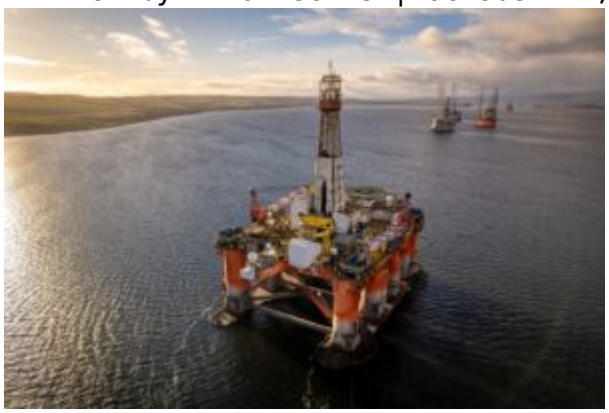
What Constitutes Doing Business Abroad for OETC Eligibility Purposes?

written by Tina Tsonis | October 17, 2023



To qualify for the overseas employment tax credit (OETC), an employee must be a Canadian resident and perform employment services abroad for 6 consecutive months. In addition, the employer must be resident in Canada but carry on business abroad, under contract, in 1 of 3 activities:

- Exploration for or exploitation of petroleum, natural gas, minerals or similar resources;
- Construction, installation, agricultural or engineering activity; or
- United Nations work.

Applying these criteria is fairly straightforward when the Canadian employer engages in international activities directly. But it can get complicated when the employer relies on subcontractors or personnel agencies to supply employees to carry out the work. CRA has challenged employee eligibility for the OETC in such cases on the grounds that the employer isn't really doing business abroad. Here are 2 cases showing how tax courts decide the appeals these OETC denials generate.

OETC Allowed

SITUATION

A Newfoundland firm recruits skilled employees to work on overseas oil rigs for international oil exploration and drilling company clients. Clients approve each employee the firm puts forward and retain overall supervision of the employee's work while they're on the rig site. The firm is responsible for all other aspects of the workers' employment, including payroll and providing group insurance and benefits. It also manages health and safety certification, drug and alcohol screening and liability insurance for employees' work on the site. Two employees assigned to work on foreign rigs under these arrangements claim the OETC related to their overseas employment. CRA rules that the firm isn't carrying on business abroad and denies the credit.

RULING

The federal tax court allows the appeal and rules that the employees are eligible for the OETC.

EXPLANATION

The court found that the Newfoundland firm was carrying on business abroad. The firm was required by its client contracts to bear risks associated with the on-site activities of its employees and supply third-party insurance to meet these liability obligations, the court explained. The court also noted that for OETC purposes, there was very little difference between the firm's supplying the individuals who performed services abroad and supplying those services itself. In supplying an engineer to work abroad, the firm was essentially supplying the services performed by that engineer, it reasoned.

MacIsaac v. Canada, [2010] TCC 436 (CanLII)

OETC Denied

SITUATION

A Canadian engineer is recruited by a Canadian employment agency to provide design services for a mass transit project in California. Although the client's Manager of Engineering supervises the work on site, the engineer's time sheets are submitted to the employment agency which processes payroll. The employment agency doesn't bill the client directly but through a third-party employment agency based in the US, who in turn bills the client. For all other purposes, the California mass transit project is the direct client of the Canadian employment agency. The engineer claims an OETC related to his work in California for 1996 and 1997. The CRA denies the claim on the grounds that the Canadian employment agency isn't engaged in any of the international activities to which the OETC applies or carrying on business outside of Canada.

RULING

The federal tax court denies the engineer's appeal.

EXPLANATION

CRA was right to find that the services the Canadian employment agency provided to its California client weren't international activities that an employer must engage in for employees to qualify for the OETC, according to the court. The qualification criteria could have been met if the agency had been a sub-contractor to the project. However, the court explained, the legal meaning of "subcontractor" is a person who assumes responsibility for the performance of all or part of the project work from the main contractor. The Canadian employment agency in this case was simply supplying employees to work on the project, not taking responsibility for performing under the main project contract, reasoned the court. In addition, the court said it wasn't persuaded that the employment agency was carrying on business abroad simply because it supplied a Canadian engineer to work on a California project.

Fonta v. The Queen, [2001] TCC 843 (CanLII)