

**German Federal Tax Gazette (BStBl) I 2006, page 532**

**Double Taxation Conventions**

**Federal Ministry of Finance**

Berlin, 14 September 2006

**IV B 6 - S 1300 - 367/06**

Supreme tax authorities of the federal states  
For information: Federal Central Tax Office

**Tax treatment of salaries under double taxation conventions**

With reference to the outcome of the discussions with the supreme tax authorities of the federal states, the following applies to taxation of the income from employment pursuant to double taxation conventions:

**Contents**

- 1. General**
  - 1.1 Scope of a DBA
  - 1.2 OECD Model Tax Convention
    - 1.2.1 Determining residency – Article 4 OECD-MA
    - 1.2.2 Income from employment
      - 1.2.2.1 Article 15 OECD-MA
      - 1.2.2.2 Stipulation on cross-border commuters
      - 1.2.2.3 Delimitation from other convention provisions
    - 1.2.3 Elimination of double taxation – Article 23 OECD-MA
- 2. Taxation in Germany**
  - 2.1 Tax liability under the Income Tax Act
  - 2.2 Progression proviso
  - 2.3 Application of §50d, para. 8, EStG
- 3. Taxation in the State in which the work is carried out – Article 15, para. 1 OECD-MA**
- 4. Taxation in the State of residence – Article 15, para. 2 OECD-MA (183-day clause)**
  - 4.1 Conditions
  - 4.2 Article 15, para. 2a OECD-MA – presence of up to 183 days
    - 4.2.1 Determining the days of presence / work
    - 4.2.2 183-day period – Presence in the State in which work is carried out

- 4.2.3 183-day period – Duration of employment in the State in which the work is carried out
- 4.2.4 Application of the 183-day period to the tax year / calendar year
- 4.2.5 Application of the 183-day period to a 12-month period
- 4.3 Article 15, para. 15 2b OECD-MA – Payment by an employer domiciled in the State in which the work is carried out
  - 4.3.1 General
  - 4.3.2 Work carried out abroad for a civil law employer
  - 4.3.3 Secondment of employees between internationally associated enterprises
    - 4.3.3.1 Economic employer
    - 4.3.3.2 Simplification rule
    - 4.3.3.3 Seconding and client enterprises are employers
    - 4.3.3.4 Abuse of the procedure within the meaning of §42 AO
    - 4.3.3.5 Employer under a pool agreement
  - 4.3.4 Commercial supply of temporary staff
  - 4.3.5 Occasional supply of temporary staff between independent third parties
  - 4.3.6 Examples
- 4.4 Article 15, paragraph 2c OECD-MA – Payment of salary charged to a permanent establishment of the employer in the State in which the work is carried out

## **5. Determining the taxable / tax-exempt salary**

- 5.1 Distinction between the application of the 183-day clause and determination of the taxable / tax-exempt salary
- 5.2 Principles of determining the taxable / tax-exempt salary
- 5.3 Direct attribution
- 5.4 Apportionment of the remaining salary
- 5.5 Particular features in the apportionment of certain components of salary
- 5.6 Examples

## **6. Assessment of certain work abroad under the convention**

- 6.1 Executives of incorporated companies
- 6.2 Stand-by
- 6.3 Lump-sum settlement
- 6.4 Non-competition clause
- 6.5 Bonuses and other performance-related payments for the year
- 6.6 Stock options
  - 6.6.1 Tradable stock options
  - 6.6.2 Non-tradable stock options
- 6.7 Progressive retirement in accordance with the "block" model

## **7. Specific features in the case of professional drivers**

- 7.1 General
- 7.2 The professional driver and employer are domiciled in Germany; the salary is not borne by a foreign permanent establishment
- 7.3 The professional driver is resident in Germany; the employer is domiciled abroad or the salary is paid by a foreign permanent establishment
- 7.4 Special stipulation in DBA-Turkey

## **8. Staff on ships and aircraft**

- 9. Reversionary clauses**
  - 9.1 "Subject to tax" clause
  - 9.2 "Remittance base" clause
- 10. Mutual agreements**
- 11. Withdrawal of administrative instructions**
- 12. Initial application**

### ***Abbreviations***

#	line no(s).
AO	Fiscal Code
Art.	Article
BFH	Federal Finance Court
BMF	Federal Ministry of Finance
BStBl	Federal Tax Gazette
cf.	confer, compare
DBA	double taxation convention
e.g.	lat. <i>exempli gratia</i> / for example
EEA	European Economic Area
EStG	Income Tax Act
et seq.	et sequentes / and the following
EU	European Union
ex.	example
i.e.	lat. <i>id est</i> / that is
LStR	PAYE Tax Regulations
OECD	Organization for Economic Cooperation and Development
OECD-MA	OECD Model Tax Treaty
p.	page
para.	paragraph

## **1. General**

### **1.1 Scope of a Double Taxation Convention (DBA)**

- 1 Double taxation in the relationship between the two Contracting States. The conventions are often supplemented and explained by protocols, correspondence or other documents. Such documents form a constituent part of the convention and are similarly binding.
- 2 The rules for treatment of income from employment under the agreement are presented below on the basis of the OECD-MA. This specimen treaty itself is not legally binding, but the legally-valid DBAs concluded by Germany are usually based on the content and structure of the OECD-MA. The respective stipulations of the applicable DBA are applicable in the specific individual case, not the OECD-MA.

### **1.2 OECD Model Tax Convention**

- 3 Both the OECD-MA and the commentary on the model are continuously being developed by the OECD tax committee. The German translation of the OECD-MA, taking account of the amendments approved by the OECD tax committee on 28 January 2003, includes the BMF letter dated 18 February 2004, BStBl I p. 286.
- 4 Provisions of national law and those of the respectively relevant DBA must be observed in the tax assessment of income from employment, whereby the following stipulations of the OECD-MA must be taken into account in interpretation.

#### **1.2.1 Determining residency – Article 4 OECD-MA**

- 5 The residency of the employee and, if applicable, the domiciliation of the employer in accordance with Art. 1 in conjunction with Art. 4 OECD-MA must be determined for the application of a DBA. The concept of residency under the agreement does not correspond to the term of unlimited tax liability used in national law.
- 6 Whilst the unlimited tax liability entails a comprehensive tax liability, the residency of an individual in one of the Contracting States entails the legitimacy of the convention (cf. Art. 1 OECD-MA). At the same time, when an individual is determined as being resident in one Contracting State, said State becomes the State of residence for application of the agreement and the other Contracting State is the source State. Although a person may have an unlimited tax liability in both Contracting States, e.g. on the basis of dual residency, said person may only be deemed resident in one of the two States within the meaning of a DBA.
- 7 Under Art. 1, para. 1 OECD-MA, a natural person is deemed resident in a State if he is liable for tax there on the basis of his permanent residence, his habitual abode or similar. If the person is thus resident in both Contracting States, the Contracting State in which the person is deemed resident must be established in accordance with the order of tests specified in Art. 4, para. 2 OECD-MA.
- 8 However, it must be considered that, under Art. 4 para. 1, sentence 2 OECD-MA, a person will not be deemed to be resident in a State if said person "is liable to tax in that State in respect only of income from sources in that State or capital situated therein"; the person thus only has limited tax liability according to German interpretation of the law.

