JULY 2018 ISSUE 42
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EXPATRIATE NEWSLETTER

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EU - TRANSFER OF UNDERTAKING

WHAT DOES A TRANSFER OF UNDERTAKING WITHIN THE EU ENTAIL FOR YOUR COMPANY AND EMPLOYEES?

Cross border transfer of undertaking

The free movement of employees and undertakings is a fundamental principle within the EU. This is why EU-legislation contains as few restrictions as possible for employers to establish or to relocate an undertaking to another EU Member State. There is an ongoing trend for businesses to outsource (a part of) their activities to other EU-countries.

From an employment law perspective, companies should assess whether the transfer of business activities could be considered a so called 'cross border transfer of undertaking' as defined in the European Directive. The reason being is that such a transfer of undertaking, for example by way of outsourcing of business activities or a legal merger, could well have employment law consequences for employers and employees.

Transfer of undertaking as defined in the European Directive

To answer the question of whether a transfer of undertaking has arisen, courts use the criteria set out in the 'Spijkers-case'. There are multiple factors taken into account such as the nature of the business activities, the extent to which tangible assets (machines, inventory) and personnel is acquired by the new employer, the transfer of customer base and the extent to which the activities of the business are continued in a comparable way.

Employment law protection of employed persons involved

Dealing with transactions such as these, the Directive intends to seek balance between the free movement of employees and of undertakings on the one hand and protection of employees' interests on the other.

Once established that a transfer of undertaking is in place, this has the following employment law consequences.

- Employees' employment rights are protected. In principle, all their existing employment benefits and existing duties arising from the employment contract pass by operation of law (automatically) to the new employer as of the day of the transfer.
- A transfer of undertaking does not construe grounds for dismissal. In certain cases, with so called ETO reasons (economic, technical and/or organisational reasons) that entail a change in the workforce, dismissal of employees may be approved nevertheless.
- Finally, the Directive dictates that employers involved in the transfer of undertaking have the duty to inform the employees on the following:
  - The proposed decision of the transfer of undertaking;
  - The underlying reasons for the transfer; and
  - The consequences expected for the employees involved.

The subject of a cross border transfer of undertaking is complex. It is important to realise that the Directive provides a minimum protection regime to employees involved. Individual member states are permitted to grant employees further employment protection rules than provided by the Directive. Many EU Member States have exercised this right in their legislation.

Are you contemplating establishing or relocating business activities? If so, it is important that you seek the advice of an expert specialising in local as well as European employment law.

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EDITOR'S LETTER

The BDO Expatriate Newsletter provides a brief overview of issues affecting international assignees, predominantly, but not exclusively, from a tax and social security perspective.

This newsletter brings together individual country updates over recent months. As you will appreciate, the wealth of changes across multiple jurisdictions is significant so to provide easily digestible information we have kept it to the key developments that are likely to affect your business and international assignees.

For more detailed information on any of the issues or how BDO can help, please contact me or the country contributors direct.

