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Expatriate News

This issue of Expatriate News provides details of the new combined Expatriate Centre that has been opened in Amsterdam and outlines recent EC cases on employment-related issues. The practical effects of the new UK remittance-basis rules, which took effect on 6 April 2008, are being clarified in a dialogue between tax professionals and the UK tax authorities (HMRC). Finally, we look ahead to the tax policies that may be introduced by incoming US President Obama.

NETHERLANDS

New expatriate centre

A new expatriate service centre was opened in the Netherlands on 17 June 2008. The expatriate centre is a combined service centre, which has been established by the municipalities of Amsterdam and Amstelveen and the Netherlands immigration services (IND).

The benefit of the centre is that it will enable expatriate employees coming to the Netherlands to obtain their residence permit and register themselves with the Amsterdam or Amstelveen municipality in a single visit. In addition, it will be possible for the individual to obtain his or her Netherlands tax and social security number (BSN) at the same time.

In order for the expatriate to access this new service, the individual's employer will have to start the application procedure for the residence permit four weeks before the expatriate enters the Netherlands. The date for the visit to the expatriate centre will already have been scheduled by the time that the expatriate arrives in the Netherlands, and all of the relevant procedures can be taken care of at the same time.

The expatriate centre was initially opened for a trial period, during which it assisted only qualifying highly skilled expatriates (*kennismigranten*) employed by selected employers. However, with effect from September 2008, the expatriate centre has also been available for the employees of other employers.

EUROPE

Pension funds: Czech Republic & Italy

The European Commission has sent a Reasoned Opinion to both the Czech Republic and Italy to encourage them to end their allegedly discriminatory rules for foreign pension funds. As is normal with the Reasoned Opinion procedure, these two EC Member States have been asked to reply within two months and if a satisfactory response is not received, a case may be taken to the European Court of Justice (ECJ).

The EU Taxation and Customs Commissioner has indicated that eliminating tax discrimination against Member State pension funds is a high priority for the Commission. To date, the Commission has opened fourteen infringement cases on this subject, demonstrating that it is determined to create a level playing field for pension investments, as this will benefit both the Community and all EC citizens who have an occupational pension.

Dividends paid to pension funds

In both the Czech Republic and Italy, dividends paid to foreign pension funds are taxed more heavily than dividends paid to domestic pension funds. In addition, the Czech Republic operates discriminatory rules for the taxation of any domestic interest and real-estate income paid to foreign pension funds.

Italy levies tax at 11% on Italian dividends received by Italian pension funds, but Italian dividends paid to foreign pension funds are subject to Italian withholding tax at an effective rate of 15%.

The Czech Republic levies a 15% withholding tax on dividends paid to both domestic and to foreign pension funds. However, Czech pension funds do not effectively pay tax on dividends because dividends are not part of their tax base and they can either credit the withholding tax against the corporation tax payable on their other income, or they can claim a withholding-tax refund. Pension funds established in other EC Member States, or in the EEA/EFTA States, are unable to obtain a refund of the 15% Czech tax withheld from the dividends that they receive. The overall effect is that Czech pension funds are exempt from taxation on their Czech dividends, but pension funds elsewhere in the EU pay Czech tax at a rate of 15%.

Czech pension funds are not subject to a withholding tax on the domestic interest that they receive, nor is the interest part of their taxable base. However, Czech interest paid to foreign pension funds is subject to a 15% withholding tax. Similarly, Czech pension funds pay tax at 5% on their Czech real-estate income, but foreign pension funds pay tax at 21% on such income.

Impact of discriminatory rules

The higher taxes imposed by the Czech Republic and by Italy on foreign pension funds may dissuade them from investing in these Member States, and this is a restriction of the free movement of capital guaranteed under Article 56 of the EC Treaty and Article 40 of the EEA Agreement.

The Commission has previously given formal notice to Austria, Denmark, Estonia, Finland, Germany, Lithuania, the Netherlands, Poland, Portugal, Slovenia, Spain, and Sweden regarding higher taxation of dividends paid to foreign pension funds. The Commission is examining the situation in other Member States and may open further infringement procedures as a result.

Portugal: fiscal representatives

The European Commission has formally requested Portugal to change the tax provisions requiring non-resident taxpayers to appoint a fiscal representative if they have taxable income in Portugal. The fiscal representative represents the taxpayer before the Portuguese tax authorities and guarantees that the taxpayer's obligations under the Portuguese tax system will be fulfilled.

