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GLOBAL IMMIGRATION & TAX COMPLIANCE

A COMPLICATED MARRIAGE?

By Stephen Daas and Julie Pearl

What does the phrase "global business traveler compliance" evoke? The answer depends on the department in which a stakeholder sits. For the global mobility, legal and immigration teams, immigration compliance may be the leading concern. For the finance and tax teams, tax compliance is key. However, all stakeholders have the same common goal: track global business travelers efficiently and accurately to ensure enterprisewide compliance.

Why, then, are immigration and tax compliance so often discussed individually and with separate approaches? This article discusses the leading concerns for short-term global business travelers from an immigration and tax perspective, the difficulties in addressing both tax and immigration compliance, and considerations for bridging the gap between the two.

WHY DOES COMPLIANCE MATTER?

Electronic passports and governmental authorities' increased use of technology at borders allow immigration and tax divisions not only to better communicate with each other but also to obtain more information about incoming and exiting travelers. Consider this real scenario:

Company X sent Employee A to Country B with all the proper documentation. The next time A applied to visit Country B as a business visitor, A was denied and told by Country B's government that A owed taxes and that Country B's government would not issue a business visa until the tax situation was cleared up. Upon further investigation into the matter, Country B was actually saying that Company X owed taxes on A's behalf.

The above scenario illustrates that a lack of tax compliance can affect immigration, and likewise, lack of immigration compliance can affect tax liabilities—a simple but loaded statement, since immigration and tax rules vary greatly in terms of how long an individual can stay and in which activities they can take part before incurring additional liabilities. The combined efforts of immigration and tax authorities can also result in changed rules and procedures so that the two agencies can support each other's efforts. In the Philippines, for example, assignees are required to obtain local taxpayer registration before applying for a work permit.

In immigration, two of the most important factors to consider are the travelers' intended activities and the travelers' intended length of stay.

Tools that streamline visa application and arrival processes, such as online application systems and automated kiosks at borders, give authorities instant access to traveler data, allowing authorities to recognize travel patterns, identify overstays, and detect travelers who are misusing visa regimes. This traveler data is available to and shared with other domestic agencies. For example, in October 2015, Australia's Department of Immigration and Border Protection (DIBP) and the Australian Taxation Office (ATO) implemented a data-matching program in which the DIBP would share visa-holders' records with the ATO so that both agencies could ensure compliance with registration, reporting, and payment of taxes and other tax obligations.

The compliance landscape becomes even more complicated and risky as countries share data not only among their own agencies but also with other countries' authorities by means of cross-border information-sharing agreements. For example, in 2012, the U.S. and Canada signed a Visa and Immigration Information-Sharing Agreement, which enables the two governments to share information from third-country nationals who apply for a visa or permit for either country. Or consider Europe's Schengen Agreement, in which all 26 countries that comprise the Schengen states can exchange visitor visa data. This cross-border data sharing has made it easier for government authorities to spot travelers who have misused, intentionally or not, immigration regimes or have passed a tax threshold.

IMMIGRATION: THE HOT-BUTTON ISSUES

To understand the overall immigration and tax compliance landscape and how to avoid risk in both arenas, a robust compliance program first needs to understand and address the moving pieces in immigration and tax compliance individually. In immigration, two of the most important factors to consider are the travelers' intended activities and the travelers' intended length of stay. These two factors are then qualified by the payroll location of the particular trip or assignment.

BUSINESS VISITOR ACTIVITIES

For some companies, the department(s) responsible for international travel become involved for compliance purposes only when trips are a certain length of time, e.g., more than 30 days. Otherwise, travel is not tracked, or the general policy guideline is that the trip is low-risk and can be booked without further review. However, a general policy allowing employees to travel if the trip is of less than a certain duration is no longer sufficient.

