus, all of them should be analysed as a whole. Some of them are listed below:

- ✓ The supervision of the work performed is made by the company which accepts the employees from the other country.
- ✓ The work is performed in a place of work which is at the disposal of the company which accepts the employees.
- ✓ The work equipment is provided by the company accepting the employees.
- ✓ The salary-related costs are recharged to the Lithuanian company, etc.

One of the main criteria in defining the economic employer position in Lithuania is – since it is almost the most obvious proof – that the employee works for the benefit of the company in the host country.



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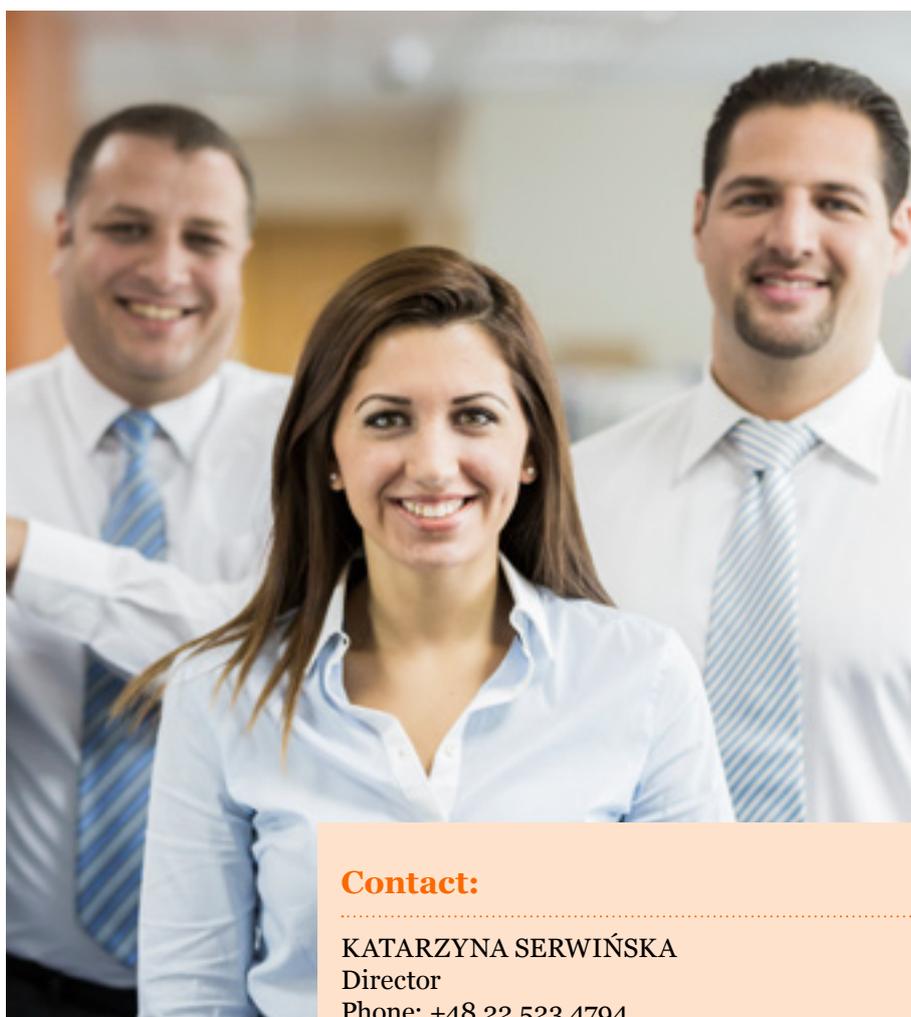
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Poland

Poland uses the “economic employer” concept in determining taxation under Article 15 (Dependent Personal Service Clause) of the double tax treaty, but this results only from some individual rulings and practice of the authorities. There are no regulations on that in Polish domestic law.

In Poland, generally, the tax authorities in their rulings follow the approach of, and indicate the factors resulting from the Commentary to the OECD Model Tax Convention. Accordingly, the following factors should be analysed.

