

February 14, 2013
2013-032

**Australia – Ruling Outlines
ATO's View of "Employer"
for Short-Term Visit
Exception**

by KPMG, Australia (a KPMG
International member firm)

flash International Executive Alert

A Publication for Global Mobility and Tax Professionals by KPMG's International Executive Services Practice

On 30 January 2013, the Australian Taxation Office ("ATO") issued a ruling that outlines the Commissioner's view of the term "employer" for the purposes of the short-term visit exception under Australia's tax treaties (Taxation Ruling 2013/1).¹ This new ruling seeks to align the Australian interpretation of "employer" for the purposes of the short-term visit exception with the concepts outlined in the commentary on the OECD model tax convention.

The ruling ceases use of the term "economic employer" and appears to take a more holistic view of the total employment relationship.

Key Changes

Key changes as outlined in the new ruling are as follows:

- The ruling introduces the concept of "ultimate control over the worker" – i.e., the ability to withdraw or terminate a worker.
- The concept of "integration" has more prominence in this ruling. The ATO is seeking to determine whether the services provided by the worker are *integral* to the activities of the Australian business.
- The ATO has sought to identify the "terms of engagement," for example: which entity has an obligation to deduct PAYG (Pay-As-You-Go), pay superannuation and workers' compensation insurance?

The above are just those factors which have been inserted or altered, and are now part of a list of nine key factors that need to be considered. The relevance/weighting of each factor will vary depending on the circumstances.

Useful Examples

The new ruling contains some useful examples in line with the OECD model commentary. The examples may assist companies when determining the "employer" for the purposes of the short-term visit exception in Australia's tax treaties. Below is a summary of the examples provided in the ruling.

Use of Nonresident Labor Hire Companies

An Australian resident company ("Aus Co") will be the "employer" of an individual for the purpose of the short-term visit exception, where they are engaged through an international labor hire company, in circumstances including where the Aus Co exercises day-to-day control and the individual provides services integral to the Aus Co business.

Although not a conclusive test, the ultimate “user” of the individual’s services in this case is the Aus Co. As a result, the Aus Co is found to be the employer for the purpose of the short-term visit exception.

Services to a Client Enterprise

Under a contract between a foreign accounting firm and an Aus Co manufacturing company to provide accounting services, an employee of the foreign accounting firm is assigned to Australia to work for Aus Co as part of the contract. The example states that the employer will remain the foreign accounting firm where the foreign firm retained responsibility for the individual’s work and continued to pay the individual.

However, in a separate example where there was a contract between a foreign resident company and an Aus Co, both in the engineering services sector, it was found that the individual was not eligible to apply the short-term visit exception. In this case, the individual’s work was integral to the business activities of the Aus Co. Aus Co also had day-to-day and ultimate control over the individual.

Foreign Head Office Functions

Where a nonresident individual, who has a ‘foreign head office’ function and is present in Australia performing the roles and responsibilities of that function, the foreign company will generally be considered his or her employer for the purposes of the short-term visit exception in Australian tax treaties.

Consequences of Ruling

The release of this ruling coincides with recent Australian government announcements regarding increased penalties for employers who fail to meet Australian visa requirements (for related coverage, see [Flash International Executive Alert 2003-065](#) (26 March 2003)).

These recent events may foreshadow greater scrutiny of short-term assignments and business travel arrangements to Australia. There is now increased sharing of information between the Australian Department of Immigration and the Australian Taxation Office.

KPMG Note

In determining which entity is the employer for the purposes of making a determination under the “Income from Employment” article in Australia’s tax treaties (short-term visit exception), consideration needs to be given to the specific facts of the situation. The key indicators of an employment relationship, as outlined by the Commissioner in this ruling, need to be carefully considered.

Due to the nature of short-term assignments and business travellers, it is often difficult for the Australian business to track and manage such arrangements. Employers will need to review their systems and processes to help foster monitoring and documenting short-term business visits to Australia, especially if they apply the short-term visit exception to a nonresident individual working in Australia.

KPMG Note (cont'd)

Employers also need to consider Australian employment tax obligations associated with short-term business visits to Australia; in particular, Superannuation Guarantee and payroll tax that do not rely on the tax treatment of employment income under the Australian tax treaty.

Footnote:

1 See "Taxation Ruling" 'Income tax: the identification of the 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties' (TR 2013/1) on the Australian Tax Office Web site (<http://www.ato.gov.au>).

For further information or assistance, please contact your local IES professional, or one of the following IES professionals with the KPMG International member firm in Australia:

Sydney

Andy Hutt
Tel. +61 2 9335 8655
ahutt@kpmg.com.au

Melbourne

Ben Travers
Tel. +61 3 9288 5279
btravers@kpmg.com.au

Ablean Saoud
Tel. +61 2 9335 8550
asaoud@kpmg.com.au

Adelaide

Tim Sandow
Tel. +61 8 8236 3234
tsandow@kpmg.com.au

Perth

Dan Hodgson
Tel. +61 8 9278 2053
dghodgson@kpmg.com.au

Brisbane

Trevor Pascall
Tel. +61 7 3233 3251
tpascall@kpmg.com.au

The information contained in this newsletter was submitted by the KPMG International member firm in Australia. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

Flash International Executive Alert is an IES publication of KPMG LLP's Washington National Tax practice. To view this publication or recent prior issues online, please click [here](#). To learn more about our IES practice, please visit us on the Internet: click [here](#) or go to <http://www.kpmg.com>.