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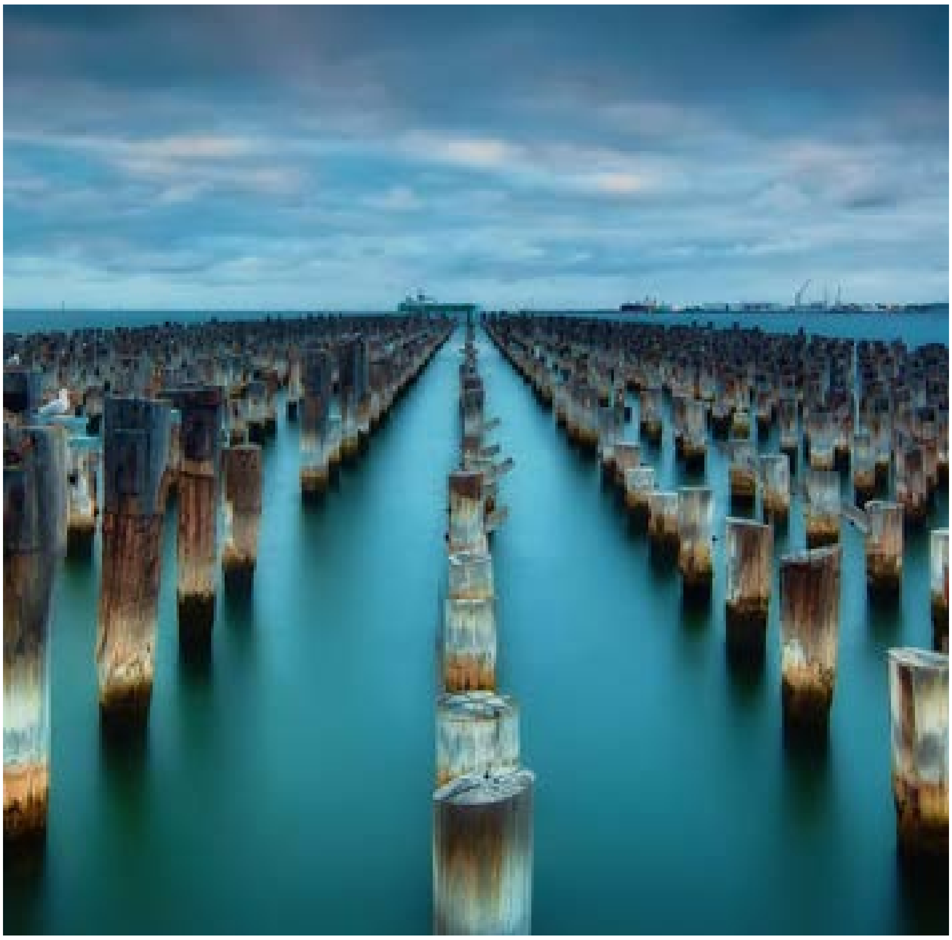
AUSTRALIA

PERSONAL INCOME TAX RELIEF



In the recent May Budget, the Federal Government announced changes to individual tax rates for the 2018/19 income year, as part of a 3-step 7-year personal income tax reform plan targeted at low and middle income earners. These changes recently passed into law without amendment by Federal Parliament.

In addition to the existing Low Income Tax Offset (LITO) of AUD 445, the first step provides a new non-refundable Low and Middle Income Tax Offset for the years ending 30 June 2019 - 30 June 2022. The offset provides a benefit of up to AUD 200 for taxpayers with income less than AUD 37,000, up to AUD 530 for taxpayers with income up to AUD 48,000, and thereafter phases out for taxpayers with income up to AUD 125,333.

The next step provides for the upper limit of the 32.5% tax bracket to increase from AUD 87,000 to AUD 90,000 starting in the 2018/19 tax year. The upper limit of the 32.5% tax bracket will further increase in 2022/23 to AUD 120,000. Also in 2022/23 the upper limit of the 19% tax bracket will increase from AUD 37,000 to AUD 41,000. In 2022/23 the existing LITO and the new Low and Middle Income Tax Offset will be combined into a new LITO with a maximum offset of AUD 645.

The last measure in the series of three, is to increase the upper limit of the 32.5% tax bracket from AUD 120,000 to AUD 200,000, eliminating the 37% tax bracket completely.

The changes also aim to address 'bracket creep'. As wages increase as a result of inflation, more employees start paying tax in the higher tax brackets and extra payments such as overtime and bonuses therefore also get taxed at the higher rate, reducing their inflation adjusted take-home pay. To help encourage workforce participation and to strengthen the post-mining economy, instead of simply increasing the tax-free threshold, the third tax bracket was targeted to specifically help the middle income employees who found themselves being pushed into the higher tax bracket. By stretching the upper limit of the brackets, more individuals can stay within the lower brackets for a longer period of time.

The Bill containing the changes received Royal Assent in June 2018.

Updated tax tables

From 1 July 2018 to 30 June 2022

Australian Resident Individuals	
Taxable Income Bracket (AUD)	**Tax (AUD)**
AUD 0 - AUD 18,200	0
AUD 18,201 - AUD 37,000	19 c for each AUD 1 over AUD 18,200
AUD 37,001 - AUD 90,000	3,572 plus 32.5 c for each AUD 1 over AUD 37,000
AUD 90,001 - AUD 180,000	20,797 plus 37 c for each AUD 1 over AUD 90,000
AUD 180,001 - and over	54,097 plus 45 c for each AUD 1 over AUD 180,000

Australian Non-Resident Individuals	
Taxable Income Bracket (AUD)	**Tax (AUD)**
AUD 0 - AUD 90,000	32.5 c for each AUD 1
AUD 90,001 - AUD 180,000	29,250 plus 37 c for each AUD 1 over
AUD 180,001 - and over	62,550 plus 45 c for each AUD 1 over AUD 180,000

Note the above rates do not include the Medicare levy.