## **1.2.2 Income from employment**

### **1.2.2.1 Article 15 OECD-MA**

- 9 Under Article 15, para. 1 OECD-MA, income from employment may only be taxed in the State in which the employee is resident, "unless the employment is exercised in the other Contracting State". Should the work be carried out in the other State, the remuneration received is taxable in said State. Notwithstanding the above, such remuneration is taxable only in the State of residence of the employee, subject to the conditions of Art. 15, para. 2 OECD-MA (the so-called 183 day clause).
- 10 Art. 15, para. 3 OECD-MA contains a separate provision for the taxation of "remuneration derived in respect of employment aboard a ship or aircraft operated in international traffic or aboard a boat engaged in inland waterways transport" (see no. 8).

### **1.2.2.2 Stipulation on cross-border commuters**

- 11 Cross-border commuters are employees who usually work in the border area of one State and return to their residence in the border area of another State every day. There are special arrangements applicable to such people under the DBA with France (Article 13, para. 5, usually the principle of residency), Austria (Article 15, para. 6, usually principle of residency) and Switzerland (Article 15a – limited taxation in the State in which the work is carried out and taxation in the State of residence, with the offsetting system).

### **1.2.2.3 Delimitation from other convention provisions**

- 12 The OECD-MA and the individual DBAs also contain particular stipulations for the allocation of the right of taxation for specific employees, particularly for the staff responsible for management of an enterprise (e.g. Art. 16, para. 2 DBA-Austria; Art. 16 para. 2 DBA-Poland; Art. 15 para. 4 DBA-Switzerland; see also no. 6.1), for artistes and sportsmen (Art. 17 OECD-MA), for pensions (Art. 18 OECD-MA), for students, pupils, apprentices and other trainees (Art. 20 OECD-MA), for teachers and lecturers in higher education (e.g. Art. 21 DBA-Italy; Art. 20 para. 1 DBA-Austria; Art. 20 para. 1 DBA-USA) and for members of diplomatic missions and consular posts (Art. 28 OECD-MA).
- 13 Art. 15 OECD-MA does not cover public-sector remuneration and pensions. Under Art. 19 OECD-MA, the State of the fund making the payments usually has the right of taxation. Exceptions apply to employees who have the nationality of the State in which the work is carried out (so-called local employees) or their income relates to commercial activity of one of the Contracting States.

## **1.2.3 Elimination of double taxation – Article 23 OECD-MA**

- 14 Germany, as the State of residence, usually eliminates double taxation on income derived from employment by application of the exemption method (in accordance with Article 23 A OECD-MA). This means that the income from employment which may be taxed under the provisions of the applicable treaty in the respective other State (State in which the work is carried out) may be exempt from tax in Germany taking account of the progression proviso (§ 32b EStG). Stipulations of individual treaties which deviate from this (e.g. Art. 24 para. 1b, bb DBA-

Denmark; Art. 20 para. 1c DBA-France; para. 13 of the Protocol to DBA-Italy applicable to the commercial supply of temporary staff) must be taken into account.

15 Reference is made to R 123 LStR in respect of specific features to be observed in respect of exemption in the German income tax deduction procedure.

16 Further to the stipulations in the convention, tax exemption in the assessment procedure requires foreign taxation. Reference is made to the comments on § 50d para. 8 EStG and on the reversionary clauses in the DBAs (see nos. 2.3 and 9).

## 2. Taxation in Germany

### 2.1 Tax liability under the Income Tax Act

17 Tax circumstances with a foreign connection which are subject to taxation in Germany under domestic law may only be taxed in the relationship with DBA States if the applicable DBA does not preclude taxation in Germany.

18 If an employee has a residence or his habitual abode in Germany, as a taxpayer with unlimited tax liability ( § 1, para. 1 EStG in conjunction with paragraph 1 EStG), his entire world income will be taxed in Germany. If no such residence or habitual abode exists, an employee who draws German income within the meaning of § 49, para. 1, no. 4 EStG is liable for tax under § 1, no. 4 EStG. Drawing German income under § 49, para. 1, no. 4 EStG does not depend on a minimum period of time spent in Germany.

19 Reference is made to the unlimited tax liability under §1, paras. 2 and 3 EStG and §1a EStG.

20 Example:

Employee A, who is resident in the Netherlands works for employer B, which is domiciled in Aachen. A exercises 60% of his employment in Germany and 40% in the Netherlands.

Insofar as A exercises his employment in Germany, he earns German income within the meaning of §49, para. 1 no. 4a EStG. Limited tax liability under §1, para. 4 EStG applies only to the salary applicable to said employment.

If a limited tax liability within the meaning of §1, para. 4 EStG applies, the employee may be treated as a taxpayer with an unlimited tax liability if the conditions of §1, para. 3 EStG apply (in conjunction with §1a EStG for EU/EEA citizens).

### 2.2 Progression proviso

21 If there is a residence or habitual abode in Germany, the tax-exempt income in Germany under a DBA is subject to the progression proviso under § 32b para. 1, no. 3 EStG, first half of sentence. In the event of only occasional unlimited tax liability in an assessment period, foreign income which was not subject to income tax in Germany in the assessment period must also be included in the progression proviso (§ 32b para. 1, no. 2 EStG).

22 If the employee does not have a residence or habitual abode in Germany and if § 1, para. 3 EStG, § 1a EStG or § 50 para. 5, sentence 2, no. 2 EStG is applied, the progression proviso must also be taken into account if the total income which is not subject to German income tax is positive (§ 32b para. 1, no. 3 EStG, second half of sentence). If an income tax assessment is carried out under § 50, para. 5, sentence 2, no. 2 EStG on application, the income which is also

subject to deduction of tax from the return on capital or deduction of tax on the basis of § 50a EStG must also be included in the progression proviso (§50 para. 5, sentence 2, no. 2, sentence 6 EStG).

- 23 The amount of income which is subject to the progression proviso must be determined under German tax law (BFH judgement of 22 May 1991, BStBl 1992 II p. 94). This means that, for example, foreign lump sums for professional expenses or tax exemption regulations need not be taken into account. Tax-free foreign income from employment within the meaning of §32b, para. 1, nos. 2 and 3 EStG must be calculated as income in excess of the professional expenses, whereby professional expenses actually incurred or the employed person's allowance for professional expenses must also be taken into account if the lump sum for professional expenses under §9a, sentence 1, no. 1a EStG was granted in determination of the income to be taxed in Germany (BFH judgement of 17 December 2003, BStBl 2005 II p. 96).

### **2.3 Application of §50d, para. 8 EStG**

- 24 From the 2004 assessment period, it must be observed under §50d, para. 8 EStG that the exemption granted in a DBA of the income from employment in Germany of a taxpayer with unlimited tax liability must only be granted insofar as the taxpayer proves that the State with the right of taxation under the DBA (State in which the work is carried out) has waived its right of taxation or that the taxes assessed on the income in said State have been paid.
- 25 Further details may be found in the comments in the BMF letter dated 21 July 2005, BStBl I p. 821.

