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TAX SPECIAL



UPDATE TAX LIABILITY LAWS

In our previous tax special, we have informed you on the highlights of the new State Ordinances on tax and social security premium liabilities, as well as on the collection methods. Although the laws have not yet been passed by the Parliament, discussions with the Servicio di Impuesto y Aduana (SIAD) have taken place regarding the implications and practical issues of the new laws. In light of these discussions and the (soon to be published on the website of the SIAD, www.siad.aw) draft brochures, **WTS** wants to elaborate on some frequently asked questions regarding these new laws.

Directors' liability – for what can the director be held responsible?

All members of the Board of Directors can be held severally liable for wage tax, corporate income tax, room tax, gaming tax, dividend withholding tax, turnover tax (BBO) and social security premiums (AOV, AWW and AZV) of the company. Please note a director cannot be held liable for debts the company itself is held liable for.

Directors' liability – how and when do I notify the SIAD?

The SIAD will issue a special form (“melding betalingsproblemen”) that can be used to notify the SIAD of the inability to pay the taxes due. This form should be filed within two weeks after:

Taxes paid via return (e.g. wage tax and social security premiums, BBO and dividend withholding tax): 15th of the month in which the taxes were ultimately due. For example, should the payroll taxes for the month June 2008 not be paid ultimately July 15, 2008, within two weeks after July 15, 2008 the notification should be filed.

Taxes via assessment (e.g. corporate income tax): 2 months after the date of the assessment. For example, if an assessment is issued on July 25, 2008, the corporate income tax should be paid ultimately September 25, 2008 and the notification of the inability to pay should be filed within two weeks after September 25, 2008.

You can also consider asking for an extension of payment of the taxes due or close a payment regulation with the SIAD. Both the notification and the request for an extension of payment can be filed at the same time.

Directors' liability – do I have to notify each time?

We understand that the SIAD will allow you to file one notification, which is valid until the time you pay the taxes due on time. After that, you will have to file another notification should you again be unable to pay the taxes due.

Please note that having filed the notification, does not exonerate you from filing the (monthly) returns. You will have to file the returns timely each period in order to avoid penalties.

Directors' liability – what is the inability to pay?

The inability to pay can be defined as not paying the taxes due in time, regardless of why the taxes cannot be paid. You will have to explain to the SIAD however why you are unable to pay. It will most likely not suffice to mention “cash flow issues”.

Directors' liability – what if the notification is filed too late?

In that case the directors are assumed to have mismanaged the company. You will have to make credible that not filing the notification in time was not your fault, and you will have to make credible that you have not mismanaged the company. Especially this last item may be difficult to prove, since mismanagement can be described as reckless decisions, irresponsible investments or already knowing that the buyer of your products or services will not pay (on time). Any actions taken in the last five years prior to the notification are of importance in determining if mismanagement took place. External factors, like bankruptcy of your biggest client or this client going to a competitor, may exonerate you from “mismanaging” the company.

Contractors' liability – for what can the contractor be held liable?

A contractor can be held liable for all wage tax and social security premiums of the persons the subcontractor (and subsequent subcontractors) employed to execute the specific tangible work. This liability includes any interest or collection costs, but no penalties.

Contractors' liability – what is a specific tangible work?

A tangible work can be defined as construction of real estate, roads and repair of tangible assets. However, also certain services are included, such as typing, wrapping of goods and cleaning. If the services provided are the result of intellectual efforts, no tangible work is deemed to exist.

Contractors' liability – when is a contractor not liable?

In case the subcontractor performs the tangible work, for more than 50% of the man-hours required, in his own company, then the contractor cannot be held liable. An example could be a printing company. If the printing takes place in his company for more than 50% of the required man-hours, the contractors' liability will not be applicable.

Another exception is when a purchase agreement is closed for an existing asset, but the seller will perform additional services regarding these assets. An example could be a contractor buying doors at a supplier, where the supplier agrees that he will also install the doors. Installing the doors implies that the supplier is a subcontractor of the contractor, but because the installation is insignificant compared to sale of the doors, the contractor cannot be held liable for wage tax or social security premiums not paid by the supplier of the doors.

Contractors' liability – how can I mitigate my liability?

