Pragmatism wins out

Inland Revenue's guidance on non-resident employers

More and more we are seeing examples of people working in New Zealand (NZ) for employers that are based outside NZ and have no NZ trading presence. Because of remote working tools those workers can choose to live and work anywhere in the world and have chosen to base themselves in NZ for family and/or lifestyle reasons. This can give rise to some thorny tax questions for their overseas employers as to what their NZ tax compliance obligations might be.

Inland Revenue have released much needed draft guidance regarding non-resident employers' tax obligations. It is intended the draft guidance will apply from the date it comes into force and will not be applied retrospectively. We understand this guidance has been carefully considered for some years.

This draft operational statement provides guidance on whether employers have PAYE, Fringe Benefit Tax (FBT) and Employers Superannuation Contribution Tax (ESCT) obligations in various cross-border employment situations.

Under the guidance, a non-resident employer has an obligation to withhold PAYE and pay FBT and ESCT on payments/benefits/contributions made to NZ resident employees where:

- The employer has sufficient presence in NZ; and
- The services performed by the employee are properly attributable to the employer's presence in NZ.

There is no PAYE withholding obligation if a PAYE income payment is "non-residents' foreign sourced income" for the employee. This latter point is useful where a NZ business employs a non-resident in an offshore jurisdiction (for example, a NZ business employing an Australian who works in Australia).

Definition of "Sufficient Presence"

There are different categories of presence or activity that can give rise to tax compliance obligations in NZ. It is clear that if a non-resident operates a branch in NZ and employs staff for that branch, then they will have full NZ tax compliance obligations for those employees. The situation is less clear where there is no full branch trading operation.

The extent of the presence required to trigger employer tax obligations will vary depending on the facts of the particular case. The following are examples of when the required presence has been met:

- If a non-resident employer has a trading presence in NZ (i.e. a branch); or
- If a non-resident employer has a permanent establishment, with contracts that are entered into and performed in NZ with employees based in NZ; or
- A NZ address for service being listed on a website or similar.

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A sufficient presence would not include a situation where an employee chooses to undertake employment activities in NZ where those activities have no connection to NZ. Merely having employees in NZ would not, of itself, constitute a presence for the employer.

Services Performed

Where a non-resident employer has sufficient presence in NZ their obligations will be limited to matters that are attributable to that presence. Generally, PAYE withholding obligations will arise where the employee is based in NZ. However, it is possible that a NZ resident employee could perform services overseas that are attributable to the non-resident employers' NZ presence.

Relief given by a double tax agreement (DTA)

No PAYE withholding obligation will arise for PAYE income payments where a DTA provides the employee with relief from NZ taxation. In certain circumstances (usually connected with short term assignments) a DTA may have the effect of denying NZ any taxing rights for an amount of employment income derived by a non-resident employee for services performed in NZ.

Options Available

In all cases, even if there are no NZ tax obligations for the employer, a New Zealand tax resident will be taxable on their employment income earned in New Zealand.

While not specifically discussed in the draft guidance, for a single NZ representative, an option is available for an employee of a non-resident employer to become an "IR56 taxpayer". This means the employee withholds and remits PAYE to Inland Revenue.

Comment

While this is only a draft statement, it represents Inland Revenue's well considered initial view. We welcome Inland Revenue taking a pragmatic approach as it can be a compliance nightmare for non-resident employers to register with Inland Revenue, especially with the requirement for customer due diligence to be done.

Given the difficulties of enforcing a tax obligation on an overseas company in respect of a relatively small amount, this is a pragmatic approach that reduces the compliance risk for overseas companies.

If you have any queries in relation to the tax obligations associated with employing staff, or require assistance with payroll, please contact your Baker Tilly Staples Rodway advisor.

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