Future rates and thresholds (Australian Tax Residents)

Rate	2018-19 to 2021-22	2022-23 to 2023-24	2024-25 onwards
0 %	AUD 0 - AUD 18,200	AUD 0 - AUD 18,200	AUD 0 - AUD 18,200
19 %	AUD 18,201 - AUD 37,000	AUD 18,201 - **AUD 41,000**	AUD 18,201 - AUD 41,000
32.5 %	AUD 37,001 - **AUD 90,000**	**AUD 41,001** - **AUD 120,000**	AUD 41,001 - **AUD 200,000**
37 %	**AUD 90,001** - AUD 180,000	**AUD 120,001** - AUD 180,000	**N/A**
45 %	AUD 180,001 - and over	AUD 180,001 - and over	**AUD 200,001** - and over

Employers

Unlike the last tax bracket increase in October 2016, as the change is effective from 1 July 2018 (the start of the tax year), there is no need to consider an adjustment for Pay-As-You-Go Withholding (PAYG), and the general end-of-year payroll software updates should automatically account for the change in PAYG rates.

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CHINA

INDIVIDUAL INCOME TAX POLICY FOR CASH AWARDS RECEIVED BY SCIENTIFIC AND TECHNOLOGICAL STAFF

In support of the implementation of the country's 'Mass Entrepreneurship and Innovation' initiative and facilitating the transformation of scientific and technological achievements, notice has been issued on the Individual Income Tax Policy for Cash Awards Received by Scientific and Technological Staff for the Transformation of On-duty Scientific and Technological Achievements.

The main points of the Notice are below:

1. 50% of cash awards distributed to scientific and technological staff by non-profit research and development institutes and institution of higher learning is counted as 'wage and salary income' for the current month to calculate the individual income tax due.
2. When distributing cash awards to scientific and technological staff, non-profit research institutes and colleges shall withhold and remit the individual income tax in compliance with the individual Income Tax Law.

This Notice shall come into force as of 1 July 2018. It may apply if cash awards are offered within 36 months of the effective date of this Notice.

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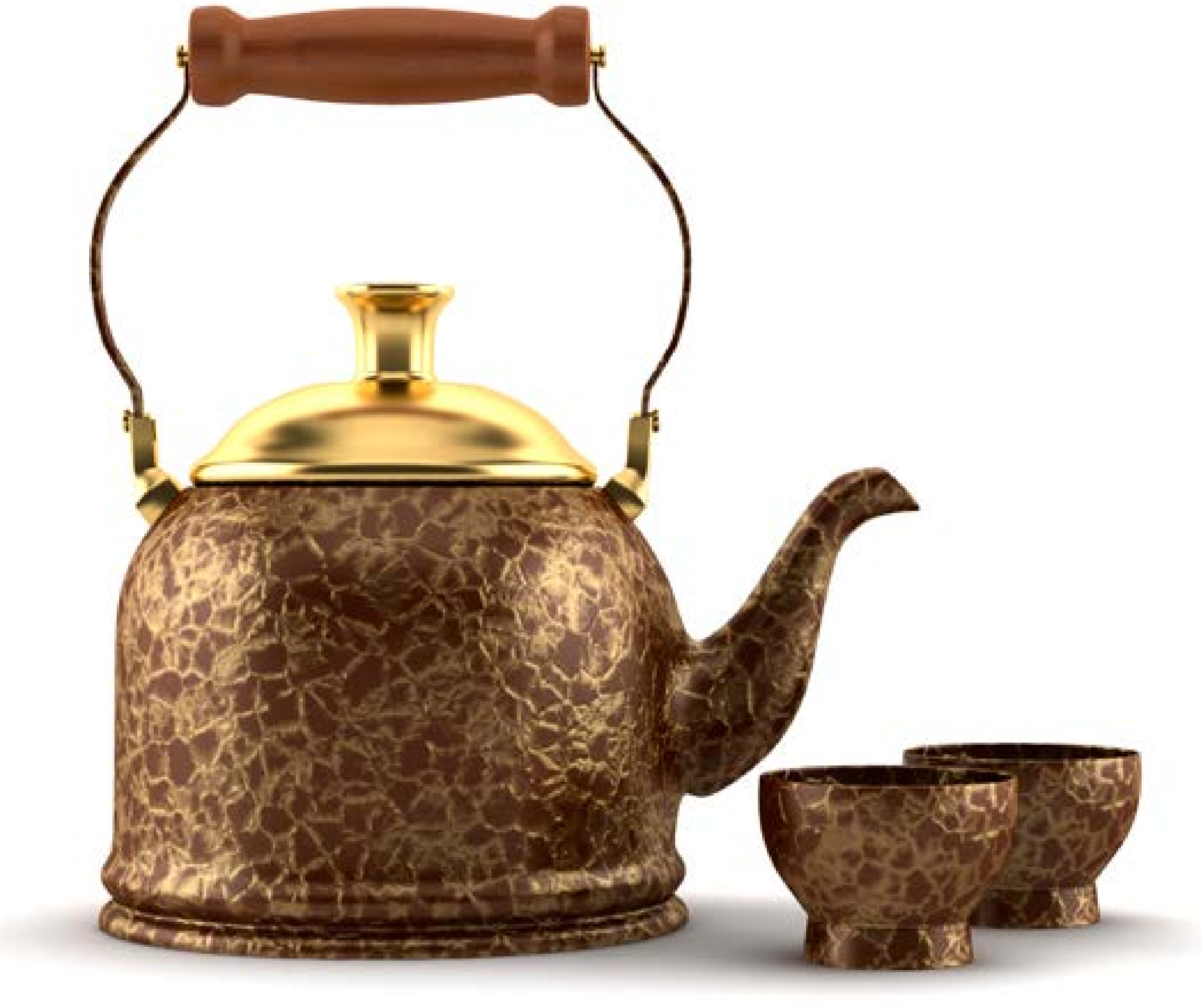