Immigration requirements turn not only on length of stay but also, and more importantly, on the activities in which the traveler will engage. For example, a business traveler to Argentina can speak at a conference on a business visa, but that same traveler would need a work permit to speak at a conference in Brazil, regardless of length of stay. Auditing, one of the most common activities on an international trip, is an allowable business visitor activity in some jurisdictions while requiring a work permit in other destinations.

BUSINESS VISITOR LENGTH OF STAY

Similarly, a general "under 30 days is acceptable" business travel policy is not sufficient because, country by country, authorities differ on how long business visitors can remain, either cumulatively or consecutively; how many entries they can make within a certain time frame before more scrutiny or even a work authorization requirement is triggered; or in some countries, the province or region the traveler will be visiting.

For example, in the United Arab Emirates, business visas for non–visa waiver nationals visiting the mainland will be issued for up to 14 days, but business visas for visitors to the Free Zone areas can be issued for up to 30 days.

Further, the two factors may hinge on each other. A business visitor's allowable length of stay may turn on the activities in which the traveler will engage. For example, in Belgium, a business visitor can perform up to eight days of actual, hands-on work in a calendar year before triggering a work permit requirement. In other Schengen countries, such as France, hands-on work would require a work permit from day one.

The foregoing examples exemplify the importance of staying ahead of tracking and managing all global assignments, even short-term trips. Technological solutions, including software that tracks assignments through calendar features and pre-trip immigration assessments, can be a critical asset in keeping up to date with compliance risk. Stakeholders in charge of immigration compliance should find tools to receive and keep apprised of immigration legislation changes that affect business travel in countries where the company operates.

TAX: THE HOT-BUTTON ISSUES

As with immigration, accurate tracking of travel is a must to gather data needed to determine the tax implications of a short-term business trip. Taxation in a country is often determined using the number of days present in a country, the number of days worked in a country, or both.

BUSINESS VISITOR LENGTH OF STAY — THE 183-DAY RULE

There is a vast network of more than 3,000 bilateral income tax treaties globally that could be used to minimize the tax cost of business visitors. An income tax treaty typically includes an article, often referred to as the "183-day rule," that addresses the taxation of employees working temporarily in a country. Under the OECD Model Income Tax Treaty ("model treaty"), an employee will not be subject to income tax in the host location if:

- the employee is present in the host location for no more than 183 days in a 12-month period commencing or ending in the taxable year concerned; and
- the compensation is not paid by, or on behalf of, an employer resident in the host location; and
- the compensation is not borne by a permanent establishment or fixed base that the employer has in the host location.

If an employee and employer meet the requirements of the 183-day article, the employee will not be subject to income tax in the host location. Given that each treaty is unique, a company must review the specific treaty to avoid potential traps. Many countries also use the number of days present in their country to determine how an individual is taxed. Thus, accurate travel information can have a large impact on the tax cost for business visitors.

BUSINESS VISITOR ACTIVITIES

The activities of the business visitor can also result in individual income tax and corporate income tax issues for the employer and employee.

Certain countries are now considering the "economic employer" of the employee. The income tax treaty would not apply if the host location is deemed the economic employer. As a result, the employee would be taxable in the host location even if they spent fewer than 183 days in the host location. These rules should be reviewed on a country-by-country basis.

From a corporate tax perspective, the business visitor's activities could create a fixed place of business or permanent establishment (PE), resulting in corporate tax issues for the company. The potential issues include host country income tax filing and payment obligations for the employer and the employee; value added tax registration and filing obligations; social insurance taxes on the employer and the employee; exposure to labor and employment laws; immigration law issues; and employer tax withholding and reporting requirements. These obligations, if not planned for, can be expensive and time-consuming. Failure to attend to them can lead to penalties and travel restrictions that can discourage business prospects.

IMMIGRATION AND TAX: HOW TO RECONCILE

Finding ways to accurately track travel is the first step in getting ahead of both immigration and tax compliance. Both immigration and tax compliance stakeholders have a vested interest in knowing the potential risks of a business trip before the trip happens. Those stakeholders also have a vested interest in obtaining the same or similar trip information, thereby highlighting that the more stakeholders within a company can share tools and information and create a cohesive global business traveler policy, the easier it will be to create a robust and efficient compliance program.