### **3. Taxation in the State in which the work is carried out – Article 15, para. 1 OECD-MA**

- 26 Under Article 15, para. 1 OECD-MA, income from employment may only be taxed in the State in which the employee is resident, unless the employment is exercised in the other Contracting State. If the employment is exercised in the other State, the remuneration received is taxable in said State (State in which the work is carried out).
- 27 The place where the work is carried out is the place in which the employee is personally located in order to carry out his work. It is immaterial from or to where payment of the salary is made or where the employer is domiciled.

### **4. Taxation in the State of residence – Article 15, para. 2 OECD-MA (183-day clause)**

#### **4.1 Conditions**

- 28 Notwithstanding Article 15, para. 1 OECD-MA, income from employment which was not exercised in the State in which the employee is resident is taxable in said State if
- the employee was present in the State in which the work is carried out, or carried out the work there, for a period not exceeding a total of 183 days in a period described in more detail in the respective DBA (no. 4.2) **and**

- the employer paying the remuneration is not domiciled in the State in which the work is carried out (no. 4.3) **and**
- the salary was not paid by a permanent establishment which the employer has in the State in which the work is carried out (no. 4.4).

29 It is a further condition of some DBAs that the employer be resident in the same State as the employee, e.g. Art. 15, para. 2b DBA-Norway.

30 Only if all three conditions are fulfilled at the same time is the remuneration for work carried out abroad taxable in the State in which the employee is resident.

31 On the other hand, if all the conditions of Article 15, para. 2 OECD-MA are not fulfilled at the same time, the salary for the work carried out by the employee is taxable in the State in which the work is carried out, under Article 15, para. 1, OECD-MA.

32 If Germany is the State of residence of the employee in such a case, the remuneration is exempt in Germany under §50d, para. 8 EStG and need only be taken into account within the scope of the progression proviso.

33 If Germany is the State in which the work is carried out in such a case, it must be examined under national legislation whether the employee's remuneration for work carried out in Germany is subject to unlimited or limited taxation in Germany.

## 4.2 Article 15, para. 2a OECD-MA – presence of up to 183 days

### 4.2.1 Determining the days of presence / work

34 The 183-day limit specified in the DBA frequently relates to **presence** in the State in which the work is carried out (e.g. Article 13, para. 4 no. 1 DBA-France; Article 15, para. 2a DBA-Italy; Art. 15, para. 2a DBA-Austria). However, under some DBAs, the duration of the employment in the State in which the work is carried out is crucial (Article 15, para. 2, no. 1 DBA-Belgium; Article 15, para. 2a, DBA-Denmark)

35 The specified 183-day limit may relate to either the tax year **or** the **calendar year** (e.g. Article 15, para. 2a DBA-Italy; Article 15, para. 2a DBA-Switzerland; Art. 10, para. 2, no. 1 DBA-Luxembourg) **or** a **period of twelve months** (e.g. Article 15, para. 2a DBA-Canada 2001; Article 15, para. 2a DBA-Russian Federation; Art. 15 para. 2a DBA-Norway). Reference is made to the BMF letter dated 29 October 2004, BStBl I p. 1029 for the transition from the tax year to a twelve-month period as a reference period under the DBA-Poland.

36 As a taxation feature which only concerns the days of presence/work is involved in determining the days of presence / work, a change in residence within the aforementioned reference periods is irrelevant. Consequently, the days in the State in which the work is carried out to be taken into account under the 183-day clause can be added together, irrespective of residency.

#### Example:

A, who is resident in Sweden, works for his Swedish employer for a probationary period of three months from 1 June 2001 in Germany. A works permanently in Germany from 1 September 2001 and is to be deemed resident in Germany from said date. A spends more than 183 days in Germany during the period as a whole.

The fact that A is resident in Germany from 1 September 2001 is immaterial to determining the days of presence. Remuneration earned from 1 June to 31 December 2001 is taxable in Germany.

#### 4.2.2 183-day period – Presence in the State in which work is carried out

37 If **presence** in the State in which the work is carried out is used in a DBA as a basis for determining the days of presence / work, only the physical presence in the State in which the work is carried out is crucial, not the duration of employment. Whether the employee was present in the State in which the work was carried out for more than 183 days is crucial, whereby even a short stay on one day must be taken into account as a full day of presence in the State in which the work is carried out. Consecutive days need not be spent in the State in which the work is carried out; several stays in the same State must be added together.

38 The following are counted as full days of presence in the State in which the work is carried out, for example:

- the day of arrival and departure,
- all the days immediately before, during and after the work, e.g. Saturdays, Sundays and public holidays,
- the days spent in the State in which the work is carried out while work is suspended, e.g. in the event of a strike, lockout, lack of deliveries or illness, unless the illness prevents the departure of the employee, and he would otherwise have met the conditions of exemption from tax in the State in which the work is carried out,
- days of leave spent immediately or soon before, during and after the work in the State in which the work is carried out (see ex. 3, # 44).

39 Days which are spent outside the State in which the work is carried out, irrespective of whether for professional or private reasons, are not counted. Days of transit through a State do not count as days spent in said State (see ex. 4, # 45).

40 Should the employee return each day to his residence in the State of domicile, he spends each day in the State in which the work is carried out (BFH judgement of 10 July 1996, BStBl 1997 II p. 15).

41 Reference is made to the mutual agreement of 16 February 2006 with France (BMF letter dated 3 April 2006, BStBl I p. 304) for determination of the days of presence in accordance with DBA-France.

42 Example 1:

For several months, A works from Monday to Friday in the Netherlands for his German employer. He spends his weekends with his family in Germany, which requires him to travel to Germany every Friday after work. He leaves Germany every Monday morning, to go to work in the Netherlands.

The days from Monday to Friday must be taken into account as full days spent in the Netherlands, because A spent at least some of the time there. On the other hand, the Saturdays and Sundays may not be taken into account as days spent in the Netherlands within the meaning of the 183-day clause, as he was not there.

43 Example 2:

As in case 1, but A travels every Saturday morning from the Netherlands to Germany and back to the Netherlands every Sunday evening.

In this case, Saturdays and Sundays must be taken into account as full days spent in the Netherlands within the meaning of the 183-day clause, because A spends at least some of the time there on these days.

44

Example 3 (see #38):

B works in Sweden for his German employer from 1 January to 15 June. He spends his holiday there from 25 June to 24 July.

His salary is taxable in Sweden, because B has been in Sweden for more than 183 days in the calendar year (Article 15 DBA-Sweden), as the days of leave which B spends in Sweden when he has finished working are close to the period of said work and are therefore taken into account in the period of spent there.

45

Example 4 (see #39):

C travels by car from Hamburg to Milan on a Monday to carry out installation work for his German employer. He breaks his journey in Austria, where he spends the night. C drives on to Milan the following day. On Friday, C drives from Milan through Austria back to Hamburg.

C drives through Austria purely for transit purposes. The days which C spends in Austria travelling from and to Milan are therefore not counted in the calculation of days spent in Austria, so four days are to be counted for Italy and no days for Austria.

