

Employment Tax

New Foreign Activities Decree (ATE) as of the 2023 assessment period

The BMF letter of 10 June 2022 (IV C 5 - S 2293/19/10012 :001) on the tax treatment of employee income in the case of activities abroad replaces the BMF letter of 31 October 1983 (IV B 6 - S 2293 - 50/83) with effect from the 2023 assessment period. The old so-called Auslandstätigkeitserlass (decree on activities abroad) has been supplemented by current case law and, in addition, an obligation to provide evidence of the average minimum taxation of 10% in the state in which the activity is carried out has been included for the first time.

According to the updated version of the Foreign Employment Decree, the taxation of wages from favoured activities abroad is also waived if there is no DTA that includes income from non-self-employed work.

Whereas the old version required a "domestic employer", it is now sufficient that the employer's registered office, management, permanent establishment or permanent representative is located in a member state of the European Union (EU) or a member state of the European Economic Area (EEA). The regulations apply to

current wages paid for a wage payment period ending after 31.12.2022 as well as to other remuneration that accrues after 31.12.2022.

Beneficiary activities

Beneficiary foreign activities continue to include, in particular, the planning, construction, installation, commissioning, etc. of factories, buildings, large-scale local machinery or similar facilities. The operation of such facilities until handover to the client is also eligible. Newly eligible from 2023 are the installation, erection, repair or maintenance of other assets. These must be manufactured or repaired or maintained exclusively by EU/EEA employers.

The exploration and extraction of mineral resources continue to benefit. In addition, the provision of advice to foreign clients or organisations in the aforementioned activities is also eligible. In the case of German development aid activities in the context of technical or financial cooperation, at least 75% of the project funding must come directly or indirectly from domestic public funds in order to be eligible from 2023 onwards.

Please note: From 2023 onwards, activities such as renovation, restoration, cleaning and safeguarding of structures without industrial or technical use will no longer be eligible. The activities of shipboard personnel on seagoing vessels, the production of ships abroad and activities in the field of humanitarian aid, as well as financial advice and the solicitation of orders, in each case with the exception of financial advice to German development aid or participation in tenders, remain non-beneficiary activities.

Duration of the beneficiary activity

The work abroad begins with the start of the journey and must be carried out for at least three months without interruption in countries with which there is no DTA that includes income from non-self-employed work. It ends with the final return to the home country.

A temporary return to the home country or a stay of a maximum of 10 days in a state with which a DTA exists that includes income from employment is not considered an interruption of the foreign activity. The prerequisite for this is that the stays are necessary for the further implementation or preparation of a beneficiary project.

Interruptions due to holidays or illness are harmless regardless of the place of residence. However, these periods are not to be included in the minimum period of 3 months. Similarly, from 2023 onwards, blocks of time off (including included work-free weekends or public holidays) during work abroad are not harmful, provided the 3-month minimum period is observed.

Beneficiary wages

Taxable income continues to be included in the tax-privileged salary, insofar as it is paid for the tax-privileged foreign activity. These include, in particular, Christmas bonuses, performance bonuses, bonuses, wages attributable to holidays, as well as holiday pay or payments in lieu of holidays. Also, continued salary payments in the event of illness as well as allowances, bonuses and subsidies of the employer for expenses of the employee which are caused by the beneficiary foreign activity. The

same applies to the corresponding free equipment of the employee or the provision of the equipment by the employer.

If such benefits are not paid separately for the beneficiary activity, they must also be apportioned according to working days from 2023 in accordance with the BMF letter dated 14 March 2017 (BStBl. I p. 473).

Progression proviso

According to the new BMF letter, the beneficiary income is still to be included in the calculation of the tax rate. Due to the reference to § 32b paragraph 2 GITA, the paragraph is now correspondingly shorter.

Non-application

As before, the ATE does not apply if the salary is paid directly or indirectly from domestic public funds or is performed in a state with which a corresponding DTA exists. From 2023 onwards, activities carried out within the framework of a project co-financed by other institutions that are not domestic public funds (e.g. EU institutions) will be exempt from this non-application rule. In the case of such mixed financing, the payments are to be split.

On the other hand, there are far-reaching changes under point V no. 3. The non-application of the ATE for an activity in the GDR is replaced by a 10% minimum taxation to be proven in the country of activity. The taxpayer must prove that the income from employment (salary less the income-related expenses directly connected with it) is subject to a tax equivalent to German income tax in the State in which the work is carried out at an average rate of at least 10% and that the tax assessed on the income has also been paid. In order to determine the average tax burden, the income from employment in the State in which the work is carried out must be determined in accordance with German tax law.

The new BMF letter also clarifies with regard to the scope of application that only persons with unlimited tax liability can benefit from the ATE.

Rules of procedure

The waiver of taxation in the tax deduction procedure must be applied for by the employer or employee at the tax office of the place of business (exemption certificate). Due to the minimum taxation introduced, it must now be shown credibly that the income determined according to German law is likely to be subject to a tax corresponding to German income tax in the state in which the work is carried out.

If it has been credibly shown that the conditions for tax exemption are met, the exemption certificate can be issued as long as it is possible for the employer to change the deduction of income tax (§ 41c GITA). Proof of the amount of taxation is only required in the income tax assessment procedure.

As before, the following points must be observed by the employer:

1. The favoured wage must be recorded separately in the wage account and stated separately from the other wages in the wage tax certificate (if applicable, the special wage tax certificate), the salary certificate, the remuneration statement, etc. The wage tax certificate (if applicable, the special wage tax

certificate), the salary certificate, the remuneration statement, etc. must be recorded separately from the other wages.

2. The exemption certificate is to be taken as a voucher to the employee's payroll account.
3. For employees who have received preferential wages during the calendar year, the employer may neither determine the wage tax according to the expected annual wage ("permanent annual equalisation", section 39b, paragraph 2, sentence 12 GITA) nor carry out an annual wage tax equalisation according to section 42b GITA.

Insofar as wage tax has been withheld, the employee may also apply for a waiver of taxation only in the course of the income tax assessment until the income tax assessment becomes final at the latest.

Recommendation for action

If you have any questions about the applicability, the requirements or the procedure with regard to the tax treatment of employee income from activities abroad, please do not hesitate to contact us. The contact persons of the PwC payroll tax team look forward to exchanging views with you.

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