UPPSALA UNIVERSITET

The new legislation on ”economic employer” in Sweden

Mattias Dahlberg, Professor of fiscal law, Faculty of Law, Uppsala university

mattias.dahlberg@jur.uu.se

NSFR

Helsinki 3 May 2023

UPPSALA UNIVERSITET

Background

- New Swedish legislation on the taxation of non-resident employees from 1 January 2021
- Introducing the concept of ”economic employer” (although not this specific term)
- Non-resident employees working in Sweden are normally taxed according to the Law on Special Income Tax on Non-Residents (lagen om särskild inkomstskatt för utomlands bosatta, or ”SINK”, however, note the ”Wallentin-valve” in Section 4 SINK)

UPPSALA UNIVERSITET

Problem prior to the new legislation

- Non-resident employees working in Sweden were normally taxed according to SINK, with a tax rate of 25 per cent on the gross income
- An exception from taxation in Sweden followed from the “183-day-rule” in previous Section 6 of SINK, which was based on Article 15 (2) of the OECD MTC.
- Accordingly, employment income from short-term hiring-out-of-labour could be tax exempt in Sweden

UPPSALA UNIVERSITET

Article 15 (1) of the OECD MTC

”Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remunerations 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.”

UPPSALA UNIVERSITET

Article 15 (2) of the OECD MTC

“Notwithstanding the provisions of para. 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 [cont.]

Article 15 of the OECD MTC [cont.]

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.”

UPPSALA UNIVERSITET

Section 6 of SINK (prior to 2021)

- Section 6 of SINK, prior to 2021, replicated Article 15 (2) of the OECD MTC.
- As a consequence, Sweden could not tax non-resident employees working in Sweden, for a period of less than 183 days, if the ”formal” employer was not a resident in Sweden, the source state.

UPPSALA UNIVERSITET

New Section 6 a of SINK

- Section 6 a, sub-section 2, of SINK provides that the exemption from taxation in Sweden following the 183-day-rule, will not apply regarding **hiring out of labour** if the work is performed in Sweden for the benefit of a principal/assigner (”economic employer”) under its control and leadership, if the ”economic employer” is subject to business taxation according to the Swedish Income Tax Act [or otherwise a Swedish taxable entity].

UPPSALA UNIVERSITET

New Section 6 b of SINK

According to the new Section 6 b of SINK the hiring out of labour according to Section 6 a SINK does not include work conducted in Sweden for a maximum of 15 subsequent days, provided that the work in Sweden does not exceed 45 days in the calendar year at issue.

This ”exception from the exception” means that Sweden as a source state will not tax the employment income for such short work periods according to the new concept ”economic employer”

Additional requirement (1)

Foreign companies have to register as employers in Sweden with the Swedish tax agency.

Such foreign companies should also withhold and remit taxes on a monthly basis regarding employees that are taxable in Sweden.

Additional requirement (2)

Swedish companies should withhold tax regarding payments to foreign companies, if the payments concern work performed in Sweden, and if the foreign company does not have a Swedish tax registration certificate (”F-skatt”)

Considerations

- Complex legislation (i.a. exception from the exception)
- Extension of the scope of domestic law. How does the extension relate to Article 15 of Swedish tax treaties, designed according to the OECD MTC? Risk of tax treaty override?
- What is the value of the Commentary to Article 15 of the OECD MTC (i.a. Para. 8, 8.1-8.28)?