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by Ruth De Baere

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Belgian tax authorities recently issued their new commentary on article 15 (the employment article) of the OECD model income tax treaty.[1] The article defines where salaries derived by a resident of one country for employment carried out in the other country should be taxed. As a rule, the right to tax employment income is attributed to the country where the activities are actually performed (hereafter referred to as the work state), unless the 183-day rule (described below) prevails.

Although article 15 applies to every taxpayer with cross-border employment activities, there was a considerable lack of clarity regarding its application, often resulting in double taxation. The new practice note is intended to eliminate those legal uncertainties by defining the scope of, and terms used in, article 15 in line with the OECD guidelines and Belgian case law.

It is important that Belgian tax authorities clarify not only which income falls within the scope of article 15, but also how the days should be counted under the 183-day rule, how the income should be split in cases of simultaneous employment, and how to deal with cross-border tax issues arising from stock options. Those issues are described in more detail below.

Employment Income

For purposes of article 15, an employment relationship exists whenever there is a link of subordination between the parties involved. No written employment agreement is needed. Substance prevails over form.

Belgian authorities follow the "related to" principle, which implies that employment income received during, before, or after the period the activities are actually physically performed in a country is taxable in that country.

Not only do salaries, wages, bonuses, and benefits in kind derived from employment fall within the scope of article 15, but also exceptional payments such as severance pay, noncompetition payments, sickness benefits, and stock options.

Exceptional Payments

Exceptional payments are considered separately in the practice note because, generally speaking, the beneficiary of the income does not perform any activity for which the exceptional payment is compensation.

It is a principle in Belgium that severance pay, calculated in accordance with Belgian law, relates to activities performed at the moment the employment relation is terminated. As a consequence, the right to tax a severance payment can be split between the countries that have the right to tax the worker's regular employment income received at that time. Depending on the circumstances, the worker's international career can also be considered when splitting the payment for tax purposes.

Noncompetition payments, on the other hand, are taxable in the worker's country of residence, as those payments compensate for the fact that the taxpayer cannot perform certain activities in the future.

Unless the relevant tax treaty contains a special rule, sickness benefits received from an employer are taxable in the work state, while any benefits received from a third party (for example, an insurance company) are taxable in the worker's state of residence.

The 183-Day Rule

In an exception to the general rule, employment income is taxable in the worker's country of residence if the following three conditions are met simultaneously:

- The recipient of the income is not present in the work state for a period exceeding 183 days during any 12-month period. When calculating the 183-day threshold, Belgium counts the days of physical presence for both professional and private purposes (unless the relevant treaty

[1]Practice Note AFZ 2005/0652 (AFZ 08/2005) of May 25, 2005. Available in French and Dutch at http://www.fisconet.be.

expressly refers to the duration of the activity). Days of arrival and departure, weekends, national holidays, vacation days, and sickness days in the work state are included. Every full day outside the work state may be excluded.

- The income is paid by, or on behalf of, an employer who is not a resident of the work state. Regarding the concept of "employer," Belgium follows the economic approach: The link of subordination determines the employment relationship. Direct payment by the employer is of no importance; the cost of the employment can also be part of a management fee.
- The income is not borne by a permanent establishment or a fixed base that the employer has in the work state. The existence of a PE must be verified in accordance with article 5 of the OECD model income tax treaty. (The practice note also announces another practice note on article 5.) The phrase "borne by" is defined in accordance with article 7 of the OECD model. Belgian tax authorities emphasize that even if the cost of the employment is not actually deducted from the profits of the PE, the income will be deemed to be borne by the PE if, from an economic point of view, the employer *should have* attributed the cost to its PE.

Simultaneous Employment

If any of the conditions of the 183-day rule is not met, the work state will have the right to tax employment income related to the work actually performed in that country.

On that basis, a salary split can be implemented. The practice note clarifies how the income should be split in cases of simultaneous employment.

When different countries have the right to tax the income, the income must be allocated to the work states in accordance with the terms and conditions of the employment contracts. If those contracts are not available, the income will be split on a *pro rata temporis* basis (in proportion to the length of time involved) unless the taxpayer proves that the level of work done in the work states, or the salary levels, differ considerably.

Stock Options

Under Belgian law, stock options granted to employees are taxable at grant. (For related coverage, see *Tax Notes Int'l*, July 28, 2003, p. 379.) There is no taxation at vesting or at exercise, and capital gains realized when the shares are sold are exempt. Because most other countries tax stock options at exercise, this often gives rise to situations of double taxation for employees with international careers, and sometimes to no taxation at all.

Belgian tax authorities have now given their interpretation of the OECD guidelines issued in 2004[2] regarding cross-border tax issues arising from employee stock option plans. As a rule, the practice note states that stock option income relates to activities performed at the moment the stock options are granted. However, a taxpayer can prove otherwise based on the facts and circumstances. Therefore, when making an offer of stock options to employees, it is advisable to specify for which activities the benefit is being granted.

If the employment activities are being performed in Belgium at grant, Belgium has the right to tax the stock option income. In the case of a salary split, the benefit is divided between the work states on a pro rata basis (in relation to the time spent in the different countries), unless the taxpayer puts forward other criteria.

As a principle, Belgium will always tax the stock options at grant, but it acknowledges that other states can tax the income at a later stage (on vesting or exercise) and that this may result in double taxation. In such cases, Belgium will refund part of the tax when the income is taxed in the other state. Notably, it is the taxpayer who must take the initiative to apply for the refund in accordance with the mutual agreement procedure set out in article 25 of the OECD model. That procedure must be started within a specific period of time — usually three years — so the taxpayer may have to take action before he is in a position of double taxation.

Specific Provisions

The practice note concludes by clarifying specific provisions included in article 15 of Belgium's tax treaties with France, India, the Republic of Korea, Malaysia, Norway, Singapore, Thailand, the United States, and the former Union of Soviet Socialist Republics.[3] ◆

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[2]Available at http://www.oecd.org/dataoecd/35/53/33700277.pdf.

[3]*See supra* note 1.