

Working Worldwide Newsletter January 2005



A very Happy New Year to all our subscribers! In our first Working Worldwide issue of 2005 we cover news from China, India, Indonesia, New Zealand, Europe, USA, Mexico, Australia and conclude with a major round up of topical UK stories.

As usual we invite you to send in feedback and comment on the articles covered, and look forward to keeping you up to date with changes to Taxtion, Immigration and Employment legislation around the globe in 2005

I hope you find the newsletter informative and useful, if you wish to discuss any of the topics please send me an email or call me on **+44(0)20 7484 3000**.

As always we welcome your feedback on any of the issues raised, or the Newsletter itself to **webfeedbackUK@glotel.com**.

Regards,

Lara Pritchard
Tax & Compliance Director

The information contained in this newsletter is strictly confidential and may only be read, copied and used by the intended recipient. This newsletter is intended as a general guide only, and the application of its contents to specific situations will depend on the particular scenario(s) involved. Consequently, we recommend that readers seek appropriate professional advice regarding their particular circumstances.



Germany

With an ever-increasing number of workers working 'cross border' Germany has set up a basis for determining which country's law apply in any particular employment situation.

In theory, just like any other type of agreement, the basis for determining which Country's laws apply to a particular agreement is down to what the parties agree, i.e. what is written in the contract. However, it is not always in the best interests of an employer to insist upon a contract being governed by laws other than those of the country that would naturally govern the Agreement. In Germany there are Mandatory Clauses that the employer cannot contract out of. The German legislature has stated the following: As long as the totality of the circumstances do not clearly lead to the application of the laws of a particular country, or the employment relationship does not have a nexus to a particular country, then the laws of the country where the employee generally performs his work obligations – even if the employee has only been transferred to another country temporarily – or that country where the employer hired the employee will apply to the employment relationship.

Although this sounds simple there was a recent case heard by the federal labour court where a worker was hired in Belgium but working in Germany. The court concluded that German law applied and hence the Belgian employer did not have to pay termination compensation which would have been due had Belgian law applied. The court held that the employment relationship had a closer nexus to Germany than Belgium and that the fact the employee's general place of performance was in Germany carried more weight than the fact he was hired in Belgium. Interestingly the court gave no weight to the fact the contract of employment stated German law would cover the relationship.

Temporary employment agreements are not viewed sympathetically in Germany and any temporary arrangement must be in writing.

Temporary employment agreements are more acceptable in Germany than they once were. Agreements under two years do not cause a problem, but an employer must have legally sound grounds for concluding a temporary employment agreement which has been in place for longer than 2 years.

Otherwise the agreement will not constitute a temporary contract and will be construed as an open-ended contract.

German law states that any duration of an employment agreement must be in writing. On June 23 2004 the federal court upheld that the statutory language regarding employment agreements must be read literally. According to the court the fact the employment is temporary must be set out in writing. Other aspects of employment do not necessarily have to be set out in writing, nor do the grounds for the temporary nature of the work if under two years in duration.



China

The Chinese tax authorities known as the State Administration of Taxation (SAT) have recently clarified the income tax rules regarding non-resident individuals.

In general, expatriate taxpayers may be subject to Chinese income tax (IIT) if they are resident in China for more than 90 days (domestic law) or 183 days (under relevant tax treaties).

The new rule in determining whether a taxpayer is subject to China IIT (i.e if they have been physically present in China for more than 90 or 183 days), both the day of entry and exit are counted as full days for tax purposes. Individuals who enter and exit on the same day are treated as being in China for half a day.

If an individual who is in a senior management position resides in China for less than 90 days or 183 under a relevant treaty, such individuals will be exempt from IIT if their salary is not paid or borne by a Chinese Employer.

If a senior manager resides in China for more than 90 days or 183 but less than one year in any tax year, the senior manager's tax will be based on the time apportionment method, provided that their salary is not paid or borne by a Chinese entity.

