



Human Capital News

Contacts at Ernst & Young:

Olga Gorbanovskaya
Tel: +380 (44) 490 3022
Olga.Gorbanovskaya@ua.ey.com

Halyna Khomenko
Tel: +380 (44) 490 3028
Halyna.Khomenko@ua.ey.com

Olena Boichenko
Tel: +380 (44) 499 2404
Olena.Boichenko@ua.ey.com

Contents

- Taxation of non-residents' income in Ukraine
-

Taxation of non-residents' income in Ukraine

On 25 November 2009 the STAU issued its latest clarification letter #26106/7/17-0717, which undermined the approach to taxation of Ukrainian non-residents' income expressed *inter alia* in the Order of STAU #50. On 18 December 2009 STAU issued Order #718, which terminated the Order #50. Moreover, State Tax Administration issued a new overview letter #28593/7/17-0717 of 23 December 2009 regarding taxation of non-residents' and foreign individuals' income. The latest letter covers the following issues:

- definition of Ukrainian tax residency;
- period for which such tax residency status is granted under various conditions;
- taxation of foreign individuals' salaries, as well as other types of income;
- tax accrual and payment procedures for foreign individuals;
- procedure of registration of foreign individuals at Ukrainian Tax Authorities and other.

In the abovementioned letters STAU expressed its approach to a range of practical questions, which may have an essential influence on taxation procedure and rates applicable to Ukrainian non-residents' income, namely:

1. STAU emphasized that it is obligatory to obtain an employer's notification on foreign individual's voluntary determination of his/her residence status envisaged by the Order of STAU #581. Such a notification must be obtained even if foreign individual's actual personal situation corresponds to at least one of the criteria of the tie-breaker tax residence test for

determination him/her as a tax resident envisaged by the Law of Ukraine "On Personal Income Tax" #889. These criteria are: a) the availability of a place of permanent residence in Ukraine; or b) a center of vital interests in Ukraine; or c) staying in Ukraine for at least 183 calendar days within a year. The Law #889 does not make a foreigner's residence status dependent on the receipt of confirmation from the Tax Authorities. Since neither the Law nor the effective subordinate acts establish a deadline for voluntary determination of an individual's tax residence status by means of obtaining a respective notification from the Tax Authorities, such a way of determining tax residence status is considered to be an alternative to a tie-breaker tax residence test. Thus, a foreign individual, who is considered as tax resident according to the abovementioned conditions, does not have to additionally voluntarily determine him/herself as a tax resident.

2. In its letters STAU also pays attention to the fact that a foreign individual becomes Ukrainian tax resident effective the tax period (month), in which foreigner's employer receives a notification on foreign individual's voluntary determination of his/her residence status. Such a notification will be issued by the Tax Authorities only in case a foreign individual provides documentary proof of sufficient grounds for considering him/her as a tax resident of Ukraine. Such documents are temporary or permanent residence permit. In case a foreign individual lacks temporary or permanent residence permit, the notification on tax residence status can be obtained not earlier than in July (provided that a foreign individual resides on the territory of Ukraine more than 183 days during a calendar year). Therefore, it may be concluded that according to the STAU's approach, during the period from January to June foreign individuals will be, in any case, considered as Ukrainian tax non-residents and their income received during this period will be taxed at 30% rate. Obviously, such an approach will result in significant overpayment of personal income tax, provided that tax residence status is to be obtained later on.
3. Tax Administration furthermore declares that if non-residents' income was taxed at 15% during the reporting year, accrual of additional taxes, namely application of 30% tax rate to tax non-residents, should be made in the current reporting period and revised tax reports (1DF) for the respective periods should be filed.
Such STAU's demand is inconsistent, taking into consideration the fact that application of 15% tax rate was recently supported by the Tax Authorities.
4. It is also worth mentioning that according to Resolution of the Cabinet of Ministers of Ukraine "On State Registration of Regulatory Legal Acts of Ministries and Other Executive Authorities" #713 of 28 December 1992, any type of regulatory legal act, which contains one or more regulations affecting social-economic, political, personal or other rights and freedoms, legitimate interests of the citizens proclaimed and guaranteed by the Constitution and Laws of Ukraine are subject to state registration; or if such regulations set new, either change, enlarge or terminate legal organizational mechanism of their implementation they are also subject to state registration.

STAU's intention to mandatory apply regulations of the Order #581 implies that STAU considers this Order as a regulatory legal act. An Order legally takes effect only after its

state registration. As of today, the Order #581 has not passed the state registration in the Ministry of Justice of Ukraine, therefore could not come into legal force.

In such a case, STAU's claims to oblige foreign individuals and their employers to follow the regulations envisaged by the Order #581 are not sufficiently grounded, as without the state registration the Order #581 is considered as methodic recommendations.

Taking the abovementioned facts into consideration, we believe that the new approach of the Tax Authorities expressed in the latest letter is not consistent with the current Ukrainian law. However, existence of such approach requires more attentive structuring of relations with foreign individuals.