There may be several ways to limit your liability. First, you may ask a subcontractor to provide a statement of payment behavior. This statement can be requested at the SIAD and will be issued within 14 days. Although this statement does not imply you cannot be held liable anymore, it does assist in determining if the subcontractor met its obligations in the past (and is likely to continue to do so).

Secondly, you may include a clause in your contract that prohibits the subcontractor to subcontract part of the work to another subcontractor (the so called "kettingbeding"). This clause does not prevent you from possibly being held liable, but it keeps control on your possible liability.

Thirdly, you can keep a project administration showing e.g. how many and which employees of the subcontractor work each day, for how long, what they do, where they perform the work, and such. Based on your experience of the remuneration of such employees, you can then keep a shadow payroll of the subcontractor or even execute the payroll on behalf of your subcontractor. This administration may mitigate your liability and, combined with the "escrow account" (in Dutch: "vrijwaringsrekening"), can minimize your risks of being held liable.

Finally, the SIAD will open an "escrow account" per request of a subcontractor, which request must be accompanied by the agreement between the contractor and the subcontractor. Please note that the request may be denied. The subcontractor will have to request the use of this escrow account per project. The SIAD and the subcontractor will close an agreement (per project), which agreement will obtain a specific assigned number. On this account, the contractor can deposit funds from which the wage tax and social security premiums due by the subcontractor can be paid. The contractor will have to specify the assigned number and other invoice details when depositing the funds, so the SIAD can keep track of the payments.

Using this escrow account, combined with a good project administration, will minimize your contractors' liability.

Liability for hiring employees – for what can one be held liable?

The individual or entity hiring the employee (“borrower”) will be held jointly and severally liable for all wage tax and social security premiums owed by the entity hiring out the employees (“lender”) for the employees hired by the borrower and who are under his/her supervision or management. This liability includes any interest or collection costs, but no penalties.

Liability for hiring employees – what is management or supervision?

Management or supervision will depend on the facts and circumstances. Of importance may be (i) the wordings of the contract (i.e. is the lender hired to perform certain services or are specific employees of lender hired), (ii) whether or not the employee of the lender has to report to the borrower, (iii) is the work borrower hires from lender (part of) his core business, and/or (iv) if the employee of the lender can easily be replaced by another without the borrower objecting.

Liability for hiring employees – how can I mitigate my liability?

A similar situation applies for the borrower of employees as for contractors. We refer to the above.

Other – can I be exonerated from the contractors’ or hiring of employees liability?

Under certain conditions, one cannot be held liable. These circumstances are for example a sudden and severe recession in the economy, or natural disasters. Such circumstances must therefore be out of the control of both the contractor/ borrower and the subcontractor/ lender.

Other – can the different liabilities coincide?

Yes, they can.

For example, if a subcontractor hires employees to execute a tangible work, the subcontractor can be regarded as a borrower of employees and can be held liable (hiring of employees liability) for the wage tax and social security premiums of these employees. If the subcontractor, after being held liable, does not pay the tax due, the contractor can be held liable (contractors’ liability) for these taxes as well.

Another example is the contractor who hires a subcontractor to execute a tangible work, and the subcontractor does not pay the wage tax and social security premiums. In that case, both the contractor (contractors’ liability) and the directors of the subcontractor (directors’ liability) can be held liable.

In principle, the SIAD will first try to collect the taxes due from the directors before holding the contractor/ borrower liable. Under conditions, the SIAD has the authority to go to the contractor/ borrower directly.

Other – can I recover the amounts I paid because I have been held liable?

Yes, you can. The general rule is that you must recover the amount at the tax payer itself first, and perhaps even its directors. It is advisable to also file an attachment at the SIAD, so that should any refund be provided to the tax payer, you may recover (part of) the amount you paid. If more than one individual or entity can be held jointly and severally liable, you can recover a pro rata part at these individuals or entities. Your lawyer can assist you with the (details of the) recovery process.

In the above we have highlighted some frequently asked questions related to the coming State Ordinances regarding the liability for taxes and premiums, as well as the collection of taxes. Please note that no action should be taken on the basis of information contained in this memorandum prior to consulting your tax advisor.

The team of **WTS** can assist you with any questions you may have with respect to these new laws. You may reach us by e-mail at the following addresses:



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