If their salary is borne by a Chinese employer, regardless of the number of days the individual is present in China, their entire salary income is subject to tax.

If a senior manager is resident in China for more than 1 year but less than 5 years, his entire salary will be subject to tax. However, any income paid by a non-Chinese employer for services rendered outside China is exempt.

A senior manager is defined as a general manager, deputy general manager, technical director, department head or its equivalent.

Questions remain on the tax and social security obligations of green card holders. The treatment will depend on whether the individual is deemed to be domiciled in China or is deemed to be a foreigner.

Since the introduction of the green card (for foreigners who wish to be permanent residents in China), questions have arisen regarding the liabilities for income tax (IIT) and social security for green card holders. The Chinese government have yet to issue any guidance for green card holders. IIT and social security payments vary for locals and foreigners. Therefore, the tax treatment will vary for green card holders depending on whether they are deemed to be domiciled or foreigners. Where

the green card holder is domiciled in China that individual will be subject to IIT on their worldwide income and will be required to pay in to the social security scheme.

Worldwide income includes income from business, employment investments, royalties and any other income specified by the Chinese tax authorities as taxable. Included in the social security scheme are pensions, unemployment insurance, medical insurance, work injury insurance and housing funds.

If an individual is regarded as a foreigner, tax liability will be dependent on the amount of time the individual is physically present in China, the source of income and who bears the compensation.

A new procedure has been introduced for work visa applications in Beijing, this will affect both current and potential work visa holders.

The Beijing Public Security Bureau ("PSB") announced new requirements for the application and renewal of visas and residence permits on 22nd Nov 2004.

The new requirements will apply to all visas including the 'F' type business visa and the 'Z' type work visa.

The additional documents required are :
Proof of Residency in China - Applicable to both the assignee and any family members that accompany them. To obtain this the assignee needs a letter to confirm the residence of the assignee with the official company stamp issued by the hotel or apartment where the assignee is staying. If the residence where the assignee is staying is not a government approved international estate, then the letter from the residence needs to be notarised by the local police office.

Proof of family relations - If a foreign assignee enters with his/her family who are applying for Chinese visas the family members must provide official documents proving the family relationship with the assignee. The home country government authority must issue these documents. For a spouse, the marriage certificate is required. For Children, the birth certificate is required.

At present these new requirements only apply to Beijing.



India

As of the 10th September 2004 the rates of service tax in India have risen to 10.2% (10% plus 2% Education Cess surcharge). All invoices issued after 10th September 2004 relating to services provided both before and after 10th September 2004, must pro-rate the relevant fee and charge the increased service tax only on the proportion of the services carried out on or post 10th September 2004.



Australia

The Australian Government has announced a change in its system for taxing small business aimed at reducing the compliance burden.

On Friday 3rd September 2004 the Australian government brought in a new system of self-assessment for small businesses. Previously the Government required contractors who received more than 80% of their income from one source to apply to the Commissioner of Taxation for a determination of their tax status. This was necessary for the taxpayer to remain outside the PAYG system and still be able to claim deductions not available to employees. As of the 3rd September it is now possible for contractors to assess themselves as to whether they fall into the PAYG system or not. The same strict tests for independence remain in place to determine whether or not the contractor would still be eligible for the deductions and avoid PAYG.

The strict tests a contractor has to pass include:

- the contractor controls the services offered and the risk;
- the contractor has multiple concurrent clients;
- the contractor has substantial investments in equipment;

The business entity then has to pass one of the following tests:

- A personal service business must have multiple and unrelated clients. This negates inter company invoicing and the use of investment income;
- A personal service business must employ people to deliver the service other than the principals;
- A personal Business is expected to have its own premises, not a home office or a serviced office;

Whilst the contractor will no longer have to fill out forms to apply for a Personal Service Business Determination, they will still be required to consult their accountant to see if they pass the tests and it will add a degree of uncertainty to contractors tax situations.

The Australian Taxation office announced it would be clamping down on employers who flouted basic employer obligations.

