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Only actual working days to be included in 183-day test

The Supreme Tax Court held that only work actually performed abroad may be included when reviewing the 183-day period under the employment income regime of the German-French tax treaty. Interruptions caused by work-free time on sundays, weekends,and holidays would generally not be counted.

Under the double tax treaty with France the employment income of cross-border commuters is taxable in the country of residence, rather than in that of employment. A cross-border commuter is a person who lives and works within a different border zone of the two states. The border zone in Germany is the area covered by local communities with at least part of their territories lying within 30 km of the border (20 km for German residents working in France). There is a provision that for minor exceptions in that the cross-border commuter status will not be lost if the employee does not meet the definition for up to 45 days in any one year.

The Supreme Tax Court has been asked to review the position of a French resident employee who lived in the border zone of France and who had worked as an assemblyman in Germany for 166 working days in 2001 and 157 working days during 2002. Since he had commuted between his home and the various locations of duty for more than 45 days outside the border zone, taxation of his salary was to be judged according to the general rules of the treaty following the so called 183-day test. In contrast to the basic rule that employment income be taxed in the country of employment, such income may be taxed in the country of residence if, i.a., the presence of the employee in the country of employment does not exceed 183 days during any calendar year.

Although the employee returned home daily and on weekends, the tax office took the view that he had exceeded the 183-day threshold. It based its opinion on the mutual agreement of the two States from February 2006 – whereby sundays, holidays, vacation and days off sick be included while calculating time spent in the country of employment. The Supreme Tax Court, however, sided with the taxpayer and held that only days of physical presence will be counted. Above all, the mutual consultation agreement could not supersede the wording in the treaty which in principle was based on the OECD model treaty. Hence, the OECD reference that “the recipient be present in the other state” implied physical presence of the employee. The court conceded that this indeed meant to include sundays, weekends etc. but only if the employee did actually work on those days. (mh)

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