Mobility: Tax alert

December 2023

The Netherlands

New 60-days decree published for intercompany secondments

On December 21, 2023, a new '60-day decree' was published. This decree is an update of the decree dated January 12, 2010, concerning the interpretation of the concept of 'employer' under tax treaties. This adjustment follows the ruling of the Dutch Supreme Court on October 14, 2022, in which the Supreme Court ruled on the applicability of new OECD commentary in the interpretation of the concept of 'employer' in a previously concluded tax treaty.

It is important to note that this decree only applies to the situation where an employee of one entity is working for another entity. If there is a structure of permanent establishments, the decree cannot be applied.

Interpretation of term 'employer' under tax treaties

Based on the aforementioned ruling of October 14, 2022, a distinction is made for the interpretation of the term 'employer' between tax treaties signed before July 22, 2010 and tax treaties signed after July 22, 2010.

- For tax treaties signed after July 22, 2010, the version of the OECD commentary of that date is leading. According to this OECD commentary, whether there is an (actual) employer is assessed based on a holistic approach; one specific element - such as the individual cost allocation - is not decisive in itself.
- For tax treaties signed before July 22, 2010, it should be assessed whether there is an employer based on rulings of the Supreme Court of December 1, 2006. This means that there are cumulative requirements to recognize an (actual) employer in the country of work:
  - There is a relationship of authority (power to issue instructions); and
  - the costs of the activities (remuneration) are borne by the entity, and the work is performed for this entity's risk and benefit. If wages are paid by another entity, it is required that these salary costs must be specifically and individually charged.

The decision contains a practical approval for short-term secondments, also known as the 60-day rule. Namely, for transfers within a group of companies to the Netherlands, it is assumed in advance that there is no Dutch (economic) employer under the employment article of tax treaties, if the following conditions are met:

- It concerns a secondment within a group of companies;
- The secondment does not last longer than 60 working days in a period of 12 months. This refers to any period of 12 months, even if the relevant tax treaty applies the 183-day rule per calendar or tax year;
- The employee does not stay in the Netherlands for more than 183 days;
- It does not concern structural secondments; only incidental secondments can apply the decision;
- The secondment takes place as part of an exchange program, career development, or due to the specific expertise of the employee. The latter applies when the salary criterion for the 30% provision is met;
- Applying the exemption may not lead to a double tax exemption.

The decision does not specify when there is a structural secondment and when there is an incidental secondment.

Your EY advisor would be happy to discuss the possible applications of this decision with you.

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