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Commuters to Switzerland - secondment can rank as days of non-return

The Supreme Tax Court has held that a German resident employee of a Swiss company can lose his status as a commuter, if seconded to a third country in the interests of his Swiss employer.

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Under the double tax treaty with Switzerland, cross-border commuters tax their employment income in their country of residence with a credit for a minor amount deducted at source in the country of employment. A cross-border commuter is a person who lives in one country, but works in the other and who regularly goes home after work. His return home is still seen as regular, if, for reasons occasioned by his employment, he does not return home after work on up to 60 working days in the year. Recently, the Supreme Tax Court has ruled on a series of cases dealing with the application of this 60-day rule to days spent on business travel and to shift workers. The court has now been asked to review the position of an employee temporarily seconded to a subsidiary in a third country, the USA. The employee maintained that during his secondment he could not return home daily by reasons of his employment, whilst the tax office took the view that the time spent on secondment, was a different employment altogether and should therefore be ignored in the determination of commuter status. The Supreme Tax Court has held that the question depends on the reasons for the secondment and on the continuity of the individual's employment. In the present case, he remained an employee solely of the Swiss company from which he continued to draw his salary and benefits (including a US cost of living allowance). The secondment was for him to get to know the US subsidiary in order for him to be better able to supervise its management from Switzerland later. There was no charge to the US company, although that company did provide him with living accommodation. The individual continued to be involved in Swiss projects, whilst in the USA. Under these circumstances, the Supreme Tax Court took the view that the assignment was very largely in the interests, and at the expense, of the Swiss employer. There had been no formal or informal interruption of his Swiss employment relationship, and no new employment had been established in the USA. Accordingly, the time spend in the USA was time in which he could not return home after work for reasons occasioned by his employment. As a result, he lost his commuter status for the year in question, and the German taxation on his employment income was limited to that earned outside Switzerland. Irrecoverable Swiss withholding tax on this portion could be deducted as an expense.

Supreme Tax Court judgment I R 76/09 of November 17, 2010 published on March 2, 2011

Schlagwörter

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