The Australian Taxation Office cited increased auditing activities on the following employers who:

- do not withhold PAYG from payments to employees and workers;
- withhold PAYG but do not notify or pay the withheld amounts;
- do not make mandatory superannuation contributions and/or provide superannuation reports to employees;
- do not report eligible termination payments for reasonable benefit limit purposes;
- do not report and pay fringe benefits tax on benefits provided to employees;
- do not declare employee contributions towards taxable benefits as taxable income and do not return GST credits; or
- have not contributed the correct amount of superannuation to a superannuation fund on their employees' behalf.

Any employers found not meeting these requirements are likely to face fines and further penalties including not being able to sponsor for visas and work permits.



New Zealand

Overview of the taxation of Contractors

New Zealand has a basic rate of tax of 33% with a higher rate of 39% payable on NZ\$60,000 (+/- US\$42,500, £22,100). The NZ Inland Revenue like many other countries has looked at ways of increasing the tax burden on personal service companies to bring individuals working through personal service companies more in line with employees.

In 2000 the NZ government brought in the Income Attribution Rule (IAR). The legislation means that income derived by the company, trust or partnership will be required to attribute all income to the individual who provided the service and be taxed as an PAYE employee.

The Income Attribution Rule will apply where;

- an entity is interposed between a service purchaser (client) and the individual who provides the service (e.g. a company or sole trader);
- the interposed entity and the individual are related;
- during the year, the interposed entity receives 80% or more of its income from a single source or associated sources;
- significant and substantial assets do not form a structural part of the income earning process of the interposed entity.

Where the IAR applies, all contractual income will be subject to PAYE with minimal expense allowances. The IAR will force contractors trading in their own limited companies to rethink their structure, the legislation is backdated to April 2000.

The New Zealand Immigration Service (NZIS) has lowered the pass mark for the skilled migrant program to 100 points.

This is the first time since inception of the skilled migrant program that the pass mark has been reduced. Now people who score at least 100 under the points test and have lodged an Expression of Interest will be selected from the pool and invited to make a formal application for migration to New Zealand.

Even if the candidates do not have a formal job offer, as long as they hold the relevant qualifications, have at least four years of skilled work experience, and have gained experience in a comparable labour market they qualify to lodge a skilled migrant

application. The NZIS makes a selection from the pooled expression of interest every two weeks.



United States

Congress has passed two new immigration laws reforming both the L-1 and H-1B visas.

The L-1 visa reform act will close the loophole that allowed some multinational companies to bring in professional workers on L-1 visas and then outsource these workers to third party companies. The new legislation requires that an L-1B "specialised knowledge" employee, who is placed at a 3rd party, are under the direction and control of the petitioning party.

There is also a change in the period of continuous employment required abroad, originally this was 6 months but now will be a year. The reasoning behind this was that "one year is a reasonable amount of time to require an employee to have gained the specialised knowledge of the company's products, services and processes to qualify for the visa".

The H-1B visa reform act makes a few amendments to the laws surrounding H-1B visas. The first is the prevailing wage level, at present employers may pay 95% of the prevailing wage in the US for the occupation that H-1B holder is carrying out. This will be amended to 100% of the prevailing wage. Wage levels are based on experience, education and level of supervision.

The second amendment reinstates the training fee. The previous worker retraining fee was \$1,000 that has now increased to \$1,500. Employers with less than 25 full-time employees in the US will only need pay \$750.

From 90 days after the enactment of the law, up to 20,000 new H-1B slots will be made available to graduates with US master's degrees or higher programs.

Finally all H-1B and L-1 visa applications submitted 90 days after the law's enactment will require a \$500 fraud fee. The money collected will go into creating a new Fraud Presentation and Detection account.

The US Citizenship and Immigration Services (USCIS) announced on the 1st October that it had received its congressionally-mandated limit for applications of H-1B visas for the fiscal year 2005.

