TR 2013/1EC - Compendium

Ruling Compendium – TR 2013/1

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling TR 2012/D4 – *Income tax: the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties.*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	**Application of the 'substance over form' approach** 1.1 The ATO should expand on the 'substance over form' approach to clarify when that criteria will be applied to conclude that a non-resident employer under the formal contract of employment is not the employer of the non-resident individual for the purposes of the short-term visit exception. 1.2 The ATO should align its view in relation to the 'substance over form' approach with the relevant view in Taxation Ruling 2005/16.	1.1 When the 'substance over form' approach applies is addressed in paragraph 11 of the Ruling, which states that the 'substance over form' approach applies in all cases to determine whether the relationship is properly one of employment and who the employer is. 1.2 The 'substance over form' approach as expressed in the Ruling is consistent with TR 2005/16. This is reflected at footnote 32 at paragraph 81 of the Ruling.
2	**Further clarification from the Commentary on the OECD Model** Explore whether further clarification in relation to the meaning of the term 'employer' for the purposes of the short-term visit exception may be extracted from the Commentary on Article 15 of the OECD Model.	We have considered whether further clarity can be extracted from the Commentary on Article 15 of the OECD Model but do not consider that any more can be added to paragraphs 7, 15, 16, 18, 62 to 67, 81 to 83 and 126 to 130 of the Ruling.
3	**Examples 2 and 3: expansion of reasoning** Expansion of the reasoning in determining which party the	Both these examples are illustrative of the approach and factors specified in the Ruling that are relevant to the particular facts and circumstances.

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	employer is for the purposes of the short-term visit exception is required, in particular on how the key indicators of an employment relationship are applied and weighted to reach the conclusions.	Given that the relevance of and weighting given to a particular factor will vary according to the circumstances, and that no single factor is determinative, any further expansion of the reasoning would not provide any meaningful clarification in respect of other different scenarios.
4	**Paragraph 81 of the draft Ruling: statement without any reference to case law** The statement that 'the approach under Australian common law is to find the true substance of the relationship' is made without any reference to case law.	References to the relevant cases are set out in paragraphs 86 and 87 of the Ruling. For clarity, footnote 31 has been added to paragraph 81, thus providing a cross reference to those paragraphs.
5	**Disagreement between States: additional layer of complexity to the process** The involvement of the competent authorities will present an additional layer of complexity to the process.	Although such additional process(es) are noted, such processes are not within the scope of the Ruling.
6	**Addition of a general de minimus threshold** A general de minimus threshold (for example a presence of a non-resident individual in the State of source of less than 60 days) that the short-term visit exception would be available will reduce some of the inherent complexities associated with these rules.	A de minimus rule is not part of the text of any of the relevant tax treaties. Accordingly, discussion of such a rule is outside the scope of the Ruling.