

## Circular

**Istanbul, 27 September 2017**

**Circular No: 101**

**Subject: General Communiqué for Avoidance of Double Taxation Treaties series no.4 published.**

**Summary:** *Through the General Communiqué series no.4 on Avoidance of Double Taxation Treaties (“Double Tax Treaties”) published in the Official Gazette dated 26 September 2017 and enacted as of the same date; some explanations are issued within the context of Double Tax Treaties which are signed by Turkey regarding taxation of income derived from independent personal services or similar activities by residents of other contracting states who are either an individual or a legal person.*

Within the scope of DTTs signed by Turkey, the General Communiqué series no.4 on Double Tax Treaties, containing explanations on the taxation of income derived by residents of other contracting states who are either an individual or a legal person, from independent personal services or similar activities has been published in the Official Gazette dated 26 September 2017 and become effective as of the same date.

When analyzed, content of the Communiqué contains the following in brief,

- The terms concerning independent personal services within the Double Tax Treaties in which Turkey is a party to, have been classified under 5 main groups,
- Detailed assessment regarding the factors shaping Turkey’s taxation rights,
- Turkey’s taxation right, whether it exists or not depending on each treaty, is explained through presenting examples over Double Tax Treaties which were signed by Turkey,
- With respect to legal entities and enterprises, in calculating the length of stay in Turkey, the implementation based on opinion and thought which was shaped prior to this Communiqué is amended and the number of days spent in Turkey will be considered for the activity performed, regardless of the total headcount.
- Calculation for the length of stay is explained by examples regarding the concepts of “same or contingent projects” and “separate projects”,
- the liabilities on withholding have been regulated,
- In the circumstances that withholding tax is not applied, obligation of filling in forms has been introduced and arrangements have been announced concerning the forms to be submitted by the residents of other contracting states deriving income from independent personal activities/withholding agents (tax withholders).

The complete version of the Communiqué is available in the attachment of our circular and some of the most significant aspects introduced through the General Communiqué are provided below.

### **The ways how the income factor (concerning the independent personal activities) is regulated under the DTTs in which Turkey is a party to**

The Communiqué indicates that it is possible to classify the terms, concerning the independent personal services of the DTTs signed by Turkey with various countries, under five main groups. Those five groups are explained as below:

1. For the first group of treaties, independent personal services are regulated within articles 5 and 14. Under Article 5 of these group of treaties, formation conditions for the fixed place of business are regulated for the independent personal services performed by the enterprises, while those activities are defined by the term “resident” for the individuals within Article 14. Treaties signed with China, Indonesia, Croatia, Israel and Singapore are ranked as examples for the treaties of this category.

2. The difference in treaties within the second group from the previous one is the usage of the term “a resident individual” instead of “resident” in Article 14. Therefore, during the allocation of taxation rights concerning the income derived from independent personal services and similar activities, provisions of Article 14 will be taken into account regarding individuals while the commercial income provisions stated in Article 7 will be applicable for enterprises depending whether or not the enterprise constitutes a fixed place of business, resulting from a special provision which takes place in Article 5. Treaties signed with Germany, Australia and Switzerland stand as examples to the treaties of this category.

3. The third group of treaties covers the types of treaties in which independent personal services are regulated only in Article 14 by the term “resident individual” and the independent personal services performed by enterprises are subject to provisions of Article 5 without any special terms for a fixed place of business.

4. The fourth group of treaties regulates independent personal services only in Article 14, similar to the previous group, however differentiating from the previous group since being regulated with the term of “resident” which is an expression with a larger coverage than “a resident individual” and therefore the legal entities have also been included into the scope of this article. Examples to these treaties are the ones signed with Albania, Azerbaijan, UAE, Bahrain, Brazil, Ethiopia and Ukraine.

5. Treaties within the fifth and last group are the ones in which independent personal activities are regulated only within Article 14, however the matters concerning allocation of taxation rights regarding individuals and enterprises are regulated separately. Treaties signed with US, Austria, Belgium, Denmark, Finland, France, Netherlands and Poland are set as examples to this category.

### **Factors identifying the taxation rights of Turkey within the scope of DTTs**

To determine the country that will be taxing the income derived from independent personal services or similar other activities provided to the service receivers in Turkey by the residents of other contracting states, the place where the activity is performed is of primary importance.

In the circumstances that the activity is performed in Turkey by the resident of the other contracting state, in terms of distributing the taxation rights within the scope of the related treaty, factors provided below may be distinctive:

**-Permanent establishment or a fixed place:** Performing the activity in Turkey through a permanent establishment or a fixed place.