The annual cap of 65,000 petitions has been received by USCIS. USCIS will follow the

procedures set out below for the rest of FY 2005.

- USCIS will process all petitions filed for first time employment received by the end of business, October 1st
- USCIS will return all petitions for first-time employment, subject to the annual cap, received after the end of the business day on October 1st
- Returned petitions will be accompanied by the filing fee
- Petitioners may re-submit their petitions when H-1B visas become available for FY2006
- The earliest date a petitioner may file a petition requesting FY2006 H-1B employment with a start date of October 1, 2005, would be April 1, 2005.

This will not affect current holders of H-1B visas. Therefore current H-1B holders can file petitions to:

- Extend the amount of time a current H-1B worker may remain in the US.
- Change the terms of employment for current H-1B
- Allow current H-1B workers to change employers
- Allow current H-1B workers to work concurrently in a second position.



Mexico

A recent case in Mexico has asked the question of the ownership of Intellectual Property (IP) rights in Mexico

There are three statutes in Mexican law that can involve IP rights, the Copyright Law (CL), Industrial Property Law (IPL) and Federal Labour Law (LL). Different types of IP may be qualify under a different statute and receive different types of protection.

Economic rights related to copyrights would belong entirely to the employee that created them, aside from his specific functions under any employment agreement and the employer would need to license such work to use it. If the creations fall within an employment agreement the employer and employee share in equal parts the economic rights.

LL establishes a legal assumption that the employee will have ownership of all IP if the corresponding employment agreement does not establish that his scope of work includes the creation of specific IP. If the IP sits with the employee the employer will have a preferential right to acquire or use exclusively the IP.

Finally where the creator of any IP is an independent contractor CL provides that the payer of the commission i.e. the Client, will own any IP, however, the contractor has the right to be acknowledged as a creator.



Indonesia

Indonesia has passed a new social security law. The law looks to provide a wide range of social security programs funded by both employees and employers.

The new social security law aims to bring Health, Workers Compensation, Assistance for the Elderly, Pension and Death Benefit together under one piece of legislation.

The new law makes contributions to the health scheme compulsory and has defined benefits for old age provision.

Despite the legislation being passed it is still subject to ministerial decrees to clarify it. The legislation is expected to add an extra 20% to 30% to employee costs for companies over the next 10 years. The cost of the health insurance is expected to be shared equally between the employer and employee. The rate of the contributions is likely to be 6% of the employee's total taxable compensation.



Belgium

The Belgian Parliament has adopted a new law to tax the exchange of foreign currency, notes and coins, however, the law will not enter into force until all other members of the European Economic and Monetary Union have adopted similar legislation.

The tax, known as Tobin Tax, is imposed on any direct or indirect currency exchange transaction taking place in Belgium. This includes all cash and futures, and whether or not by using the giro system.

A currency exchange is deemed to have taken place in Belgium if one of the following exist;

- *one of the parties involved in the currency exchange transaction is established in Belgium;*
- *the payment, negotiation or order for the exchange is made in Belgium; or*
- *one of the currencies exchanged is a legal means of payment in Belgium.*

To avoid international double taxation any exchange taxed abroad under similar legislation will be exempt from tax in Belgium. If one of the parties involved is established in Belgium the exemption is limited to 50%, when both parties are present in Belgium there will be no exemption.

The rate of tax will be 0.02% imposed on the gross amount of the exchange transaction. Individual exchanges of less than \square 10,000 will be exempt. Each party involved in the transaction will pay 50% of the tax.



Norway

From 1st October 2004 all employers must report all foreign employees and subcontractors working in Norway to the Central Office for Foreign Affairs (COFTA).

According to the previous rules, up until 1st October, only foreign employees who were engaged directly or through contracts for work on the Norwegian Continental Shelf, or on site for building and/or construction, should be reported to COFTA.

From 1st October 2004, all foreign employees and subcontractors, regardless of the type of work, or the type or contract with subcontractors will need to be reported to COFTA. For the time being it seems that COFTA will interpret the rules strictly until any exemptions are adopted.

