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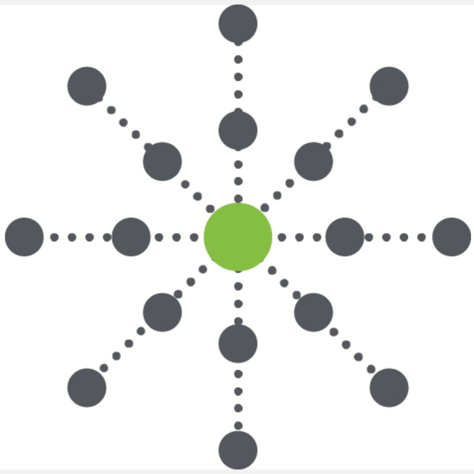

Global Rewards Update

Tax reporting and withholding in Belgium – Update

Are your equity plans still audit proof? Update on the latest developments in Belgium

Background

As covered by the October 2017 alert, the Income and Social tax reporting and withholding landscape has shifted for local Belgian subsidiaries, leading to an increasingly narrow view of historical Belgian guidelines upon audit. The audits by the Special Tax Inspection office have been focused on non-declared foreign equity incentives while Social Security Inspection audit findings have been very critical on benefits granted by a 'third party'.

Income tax

The previous tax alert on this topic informed of an ongoing audit campaign by the Special Tax Inspection targeting local Belgian employers with employees who receive equity awards from a foreign (non-Belgium) parent company.

It's clear from the audits that the inspection's focus is to, where applicable, collect personal income taxes from these companies' employees. However, even though the tax liability remains the obligation of the individual, when no withholding was originally operated by the employer, the employer itself can also be held liable if the tax authorities are unable to be collect taxes due from the individual. Of note, these audits have shown an enhanced focus on US-based companies (both large and small).

Where employees fail to accurately report the equity income on their individual tax filings, the tax authority has begun to impose increases in taxes owed. The imposed increase in taxes may differ, depending on the employees' behavior and intentions:

- If there was no intent to commit fraud, a tax increase of 30% is applied to the unreported equity income from the past 3 years
- If there was an intent to commit fraud, a tax increase of 50% is applied to the unreported equity income from the past 7 years

An unwillingness to collaborate with the tax authorities during the regularization process, or a failure to register a foreign brokerage account with the National bank, where necessary, are both grounds for a taxpayer's actions to be considered as fraudulent.

The employer's communications on plan features and related compliance has become an important factor in promoting and documenting that employees are aware of the correct reporting rules. This is an area specifically emphasized during the audit process.

Social security

Following the Supreme Court's October 2016 decision (also covered by this previous tax alert on the topic), the social security authorities have recently confirmed that it is possible to trigger the application of Belgian social security simply by having performance based equity grants, where the performance metric is lodged by the Belgian local employer into the global HR ERP systems.

The social security authorities consider that if grants made by a foreign parent company to employees of a Belgian subsidiary company, are determined based on performance evaluations lodged in a global HR ERP systems by the local Belgian employer, then such grants should be considered as being impacted by "local intervention" of the Belgian subsidiary. This determination of local intervention is regardless of whether there is a legal commitment by the Belgian local employer or if there is any recharge back to the foreign parent company for the costs of the awards. If local intervention exists, then any equity received by the employee would then be subject to Belgian statutory social security contributions.

Although the position taken by the social security authorities does not appear to be in alignment with the legal provisions or with Supreme Court rulings, Deloitte strongly recommends performing an in-depth assessment of your company's equity processes. Should the social security authorities enforce regularization of this position, a company could face an incremental cost of 60% or more.

Deloitte’s view

Employers are encouraged to consider a re-alignment or revision of current practice, with all concerned stakeholders. With the audit activity in Belgium changing and the tax authorities taking an active interest in this issue, it can be very challenging in practice to demonstrate that there is no involvement in the equity plan from the Belgium subsidiary, and clients are advised to carefully review and consider withholding taxes in the interests of prudence.

As recommended in our previous alert, companies relying on the “no intervention” principle, are encouraged to test the local level of intervention and to consider conducting a mock audit. Employers that conclude to continue to operate no PAYE are encouraged to carefully document the basis of their decision making, to test that conclusion periodically, and to make sure employees are fully aware of their personal tax obligations.

Deloitte’s Global Employer Services team is readily available to help make sure employers are fully compliant and that their employees are fully informed of their obligations.