It is understood that the aims of this provision in the Portuguese legislation is to guarantee the payment of taxes and to prevent tax evasion. Although these objectives are recognised as being in the public interest, the Commission believes that a general obligation that requires a non-resident to appoint a fiscal representative exceeds what is necessary. As a result, it impedes the free movement of persons and the free movement of capital within the European Union, which are guaranteed under Articles 18 and 56 of the EC Treaty and under Articles 36 and 40 of the EEA Agreement.

The Commission's request takes the form of a Reasoned Opinion. If there is no satisfactory reaction from Portugal within two months, the Commission may decide to refer the matter to the ECJ.

Sweden: private residence

The European Commission has decided to open a new infringement procedure against Sweden and has issued a letter of formal notice under Article 228 of the EC Treaty. Despite some modifications to the relevant legislation and a recent ECJ judgment, in practice the Swedish capital gains tax rules continue to favour the purchase and sale of properties located in Sweden. This discriminates against individuals who wish to buy or sell a property in another EU Member State.

The Swedish law provides a deferment of the tax on capital gains arising on the sale of an individual's private residence. However, the deferment is not available if the property being bought or sold is situated abroad, unless it is owned through a similar legal form to the *privatbostadsföretag* type of ownership prevalent in Sweden. The majority of Swedish properties are owned through this legal form, but there are few comparable legal forms of ownership in other Member States. This means that in practice it is very difficult to satisfy the requirements for Swedish tax deferment when buying or selling a property in another Member State. Thus, individuals who own property in other States are unlikely to be able to benefit from the beneficial tax treatment available to the owners of property located in Sweden.

The EC rules forbid any restriction of the free movement of persons between the Member States. The effect of the Swedish rules is that individuals who wish to make use of that right and who either sell their foreign property and buy a house or apartment in Sweden, or who sell their house or apartment in Sweden and buy a property abroad, are exposed to a significantly higher tax burden than individuals who move their homes within Sweden.

If Sweden fails to comply with the letter of formal notice, the Commission can send a further Reasoned Opinion to Sweden. If there is no satisfactory response to such a Reasoned Opinion, the Commission may bring this matter before the ECJ for a second time and seek the imposition of a penalty payment

UNITED KINGDOM

Counting days for UK residence

The Finance Act 2008 introduced a statutory day-counting test from 6 April 2008, under which a day is regarded as spent in the United Kingdom only if the individual is physically present in the United Kingdom at the end of it (i.e. at midnight). The UK tax authorities (HMRC) have now confirmed that the individual's time of arrival in the United Kingdom will be when the aircraft lands, the train arrives at the first UK station, or the boat docks or drops anchor in UK waters, as applicable.

There is an exception to the midnight rule for a day on which the individual arrives in the United Kingdom as a passenger. This exception cannot be claimed by transport workers such as airline pilots, the crew on ships and planes or by employees on cross-channel trains and ferries. An individual who is present in the United Kingdom at midnight will nevertheless not be treated as having spent the day then ending if he or she leaves the United Kingdom on the following day and does not, between the time of arrival or departure, engage in any activities that are substantially unrelated to the individual's passage through the United Kingdom. HMRC's guidance makes it clear that a pre-arranged business meeting or private appointment in the period between UK arrival and departure can make the transit-day exception unavailable. However, unscheduled meetings may be allowed, depending on the circumstances.

The remittance basis from 6 April 2008

Changes to the UK remittance basis became law in the 2008 Finance Act and these have far-reaching effects for expatriate employees working in the United Kingdom. The new rules impact both long and short-term expatriates. However, individuals who have been UK-resident for more than seven tax years have the added complication of deciding whether to pay the GBP 30 000 Remittance Basis Charge (RBC) or to be taxed on their worldwide income and gains on the arising basis.

Basis of assessment

The UK remittance basis applies to two main types of earnings:

a) The earnings of a UK-resident and ordinarily resident, but non-domiciled, individual from an employment with an employer not resident in the United Kingdom, the duties of which are performed wholly outside the United Kingdom.

b) The earnings for the non-UK workdays of a resident, but not ordinarily resident, individual who is employed by either a UK or a foreign employer.

The basis on which share-based employment incentives are taxed also changed from 6 April 2008. The UK tax charge was extended to all residents and to remittance-basis earnings. The foreign element of the gains on shares and options granted after 5 April 2008 is calculated on the basis of the employee's non-UK workdays and assessed on the remittance basis. The period over which the apportionment between UK and non-UK workdays is calculated varies according to the type of share-based incentive.