The reporting should be made using standard forms from COFTA and should be returned to COFTA as soon as possible and no later than 14 days after the work has started. COFTA also needs to be informed no less than 14 days after employment or the contract has finished.

The consequences of not reporting will include liability for all subcontractors tax and social security contributions and fines of up to NOK 150 per day for subcontractors, NOK 30 per day for employees.



Netherlands

Non-EU nationals who earn in excess of 45,000 euros a year will no longer be required to have work permits.

On the 1st October 2004 the Dutch Government passed legislation that a work permit will no longer be required for knowledge workers. A knowledge worker is defined as the following;

- anyone who earns a gross salary of 45,000 euros or 32,600 euros if under the age of 30;
- PhD students;
- Post-doctoral or University teachers, under the age of 30

Implementation of these new rules will take effect in January 2005.

The knowledge worker will be granted a residence permit/work authorisation for 5 years, if the worker holds an employment contract for an indefinite period of time or for the duration of the contract if it is a fixed term. The cost for the residence permit will be 424 euros. The government has promised that all applications will be dealt with within 2 weeks. Applications will need to be filed at the Labour Immigration Desk of the IND (Loket Arbeidsmigratie) in Rijswijk.



Czech Republic

Recent changes in Czech labour law will affect an employer's ability to second employees to third parties.

Under previous legislation, where individuals are employed by a foreign entity and assigned to the Czech Republic this could be structured in one of two ways; either as the Hiring Out of Labour Arrangement (HOLA), or as a Provision of Management Services. No licence was required from the Ministry of Labour to perform these duties.

New legislation, as of 1st October 2004, is supposed to regulate the Labour market. Entities that are awarded the licence are referred to as "placement agencies".

There is a limited exception for EU employers who are authorised in their home country to transfer employees, provided that the employment activity is carried out in the Czech Republic and is on an ad hoc and temporary basis. Even in this case the Ministry of Labour must be informed of all assignments.



United Kingdom

Overview of rules on employees of fixed term contracts.

Rules governing fixed term employees are outlined in the Fixed Term Employees (Prevention of Less Favourable Treatment) regulations 2002. The regulations make it unlawful to treat fixed term workers less favourable than permanent employees purely because they are temporary.

Webley v Department for Work and Pensions is an example of a recent case where Ms Webley took out an unfair dismissal claim against the Department of Work and Pensions. Ms Webley fixed term contract came to its natural conclusion after 51 weeks. Ms Webley claimed that permanent employees doing comparable work would not have had their employment contract terminated after 51 weeks as she had. The tribunal had to decide whether non-renewal of a fixed term contract was a cause for complaint under the regulations. The employment tribunal found against Ms Webley and accepted the employers argument that the non renewal of a contract could neither be less favourable nor detrimental for the purposes of the regulations. However, the Employment Appeal Tribunal (EAT) overturned this decision. The EAT stated that once the fixed term contract claimant was employed under a fixed term contract for 51 weeks which permanent employees were not subject to she had in fact suffered a detriment as she was being less favourably treated by not having her contract renewed.

In a second recent case, *Allen v National Australia Group Europe Ltd.* The dispute in this case was over the right to terminate a fixed term contract by giving 1 weeks notice. The employer argued due to the nature of the contract with a notice period included it was not a fixed term contract as it would not necessarily terminate on a specific date and thus was not covered by the regulations.

The EAT rejected this by stating it was clear both parties had hoped the contract would run for a full duration and that the employee could bring a claim under the regulations.

These decisions open up the way for fixed term employees to site less favourable treatment by their contracts not being renewed and the existence of a notice period may not be enough to protect employers.

Since the UK opened its border to all new EU accession countries there has

been a large increase in the number of East European migrants.

From the period 1st May 2004 to 1st November 2004, 91,000 registered migrants from the 10 new countries of the EU have entered UK. This number is far higher than Home Office estimates of between 5,000 – 13,000 immigrants per year.

