Tax Excellence Decoded

Moving Beyond Geographic Boundaries

Managing Tax Implications of Cross-border Staff Movements

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Accredited Tax Advisor (Income Tax) Sivakumar Saravan, Executive Director at Crowe Horwath First Trust Tax Pte Ltd, shared practical tips on the tax implications of cross-border staff movements.

Cross-border staff movements, while seemingly benign, may in fact expose businesses to tax risks.

In structuring secondment arrangements, companies should ensure that the substance of the secondment follows its legal form, or the PE risk cannot be mitigated.

For many businesses in Singapore, international expansion is a critical component of their overall growth strategy. The ability to field a mobile workforce is becoming ever more vital in today's competitive environment. As such, there is an increasing need for businesses to understand the tax implications of cross-border staff movements.

At a sell-out *Tax Excellence Decoded* session organised by the Singapore Institute of Accredited Tax Professionals (SIATP), Accredited Tax Advisor (Income Tax) Sivakumar Saravan, Executive Director at Crowe Horwath First Trust Tax Pte Ltd, generously shared practical tax tips on the topic.

Taxation of service income

Most jurisdictions have some form of mechanism to impose tax on income from services derived by foreign businesses from their jurisdiction. Therefore, a Singapore company providing services to a customer in a foreign jurisdiction may be subject to tax on either its gross or net service income under the domestic tax laws of that jurisdiction. This service income may also be subject to tax in Singapore unless it qualifies for income tax exemption.

Subject to certain conditions[1], section 13(8) of the Singapore Income Tax Act (ITA) provides for income tax exemption for certain foreign-sourced income, including service income, received in Singapore. In order for service income to be regarded as foreign-sourced, the services must be performed through a fixed place of operation outside of Singapore[2].

Where the conditions under section 13(8) cannot be met (for example, the services are not performed through a fixed place of operation outside of Singapore), the Singapore company's service income may suffer double taxation. If there is a Double Tax Avoidance Agreement (DTA) between Singapore and the

[1] Specified under section 13(9) of the ITA

[2] IRAS e-tax guide "Tax Exemption for Foreign-Sourced Income (Second edition)" dated 31 May 2013

foreign jurisdiction and the Singapore company is a tax resident of Singapore, the double taxation can be eliminated by:

- The service income being exempted in the foreign jurisdiction under the DTA (for example, the level of the Singapore company's activities in the foreign jurisdiction does not trigger a tax under the DTA's allocation rules), or

- The Singapore company claiming a tax credit for the foreign tax suffered on the service income against the Singapore tax payable on that same income in cases where the DTA gives the foreign jurisdiction the right to tax the income.

While the tax credit mechanism under a relevant DTA can effectively eliminate double taxation, there is a case for businesses to plan to eliminate the foreign tax, where possible under the DTA, due to several reasons, such as when the effective tax rate in the foreign jurisdiction is higher than the effective tax rate in Singapore.

The Business Profits Article

Let's take a case of Company X, a Singapore tax resident, providing services to a customer in Country A that has a DTA with Singapore.

The first thing to determine is whether Country A will impose tax on the service income derived by Company X under its domestic tax laws. If so, Company X could look to the DTA for possible relief.

Under the Business Profits Article, business profits of Company X shall only be taxed in the country of residence (that is, Singapore) unless it is attributable to a permanent establishment (PE) in the source country (example, Country A). This means that if Company X does not have a PE in the source country, its business profits should be exempted from tax in the source country.

Whether the Business Profits Article can be used in the context of service fee income will depend on factors such as:

- Whether the service fee income is covered under a separate article that overrides the Business Profits Article, and
- Whether the nature of the service fee income is excluded from the definition of business profits.

Permanent establishment

To take this discussion further, let's assume that the DTA between Singapore and Country A requires the existence of a PE in Country A in order for the service income in question to be taxable in Country A. In this regard, it becomes important for Company X to understand what actually gives rise to a PE in Country A.