#### **4.2.3 183-day period – Duration of employment in the State in which the work is carried out**

46

If the duration of employment in the State in which the work is carried out is used as a basis in a DBA for determining the days of presence / work, each day which the employee has actually spent in the other Contracting State to carry out the work must be taken into account, even if this period was very short.

47

Days spent in the State in which the work is carried out on which work is not possible, by way of exception, e.g. in the event of a strike or lockout, lack of deliveries or illness, unless the illness prevents the departure of the employee, and he would otherwise have met the conditions of exemption from tax in the State in which the work is carried out (see ex. 1, # 49). Notwithstanding no. 4.2.2., all the non-working days spent in the State in which the work is carried out immediately before, during and after the work, e.g. Saturdays, Sundays, public holidays and days of leave, must not be taken into account.

48

The relationship with Belgium is governed by a particular rule that the days of suspension of work must also be counted in the calculation of the days of work (see Ex. 2, # 50). Consequently, for example, days such as Saturdays, Sundays, days of sickness or holiday must be counted, even if they are not spent in the State in which the work is carried out, provided that they occur during the period of work abroad (Article 15, para. 2, no. 1 DBA-Belgium).

49

Example 1 (see #47):

For several months, A works from Monday to Friday in Denmark for his German employer. He spends his weekends with his family in Germany, which requires him to travel from Denmark to Germany every Saturday morning after work and back to Denmark every Sunday evening.

The days from Monday to Friday are to be counted as full days in Denmark, because A worked there on said days. On the other hand, the Saturdays and Sundays may not be taken into account as days spent in Denmark within the meaning of the 183-day clause, as he was not there.

50

Example 2 (see #48):

B works for two weeks in Belgium for his German employer, which requires him to travel to Brussels on Sunday so that he can begin work there on Monday. On the following non-working weekend, B travel to Germany on Saturday and returns to Brussels on Monday morning. B returns to Germany on Saturday the following Friday after he has

finished work.

The day of arrival and the day of departure are not counted as days in Belgium, because B did not work there on said days and work was not suspended. The days from Monday to Friday are to be counted as full days Belgium, because B worked there on said days. The weekend between is taken into account for Belgium, regardless of where B is staying, because a regular suspension of work has taken place.

#### 4.2.4 Application of the 183-day period to the tax year / calendar year

- 51 If the tax year or the calendar year are used in a DBA as a basis for determining the days of presence / work, the days of presence / work must be determined separately for each tax or calendar year. If the tax year of the other Contracting State differs from Germany's tax year (= calendar year), the tax year of the Contracting State in which the work is carried out is crucial.
- 52 The tax year in the following Contracting States differs from Germany's tax year:
- Australia 01.07. to 30.06.
  - Bangladesh 01.07. to 30.06.
  - U.K. 06.04 to 05.04.
  - India 01.04. to 31.03.
  - Iran 21.03. to 20.03.
  - Mauritius 01.07. to 30.06.
  - Namibia 01.03. to 28./29.02.
  - New Zealand 01.04. to 31.03.
  - Pakistan 01.04. to 30.06.
  - Sri Lanka 01.04. to 31.03.
  - South Africa 01.03. to 28./29.02
- 53 Ireland changed its tax year to the calendar year on 1 January 2002.

- 54 Example 1:  
A worked in Sweden from 01 October 2001 to 31 May 2002 for his German employer.

The days spent in Sweden must be determined separately for each calendar year. A does not spend more than 183 days in Sweden either in the 2001 or the 2002 calendar year.

- 55 Example 2:  
B works in the U.K. (tax year 6 April – 5 April) for his German employer from 1 January to 31 July 2002.
- The days spent in the UK must be determined separately for each tax year. The days spent in the State in which the work is carried out are crucial. As the 2001/2002 tax year ends on 5 April 2002 in the U.K., B. does not spend more than 183 days in the U.K. either in the 2001/2002 nor in the 2002/2003 tax year.

#### 4.2.5 Application of the 183-day period to a 12-month period

- 56 If a "period of twelve months" is used as a basis in a DBA instead of the tax year or the calendar year, all conceivable 12-month periods must be taken into account, even if they partially overlap. If the employee has spent more than 183 days in the other Contracting State in any 12-month period, his income attributable to said days is taxable in said State. Each day the employee spends in another Contracting State thus entails a new 12-month period to be taken into account.

57

Example 1:

A works in Norway for his German employer from 1 April 2001 to 20 April 2001, for 90 days between 1 August 2001 and 31 March 2002 and for 97 days from 25 April to 31 July 2002.

Remuneration attributable to days which A spent in Norway within the period from 01 August 2001 to 31 July 2002 is taxable in Norway, as A spent more than 183 days in Norway within a 12-month period. Germany exempts A's remuneration from tax, in accordance with §50d, para. 8 EStG and the progression proviso (Article 23, para. 2 DBA-Norway). On the other hand, income earned in the period from 1 April to 20 April 2001 is taxable in Germany, as A did not spend more than 183 days in Norway in any conceivable 12-month period during that time.

58

Example 2:

B works in Norway for his German employer between 1 January 2001 and 28 February 2001 and for 20 days a month from 1 May 2001 until 30 April 2002.

Remuneration attributable to days which B spends in Norway in the period from 01 May 2001 and 30 April 2002 is taxable in Norway, as B spent more than 183 days (= 240 days) in Norway within a 12-month period. The same applies to the period 01 January 2001 to 28 February 2001, as B spent a total of more than 183 days (= 200 days) in Norway in the period from 01 January 2001 to 31 December 2001. German exempts B's remuneration from tax, in accordance with §50d, para. 8 EStG and the progression proviso (Article 23, para. 2 DBA-Norway).

### **4.3 Article 15, para. 15 2b OECD-MA – Payment by an employer domiciled in the State in which the work is carried out**

#### **4.3.1 General**

59

An employee's work abroad may be carried out for his employer under civil law (no. 4.3.2 hereof) within the scope of employee postings between associated enterprises (no. 4.3.3) or for an independent third-party employer (no. 4.3.4 and 4.3.5).

60

Under civil law, permanent establishments are not regarded as an employer (BFH judgements of 29 January 1986, BStBl II p. 442 and BStBl II p. 513). However, an unincorporated business is often an employer under civil law. The domiciliation of an enterprise is determined in this case by the location of the management. The same applies analogously to an unincorporated business which is taxed as an incorporated business in the other State.

61

Example:

A is an employee of the foreign (U.K.) enterprise B. He has been living in Germany for years and is employed by a dependent German permanent establishment of B in Hamburg. In 2001, he spends five working days visiting customers in Switzerland and five working days visiting customers in Norway.

Period spent in Switzerland: DBA-Switzerland is applicable, as A is resident in Germany (Article 1, 4, para. 1 DBA-Switzerland) and the "source" of the income from employment is in the State in which the work is carried out.

Under Article 15, para. 2 of DBA-Switzerland, Germany has the right of taxation as, in addition to meeting the other conditions of said stipulation, A is remunerated by an employer not domiciled in Switzerland.

