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“Stay away” days of hospital staff commuters to Switzerland

The Supreme Tax Court has held that hospital staff commuters to Switzerland do not “stay away” from home by reason of their remaining on stand-by following their regular shift.

A German resident doctor worked in a Swiss hospital. His duties sometimes required him to remain on stand-by following the end of his regular shift and also to be on call at weekends for operations or for going round the wards. Since he was required to report at the hospital within ten minutes of being called in, he rented a small flat near his place of work as local accommodation. On such stand-by days or when he was required to work on weekends, he did not return to Germany at the end of his previous day's shift. He claimed to the tax office that he should count each day on which he did not go home to Germany for occupational reasons as a "stay away" day within the meaning of the cross-border commuter provision of the double tax treaty. This brought him over the treaty limit of 60 days with the consequence that his employment income became fully taxable in Switzerland only. The tax office countered with its own calculation, bringing the total "stay away" days to slightly below 60, with the consequence of full taxation of the employment income in Germany relieved only by a credit for the Swiss tax deducted at source which should, however, not exceed 4.5% of the total salary paid. Any excess over this amount should be recovered in Switzerland.

The Supreme Tax Court has now gone a step beyond the tax office with its own calculation showing the "stay away" days to be far below the 60 day treaty limit. The protocol to the treaty specifically states that "the assumption of a regular return to the place of residence shall not be precluded by occupational circumstances requiring continuous work over several days". Shift workers and hospital staff are mentioned in the protocol as examples. The Supreme Tax Court took this to mean that the doctor on stand-by following a regular shift could only count a single "stay away" day at the end of his stand-by or weekend duty and only then if he did not then return home to Germany for occupational reasons. Thus a period on duty on Friday, followed by stand-by over the weekend followed by the next period of regular duty on Monday gave Sunday as the single possible "stay away" day.

Supreme Tax Court judgment I R 23/12 of February 5, 2014 published on April 24

Keywords

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