

SECONDMENT ARRANGEMENTS CAN GIVE RISE TO TAX RISKS

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To help support their businesses and enable them to grow internationally, multinational companies frequently send skilled employees from their home countries to work in group companies abroad, including Thailand.

The process of sending employees abroad often involves secondment arrangements. A secondment can be defined as the temporary transfer of an employee to work for another project under the control and supervision of another employer (in this case, a subsidiary of the multinational company).

Normally, when being transferred to work for another company abroad, the person being seconded will remain an employee of the original employer. There is no rupture in the continuity of employment.

Although maintaining the employee's status with the home company is a sensible option for both parties, the business could risk facing unnecessary tax liabilities. This could happen if the employee did not have a properly documented secondment agreement, or no agreement at all. As a result, the company could be considered to have a taxable permanent establishment (PE) in Thailand through its employee.

The risk of PE exposure would be especially high if the fee charged by the home company was not completely justifiable. The Revenue Department could perceive the secondee as an employee of the foreign company when providing services to the Thai subsidiary and the fee (regardless of what it is called in the transaction) as a management service fee. Therefore, the home company could be considered as having a PE in Thailand.

The Revenue Department recently challenged a secondment arrangement in a ruling (No. Gor. Khor. 0702/9406) dated Oct 25, 2012. In this case, the Thai

company had paid a "dispatch fee" to the employee's home company in accordance with the secondment agreement.

Even though the secondment was properly documented, the Revenue Department considered the agreement to be a contract of service. It regarded the home company as the provider of services through its employees seconded to the Thai company. Therefore, the home company had a PE in Thailand and was subject to corporate income tax on the dispatch fee.

However, it is worth noting that this ruling did not indicate that the Revenue Department has changed its position and would consider all secondment arrangements to be devious and reject them. It merely implies that it is keeping an eye on the misuse of secondments.

What struck the tax authorities in this particular case was the fact that the dispatch fee was unjustifiable. In fact, the true interest of the home company seemed to lie in the fee itself which was extravagantly added on as a dispatch fee.

Multinational companies therefore have to take extra care since the mere existence of a written secondment agreement is no longer a guarantee that they would not be exposed to the risk of having a PE in a host country. The secondment has to be structured properly in a way that it can undoubtedly be differentiated from a service arrangement.

The most appropriate way would be for the person being seconded to work solely under the direct control and supervision of the Thai company. This is entirely different from a service contract where the employee would usually work under the control and supervision of the home company when providing services to the Thai entity.

Nevertheless, if the Revenue Department becomes more stringent, there may come a time when the secondee will feel the need to end his or her employment status completely with the home company during the secondment period, solely to alleviate the risk of unnecessary tax liability from PE exposure. Although it would be inconvenient and detrimental in practice for the employee and the enterprise, it might be the only choice

available in certain situations.

Inevitably, the authorities will attempt to investigate the improper use of secondments as a disguise for service agreements because they see the practice as a loophole used to avoid tax. Enterprises therefore have to plan ahead to mitigate their risks to tax exposure.

Local companies should explore ways to draft proper secondment arrangements in compliance with the law and regulations and obtain proper advice before undertaking secondment arrangements to ensure there are no unnecessary tax obligations. Finally, all documentation for the secondment should be consistent, particularly the details on the billings for reimbursement of salaries and other fringe benefits that have been advanced by the home company.

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