Period spent in Norway: DBA-Norway is applicable. Work in Norway is not taxable in Germany. Although A does not spend more than 183 days in Norway, under Article 15, para. 2b DBA-Norway, Germany only has the right of taxation if the employer is domiciled in the State in which the employee is also resident. In this case, the employer is the foreign (U.K.) enterprise B; the dependent German permanent establishment cannot be the employer within the meaning of the DBA. Germany exempts the income from tax, in accordance with §50d, para. 8 EStG and the progression proviso (Article 23, para. 2 DBA-Norway).

#### **4.3.2 Work carried out abroad for a civil law employer (see ex. 1, # 89)**

- 62 Insofar as the employee domiciled in Germany works for a civil law employer, e.g. within the scope of a contract for goods or services in a independent enterprise abroad, it must often be assumed that the civil law employer is also the employer within the meaning of the DBA.
- 63 The same applies analogously to an employee domiciled in Germany who works for his civil law employer in Germany.

#### **4.3.3 Secondment of employees between internationally associated enterprises**

##### **4.3.3.1 Economic employer (see ex. 2, 3 # 90, 91)**

- 64 Not only the civil law employer, but also another natural person or legal entity responsible for remuneration for work from employment by an employee can be an employer within the meaning of the DBA (BFH judgement of 23 February 2005, BStBl II p. 547). The same applies analogously to unincorporated enterprises (see no. 4.3.1). If an employee resident in Germany works for an associated enterprise domiciled abroad (Art. 9 OECD-MA), it must be considered which of these enterprises should be deemed the employer within the meaning of the DBA. This must be on the basis of the economic content and actual implementation of the underlying agreements.
- 65 The same applies analogously if an employee resident abroad works for an associated enterprise domiciled in Germany (Art. 9 OECD-MA).
- 66 If the employee's work consists of fulfilling a supply or service obligation of the seconding enterprise at an associated enterprise, and if his salary forms a constituent part of the supply or service, the civil law employer (= seconding enterprise) is also the employer within the meaning of the DBA. The principles of the BMF letter of 9 November 2001, BStBl I p. 796 (principles of consideration of the delimitation of income between internationally associated enterprises in the case of staff secondment ([Administrative Principles – Staff Secondment]) must be observed in delimitation. Individually delimitable services must be considered separately.
- 67 On the other hand, the associated enterprise constituting the client becomes the employer in the sense of treaty law (economic employer) if
- the employee is integrated into the client enterprise and
  - the client enterprise bears financial responsibility for the salary (as a result of its own business interest in secondment of the employee). It is immaterial here whether the remuneration is paid directly to the employee in question or whether another enterprise advances said remuneration.
- 68 The overall picture of the circumstances is crucial to the decision on whether the employee is integrated into the client enterprise, whereby it must expressly be taken into account whether
- the client enterprise bears the liability or risk for the results achieved by the work of the employee, and
  - the employee is subject to the instructions of the client enterprise.
- 69 Furthermore, it may also have to be considered for the aforementioned decision who decides on the nature and scope of daily work, the amount of remuneration, participation in any bonus

scheme or share plan or the grant of holiday, who provides the work resources, bears the risk of payment of the salary in the event of failure to perform, who has the right of decision on service of notice or dismissal, who is responsible for matters relating to the employee's national insurance, on whose premises the work is carried out, the period covered by work in the client enterprise, to whom gratuity and pension claims accrue and with whom the employee must settle differences of opinion arising from the contract of employment.

- 70 A client enterprise must often be regarded as the economic employer if it has paid the salary expenses in accordance with the Administrative Principles – Staff Deployment (BMF letter of 9 November 2001, BStBl I p. 796) or should have done so in accordance with the arm's length principle.
- 71 A change in employer status requires neither a formal amendment of the contract of service between the employee and the seconding enterprise nor the conclusion of a supplementary contract of employment between the employee and the client enterprise, nor a transfer price agreement made from the outset between the associated enterprises involved (see also BFH judgement of 23 February 2005, BStBl II p. 547).
- 72 See the BFH judgement of 23 February 2005, loc. cit., for the special case of an employee who assumes the role of member of or adviser to the board of a foreign associated enterprise, see BFH judgement of 23 February 2005, loc. cit.
- 73 Reference is made to the potential income tax deduction obligation for the client enterprise under § 38, para. 1, sentence 2 EStG in cases of staff secondment.

#### **4.3.3.2 Simplification rule**

- 74 In the case of secondment not exceeding three months (spread over the year for objectively related work), a refutable apparent assumption indicates that the client enterprise is not to be regarded as the economic employer, because the employee has not been integrated.

#### **4.3.3.3 Seconding and client enterprises are employers**

- 75 If an employee works alternately both for his German civil law employer and for another associated enterprise domiciled abroad, both enterprises may be regarded under the treaty as the "employer" of the employee concerned, on condition that, under the above principles, both enterprises are to be regarded as employers within the meaning of the DBA for the respective pro rata payments of remuneration. This may be the case, for example, if both the seconding and the client enterprise have an interest in the secondment because the employee carries out planning, coordination or management functions for the seconding enterprise (no. 3.1.1 of the Administrative Principles – Staff Deployment; BMF letter of 9 November 2001, BStBl I p. 796). In such a case, two employment relationships exist, which are to be assessed separately with their pro rata payments of remuneration.
- 76 Should the employee receive his remuneration from employment in full from his civil law employer and should the associated enterprise domiciled abroad bear the financial burden of the pro rata payments of remuneration made to the employee for the work carried out in said enterprise, by apportionment of said pro rata payments of remuneration between the associated enterprises, it must be considered whether the amount of said (pro rata) payments of remuneration is higher than would have been received by another employee under the same or similar conditions for such work in another State. The excess amount does not represent salary,

but reflects the relationship of the two associated enterprises with one another. The excess amount does not constitute part of the salary for the work carried out for the associated enterprise domiciled abroad.

#### **4.3.3.4 Abuse of the procedure within the meaning of § 42 AO**

77 If staff secondment is exclusively or almost exclusively for the purpose of avoiding German tax, it must be considered in individual cases whether it abuses possible legally valid procedures under § 42 AO.

78 Example:

A managing director of an enterprise incorporated in Germany, who is resident in Switzerland, has been taxed in Germany in the past in accordance with Article 15, para. 4 DBA-Switzerland. He invests said holding in a Swiss AG, in which he also has a major holding as managing director. Under Article 13, para. 3 in conjunction with para. 4 DBA-Switzerland, these proceeds are exempt from tax in Germany. His German contract of employment is terminated and, after restructuring, he works as an employee of the new parent company under a temporary management contract for the German subsidiary.

If the purpose of the selected arrangement is to avoid application of Article 15, para. 4 DBA-Switzerland, the arrangement is unacceptable under §42 AO, irrespective of any criteria of no. 4.3.3.1 which may have been met.

#### **4.3.3.5 Employer under a pool agreement**

79 If associated enterprises form a pool, this constitutes an undisclosed partnership from a tax point of view (Administrative Principles – Assessment Contracts, BMF letter of 30 December 1999, BStBl I p. 1122). The existing working civil law relationship remains unchanged in such cases. This employment relationship is crucial to application of the DBA.