SWITZERLAND

CONTROLS TO AVOID 'SALARY DUMPING'

Detailed controls were carried out in 2017 as part of the measures to act against illegal employment. The number of company controls remained constant compared to the previous year, however the number of controls on individuals increased.

The accompanying measures ensure that the applicable wage and working conditions are adhered to in Switzerland. This prevents undercutting of Swiss wage and working conditions and guarantees fair competitive conditions for Swiss and European companies.

Compliance with the mandatory regulations is controlled on site by cantonal labour market inspectors. For this purpose, each executive body is obliged by the SECO to achieve certain annual control objectives.

The implementation of the accompanying measures is enforced by the cantonal tripartite commissions (for sectors without collective labour agreements) and by the cantonal joint commissions (for sectors with collective labour agreements).

The results of the accompanying measures in brief:

- **170,000 persons** and around **44,000 companies** were controlled by the cantonal joint and tripartite commissions;
- **7% of all Swiss employers, 36% of all posted workers and 33% of self-employed service providers** from the EU/EFTA were inspected;
- **6% increase** in control volume compared to previous year;
- **1,935 violations** of mandatory wage and working conditions as a result of the 8,036 controls carried out in the posting area;
- A slight **increase in wage undercutting** among controlled Swiss employers and controlled posting companies;
- More than **70% of all wage undercutting** in the cantons of **Zurich, Ticino, and Geneva**;
- **2,645 fines and 975 service bans** imposed.

How to combat illegal employment in Switzerland

The Federal Law against undeclared work protects the interests of employees and combats distortion of competition between companies. As part of the measures against illegal employment, employers, employees and self-employed persons are monitored for compliance with the reporting and authorisation requirements of social security, aliens act and withholding tax law.

The continuing measures taken against undeclared work have been established over the past ten years and are coordinated and risk-based according to the SECO. In addition to carrying out controls, the relevant cantonal bodies also perform coordination tasks. Any violations and suspicious cases reported to the controlling body are forwarded to the responsible special authorities such as the social security or tax authorities for detailed clarification.

The results of the controls on undeclared work in brief:

- The company controls have remained constant at **11,971 controls**;
- **Checks on persons** increased by 2% to **36,072**;
- Overall in Switzerland, **12% fewer suspicions** of illegal employment work were reported;
- The cantons received **CHF 1.2 million in fees and fines**;
- **10% decrease in feedback from special authorities** on measures taken and sanctions imposed on cantonal control bodies.

BDO comment

BDO in Switzerland may support you in ensuring compliance with Swiss minimum salary and work conditions to avoid lengthy labour market inspections, fines and other sanctions. In the event of a labour market inspection, BDO Switzerland assists and checks required documents.

