

GMS Flash Alert

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Switzerland - Agreement with Germany: Cross-Border 60 "Non-Return" Days Count

In a new consultation agreement the Swiss and German federal tax authorities have redefined the "cross-border commuter."¹ In particular, a new "day-count" method applies for all cases starting 1 January 2019.

WHY THIS MATTERS

Under the terms of this new consultation agreement between Switzerland and Germany¹, Germany's right of taxation lapses if a cross-border commuter exceeds the maximum threshold of 60 non-return-days. Cross-border commuters who have more than 60 non-return days per year no longer fall under the cross-border tax regime and instead are subject to the ordinary Swiss source tax rates on their Swiss work-days with an exemption of these work-days from German taxation.

Therefore, it is very important to clarify the cross-border working individual's non-return days correctly in order to apply the correct tax rate. The current minimum requirement is to provide the tax authorities with a list of non-return days; some cantons in Switzerland (e.g., Zurich and Basel) require this list to be signed by the employee as well as by the employer. The consultation agreement clarifies the declaration of the non-return days, but will make it harder for employees to prove that they are not cross-border commuters and therefore fully taxable in their country of residence.

Background

In accordance with the double taxation treaty between the Federal Republic of Germany and the Swiss Confederation dated August 11, 1971 ("DTT Germany-Switzerland"), the salary of employees commuting between Switzerland and Germany or vice-versa is taxed in their country of residence. The state of employment has a residual right to tax the employment income at a special commuter source tax rate of 4.5 percent, which is credited to the taxpayer's overall tax liability in his or her country of residence.

Art. 15a of the DTT Germany-Switzerland qualifies a cross-border commuter as someone who is a resident in one state, but works in another, and usually commutes back daily to the place of residence. In this regard "daily" signifies that an

amount of 60 non-return days is not exceeded in a calendar year. A "non-return day" is defined as a day when the return to the place of residence is not possible due to professional duties or because of unreasonableness.

Even though the interpretation of "professional duties" and "unreasonableness" in the past have been defined by court decisions, now for the first time the criteria have been published in an official consultation agreement.

Previously, a "non-return day" was considered to be given if the commute distance was more than 110 kilometres between home and place of work or if the one-way commute to work took more than 1.5 hours. Within these limits, a daily return home was generally considered reasonable. If the distance between the place of residence and the place of work was longer, a daily return home was considered unreasonable and would qualify as a non-return day.

Terms under New Consultation Agreement

According to this new consultation agreement, a return to the place of residence is considered unreasonable if the daily commute from work to the place of residence by vehicle is more than 100 kilometres or if the commute by public transport takes more than 1.5 hours one way with the quickest connection. Under the previous agreement, it was assumed that in case of unreasonableness the employee did not return home. Going forward, the cross-border commuter has to prove that a return to the place of residence in fact did not happen.

The German-Swiss consultation agreement dated 12 October 2018, is effective for facts and circumstances occurring from 1 January 2019 onwards.

FOOTNOTE:

1 To see the consultation agreement (in German) "Konsultationsvereinbarung: Nichtrückkehr eines Grenzgängers aufgrund der Arbeitsausübung nach Art. 15 Abs. 2 des Abkommens zwischen der Bundesrepublik Deutschland und der Schweizerischen Eidgenossenschaft zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen und vom Vermögen vom 11. August 1971 (DBA)", click [here](#).
Also, for a .pdf format versión, click [here](#).

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