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Global Tax Alert

Danish Court rules PE created by construction activities effectively carried out through a fixed place in Denmark

Executive summary

In a binding ruling dated 15 November 2017 and published 11 December 2017 (SKM2017.710.ØLR), the Danish Eastern High Court ruled that an individually owned Polish construction company, which had been carrying out business through a Danish fixed place for several years, created a Danish permanent establishment (PE) per article 5(1) of the Danish-Polish double tax treaty (the Treaty).

Detailed discussion

Facts

Company A, an individually owned Polish construction company, was specialized within all types of construction services, refurbishments and renovations of real estate, and had for a number of years serviced Danish clients.

Company A's webpage showed a Danish contact address and stated that the company had been present in the Danish market since 2005. Company A had been registered for Danish Value Added Tax (VAT) since 2007 and had filed its Danish VAT returns.

Company A, since 2007, had rented a facility at the Danish contact address, which was used as storage facility for scaffolds and other building materials as well as to provide accommodation for Polish construction workers, who worked on Danish construction projects for Company A.

In the process, the Danish tax authorities reviewed and logged Company A's cash withdrawals and credit card payments, which showed the following extent of presence in Denmark:

2009: 247 days

2010: 213 days

2011: 246 days

2012: 170 days (during the period 1 January – 31 July)

Decision

The Danish Eastern High Court issued a ruling in line with the previous administrative rulings and municipal court decision, which had all been appealed by Company A, determining that Company A had a Danish PE according to art. 5(1) of the Treaty, which with minor insignificant deviations is based on art. 5(1) of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention.

Company A was of the impression that the question of Danish tax liability had to be assessed in accordance with the construction PE provisions of art. 5(3), implying that Company A would only create a Danish PE to the extent Company A carried out individual construction projects with a duration longer than the 12 months threshold described in art. 5(3).

The Danish tax authorities and courts did not agree to this approach and ruled that question of tax liability should instead be assessed based on the ordinary fixed-place provisions of art. 5(1) of the Treaty.

With reference to the duration and extent of work and presence in Denmark, the Danish Eastern High Court ruled that Company A created a Danish fixed-place PE, as the business activities were considered to be carried out through Company A's rented facility and had been so for a number of years.

The Danish Eastern High Court is the ultimate court body for this case and the case cannot be appealed further in the Danish court system.

Implications

The fact that the construction activities were effectively carried out through a Danish fixed place on an ongoing basis for years and with a Danish contact address was decisive in determining Company A's Danish tax liability.

The Danish Eastern High Court put emphasis on the extent and duration of the construction work carried out in Denmark, which was considered to be carried out from Denmark and not from Poland. Art. 5(3) of the Treaty does not preclude Denmark from taxing construction companies notwithstanding the 12-month threshold in the event that the general fixed-place PE requirements of art. 5(1) are met.

As art. 5(3) is inserted in the OECD Model Tax Convention as an exemption to the main rule of art. 5(1), the Danish assessment of the interplay between these two provisions is the main takeaway of this ruling, whereby construction companies are not given a preferential status when at the same time, the regular fixed-place PE requirements are fulfilled.

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