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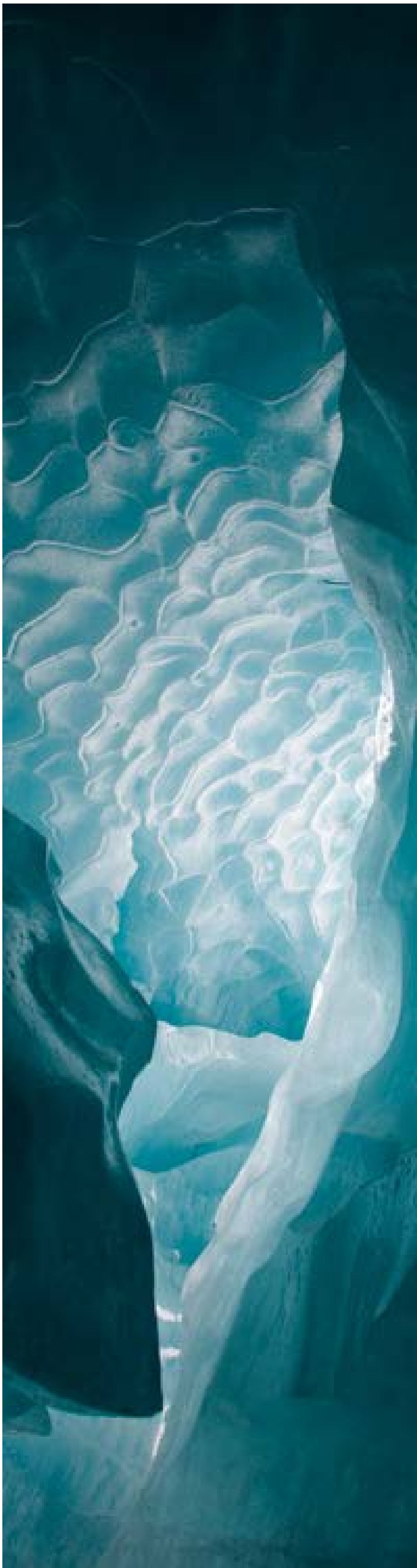


UNITED KINGDOM

EXTENSION OF OFFSHORE TIME LIMITS

HMRC, the UK tax authority, are extending the time limits that apply whereby they can raise an assessment in cases of under declared offshore income.

