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By PwC Deutschland | 05 April 2021

Taxation of employment income of executive directors and cross-border commuters

In two cases the Supreme Tax Court answered questions raised on the calculation of the “stay away” days (non-return days) of cross-border commuters when returning to their domestic residence from a third-country business trip and of the allocation of the right of taxation of the employment income of executive directors under the German / Swiss tax treaty.

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Background

The German/Swiss double tax treaty provides in article 15 (4) that executive directors and their deputies tax their remuneration in the country of the company in which they hold office unless their duties are necessarily fully discharged abroad. This contrasts with the position of commuters (taxed in the country of residence). The taxation in the country of residence as commuters presupposes a person resident in one Contracting State having his place of work in the other Contracting State and who regularly returns from there to his place of residence. Cross-border commuter status does not apply if the person does not return to his/her place of residence for more than 60 working days (“stay away”/ non-return days).

Decisions

The plaintiff in one of the cases (case ref. I R 37/17) calculated 65 “stay away” days, which brought him over the treaty limit of 60 days with the consequence that his employment income to become fully taxable in Switzerland only. He counted as “stay away” days both weekend days and days when he returned to his domestic residence from a third-country business trip. This was not accepted by the tax office and finally confirmed by the Supreme Tax Court. The plaintiff is to be taxed as a cross-border commuter and his employment income subject to German income tax. The Supreme Tax Court held that days where the taxpayer actually returns to his residence from a business trip from the third country do not count as non-return days. The same applies to business trips on weekends and public holidays, provided that work on these days is not expressly agreed in the employment contract and the employer does not grant any other compensation for time off or additional remuneration for the work performed on these days, but merely covers the travel expenses.

In both cases I R 37/17 and I R 60/17, the plaintiffs were employed as senior executive managers / executive directors. In case I R 60/17, however, the plaintiff was listed in the commercial register as Chief Financial Officer, but without description of the functions carried out. Here the Supreme Tax Court decided that the relevant article 15 (4) - dealing with the question of the allocation of the right of taxation in the case of executive employees - does not require the taxpayer's function to be entered in the commercial register. The provision to the contrary in the relevant Regulation on the Implementation of Consultation Agreements between Germany and Switzerland violates the principle of the primacy of law. As opposed to the tax treaty itself, the implementation regulation does not rank as a statute and thus cannot amend or change provisions in the tax treaty or to complement its shortfalls. Accordingly, the remuneration, as earned in that capacity, fell under the tax treaty provision for executive directors and was taxable in Switzerland, the country of the company.

Sources:

Supreme Tax Court decision of 39 September 2020 (case ref.: I R 37/17 and I R 60/17), published on 1 April 2021.

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Keywords

cross-border commuters, executive directors, non return days, stay away days