The remittance basis must normally be claimed on the individual's tax return for the years 2008-09 onwards. However, the remittance basis applies automatically without a claim if the individual is UK-resident, but not domiciled or not ordinarily resident in the United Kingdom, and either:

a) the individual's unremitted foreign income and gains are less than GBP 2000 for the tax year; or

b) the individual has no UK-source income or gains, has made no UK remittances in the tax year (of income or gains for that or any earlier year), and is either under 18 throughout the tax year or has been UK-resident in no more than six of the previous nine tax years.

The GBP 2000 limit at (a) includes all unremitted income and gains for the tax year. If the individual leaves, or arrives in, the United Kingdom part-way through the tax year, the income and gains for the whole tax year are included. HMRC has confirmed that the individual's earnings for non-UK duties in the part of the UK tax year before UK arrival or after UK departure must be taken into account, even though in many cases those earnings will be exempt from UK taxation (either under the UK domestic legislation or under a double tax treaty).

If either (a) or (b) above does not apply, a formal claim must be made to use the remittance basis and the individual will forfeit certain personal tax allowances and the capital gains tax exemption for that tax year (GBP 9600 for 2008-09). This will increase the tax liabilities for the UK arrival and departure years of many assignees who have minimal foreign investment income or gains.

The RBC

In addition to the loss of allowances and exemptions, the other effect of a formal remittance-basis claim is that the GBP 30 000 RBC may apply if the individual has been UK-resident in at least eight out the ten consecutive tax years including the year of the claim. The RBC will apply if the individual is aged over 18 at any time in the tax year.

The remittance-basis claim must nominate the specific non-UK income or gains to which the RBC is to apply and this is essential for any foreign tax credit claim. However, it is not currently clear whether the RBC will actually be accepted for tax credit purposes by other tax authorities.

Where income or gains nominated for the RBC are remitted to the United Kingdom and any of the individual's other post-5 April 2008 remittance-basis income or gains remain unremitted, tax is charged as if the individual's various types of income or gains had been remitted to the UK in a set order. This order means that the nominated income or gains will be treated as remitted after all other remittance-basis income or gains for the tax years 2008-09 onwards, and it delays the giving of any credit against UK tax for the RBC. Thus, ideally, an individual with more than one type of remittance-basis income or gains should ensure that either the nominated income and gains are never remitted to the United Kingdom, or that the nominated income or gains are only remitted to the United Kingdom after all other remittance-basis income or gains (either for that tax year, or for an earlier year from 2008-09 onwards).

A number of other issues arise in relation to the RBC:

1) It is unclear whether the GBP 30 000 charge will be refunded if HMRC successfully challenges an individual's non-UK domicile or not ordinarily resident status (so that the individual is taxable on the arising basis).

2) The RBC is the individual's personal liability and therefore payment of the RBC by the employer gives rise to assessable earnings.

3) HMRC's views are awaited regarding whether the remittance exemption that applies where the RBC is paid directly to HMRC (see below) is available for payments by a non-UK employer.

Remittances in practice

The statutory meaning of remittance has been tightened from 6 April 2008 to include certain UK services, and certain assets and gifts that are brought to the United Kingdom, where these derive from remittance-basis income or gains. These rules treat the income or gains as remitted to the United Kingdom when the property or service is first enjoyed by a relevant person by reason of that importation or use. A relevant person includes not only the individual's spouse or civil (legal) partner, but also covers unmarried people living together as husband and wife and same-sex couples living together as if they were civil partners. The child or grandchild of a relevant individual is also within the rules, if under 18 years of age.

A number of exemptions apply to the new remittance rules:

Exempt services: Payment for UK services relating wholly or mainly to property situated outside the United Kingdom can be exempt if payment is made to the service provider's non-UK bank account. Examples of the services covered by the exemption include accountancy fees for preparing the individual's non-UK tax returns. 'Wholly or mainly' is not defined, but HMRC's guidance indicates that this means more than half of the advice (but that it does not mean more than half of the fee).

Exempt property: Certain property (excluding money) that derives from non-UK investment income is exempt where various conditions are met. It is important to note that these exemptions do **not** apply to assets acquired from earned income or from capital gains.