**-Length of stay:** To perform the activity, staying in Turkey for a total of over 6 months at once or at a number of times or 183 days or more than this period in a calendar year/fiscal year or within a 12 month continuous period, or,

**-Making the payment in Turkey:** In case where the payment is made through a workplace or a fixed place in Turkey by a person resident in Turkey or in the name of such a person.

For taxing the income derived from independent personal services or similar other activities, the country with the right to tax should be identified by considering the terms of the DTT regarding the concerned country and guiding the implementation accordingly is required.

The brief table seen below provides context on the taxation of services within the scope of the Communiqué series no.4, on the level of individuals and legal persons:

<b>Factors</b>	<b>For individuals</b>	<b>For legal entities</b>
<b>Performing the services through a workplace or a fixed place in Turkey</b>	In case the individual has a fixed place in Turkey, provided that it is limited with the income imputed to this fixed place, taxation right for Turkey arises and provisions of domestic legislation will be taken into account for taxation. In identifying whether a fixed place was constituted or not, the place used in line with the qualification of the activity is not required to be allocated exclusively for that activity. Sharing that place with another individual or legal person or if it is possessed by someone else will not change that place's being in relation with that work.	If that activity is performed in Turkey through a workplace or a fixed place of business, Turkey will have the right to tax.
<b>Making the payment in Turkey</b>	Taxing the income derived in Turkey had been tied to the realization of at least one of the conditions indicated below, beside the length of stay in Turkey; The payment should be made; - by someone resident in Turkey, or - in the name of such a person or - it should be made from a workplace or a fixed place in Turkey which was owned by the person making the payment.	Taxing the income in Turkey had been tied to the realization of at least one of the conditions indicated below beside the factor of period for the activity performed in Turkey; the payment should be made - by someone resident in Turkey, or - in the name of such a person or - it should be made from a workplace or a fixed place in Turkey which was owned by the person making the payment.

## **Liability of withholding within the scope of DTTs**

### **-Carrying out the activities without being present in Turkey**

As a general rule, the right to tax the income derived by a resident of other contracting state (an individual or a legal entity) who carries out independent personal services to service receivers in Turkey without being present in Turkey, belongs only to the country of residence, according to the DTTs. Since Turkey will not levy tax over the income derived from these activities performed without being present in Turkey, no tax will be withheld over the payments within that context, as well. In that situation, there is no need to fill in the forms no.1 and no.2 within the attachment of the Communiqué.

### **-Carrying out the activities through a workplace or a fixed place in Turkey**

In case where Turkey has the right to tax as per the DTTs, if any special restriction was not introduced concerning withholding within the DTT over the payments made in return for those activities, withholding tax should be applied in line with the provisions of the local legislation.

### **-The service or activity exceeds a certain period**

In case where a resident of the other contracting state carries out independent personal services or similar other activities without a workplace or a fixed place and exceeds the duration of stay in Turkey while conducting the activities, Turkey will have the right to tax the income derived from these activities. In that situation, if there is not a special restriction concerning withholding within the treaty over the payments made in return for those activities, withholding tax should be applied in line with the provisions of the local legislation.

However, during the service received or activity performed, pertaining to the contract of independent personal services;

The party receiving the service will not withhold any tax in the circumstances provided below:

- if the service is not performed in Turkey
- if the subject of service does not constitute an intangible right
- Despite the service's being performed in Turkey, if it is apparently detected that Turkey's right to tax did not occur as per the DTT.

In the circumstances where withholding is not required, the residents of other contracting states deriving Turkish sourced income from independent personal services activities are required to fill in the form no.1 attached to the Communiqué and submit to the party who is responsible for the withholding (withholding agents) within 30 days as of the service supply is initiated. The form no.2, also attached to the Communiqué, should be filled in by the withholding agents and together with the form no.1 submitted to them by the service suppliers and a copy of the written contract concerning the service, if available, should be submitted to the relevant tax office/fiscal directorate prior to making the payment.

Within the scope of changes occurring afterwards such as the extension of service or activity period, launching of a workplace or a fixed place and attributing the service there, in the situations that Turkey's taxation right arises; the party receiving the service should fulfil the obligation of withholding, standing as the party responsible from tax, covering the previous periods as well.

The aforementioned Communiqué has been enacted as of its publication date (26 September 2017) while the General Communiqué for Double Tax Treaties series no.3 published in the Official Gazette dated 15 July 2015 has been repealed.

Best Regards,

KUZEY YMM VE BAĞIMSIZ DENETİM A.Ş.

*Our explanations provided above include general information on the issue. No responsibility can be claimed against EY and Kuzey YMM ve Bağımsız Denetim A.Ş. due to the implications arising from the context of this document or emerging with respect to its context.*