80 Example:

Five European national companies of an international mechanical engineering group combine to create an emergency task force of engineers to be seconded as required in the individual countries. Each regional company provides three engineers for this purpose. The costs of the task force are apportioned to the companies on the basis of a turnover formula.

The respective civil law employer (regional company) of the engineer is the employer within the meaning of the DBA.

#### **4.3.4 Commercial supply of temporary staff (see ex. 4, # 92)**

81 Commercial supply of temporary staff exists in the case of enterprises which supply temporary staff (as temporary staff agencies) to third parties (clients) on a commercial basis.

82 In a cross-border supply of temporary staff, the client assumes the main employer roles. The temporary staff are usually integrated into the client's business. Accordingly, notwithstanding no. 4.3.3.2, the client must be regarded as the employer within the meaning of the DBA when the temporary staff commence work.

83 In individual cases, e.g. if the staff are made available for a short period only (see also BFH judgement of 4 September 2002, BStBl 2003 II, p. 306) the temporary staff agency may also retain substantial employer functions. In these cases, it must be considered whether, according

to the overall picture of the circumstances, the temporary staff agency or the client primarily assumes the main employer functions and is thus to be regarded as employer within the meaning of the DBA. The following criteria must be specifically observed when considering the above:

- Who bears the liability or risk for the results achieved by the work of the temporary staff?
- Who has the right to give instructions to the temporary staff?
- Under whose control and responsibility is the facility in which the temporary staff are working?
- Who primarily provides the temporary staff with tools and materials?
- Who determines the number and experience of the temporary staff?

84 Under some DBAs, the 183-day clause does not apply to temporary staff (e.g. Article 13, para. 6 DBA-France; Protocol no. 13 to DBA-Italy; Article 15, para. 4, DBA-Sweden). Both Contracting States have the right of taxation in these cases. Double taxation is eliminated by offsetting tax.

85 Under the DBA-Austria, only the State of residence of the temporary worker is entitled to tax the salary of said worker within the scope of supply of temporary staff, providing that said worker does not spend more than 183 days in the respective other State during the calendar year in question and the other conditions of Article 15, para. 2 DBA Austria are fulfilled. Should the worker spend more than 183 days in the State in which the work is carried out, tax will be payable in said State (Article 15, para. 2, 3 DBA-Austria).

#### **4.3.5 Occasional supply of temporary staff between independent third parties (see ex. 5, # 93)**

86 Insofar as a worker is seconded occasionally to an independent third party, this constitutes either a supply of temporary staff or work to fulfil a delivery or service obligation.

87 If the civil law employer, the objects of which do not include the supply of temporary staff, agrees with a independent enterprise to arrange for the worker to work for the latter on a temporary basis and the client must either conclude an agreement under employment law (employment relationship) with the worker or must be regarded as the economic employer, this constitutes occasional supply of temporary staff.

88 The supplier of temporary staff must be regarded as the employer within the meaning of the DBA in terms of the remuneration it pays.

#### **4.3.6 Examples**

89 Example 1 (see #62, 63):

Enterprise S, which is domiciled in Spain, specialises in the installation of computer systems. D, an enterprise which is domiciled in Germany, has recently purchased a new computer system and concludes a contract with S for the installation of said system. X, an employee of S resident in Spain, is seconded to the registered office of D in Germany for four months to carry out the agreed installation.

X works within the scope of a performance obligation and not within the scope of a staff secondment by S to D. On condition that X does not spend more than 183 days in Germany in the tax year in question and that S does not have permanent a establishment in Germany to which the salary payments to X are to be attributed, Article 15, para. 2 of DBA-Spain is applicable, so that remuneration for employment is taxable in Spain. The remuneration is tax-exempt in Germany.

90

Example 2 (see #64 et seq.):

Enterprise S, domiciled in Spain, is the parent company of a group. This group also includes D, an enterprise domiciled in Germany which sells the group products. S has developed a new worldwide market strategy for the group products. In order to ensure that this strategy is understood properly and implemented by D, X, an employee of S resident in Spain who has been involved in the development of the market strategy, is seconded to the company headquarters of D for four months. X's salary is paid exclusively by S.

Even if X works for D for more than three months, D must not be regarded as the economic employer of X. S alone pays the salary expenses of X. In addition, X carries out his work in the sole interest of S. He is not integrated into the administrative structure of D. X's remuneration is taxable in Spain (Article 15, para. 2 DBA-Spain). The remuneration is tax-exempt in Germany.

91

Example 3 (see #64 et seq.):

An international hotel group operates hotels worldwide through a number of subsidiaries. S, a subsidiary domiciled in Spain, operates a hotel in Spain. D, another subsidiary of the group, operates a hotel in Germany. D requires an employee with knowledge of Spanish for five months. X, an employee of S resident in Spain, is therefore seconded to D to work in reception in Germany for said period. X remains an employee of S during this period, and continues to be paid by S. D assumes the travel expenses of X and pays S a fee based on X's remuneration, national insurance contributions and other remuneration during said period.

D is to be regarded as the economic employer of X while X is working in Germany. Deployment of X between the internationally associated enterprises takes place in the interest of the client enterprise D. X is integrated into D's business in the period in question. In addition, D is also financially responsible for the remuneration. The condition of Article 15, para. 2b DBA-Spain is thus not met. Although S works in Germany for less than 183 days, Germany is accorded the right to tax X's remuneration during the period in question in accordance with Article 15, para. 1 DBA-Spain.

92

Example 4 (see #81 et seq.):

S is an enterprise domiciled in Spain. It operates a commercial temporary staff agency for highly qualified staff. D is an enterprise domiciled in Germany for high-value services in the construction sector. To complete an order in Germany, D requires a specialist for five months and so contacts S. X, a specialist resident in Spain, is then made available by S for five months. Under a separate contract between S and D, S declares its agreement to X's work during this period being carried out for D. Under said contract, D pays X's salary, national insurance contributions, travel expenses and other remuneration.

Within the scope of the international supply of temporary staff, D becomes the economic employer of X. D assumes the main employer functions throughout said period. X is integrated into the business of D. The condition of Article 15, para. 2b DBA-Spain is thus not fulfilled. Under Article 15, para. 1 DBA Spain, X's remuneration is thus taxable in Germany during the specified period.

93

Example 5 (see #86 et seq.):

S, an enterprise domiciled in Spain, and D, an enterprise domiciled in Germany, are involved exclusively with the provision of technical services. They are independent enterprises within the meaning of Article 9 OECD MA. D requires the services of a specialist for a transitional period to complete construction work in Germany and so contacts S. Both enterprises agree that X, an employee of S resident in Spain, should work for D for four months under the direct supervision of D's senior engineer. X remains formally employed by S during this period. D pays S an amount which corresponds to the salary, national insurance contributions, travel expenses and other remuneration of the engineer for this period. A premium of 5% is also paid. It was agreed that S be indemnified against any claims for damages which may arise during the period of X's work.

An occasional supply of staff between two independent enterprises exists. D is to be regarded as the economic employer of S throughout the entire period of four months. The condition of Article 15, para. 2b DBA-Spain is thus not fulfilled. Under Article 15, para. 1 DBA Spain, X's remuneration is thus taxable in Germany during the specified period. The premium of 5% does not constitute salary.