This exempt property includes:

- Clothing, footwear, jewellery and watches that are the property of a relevant person (as defined above) and are for the personal use of that person, that person's husband, wife, civil partner, child or grandchild.
- Property of any type with a notional value of less than GBP 1000.
- Assets located in the United Kingdom for a total period of no more than 275 days.
- Assets brought to the United Kingdom for repair and restoration.

If all or part of the property is sold or converted to money while it is in the United Kingdom, or it ceases to meet the exemption rules, it will cease to be exempt and will be treated as remitted to the United Kingdom at that time.

Mixed accounts

HMRC operated a non-statutory practice up to 5 April 2008 for remittances made from a mixture of remittance-basis funds and other funds, so that a remittance was treated as first made from UK-taxable income. The new rules from 6 April 2008 provide a statutory method for analysing a remittance made from a mixture of funds and they set out the order in which the various parts of the remittance are subject to tax. The rules also ensure that the character of the income or gains does not change when transfers are made between funds outside the United Kingdom, so that the original funds are treated as flowing through into the recipient fund.

The effect of the new rules for mixed accounts is broadly similar to HMRC's previous practice. In particular, where a resident but not ordinarily resident employee remits sums to the United Kingdom from an account holding both the arising-basis earnings for UK duties and the remittance-basis earnings for non-UK duties, the UK earnings are treated as remitted first. However, the precise wording of the legislation indicates that the funds in a mixed account must be analysed each time that a UK remittance takes place. This requirement appears totally impractical in the normal employee situation, in which salary is credited at intervals during the year and UK remittances may take place at any time, depending on the individual's financial commitments. This point is being discussed with HMRC at the joint HMRC Expatriate Forum in which BDO actively participates. Any further news will be reported in *BDO Expatriate News* as soon as possible.

UNITED STATES

The US Presidential election held on 4 November resulted in victory for the Democratic candidate, Barack Obama. While the President-Elect has yet made no formal statement on the tax policy his administration, which takes office in January 2009, will adopt, information shown on his website and provided in public statements during the campaign indicate that the following changes may be enacted.

President-Elect Obama indicated that he would implement policies to protect the jobs of US workers and to make the tax system more progressive. He would reduce taxes for those on lower incomes and raise taxes significantly for higher-income earners. The policies include the following:

Employment measures: The Obama view is that US companies should not qualify for tax deductions for moving their operations overseas, and public contracts would be awarded to companies that are committed to US workers. As a US senator he introduced the Patriot Employer Act of 2007, to provide a tax credit to companies that (amongst other things) maintain or increase the number of their full-time workers in the United States relative to those outside the United States and which retain their US corporate headquarters.

The Family and Medical Leave Act (FMLA) may be extended from certain employees of employers with 50 or more employees to cover businesses with 25 or more employees. It may also be expanded to include leave to care for elderly relatives or dependants, to give parents up to 24 hours of annual leave to participate in their children's academic activities, and to provide leave to address domestic violence issues. A USD 1500 million fund may be provided to encourage all 50 US states to adopt paid-leave systems, by assisting with start-up costs and to help offset costs for both employees and employers.

Bush measures: Certain measures enacted by the Bush administration would be retained. In particular, the tax cuts of recent years would be made permanent (including the 10, 15%, 25%, and 28% rates) for taxpayers with income of up to USD 250 000.

Tax changes: The 36% and 39.6% statutory income tax rates may be restored. In addition, the maximum tax rate on capital gains may be increased. However, older individuals would benefit, since income tax would be eliminated for senior individuals with an income of less than USD 50 000 per year.