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Immigration compliance necessarily happens in advance of a global business trip, because physical documents, whether a business visa or work permit, often need to be obtained. Ideally, a traveler will assess the requirements for an upcoming international trip prior to booking travel and reconciling dates of travel—in the event they changed—upon returning from a trip.

On the other hand, tax compliance tends to happen after a trip has already been completed, which can result in significant tax, penalty, and interest cost. In order to avoid such surprises, companies should review each assignment upfront to determine whether a tax treaty is available to exempt the employee from tax in the host location. The company can then ensure they and the employee follow the specific requirements in the treaty—number of days, charging of costs, etc.—to qualify for the exemption.

If no treaty is available, the company must review the tax law in the host country to determine the tax impact. Companies should consider preparing a tax cost estimate to understand the potential cost if the employee ultimately does not meet the treaty exemption. In most cases, the employee will be taxable from the first day of their travel if they fail the treaty tests.

Even if a treaty applies, many countries, including the U.K. and Canada, require companies to track and report on their business travelers. This may require the company to establish payroll in the country and the employee to obtain a taxpayer identification number. In addition, some countries require that a tax return be filed to claim the treaty exemption, even though there is no tax liability.

For U.S. tax purposes, some states, such as California, do not follow the U.S. tax treaties. Thus, the employee may have to file a California return, and the employer perform California payroll, even if no U.S. federal return or payroll reporting is needed. Planning for the potential cost and compliance requirements is important for the company and its employees to avoid surprises.

Both immigration and tax professionals need to know similar information to assist with planning and compliance. Companies should have a trusted system for tracking, at the very least, the following information:

- How many days a traveler has spent in country.
- Which activities a traveler has engaged in on that trip.
- How many days of that trip were workdays versus nonworkdays.
- Whether that traveler left the country and traveled elsewhere during the course of that business trip.
- How frequently the traveler has traveled or travels to that destination.
- What type of visa or work authorization, if any, the traveler holds.
- Whether the traveler holds multiple citizenships that might affect his or her immigration requirements or tax liabilities.

Since companies require this information to assess both immigration and tax compliance, they should find ways to share data among applicable stakeholders. The first step is opening a line of communication among finance, tax, global mobility, legal, human resources, and travel departments to discuss the company's current compliance policies

and concerns. Is there a way for your company to work with your current or desired vendors to put information in one portal where data is kept and managed? Determine what existing tools the company has and can use to track travelers for both immigration and tax purposes and which tools can be implemented to improve this process. Ask your vendors if they can integrate with existing systems so information does not have to be duplicated.

Create a culture of compliance by educating travelers about the importance of tracking travel and the potential risks not only to the company but also to individual travelers—personal tax liability, detention by immigration authorities, etc.—for noncompliance. Implementing and requiring the use of a calendar that can be edited can help make travel data more accurate and allow those in charge of compliance to assess the potential risks of a trip and continue to assess the trip after it happens, particularly since immigration and tax liabilities can change when trips extend beyond the initial end date.

TECHNOLOGY SOLUTIONS

As a result of the increase in global business travel, a variety of tools that companies can use to track travelers have popped up in the marketplace. As previously discussed, diligent use of calendars and pre-travel assessments are key in enterprisewide compliance. Use those tools to avoid duplication of data and effort. Determine which existing tools and/or desired tools can integrate and live on one portal, so that data is shared more effectively. Additionally, find trusted providers with global reach that can help the company keep up to date with changing rules and regulations, so that the company can be ahead of and reduce potential risks.

Global business travel is a growing challenge for governments and the private sector alike. As governments implement the use of smarter technology at borders to facilitate screening and detect issues with incoming travelers, companies need to be one step ahead and ensure their compliance programs are effective, efficient, and ready to handle increased scrutiny. *M*

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