#### **4.4 Article 15, paragraph 2c OECD-MA – Payment of salary charged to a permanent establishment of the employer in the State in which the work is carried out**

- 94 The definition of the term "permanent establishment" in the respective treaty (cf. Article 5 OECD-MA) is crucial. Under several DBAs, for example, a construction or installation site is only to be deemed a permanent establishment after a period of more than 12 months (unlike under §AO – 6 months) (cf. e.g. Article 5, para. 2g DBA-Switzerland).
- 95 The salary is charged to a permanent establishment if the payments are to be financially attributed to said permanent establishment. Who pays the remuneration or who accounts for the remuneration in its sub-accounts is immaterial. Only whether and, if applicable, the extent to which the work carried out by the employer is to be attributable to the permanent establishment under the respective DBA (e.g. Article 7 DBA-Switzerland) and the remuneration is thus to be charged to the permanent establishment (BFH judgement of 24 February 1988, BStBl II p. 819) alone is decisive. If the salary simply represents part of the charging for goods or services in relation to the permanent establishment, the salary as such is not borne by the permanent establishment (BFH judgement of 24 February 1988, loc. cit.).
- 96 An independent subsidiary (e.g. a private limited company) is not the permanent establishment of the parent company, but may, if applicable, establish a representative's permanent establishment or itself be an employer.
- 97 Further details may be found in the "Administrative Principles – Staff Deployment", BMF letter dated 09 November 2001, BStBl I p. 796.
- 98 The principles of the term "economic employer" are to be applied accordingly (no. 4.3).

99

##### Example 1:

###### Case 1:

A works from 1 January 2001 to 31 March 2001 at a permanent establishment of his German employer in France. The salary expenses are to be attributed to the permanent establishment as operating expenses.

The salary is taxable in France. Although A does not work for more than 183 days in France, Germany does not retain the right of taxation because the salary is charged to a French permanent establishment of the employer (Article 13, para. 4 DBA-France). As the State in which the work is carried out, the salary may be taxed in France (Article 13, para. 1, DBA-France). Germany exempts the income from tax, in accordance with §50d, para. 8 EStG, and the progression proviso (Article 20, para. 1a DBA-France).

###### Case 2:

B, who is resident in France, works in Germany at a German permanent establishment of his French employer from 1 January 2001 to 31 March 2001. The salary expenses are to be attributed to the permanent establishment as operating expenses.

The salary is taxable in Germany. Although B does not work in Germany for more than 183 days, the salary is charged to a German permanent establishment. As the State in which the work is carried out, Germany may tax the salary (Article 13, para. 1, DBA-France in conjunction with §1, para. 4 and §49, para. 1, no.4a EStG).

## **5. Determining the taxable / tax-exempt salary**

### **5.1 Distinction between the application of the 183-day clause and determination of the taxable / tax-exempt salary**

- 100 Under Article 15, para. 1 OECD-MA, income from employment may only be taxed in the State in which the employee is resident, unless the work is carried out in the other State. If the work is

carried out in another State, the remuneration paid for the work carried out there is taxable in said State (see no. 3). Under Article 15, para. 2 OECD-MA, it must be considered whether the remuneration from employment may still be taxed in the State in which the employee resides, despite the work being carried out abroad (see no. 4). Such consideration should include a calculation of the crucial days spent abroad under the respectively applicable DBA on the basis of the 183-day clause.

101 The taxable / tax-exempt salary is then determined in a further, separate step.

## **5.2 Principles of determining the taxable / tax-exempt salary**

102 Under § 90, para. 2 AO, the taxpayer must keep evidence of the work carried out in the other State and its duration, by submitting appropriate records (e.g. timesheets, diary and travel expense claims).

103 If the salary is exempt in Germany under a DBA, the extent to which remuneration may be attributed directly to the work abroad or directly to work in Germany must first be considered (no. 5.3). Should such attribution not be possible, the remaining, not directly attributable salary must be apportioned. The employer must undertake apportionment in the income tax deduction procedure, taking account of R 123 LStR. The employer must also state the tax-exempt salary on the certificate of income tax deduction. In view of the provisional nature of the income tax deduction procedure, there is nothing to prevent the tax office from checking the apportionment in the income tax assessment procedure.

## **5.3 Direct attribution**

104 Components of salary which are granted directly on the basis of specific work in Germany or abroad must be attributed directly in advance. This may be e.g. travel expenses, overtime, supplements for working on Sundays, public holidays or nights, foreign allowances, project-related bonus payments or the provision of residential accommodation in the State in which the work is carried out.

## **5.4 Apportionment of the remaining salary**

105 Apportionment of the remaining salary takes place in accordance with the principles of the BFH judgement of 29 January 1986, BStB II p. 479. The tax-exempt salary is calculated on the basis of the number of contractually-agreed working days. The contractually-agreed working days are the calendar days per year less the days on which the employee is not obliged to work according to the contract of employment (e.g. holidays, weekends and public holidays).

106 The salary agreed for the corresponding period and not directly apportioned remuneration under no. 5.3 is to be compared with the agreed working days. This includes not only the continuous remuneration (e.g. wage, salary, other benefits) but also additional remuneration attributable to the employee's work within the calculation period as a whole (e.g. Christmas bonus and holiday bonus). If the agreed salary has changed during the calendar year, said change must be taken into account.

107 The salary to be apportioned must be placed in relation to the agreed working days. This produces an agreed salary per agreed working day.

- 108 The salary to be apportioned per agreed working day must be multiplied by the agreed working days which the employee actually spent in the other State. Should the employee actually have been present in the other State on days which are not counted as agreed working days (e.g. extension of a stay for private reasons), such days will be deducted from the calculation of tax-exempt income.
- 109 Should the employee not spend a full agreed working day in the other State (e.g. on days of travel), the salary must be apportioned pro rata per agreed working day. This must be done on the basis of estimates, if necessary. The agreed working time for said day must be used as a basis.
- 110 Separate account must be taken of overtime, insofar as the employer has actually made a settlement for it.
- 111 Furthermore, apportionment must make allowance for agreed working time spent in transit countries, which must be apportioned to the State in which the employee resides.