It has been revealed that it may take up to 8 months to become a UK citizen under the present procedures.

An application to become a UK citizen could take up to 8 months to be processed. Naturalisation for an adult is likely to take up to three and a half months with registration for minors taking eight months. Other registrations can take up to four months, reunification takes two months and it takes 10 weeks to gain the right of abode. The average time for all citizenship decisions work out at seven and a half months.

As of April 2005 UK immigration service fees will increase.

The Home Office has decided to increase immigration service fees from April 2005. The move is designed to save the UK taxpayer £100 million.

The government is considering increasing the fees for the following:

- Work permit extensions to increase by £121 to between £265 and £300
- Further Leave to Remain fees to rise from £250 to between £430 and £495 for a premium service
- Fees for the Sector Based Scheme, to rise from £153 to £230 and £270.
- Highly Skilled Migrant Program fees rise from £150 to between £320 and £375.

After the Inland Revenues victory in its case vs Artic System the IR has published new guidelines regarding s660A.

As mentioned in the last issue of 'Working Worldwide' the Inland Revenue triumphed in the land-mark s660A case, known as the "settlements legislation", with Artic Systems. The result meant the IR could tax private company dividends to a non-working spouse as if they were accruing to the worker. This meant that the benefit of the personal allowance and the lower rates of tax will be lost.



United Kingdom (continued..)

The new guidelines titled 'A guide to the Settlements Legislation for Small Business Advisors' will be relevant to many family company shareholders.

In future, for a non-working spouse to claim an income at a lower tax rate the tax return needs to include, according to revenue guidance, what would have been paid to the non-working spouse had they not been a shareholder. For example, if the most that would be paid to an unconnected secretary working part time would be £5,000, but £45,000 has been paid because the secretary is also the settler's wife, then £40,000 should be returned as the settler's income on his self-assessment return.

The UK could soon lose its opt-out from the working time directive. The European Commission has proposed plans that would give trade unions a veto over accepting longer than a 48 hour week.

The European Commission have drafted a 12 page document that states a waiver of the maximum 48 hour working week would only be allowed if employers negotiate with trade unions before hand. Where trade unions did not exist workers would have to renew any opt out on an annual basis and cannot be made at the time of signing an employment contract or included in the employment contract. Workers would also not be able to opt-out during their probationary service. Even where workers agreed to opt-out of the 48 hour a week maximum no worker could work in excess of 65 hours in any given week. Employers would be forced to keep a record of employee working hours and provide these to the relevant authorities on request.

The British government previously had enough support from inside the EU to block any change to the opt-out clause, but the enlargement of the EU may put this at risk.

The Special Commissioners have released comment on the IR35 case (Usetech v Young, chancery division)

As reported in the March 2004 edition of 'Working Worldwide' the IR won their IR35 case against Usetech Ltd. The case notes highlight once again that it is the reality of the relationship between a contractor and the client will override the wording within the contract.

Bill Hood provided his services through his personal service company, Usetech, to ABB Vecto Gray (UK). The contract gave Usetech the right of substitution and there was no obligation for ABB to provide work to Usetech. Due to these two factors it was argued income received by Mr Hood was not derived from employment but from self-employment.

Despite the fact there was an agency acting as an intermediately between ABB Vecto and Usetech the court considered just the one direct contract between ABB Vecto and Usetech. The court ruled the role of the agency complicated matters and the contracts had to be looked at as if there was just one contract. Mr Justice Parker decided that had Mr Hood had a direct contract with ABB Vecto there would have been no right of substitution. On the second question of mutuality of obligation, the judge decided that Mr Hood was obliged to work for ABB Vecto and ABB were obliged to pay him for this work.

This ruling clarifies two points. Firstly, when assessing IR35 reality always outweighs what is written in a contract, and secondly the two largest pointers toward self-employment are the right of substitution and the lack of any mutuality of obligation.

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