- ✓ who is responsible or bears the risk for the results produced by the individual’s work;
- ✓ who has authority to instruct the individual regarding the manner in which work has to be performed;
- ✓ who has control and has responsibility for the place at which the work is performed;
- ✓ the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided;
- ✓ who puts the tools and materials necessary for the work at the individual’s disposal;
- ✓ who determines the number and qualifications of the individuals performing the work;
- ✓ who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;
- ✓ who has the right to impose disciplinary sanctions related to the work of that individual;
- ✓ who determines the holidays and work schedule of the individual.



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There are no clear rules regarding whether the criteria should be considered jointly or separately. Each case should be analysed separately. A significant factor is often a simple wage cost recharge. If there are doubts, there is also a possibility to apply for a binding ruling on a given individual.

There is a difference between the service fee model and a simple wage cost recharge. In the first case it can still be argued that the second condition set in Article 15 (2) is still

met assuming that the employee is linked with the foreign employer and other factors in deciding about the economic employer indicate that the employer function is kept by the foreign company and not the Polish one. In the second case, in which there is a simple wage cost recharge, the employee usually becomes taxable in Poland, but this is also connected with the fact that in such cases often other factors indicate that the employer function is taken over by the Polish company.

Romania

This concept it is not specifically regulated by Romanian law, as such. However, similar provisions to the ones in the Dependent Personal Services Article in double tax treaties, exist in Romanian domestic law.



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There is no specific procedure in Romania for determining the economic employer. The „economic employer” would be assessed depending on who is the final cost bearer of the salary costs paid during the international assignment.

In the case of services provided based on a service contract, the „economic employer” concept would not apply. Generally a service contract is used if the company provides the services and the employee is not directly working for the benefit of the local company. In the case of recharge of salary costs, the „economic employer” concept would apply and the individual would be taxable as of the first day in Romania.

Slovakia

This concept has been used in the Slovak Republic since 1999. The Ministry of Finance of the Slovak Republic issued binding instructions for unification of the application of the economic employment provision of the Slovak Income Tax Act on 14 May 1999.

Slovakia uses the economic employer concept in determining taxation under Article 15 of the double tax treaty.

For identification of the economic employee, there are two important tests:

- ✓ the employee works under orders and instructions of the local economic employer; and
- ✓ the salary for this work is paid through a foreign third party (legal employer).

Invoicing of the costs is an indicative rather than a decisive test.

An economic employment relationship is in effect where an economic employer:

- ✓ bears the responsibility and risk for the outcome of the employee's work;
- ✓ is entitled to give instructions to the employee;
- ✓ controls and is responsible for the employee's workplace;
- ✓ provides the employee with work tools and material;
- ✓ quantifies the number of hours that employee worked; and
- ✓ indicates the number and qualification of employees required.

Not all conditions must be met to be an economic employer. The cost recharge is only an indicative factor of lower importance in this regard.

The decisive factors are that an economic employee should work under instructions and orders of his/her economic employer and the income for this work is paid by a third foreign party based on a contractual agreement. Other tests mentioned above have an indicative character.

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Ukraine

In Ukraine the economic employer concept is not very well developed yet.

Whether Ukraine grants treaty exemption under Article 15 depends on the structure used by the foreign employer to charge the Ukrainian company for personnel or services. The following should be reviewed:

- ✓ Whether a foreign employer charges
 - » a fee per day / month and per position (no individuals' names are indicated), or
 - » a fee per particular person, or
 - » remuneration paid plus mark up, or
 - » remuneration only.
- ✓ How detailed is the documentation attached to invoices?
- ✓ Whether an assignee was hired specifically to work in a Ukrainian company.