Singapore's DTAs are generally modelled after the United Nations Model Double Taxation Convention (UN Model Convention) or the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention on Income and Capital (OECD Model Convention). In some cases, they are a hybrid of both. To avoid the complexity of making references to specific DTAs, we shall refer to the OECD and UN Model Conventions in the ensuing discussion.

Based on Article 5(1) of the OECD Model Convention[3], PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on. The term "fixed place" connotes the existence of a distinct geographical place with a certain degree of permanence.[4]

The Article also provides examples of fixed place of business (such as an office, branch and factory) and provisions for certain activities to constitute a PE even if there is arguably no fixed place of business (example, the presence of a dependent agent who habitually exercises the authority to conclude contracts).

[3] OECD Model Tax Convention on Income and on Capital: Condensed Version 2014

[4] Commentary on Article 5 of the OECD Model Tax Convention

In addition, DTAs modelled after the UN Model Convention generally have deeming provisions relating to the furnishing of services. Under Article 5(3)(b) of the UN Model Convention, furnishing of services by an enterprise through its employees or other personnel engaged by the enterprise for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned shall give rise to a PE. This is generally referred to as "service PE".

Therefore, even if there is no fixed place of business that constitutes a PE under Article 5(1), a PE could arise under the service PE clause, if there is one in the DTA.

Managing service PE exposure

Where there is a service PE in the DTA, businesses, in planning the overseas travel, assignments, etc, may want to take note of the following:

1) The stipulated time threshold period for service PE relates to the same or connected project. For example, if a Singapore company has five projects in a foreign jurisdiction, it should account for the duration of activities for the five projects separately unless the five projects are connected.[5] However, it should be noted that in certain DTAs (such as the Singapore-Indonesia DTA) the requirement for the time threshold to apply to connected projects is not explicitly stated.

2) When computing the number of days for the purpose of determining service PE, the general view is that the duration of activities should be considered instead of the mere presence of its employees. For example, if Company X's employee travels to a foreign jurisdiction for a project and extends his stay for a holiday, the holiday period when the employee is not working need not be included in the aggregated number of days.

3) Where more than one employee is overseas and working on the same project, the day is still counted as one and not multiplied by the number of employees assigned to the project. It is therefore possible to manage service PE exposure by deploying a bigger team overseas to work concurrently on various phases of the project and ensuring that the project is completed before a service PE is established.

4) Only services rendered within the foreign country should be taken into account when computing the number of days for the purpose of determining service PE. Therefore, upfront planning can be done to determine what services can be performed in Singapore vis-a-vis onsite in the foreign country.

As service PE requires the company to furnish services through employees or other personnel engaged by the company in another jurisdiction, it is possible to manage service PE exposure through secondments. In structuring secondment arrangements, companies should ensure that the substance of the secondment follows its legal form, or the PE risk cannot be mitigated.

Conclusion

Cross-border staff movements, while seemingly benign, may in fact expose businesses to tax risks. As cross-border staff movements are set to increase, it may be time for businesses to develop a good understanding of DTAs and plan ahead to manage tax risks.

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About SIATP's Technical Discussions

SIATP's technical discussions have continually been very well received by accredited tax professionals. Unlike the run-of-mill Continuing Professional Educational courses which typically cover tax fundamentals, SIATP's interactive technical discussions are designed to cover tax issues that do not have clear-cut solutions or situations that may have different interpretations. Over time, these discussions contribute in boosting the overall tax standards in Singapore.

[5] Commentary on Article 5 of the UN Model Tax Convention

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Siva has close to 20 years of experience in tax compliance and tax consultancy work for individuals, local corporations, multinationals and financial institutions. His extensive experience encompasses advice extended to clients on international corporate and personal tax implications of cross-border transactions involving the various countries in the region.

Siva is a member of Crowe Horwath's International Tax Committee and member of the Institute of Singapore Chartered Accountants and the Singapore Institute of Arbitrators. He has conducted numerous seminars on international tax to Crowe Horwath tax specialists in the Asia Pacific region and to tax professionals in corporations in areas such as withholding tax and employee taxation. Siva has authored several books including *Singapore Withholding Tax and Treaties Online* and *Tax Essentials for HR Professionals, Singapore* both published by CCH Asia.

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