

Austria:

Taxation of cross-border short-term employment income clarified

The Austrian Ministry of Finance (MOF) released official guidance on 17 January 2017 concerning the tax treatment of employment income of German-resident employees that are “hired out” (seconded) from a German company to a related Austrian company, if the German seconding company does not maintain a permanent establishment in Austria. The guidance clarifies which company (i.e. the German company or the Austrian company) will be considered to be the employer for purposes of determining which country has the right to tax the income under article 15 of the Austria-Germany tax treaty.

According to the MOF guidance, the employer is the company that economically bears the remuneration for the employment services, and this definition applies irrespective of whether the secondment takes place between related or unrelated companies. If the remuneration is paid by, or on behalf of, the German seconding company, only Germany is authorized to tax the employment income if the seconded employee is present in Austria for a period or periods not exceeding, in the aggregate, 183 days in the calendar year concerned. Conversely, only Austria will have the right to tax the income if the Austrian company bears the remuneration, even if the secondment period is 183 days or less.

Although the guidance addresses only the Austria-Germany treaty, the definition of an employer in this guidance also should apply to other Austrian tax treaties.

The “substance-over-form” approach adopted by the MOF does not rely on the formal contracts between the companies involved or the formal employment contract to determine which company is the employer for treaty purposes; this may provide scope for companies to tailor such contracts without causing undesired tax consequences. The reasoning of the MOF guidance also is in line with prior decisions of the Austrian Supreme Administrative Court that address the issue of which country is allowed to tax salaries in cross-border situations. By accepting the substance-over-form approach for determining the employer under a tax treaty, the MOF has aligned Austria with the practice used by most other countries to prevent double taxation of cross-border employment.

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