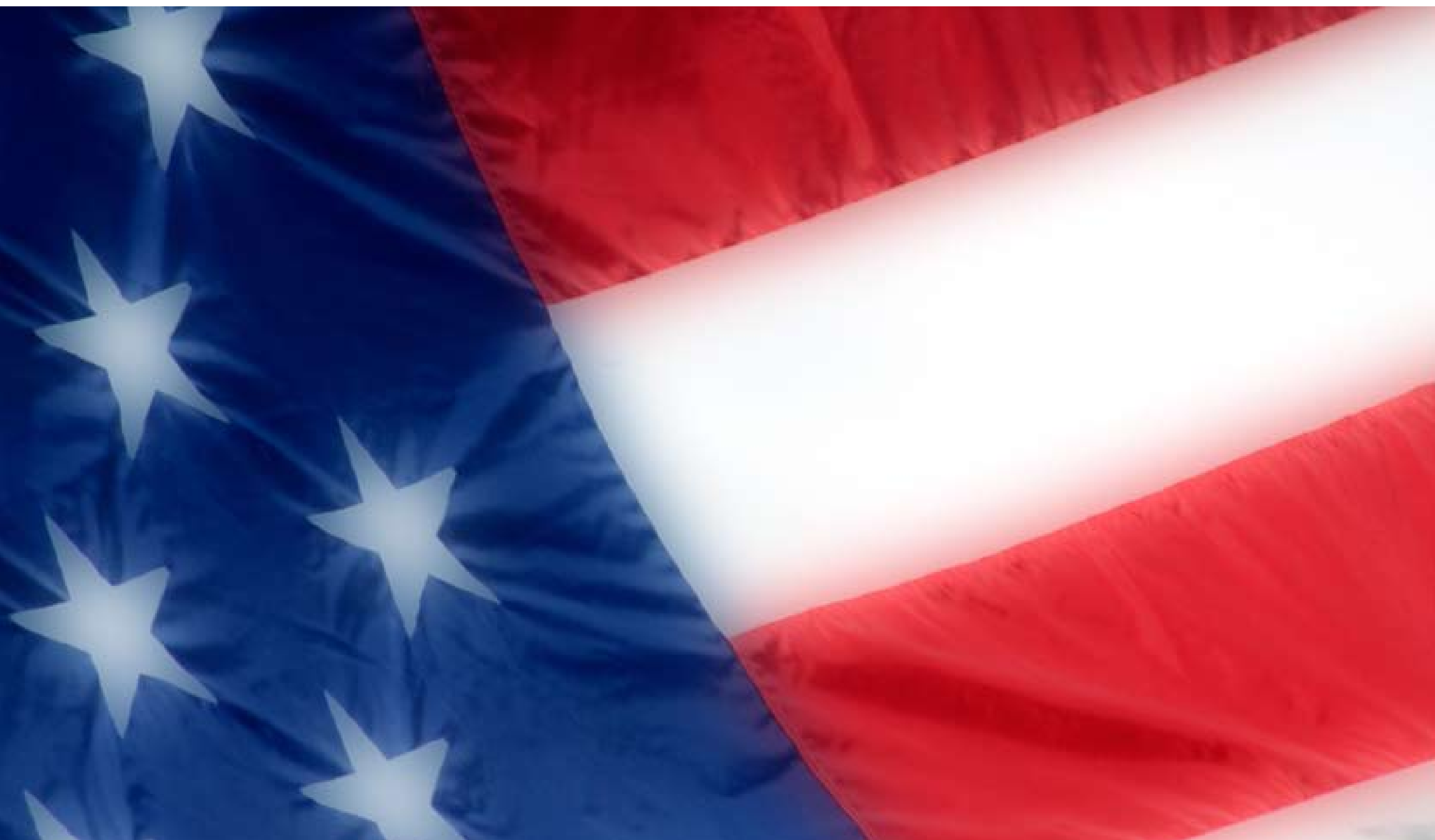
Tax credits: There may be a Refundable Making-Work-Pay tax credit for a limited amount of earnings, which would be worth up to USD 500 per person per year (USD 1000 for a family). In addition, individuals who do not claim itemised tax deductions could claim a Refundable Universal Mortgage Credit, calculated as 10% of mortgage interest up to USD 8000 (a maximum tax reduction of USD 800).

AMT: The Alternative Minimum Tax (AMT) may be retained and extended. However, the 2007 measures protecting most individuals from AMT would continue to operate and would be indexed.

Health & social security: President-Elect Obama has spoken of increasing payroll taxes to pay for social security costs. This is likely to mean an additional 2-4% combined employer and employee charge on workers with an income above USD 200 000 (USD 250 000 for married couples). Health cover may be mandatory for children and there may be income-related federal tax subsidies for health insurance. There may be a requirement for employers who do not provide health-cover assistance for their employees to make mandatory contributions.

Estate tax: Estate tax may be made permanent once again, but there would be an exemption of USD 3.5 million. The estate tax rate would be 45%.

Tax simplification: The tax system may be made more straightforward, as taxpayers would be given the option of using pre-completed tax forms, which they would review, verify, sign, and send back to the IRS.



TAX TREATIES

The following new tax treaties should be noted:

Barbados–Seychelles: The authorities have ratified the tax treaty, which was signed in November 2007. The treaty will take effect from 1 January 2009.

Jamaica–Spain: This new treaty will take effect from 1 January 2009.

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