

New decision regarding the scope of the Danish expat tax scheme

A new ruling by the National Tax Tribunal excludes the use of the expat tax scheme when a non-resident employee has been employed by the non-Danish head office prior to being employed by a Danish branch of the same group.

About the case

On 12 February 2018, a case on the Danish tax scheme for foreign researchers and key employees (the expat tax scheme) was brought before the National Tax Tribunal. The issue of the case was whether the Danish expat tax scheme contained in s. 48 E-F of the Danish Withholding Tax Act (kildeskatteloven) may be applied to employees who, prior to their employment with a Danish branch, had been employed at the foreign head-quarter.

The Danish expat tax scheme

The rules governing the expat tax scheme are stipulated in s. 48 E-F of the Danish Withholding Tax Act. Under this tax scheme, key employees and researchers recruited abroad and meeting various criteria have the opportunity to work in Denmark subject to beneficial tax treatment. The beneficial tax treatment may be upheld for a period of 84 months during which the non-Danish employees and researchers are subject to a special tax rate of 27% plus labour market contribution (AM tax) without deduction instead of regular income taxation.

The scheme changed very recently as part of the Government's initiative to support the Danish business environment and facilitate business operations in Denmark. The changes included an extension of the period to 84 months during which the favourable tax rate will apply, although this tax rate was increased at the same time to have a curbing effect.

Under s. 48 E-F of the Danish Withholding Tax Act, the tax liability to Denmark subject to the expat tax scheme must commence at the same time as the new employment relationship in Denmark.

Facts of the case

In May 2011, an Italian company established a branch in Denmark. In June 2011, one of its employees was expatriated to the company's Danish branch as branch manager. The employee had been employed by the Italian company since 2006.

In Denmark, the employee requested to be subject to taxation under the expat tax scheme. The Danish tax authorities declined this request as they found that the employee did not meet the specific conditions for the scheme to apply as the employment with the Danish branch. The reasoning of the tax authorities changed throughout the proceedings but ultimately the tax authorities rejected the request because the employment with the branch was not, as such, new.



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The ruling of the National Tax Tribunal

The National Tax Tribunal found that the employee did not satisfy the requirements under the expat scheme and thereby confirmed the decision of the Danish tax authorities. As the employee was already an employee of the non-Danish company before his employment with the Danish branch, the National Tax Tribunal held that the tax scheme for foreign researchers and key employees was not applicable as the employment and the tax liability to Denmark did not commence concurrently. As such, the new position with the Danish branch did not, for the purpose of the expat tax scheme, constitute a new employment relationship.

The National Tax Tribunal further held that this interpretation of s. 48 E of the Danish Withholding Tax Act was not contrary to EU law. Instead, a company's choice of legal structure in Denmark – i.e. whether it operates as a branch of the non-Danish company or as a company – has different consequences and effects. So, according to the National Tax Tribunal, it is equally possible to apply the expat tax scheme when being employed by a non-Danish employer with a permanent establishment in Denmark as when being employed by a Danish company.

However, under this interpretation, the chosen company form is decisive as to whether a non-Danish employee, and consequently his employer, can apply the expat tax scheme when moving an employee to the Danish entity.

Bech-Bruun's comments

The decision will be of great importance to foreign companies and their employees in situations where non-Danish companies operate in Denmark through a branch or a permanent establishment. The decision excludes the use of the expat tax scheme when an employee, prior to his or her employment with the Danish branch, is employed at the branch's non-Danish head office.

This decision seems contrary to the original purpose of the rules which is to recruit qualified labour from abroad and strengthen Denmark's international competitiveness and somewhat at odds with the recent expansion of the expat tax scheme seemingly encouraging the use of it.

Tags

Taxes and duties

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