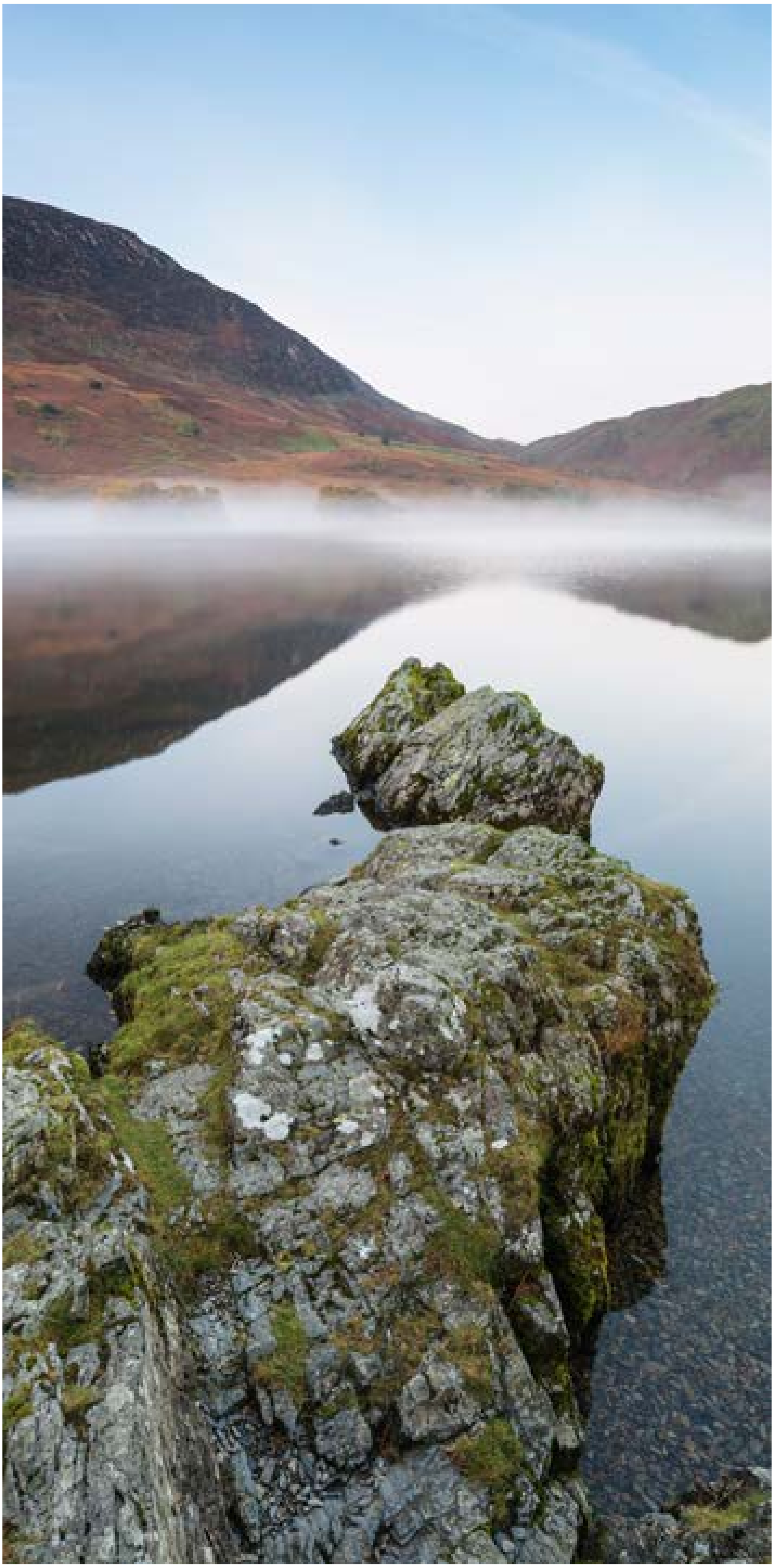
Offshore tax evasion, avoidance and non-compliance pose a threat to the UK tax base. It has been an HMRC focus area for some time now to ensure that everyone pays the tax they owe, including on offshore income and gains. It can take HMRC much longer to establish the facts concerning offshore transactions than in equivalent onshore cases, as it can be more difficult to access the information needed to understand the transactions. This is particularly true where complex offshore structures are used.

The existing time limits for income tax, inheritance tax and capital gains tax allow an assessment to be made at any time not more than four years after the end of the year of assessment to which it relates. An assessment can be made at any time not more than six years after the year of assessment if the non-compliance is due to a failure to take reasonable care. Where an assessment involves a loss of tax brought about deliberately, the assessment time limit is 20 years after the end of the year of assessment. This time limit will not change.

Due to the additional time that may be required in offshore cases, HMRC may discover an under-declaration too late to assess the tax due under the four or six year rules. The time limits are therefore being extended to a minimum of 12 years to allow HMRC more time to establish the facts in offshore cases.

BDO comment

Individuals with offshore assets must ensure they are clear on their reporting requirements for UK tax purposes. HMRC continue to focus on this area due to the view that not all offshore income is being correctly reported. They now have an extended period to raise assessments in cases where this is not happening. This ties in with the wider theme on increased sharing of information between tax authorities to ensure greater compliance.



BENCHMARK SCALE RATES AND OVERSEAS SCALE RATES – ABOLITION OF RECEIPT CHECKING

Employers are able to reimburse or pay subsistence scale rates to their employees where they are travelling on business. Previously, HMRC expected an employer to carry out a sampling exercise where scale rate payments were made. This was to demonstrate that the amount being paid did no more than reimburse the costs incurred by their employees.

From 6 April 2019, there will no longer be a requirement to evidence claim's which fall under the threshold set out in Benchmark Scale Rate (BSR) and Overseas Scale Rates (OSR). However, this treatment is only applicable to claims that fall within scope of these rates, it is therefore important to remember that a claim still needs to be verified as such before assuming this treatment.

CHANGES TO THE POSTING OF WORKERS DIRECTIVE

The Posting of Workers Directive (PWD) is in place to protect the employment rights of individuals on a work assignment in another European country. It assures that the worker has certain core rights in relation to pay, annual leave, maximum working hours and protection from discrimination etc.

