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GMS Flash Alert

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Australia - Employer Considerations for COVID-19 Displaced Workers Heading into FY2021

Many employees, working or seconded overseas, returned to Australia due to the COVID-19 pandemic. Many have been unable to return to resume work in their usual overseas location and have seen their stay in Australia extended whilst continuing to perform their overseas roles remotely.

The Australian Taxation Office (ATO) has recently updated its guidance on employees who have found themselves temporarily displaced in Australia. This guidance assists in understanding the taxability of displaced employees with respect to the sourcing of their employment income, and the impact on their personal tax residency status in Australia.[1]

WHY THIS MATTERS

COVID-19 continues to severely limit the movement of people across borders, with many employees temporarily displaced and working remotely for an extended period in Australia.

From 1 July 2020, foreign employers need to register and withhold under the PAYG withholding system where their employees are liable for Australian tax. Foreign employers will also need to pay Superannuation Guarantee on behalf of their employees in Australia, unless an exemption applies, such as a certificate of coverage under an International Social Security Agreement. For many multinational organisations with Australian subsidiaries, in practice, a shadow payroll arrangement may be used to meet these obligations.

With the new tax year, organisations should review the tax position of their displaced employees in Australia and seek to understand any resulting employer obligations.

Context

As part of the initial COVID-19 concessions, the ATO advised that **foreign** employers do not need to register for PAYG withholding where their employees are temporarily working in Australia solely as a result of COVID-19, provided they intended to leave Australia by **30 June 2020**. However, employees are still required to self-assess whether they are residents of Australia and/or assessable on their employment income in Australia, and lodge a 2020 Australian tax return to report any taxable income.

Now that foreign employers (and Australian employers) have had sufficient time to consider and take stock of their displaced employees working in Australia, the ATO has updated its guidance to be clear that from 1 July 2020, where employees continue to work in Australia and the employment income is assessable, the usual employer obligations will apply.

An employee's continued presence in Australia, a change in their intention towards Australia, changes to overseas and Australian accommodation arrangements, or a shift in their role towards being more Australian-centric, are just some of the factors that can alter the outcome of both tax residency and the taxability of employment income, in turn triggering compliance obligations for the employer.

While there is still relief where an employee continues to be nonresident of Australia for tax purposes and the work that they performing in Australia is truly foreign-sourced, this will be dependent on the individual facts and circumstances of the employee.

Some of the key considerations for employers are explained further below.

Residency

An individual's tax residency is determined by considering four tests,[2] with the satisfaction of any one test resulting in an individual being a tax resident of Australia and taxable on his worldwide employment income.

The length of time in Australia is becoming increasingly important, as there may be employees who will have spent over 183 days in Australia in a tax year and may be considered a resident under the test known as the '183-day rule'.

It is important to note that the 183-day threshold is not determinative by itself. The ATO accepts that a person may be in Australia beyond the 183-day threshold and still be a nonresident. For this to apply, the ATO would need to be satisfied that the person's usual place of abode remains abroad and that they do not intend to reside in Australia.

A recent Full Federal Court decision (*Addy v. Commissioner of Taxation [2020] FCAFC 135)* deals with the exception to the 183-day test in the context of a U.K. working holiday maker in Australia. The court agreed with the ATO that the taxpayer had not satisfied the exception to the test, and was therefore a resident of Australia. Parallels from the case may be drawn to displaced workers who remain beyond the 183-day threshold in determining whether the exception may apply.

KPMG NOTE

Ultimately the determination of residency is subjective and 'fact conditional.' Application of the four tests is complex and requires consideration of all the circumstances of each case. However, employers should be checking-in with their employees by monitoring their days, their roles, and their longer-term intentions towards Australia.

Where there is doubt about an individual's residency, guidance should be sought. Options include applying for a Private Binding Ruling from the ATO to provide clarity.

Beware of the Impact on Double Taxation Agreement Relief

The 183-day threshold is also important in the operation of the double taxation agreements that Australia has with other countries. Where presence in Australia is over 183 days, then this may cause tax relief under certain treaties to no longer apply to displaced workers. The wording of the double taxation agreement also needs to be considered, as depending on the agreement the day count may be determined on a rolling and/or calendar year basis.

As highlighted in the recently updated ATO guidance, in certain situations individuals displaced in Australia who have had work-days in Australia prior to the COVID-19 period in the same tax year may tip over the 183-day mark, bringing previously exempted business travel to Australia into taxation.

Other Employment Tax Obligations

Even if an employee's employment income is exempt from tax in Australia, there may be an obligation for the employer to pay State Payroll Tax on the employee's wages and make Superannuation Guarantee (SG) contributions on his or her behalf, unless an exemption applies.

For State Payroll Tax, the nexus provisions will need to be considered to determine whether a displaced employee's taxable wages should be subject to State Payroll Tax, unless the particular State Revenue Office has indicated a concession is available. The approach of the State Revenue Offices may not be consistent state by state.

KPMG NOTE: LOOKING FORWARD

Looking forward beyond COVID-19, a flexible working model may become the 'new normal' for many. To compete for key talent at a global level, employers may have to implement cross-border 'work from anywhere' policies to attract and retain staff in locations around the globe.

As a result, residency and sourcing issues currently at the forefront for displaced workers will continue to be a focus over the coming years for tax authorities globally.

As we move into the new tax year, employers need to re-assess any tax compliance obligations they may have for their displaced workers, both for year-end 2020 and going forward, and take steps to manage these obligations.

Efforts now by businesses to meet compliance obligations for displaced workers may serve as the base for managing future working arrangements in a post-COVID-19 world.

FOOTNOTES:

1 This guidance can be found on the ATO's COVID FAQ Portal: https://www.ato.gov.au/general/covid-19/covid-19-frequently-asked-questions/individuals-frequently-asked-questions/.

For prior coverage, see the following issues of GMS *Flash Alert*: 2020-195 (24 April 2020), 2020-098 (23 March 2020). Also see the following issues of GMS *Flash Alert*: 2020-113 (25 March 2020) and 2020-112 (25 March 2020).

2 As defined by Section 6(1) and Section 995(1) of ITAA 1936.

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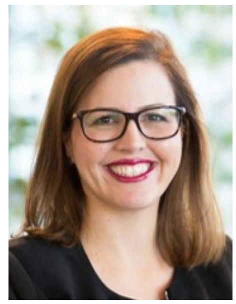

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