

# Sweden: New proposal on how to distinguish employment relationship

February 20, 2018

## In brief

The Swedish Tax Agency (hereafter STA) recently presented a memorandum that proposed the introduction of the term 'economic employer' into Swedish tax legislation. The formal employer concept is proposed to be replaced by an 'economic employer' – this will imply a change on how to distinguish an employment relationship when applying the Swedish, internal so-called 183 days rule as well as when interpreting the 183 days rule in tax treaties where Sweden is a contracting state.

As a result, for whom the work is performed will be decisive when determining if the 183 days rule is applicable and not which entity pays the salary. An employee employed by a foreign company without a permanent establishment in Sweden will likely be liable to tax in Sweden for employment income when work is physically performed for a principal in Sweden. Introducing the economic employer term as described below will generally mean that more foreign workers may be liable to tax in Sweden and a larger administrative burden is to be expected for companies sending employees to Sweden.

## In detail

### Background

#### 183 days rule

Article 15 in the OECD Model Tax Convention on Income and on Capital (hereafter OECD MTC) regulates which contracting state has the right to impose tax on income from employment. As a main principle, income from employment shall be taxable only in the state where the person is a resident, unless the employment is exercised in the other state.

An exception from taxation in the state where the employment is exercised is provided in article

15.2 of the OECD MTC – the 183 days rule. Income from employment is taxable only in the state where the person is a resident if three criteria are met:

1. the recipient is present in the other state for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and
2. the remuneration is paid by, or on behalf of, an employer who is not a resident of the other state, and
3. the remuneration is not borne by a permanent

establishment which the employer has in the other state.

An article corresponding to the 183 days rule in the OECD MTC is found in tax treaties where Sweden is a contracting state. A corresponding rule is also found in Swedish internal, tax legislation - Special Income Tax for Non-residents Act.

#### Definition of 'employer'

According to the commentary to the OECD MTC it is a matter of domestic law of the state of source to determine the application of the 183 days rule and therefore the definition of the term *employer*.

In the Special Income Tax for Non-residents Act, 'employer' is defined as the one who pays out compensation for work, i.e., normally the formal employer. The formal employment relationship is therefore the current decisive circumstance when determining the application of the 183 days rule in the Special Income Tax for Non-residents Act and in tax treaties where Sweden is a contracting state.

If the rest of the criteria in the 183 days rule are met, an employee who is formally employed by a foreign employer and receives salary from this foreign employer, will not be taxable in Sweden even if the work is exercised for, and under control of a principal in Sweden. This is the situation, for an example, in so-called 'hiring-out of labour' cases. An employee who receives salary directly from the same principal, exercising the same kind of work in Sweden should be liable to tax in Sweden.

The STA regards the consequences of this legislation as distorted competition between workers employed and working in Sweden and workers employed by a foreign employer working in Sweden, and wishes to overcome this result with the proposal.

### **Proposed regulation**

#### *Two potential alternatives*

The STA proposes that the formal employer should be replaced by the 'economic employer' in regard to application of the 183 days rule in the Special Income Tax for Non-residents Act and tax treaties where Sweden is a contracting state. The STA presents two possible alternatives for this replacement.

The first alternative implies a change of the definition of 'employer' in the

Special Income Tax for Non-residents Act. An employer should be defined as the one who receives the benefit of the work exercised by the employee in Sweden and under condition that the work is an integrated part of the employer's business in Sweden.

The second alternative implies an exception to the application of the 183 days rule in the Special Income Tax for Non-residents Act. The 183 days rule shall not be applicable when the employment is exercised for a principal other than the formal employer, when the principal controls the place where the employment is exercised and when the work is an integrated part of the principal's business in Sweden. Both alternatives are designed to aim at, among other things, so called 'hiring-out of labour' cases.

#### *Determining an economic employer*

When determining if the work is performed for an economic employer in Sweden, paragraph 8.14 in the commentary to article 15 in the OECD MTC shall be of guidance. The following factors may then be relevant to determine whether this is the case:

- Who has the authority to instruct the individual regarding the manner in which the work has to be performed?
- Who controls and has responsibility for the place at which the work is performed?
- Is the remuneration of the individual 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 agreements 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 that individual?

#### *The result? Taxable employment income*

A change according to one of the alternatives will result in the 183 days rule not applying when there is an economic employer in Sweden. Income from employment would then be taxable in Sweden. Furthermore, the STA emphasizes it should entail neutral competition between workers employed and working for a company in Sweden and workers formally employed by a foreign employer but performing work for the same company in Sweden.

In addition, it is proposed that the foreign company (which pays the salary) will be liable for reporting and payment of the Swedish tax and not the Swedish company.

#### *The takeaway*

The Swedish government generally supports the STA proposal and has the intention to put a proposal to vote at the Swedish Parliament during 2018. Should the Swedish Parliament enact the proposal, the economic employer will be applicable as from the 1<sup>st</sup> of January 2019.

A larger, administrative burden is to be expected for companies sending employees to Sweden as well as for the employees. Companies currently

applying the formal employment concept should make preparations before the transition to the economic employer term. PwC can assist your

company with identifying appropriate measures.

### **Let's talk**

For a deeper discussion of how this issue might affect your business, please contact your PwC Global Mobility Services engagement team or one of the following professionals from PwC Sweden:

#### **Global Mobility Services – Sweden**

Cecilia Arrhenius  
+ 46 10 212 67 46  
[cecilia.arrhenius@pwc.com](mailto:cecilia.arrhenius@pwc.com)

#### **Global Mobility Services – United States**

Peter Clarke, *Global Leader*  
+1 (646) 471-4743  
[peter.clarke@pwc.com](mailto:peter.clarke@pwc.com)

**Stay current and connected.** Our timely news insights, periodicals, thought leadership, and webcasts help you anticipate and adapt in today's evolving business environment. Subscribe or manage your subscriptions at:

[pwc.com/us/subscriptions](http://pwc.com/us/subscriptions)

SOLICITATION

© 2018 PwC. All rights reserved. PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. Please see [www.pwc.com/structure](http://www.pwc.com/structure) for further details.

This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.

At PwC, our purpose is to build trust in society and solve important problems. We're a network of firms in 158 countries with more than 236,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at [www.pwc.com](http://www.pwc.com).