The duration of time that an assignee can be classed as a 'posted worker' is changing. This will be limited to 12 months with the potential to extend it to 18 months. After this time, all employment rights available to local employees within the host country will be applicable to the assignee, not just the core rights applicable through the PWD.

No date has been set as of yet for the changes to come into place, but there will be a two year implementation period. However, it is best to start thinking about the affects this will have on you as an employer now. The term 'posted worker' covers a spectrum of employees, from short-term business visitors to commuters to long-term assignees. Therefore, the PWD and the changes coming into place will most likely affect your employees.

NEW DOUBLE TAX TREATIES WITH GUERNSEY, JERSEY, AND ISLE OF MAN

The UK has signed new DTAs with the three Crown Dependencies. They are expected to come into force by the start of the next tax year.

These new treaties will replace the existing treaties, which have not been updated since the 1950s. They are OECD model treaties and BEPS compliant.

There are key changes regarding residence and taxation of employment income:

- The old treaty defined residence by reference to the domestic laws. This is still the basis for the new treaty but there is now a tie breaker test so it is clear where an individual is considered resident when applying the terms of the treaty;
- Revision to the employment income article on the period over which 183 days is calculated and bringing in the concept of economic employer;
- Inclusion of a specific article to cover director's remuneration.

Individuals and employers need to be aware of these changes. It is now more difficult to be exempt from tax in the host location as the parameters have been tightened up. Non-resident directors may also find they are now liable to tax on income for board positions they hold in the other location (i.e. the country they are not resident in).

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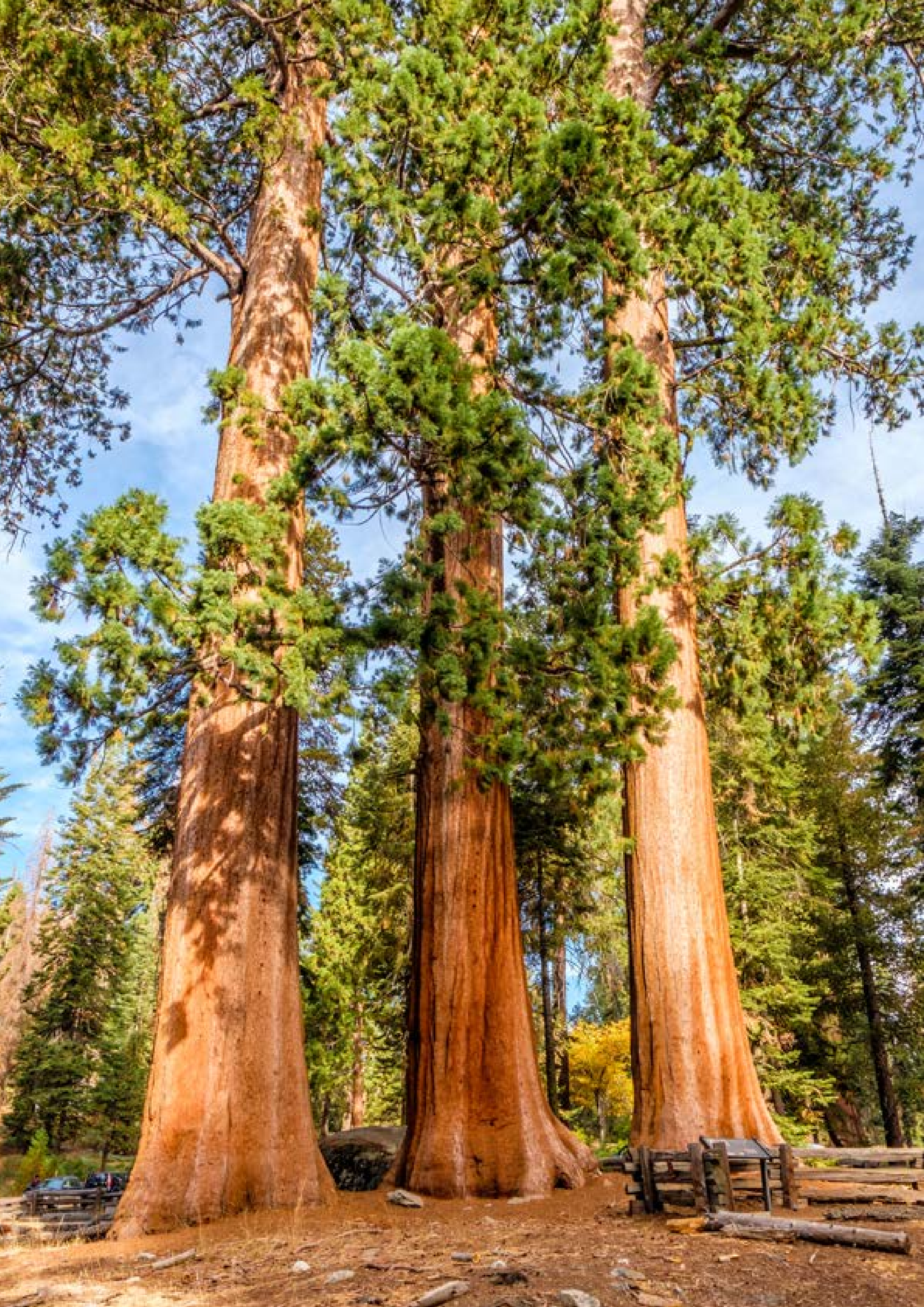

