

ITPG Meeting Marbella

Split salary / Article 15 OECD



- tax + expat
- legal
- payroll
- immigration + relocation
- pension + insurance
- human resources
- vat + customs



Split salary employees

Contents presentation

- Split salary
- Article 15 OECD
- OECD Commentary
- Possible discussions
- Conclusion

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Split salary employees

What is a split salary?

- Resident of Home Country
- Working in Host Country
- Salary subject to tax in Home and Host Country

Consequences

- Taxed on worldwide income in Home State
- Taxed on employment income in Host State
- Relief to avoid double taxation in Home State

Split salary employees

Why important?

- Split salary is often not a choice (tp-report)
- Compliance issues in Host Country
- Retro-active adjustments difficult
- Last, but not least: possible advantage!

Relief for double taxation

- Credit method: Host Country taxes due on salary can be credited against Home Country tax liability; no advantage
- Exemption method: Salary subject to Host Country taxes will be exempted from Home Country tax liability; possible advantage.
- Different interpretation allocation: no/double tax.

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Article 15 OECD Income from employment

Paragraph 1

Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

Split salary employees

Article 15 OECD Income from employment

Paragraph 2

Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and*
- b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and*
- c) the remuneration is not borne by a permanent establishment which the employer has in the other State.*

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Summary article 15 OECD Income from employment

Employee

- Resident in Home Country
- Working in Host Country
- Tax levy allocated to Host Country if:
 - ✧ Present in the Host Country for more than 183 days or
 - ✧ Remuneration paid by or on behalf of employer in the Host Country or
 - ✧ Remuneration borne by a permanent establishment in the Host Country

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Issues article 15

- Permanent establishment vs. subsidiary
- Calendar year, 12 months or tax year? Belgium?
- Host of Home country's interpretation?
- Which days do (not) have to be taken into account?
 - ✧ Part of a day?
 - ✧ Travel day?
 - ✧ Sickness day?
 - ✧ Days in transit?
- Allocation salary differs from 183 days interpretation
- Formal employer/abuse?

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2010 OECD Commentary

Non-formal employer in Host Country if

- Supervision and control on the activities performed, and
- Services performed are integral part of business

- Additional factors:
 - Direct intercompany charge
 - Control and responsibility for work place
 - Holiday and work schedules
 - Provision of tools and materials
 - Determination of number and qualifications of employees
 - Imposition of disciplinary sanctions

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2010 OECD Commentary

Examples

- Training services (no employer in Host Country)
- Marketing services (no)
- Hotel reception (yes)
- Engineering services/supervision (yes)
- HR services (no)

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Possible discussions

- Different interpretation formal employer Home vs. Host
 - ✧ Countries follow formal employer. Examples? Mexico? Sweden?
 - ✧ Countries deny formal employer. Examples? The Netherlands.
 - ✧ I/c charge relevant? Netherlands: yes. Germany: no?
- OECD Commentary (par. 8.10): Relief should be granted if the Host Country imposes tax (if not, mutual agreement procedure)
- Different outcome OECD Commentary vs national case law

Split salary employees

2006 Dutch case law employer

Employer in Host State if:

- Master-servant relationship
 - Instructions
 - Facts and circumstances (not formal employer)

- Services for the account of
 - Advantages, disadvantages and risks
 - Individualised intercompany charge salary expenses

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Example

Dutch slaughterhouse hires foreign employees from a German employment agency for 4 months. The activities of the employees consist of removing bones from the chicken. The services are paid for per kilo.

OECD: employer in the Netherlands

Dutch case law: no employer in the Netherlands

Germany?

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Split salary employees

Conclusion

- Split salary do exist more often than you think
 - ✧ Due to transfer pricing
 - ✧ Due to different interpretations “employer” in article 15
- Split salary may cause compliance issues
- Split salary may lead to advantages

Split salary employees

Questions?

Split salary employees

Thank you!

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