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Articles

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Russian companies will need to make substantial changes to their transfer pricing procedures in light of new TP rules that will take effect in January. The new rules significantly change the documentation and notification requirements, among other functions. Page 3

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New French Tax Withholding Law on Equity Compensation Carries Global Reach (and Criminal Penalties)

By David W. Powell (Groom Law Group, Chartered)

Just as the U.S. has been extending the reach of its tax system with such global tax compliance measures as Internal Revenue Code sections 409A and 457A and the Foreign Account Tax Compliance Act (FATCA), other countries seem to be following suit. Recently, a possible compliance issue has arisen for employers and financial institutions in the U.S. (and other countries) that may sponsor and/or administer equity-based compensation plans in which French taxpayers participate.

The issue arises under the Amending Finance Bill for 2010, which created a withholding tax on profits made by non-resident French taxpayers on stock option gains, stock compensation and BSPCEs (Bons de Souscription de Parts de Créateur d'Entreprise, generally stock warrants for business creators). The new law raises many questions of interpretation, but the immediate issue for U.S. companies and financial institutions is whether they have responsibility for withholding and paying over the tax. Because failure to withhold and pay the tax carries not only a fine but potential criminal penalties, the question is an important one.

What is the New French Withholding Tax?

Section 182 A of the Code Général des Impôts (French Tax Code) as changed by the new law provides that tax must be withheld at source on profits of French origin made from share options, free share (restricted stock) allocations (qualified or nonqualified) and BSPCEs when the options are exercised or shares are sold or vest for people who are not domiciled in France for tax purposes in the year of the sale. Currently, there is apparently no legal definition of a profit of French origin in the context of profits from stock options or other equity compensation, but OECD guidance suggests that this may be determined based on the proportion of services performed in France during the vesting period.

The new law generally applies to gains realized from April 1, 2011 forward, and the tax must be withheld and paid to the relevant French tax center before the 15th of the month following the date the sums are paid, at different specified rates that can generally be as high as 41 percent on sums above €152,500. There is an exception if the employee opts to tax the amount as salary, which can create a timing issue as that does not have to be elected by the date withholding would apply.

Who is Responsible for Withholding the Tax?

The tax is to be withheld by the entity that pays out the sums derived from the sale of the shares or exercise of the options, or that delivers the shares upon vesting. Thus, it may be the company or the financial institution, whether French or not, that administers the plan. Notably, if the tax is not sufficiently withheld or is paid more than a month late, a fine of €9,000 and five years of imprisonment may be applicable.

The French Direction Générale des Impôts, counterpart to the U.S. IRS, will presumably be issuing guidance on the new law, and there are a number of open questions as to how the tax will operate.

David Powell (dpowell@groom.com) is a Principal with the Groom Law Group, Chartered, in Washington. His practice is focused on tax and ERISA issues relating to all types of employee pension and welfare benefit plans. He specializes in qualified plans of public companies, including 401(k), profit sharing, pension and cash balance plans, and international benefits tax issues.

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Senior Editor: Scott P. Studebaker, Esq.
scott.studebaker@thomsonreuters.com

Assistant Editor: Edie Creter
Contributing Editor: George Boerger, Esq.
Special Interviews: Scott P. Studebaker
Marketing: Jon Martel
Production Assistance: Dana Pierce

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