UNITED STATES

NEW IRS COMPLIANCE CAMPAIGNS – INCREASED RISK OF EXAMINATION FOR TAX RETURNS WITH FOREIGN ELEMENTS

The Internal Revenue Service (IRS) announced on 21 May 2018 six additional compliance campaigns in addition to twenty-nine campaigns that are currently in process. Considering the new tax legislation enacted on 22 December 2017 and also their stagnating (or decreasing) budget, the IRS Large Business and International division (LB&I) is moving toward issue-based examinations. It appears that the IRS is deploying its limited resources (personnel and budget) into areas where it can achieve the biggest gains. The latest compliance campaigns announced in May focus heavily on international topics (five out of the six compliance campaigns address international individual compliance issues).

Form 1042 (Annual Withholding Tax Return for U.S. Source Income of Foreign Persons) and Form 1042-S (Foreign Person's U.S. Source Income Subject to Withholding) Compliance

If payment of US source income (interest, dividends) is made to foreign persons, the payer is required to comply with withholding and reporting requirements. Those requirements may create significant burden for payers who do not make those payments often and who may not have staff who are adequately trained.

Form 1040NR (U.S. Non-resident Alien Income Tax Return)

The LB&I lists three specific topics in its campaign with respect to non-resident aliens:

- Tax treaty exemptions;
- Deductions reported on schedule a (itemised deductions); and
- Tax credits.

Non-resident aliens can exempt certain income based on income tax treaties between the US and their home country; however, as each treaty may be somewhat different, it is often difficult to navigate the complex and confusing set of rules. Incorrect application may trigger an examination that could result in additional tax, penalties and interest.

Even though Form 1040NR is similar to the U.S. Individual Income Tax Return (Form 1040) filed by most U.S. citizens, green card holders and resident aliens, there are differences that have a significant impact on an individual's taxable income and ultimately their income tax liability. One of those differences is the tax treaty exemption described above. In addition, the itemised deductions allowed on a non-resident alien return are very limited compared to the itemised deductions allowed on Form 1040. Lastly, many of the credits available to U.S. citizens, green card holders and resident aliens are not available to non-resident aliens.

Form 3520/3520-A (Foreign Trust Reporting)

The last of the internationally focused compliance campaigns may have the most significant consequences for those affected. A US tax resident who receives a distribution from, or contributes to, a foreign trust is required to file Form 3520. If a US tax resident owns a foreign trust or is considered the owner of a foreign trust, the trust must file Form 3520-A. It may come as a surprise but many foreign investment instruments can fall under foreign trust reporting (e.g. Canadian Registered Education Savings Plan). Depending on the situation, generally the initial penalty for failing to file Forms 3520 or 3520-A can be USD 10,000 or up to 35% of the gross reportable amount (whichever is greater).

The IRS is focusing its resources on many of the foreign elements reported on income tax returns or informational forms. The penalties can be substantial and corrective action time-consuming and expensive. It is important to remember that each compliance campaign lists several treatment streams (like education and outreach), but every single campaign addresses non-compliance and errors through examination.

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CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 16 July 2018.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Australian Dollar (AUD)	0.63483	0.74172
Swiss Franc (CHF)	0.85392	0.99785
US dollar (USD)	0.85555	1.00000

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