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By PwC Deutschland | 25 May 2018

Federal Finance Ministry circular on the tax treatment of salaries for tax treaty purposes is updated.

The Federal Finance Ministry circular of 12 November 2014 on the taxation of salaries for tax treaty purposes has been revised by a committee made up of from both the Federal and the States' governments.

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The new version recognises OECD developments as well as recent case law and relevant changes in the legislation.

The original circular of 12 November 2014 has been withdrawn and replaced with the current circular of 3 May 2018 which contains 95 pages. Likewise the circular of 21 July 2005 with the code of practice on the tax exemption of foreign income according to Section 50d (8) Income Tax Act (ITA) has been withdrawn and replaced by the new circular.

This blog is intended to provide you quick overview on some of the adaptations and changes to the earlier circular:

Application of Sec 50d (8) ITA (Proof of tax treaty exemption; Para. 2.3 et seq)

The circular been completely restructured here and includes far more detail compared to its predecessor (inter alia, vis-à-vis the obligation to provide evidence, the taxation in the foreign state / the waiver of the right to tax, the question as to whether the donor state or the performance state has the right to tax in cases of development cooperation, assessment procedures, and exchange of information).

Taxtion in the state of residence according to Art. 15 (2) OECD-Model Treaty (183-Day-Clause)

New here are the comments on situations where there are subsequent changes to the allocation of the right to tax. (Para. 4.2.7).

Examples of the allocation of certain salary components in the calculation of taxable /exempt salaries (Para. 5.5)

Here the existing examples are complemented with remarks on signing bonuses (Para. 5.5.2); if the signing bonus is agreed before the employment relationship has begun, the right to tax is to be allocated - taking an economic approach - to the state where the work is performed on the basis of the duration of the contract.

Assessment of certain activities abroad from a tax treaty perspective. (Para. 6 et seq)

Para. 6.2 makes clear that services provided as part of a stand-by service (i.e. where the employee must remain on call without actually performing any work) are deemed to be performed at the place, at which the employee actually stays whilst he is on call. The current circular adds that *in cases of non-variable paid leave, no activity takes place, so that, according to Article 15 (1), first sentence, of the OECD-Model Treaty, the state of residence generally has the right to tax the other remuneration.*

Special rules for professional drivers (Para. 7 et seq)

The circular specifies in Para. 7.4 that the special rule in Art 14 (3) of the tax treaty with Spain, which contains special rules for personnel on ships and aircraft also applies to personnel working in road vehicles.

Subject-to-Tax clauses in tax treaties (Para. 9)

This paragraph has been developed with, inter alia, the further clarification that subject-to tax clauses are

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also to be applied to parts of income (i.e. to individual income positions). On this point the Federal Finance Ministry notes that: *insofar as the tax treaty only refuses tax relief on untaxed "income", but not expressly on untaxed "parts of income", the application of such subject-to-tax clauses for assessment periods prior to 2017 cannot be based upon the application of Section 50d (9) sentence 4 ITA, but only on the interpretation of the actual clause in the treaty itself.*

Application

The provisions of the circular may –at the request of the taxpayer - be applied in all open cases, unless this is precluded by legal regulations.

The circular dated 3 May 2018 was published on 17 Mai 2018.

Keywords

Federal Ministry of Finance, Income Tax Act, double tax treaty, wages & salaries