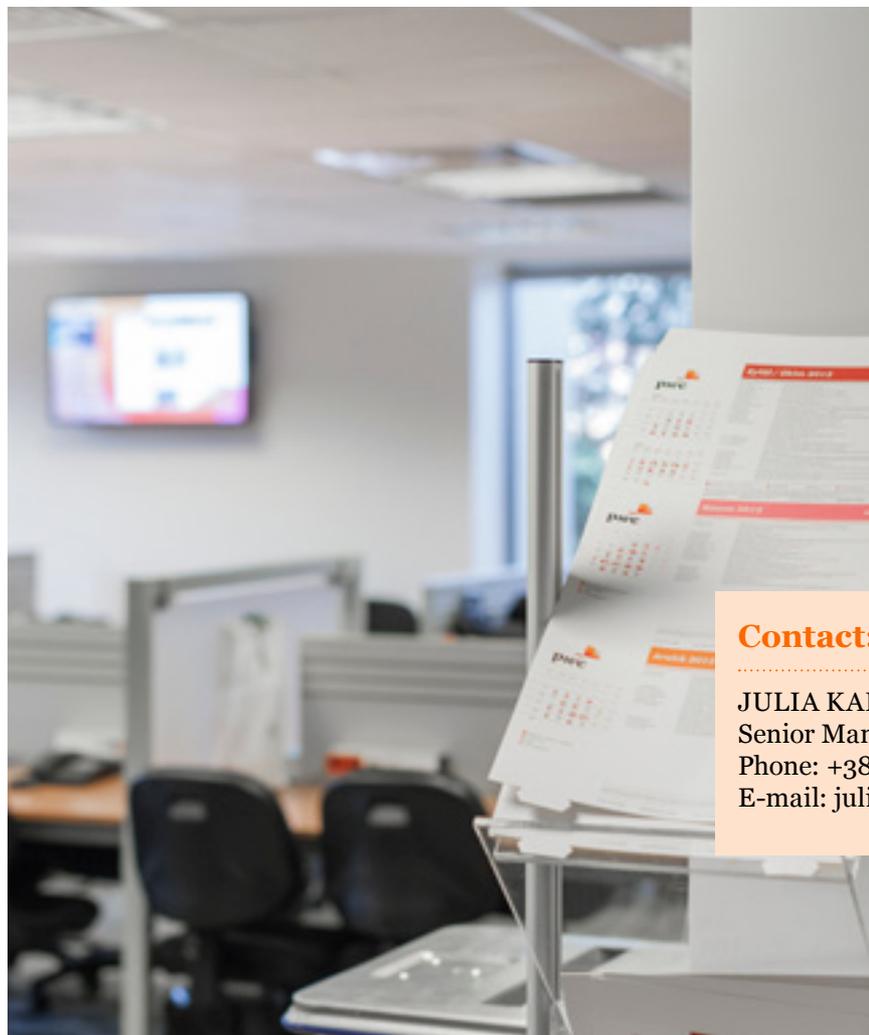
- ✓ Whether Ukrainian management has the right to dismiss the assignee from Group or from UA company only.

- ✓ What kind of services have been performed by the assignee, e.g. control on behalf of a HQ; training / consulting; position within a Ukrainian company (head of HR, Finance Director), etc.

In Ukraine more attention is given to the recharge structure. The tax authorities may raise questions in respect of foreigners' income taxation only if it involves recharging.

Provision of services based on a services contract (preferably Agreement On Provision of Personnel) would bear much less risk than the recharging of wage costs. Agreement On Provision of Personnel (APP) would be preferred from the Ukrainian Corporate Profit Tax (CPT) view. The Tax Code of Ukraine specifically provides that personnel seconded under the APP will not create a PE for a foreign employer, while specialists assigned based on a consulting services agreement might.

The „Economic employer” concept may also have an impact on social security. As the base for social security contribution is limited, the issue has not been a priority for the state authorities so far. However, the cap is likely to be removed in the near future and the tax authorities are taking control of the social security contributions, so it is likely that the situation will change in coming years. Most of the MNCs implemented split payroll in the Ukraine and current practice is that only income paid through the Ukrainian payroll is subject to social security. Thus, it could be expected that the tax authorities will attack the split-payroll structure based on the „economic employer” concept.



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