

Tax stumbling blocks for cross-border teleworking

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In our last article, we took a closer look at the social security subordination rules for cross-border activities and the resulting problems. It must always be considered that, in addition to the social security perspective, the tax perspective must also be examined. The applicable double taxation agreements (DTAs), the supplementary agreements or mutual agreements and the separate cantonal special agreements with the border states must be taken into account.

With regard to the taxation of employment income, the starting point for any tax assessment is Art. 15 of the respective applicable DTA. Paragraph 1 establishes the so-called **place of work principle**, according to which the country of employment can tax income from employment if the work is actually physically performed in that country. If certain working days in cross-border employment relationships are no longer physically performed at the employer's registered office in the country of activity, but in the home office in the country of residence, this can lead to a different allocation of the right to tax salaries.

For the example of an **international weekly resident** with residence and family domicile abroad and place of work in Switzerland, this means that Switzerland may tax the Swiss working days based on the place of work principle. However, each individual working day performed in the home office at the foreign place of residence is subject to tax abroad and must be exempt from tax in Switzerland accordingly. If the home office activity abroad reaches a certain level, it must be examined whether the foreign country of residence has the exclusive right to tax the employment income as a result of the application of the so-called "assembler's clause" in accordance with Art. 15 para. 2 of the respective DTA. This special provision applies if the employee spends a total of less than 183 calendar days in Switzerland (working days including weekends and holidays) and the remuneration is not paid by an employer in Switzerland or a permanent establishment of the foreign employer located there. If the conditions are met cumulatively, Switzerland loses its right of taxation as the place of work.

Another exception to taxation at the place of work can be found in the taxation of **senior executives**. For example, a new consultation agreement on the application of Art. 15 para. 4 DTA Germany was concluded with Germany on 6 April 2023. According to this agreement, the provisions of this article will also apply to "senior executives" not entered in the commercial register under certain conditions. Art. 15 para. 4 DTA Germany allows taxation in the other contracting state (i.e. Switzerland) of income received by a natural person resident in one contracting state (e.g. Germany) for their activities as a member of the board of directors, director, managing director or authorised signatory - a so-called "executive employee" - of a corporation (employer) resident in the other contracting state (e.g. Switzerland). This means that the country of residence of the corporation has a right to tax the salary of the executive employee, irrespective of the place from which he actually carries out his work.

Finally, there are further exceptions to the place of work principle for the taxation of **cross-border commuters**. As in the area of social security, various special consultation agreements and regulations with countries bordering Switzerland had to be observed from a tax perspective due to the COVID-19 pandemic until recently. Although these have since ceased to apply, the increase in home office work as a result of the pandemic has provided an important impetus. Against this backdrop and the fact that employees increasingly want to work from their place of residence, various new regulations have recently been concluded with neighboring countries in the area of taxation of cross-border commuters.

The relevant basic provision in the respective DTA provides for a further exception to the place of work principle. According to this provision, the country of residence may generally still tax the employment income, even if the work is carried out in the country of employment. The decisive factor and therefore often the subject of mutual agreement procedures is the definition and interpretation of the concept of cross-border commuter status and, in particular, the so-called non-return days. Cross-border commuter status may not apply if there is no periodic return to the place of residence or the non-return days exceed a certain threshold.

The question of how home office days should be qualified and whether they qualify as non-return days was not always clear. Germany and Switzerland wanted to take account of the increasing prevalence of home office. In relation to Germany, a consultation agreement regarding full-time working days spent at home came into force on 26 July 2022. According to this agreement, working days on which a cross-border commuter

works all day at their place of residence in the country of residence are not considered working days on which the person does not return to their place of residence after finishing work due to the nature of their work. These working days are therefore not considered non-return days within the meaning of the DTA.

In relation to France, the dispatch on the approval and implementation of a supplementary agreement to the double taxation agreement with France was adopted on 22 November 2023. This supplementary agreement allows cross-border working from home for up to 40% of working hours per year - especially for cross-border commuters. It is part of the home office solution agreed at the end of 2022. Within this limit, the supplementary agreement provides for remuneration in connection with teleworking to be taxed in the contracting state in which the employer is located. The agreement also stipulates that the employer's state will transfer to the employee's state of residence 40% of the taxes it has levied on the remuneration from teleworking in the state of residence. In order to ensure the application of the new rules, an automatic exchange of information on salary data is envisaged.

In relation to Italy, a declaration was signed on 10 November 2023 in which a tax regulation for the home office was agreed for a period of two years. According to the declaration, from 1 January 2024 all cross-border commuters within the meaning of the cross-border commuter agreement signed in December 2020 will be able to work up to 25% of their working hours from home. This has no impact on the state that is authorised to tax employment income and on the status of cross-border commuters. It was also decided to extend the transitional solution agreed by both countries on 20 April 2023. On 28 November 2023, the State Secretariat for International Financial Matters announced that both countries had agreed in a temporary mutual agreement that teleworking of up to 40% of working hours would be possible between 1 February 2023 and 31 December 2023, without any international allocation of tax rights or change in the status of cross-border commuters.