### **5.5 Particular features in the apportionment of certain components of salary**

- 112 A non-recurrent payment (e.g. anniversary bonus) which constitutes a subsequent payment for earlier active work and is attributable pro rata to work abroad and in Germany must be apportioned in accordance with the above principles. Attribution of the right of taxation does not depend on the time and place of payment of the remuneration but solely on the fact that it is paid to the employee for work carried out abroad (BFH judgement of 5 February 1992, BStBl II p. 660). A subsequent payment for earlier active work does not apply if a non-recurrent payment represents a pension as a whole or in part (BFH judgement of 5 February 1992, BStBl II p. 660; BFH judgement of 12 October 1978, BStBl II p. 64).
- 113 Holiday bonuses must be included in apportionment. This applies both to holiday pay and to payment in lieu of holiday (compensation for holiday not taken). The part of the salary attributable to holiday must be exempt from tax in Germany insofar as it corresponds to the work carried out abroad. Should the actual working days differ from the agreed working days because the employee either did not take holiday or took holiday from a different tax year in the calendar year to be assessed, the agreed working days must be increased or reduced correspondingly for the apportionment of salary. To simplify matters, this may be waived if the number of days' leave carried forward does not exceed ten. If salary is attributable to holiday pay or payment in lieu of holiday in a previous calendar year, the apportionment ratio in said calendar year is applicable.
- 114 Should the employee carry out work on days which, according to the contract of employment, are not attributable to agreed days and he does not receive separately calculated standard salary but time off in lieu, such days must be included in the agreed working days (see ex. 3, # 118).
- 115 If payment of salary continues during periods of illness, the periods of illness are included in the agreed working days. Salary for the period of illness spent abroad is thus tax-exempt in Germany. On the other hand, if payment of salary is not continued on days of illness, the number of agreed working days is reduced.

## 5.6 Examples

116

### Example 1:

A worked for his German employer in Japan from 01 January 2001 to 31 July 2001. He retains his family residence in Germany. In 2001, he receives a salary of €80,000 including a Christmas bonus and holiday pay. He also receives a premium of €30,000 for his work in Japan.

The salary for the work in Japan is not taxable in Germany, as A has spent more than 183 days in Japan in the 2001 calendar year (Articles 15, 23, para. 1a DBA-Japan). The tax-exempt salary is calculated as follows:

The premium of €30,000 is attributable directly to the work carried out abroad and is thus tax-free in Germany. The remaining salary of €80,000 must be apportioned in accordance with the agreed working days. The agreed working days in 2001 total 220 (= calendar days less the days on which the employee is not obliged to work, under the contract of employment). The agreed working days in 2001 must be compared with the apportionable salary of €80,000 for 2001. This produces an apportionable salary of €363.64 per working day. This salary must be multiplied by the agreed working days which A actually spent in Japan, in this case 140 days. Thus  $140 \times €363.64 = €50,910$  of the €80,000 salary is tax-exempt in Germany. The total tax-exempt salary of €80,910 (€30,000 + €50,910) is exempt after deduction of income-related expenses incurred in connection with the work in Japan and only to be taken into account in application of the progression proviso (§50d, para. 8, EStG). The remaining salary of €29,090 is taxable in Germany.

117

### Example 2:

In 2001 and 2002, B works for his German employer both in Germany and in Sweden. He retains his family residence in Germany. B spends more than 183 days in Sweden in both 2001 and 2002. B's agreed working days amount to 220 days in both the 2001 and 2002 calendar years respectively. He has 30 days of contractual holiday in 2001 and 2002. He took all his holiday for 2001 and 2002 in 2002. In 2001, there were 230 actual working days in Sweden and 20 working days in Germany. In 2002, there were 150 actual working days in Sweden and 40 actual working days in Germany. The apportionable salary was €50,000 in 2001 and €60,000 in 2002.

The salary for the work in Sweden is not taxable in Germany, as B has spent more than 183 days in Sweden in 2001 and 2002 (Articles 15 and 23, para. 1a DBA-Sweden). The tax-exempt salary is calculated as follows:

#### 2001:

The unused days of holiday (30) in 2001 are to be added to the 220 agreed working days. The 250 days determined must be compared with the apportionable salary of €50,000. The apportionable salary amounts to €200 per working day. This amount must be multiplied by the agreed working days which B actually spent in Sweden. Thus €46,000 ( $230 \times €200$ ) of the annual salary of €50,000 is tax-exempt in Germany in compliance with §50d, para. 8 EStG and taken into account in application of the progression proviso after deduction of income-related expenses incurred in connection with the work carried out in Sweden. The remaining salary of €4,000 is taxable in Germany.

#### 2002:

Insofar as the 2002 salary covers 2001 holiday, the 2001 apportionment ratio applies to apportionment of the salary.  $30/220$  of €60,000 = €8,182 must thus be apportioned in accordance with the 2001 apportionment ratio. This produces an amount of €7,528 (€8,182:  $250 \times 230$ ) exempt from tax in Germany. The remaining €51,818 (€60,000 - €8,182) must be compared to the agreed working days for 2002, less the 2001 holiday taken in 2002 (=190). The apportionable salary thus amounts to €272.73 per working day. This salary must be multiplied by the agreed working days which B has actually spent in Sweden. Thus  $150 \times €272.73 = €40,910$  of the €51,818 of the remaining salary is tax-exempt in Germany. Thus in 2002, a total of €48,438 (€40,910 + €7,528) is tax-exempt in Germany under §50d, para. 8 EStG and must be taken into account in application of the progression proviso after deduction of income-related expenses incurred in connection with the work carried out in Sweden. The remaining salary of €11,562 is taxable in Germany.

118

### Example 3 (see #114):

Under the contract of employment, C works from Monday to Friday. He goes on a business trip abroad from Monday to Friday, also working for his employer on Saturday and Sunday. C is given time off in lieu on Tuesday and Wednesday instead of a separate payment for weekend work.

C spent four agreed working days abroad, with the number of agreed working days in the calendar year unchanged.

## **6. Assessment of certain work abroad under the convention**

### **6.1 Executives of incorporated companies**

- 119 Executives of incorporated companies are usually covered by the scope of application of Article 15 OECD-MA. They carry out their work at the place where they are personally present (BFH judgement of 5 October 1994, BStBl 1995 II, p. 95). The opposing ruling of 15 November 1971 by the Enlarged Chamber of the BFH (BStBl 1972 II p. 68) on the place of work of the managing director of a limited company at the registered office of the company was issued regarding DBA-Switzerland 1931/1959 and is not transferable to other DBAs. However, the special stipulations of some DBAs on remuneration for managing directors (e.g. Article 16 DBA-Japan; Article 16, para. 2 DBA-Denmark; Article 16 DBA-Sweden; see also no. 1.2.2.3).

### **6.2 Stand-by**

- 120 Should work consist of stand-by (on-call, period of release from work in connection with the termination of an employment relationship) without work taking place, the work is carried out at the place at which the employee is actually present during the stand-by period (BFH judgement of 9 September 1970, BStBl II p. 867).

### **6.3 Lump-sum settlement**

- 121 Lump-sum settlements which are paid to the employee when he leaves employment are usually to be attributed to the remuneration from employment within the meaning of Article 15, para. 1 OECD-MA as salary paid later for work carried out. Lump-sum settlements in this sense include payments within the meaning of §3, paragraph 9 EStG in the version valid until 31 December 2005 in conjunction with R9 LStR. However, they do not constitute additional remuneration for earlier work and are not paid for specific work carried out in Germany or abroad. Lump-sum settlements are thus taxable in the employee's country of residence (Article 15, para. 1, OECD-MA, first half sentence). The date of payment is decisive (BFH judgement of 24 February 1988, BStBl II p. 819; BFH judgement of 10 July 1996, BStBl 1997 II p. 341).
- 122 Payments in settlement of entitlements already contractually agreed (e.g. compensation payments for holiday or bonus entitlements) do not constitute lump-sum settlements in the above sense and must be treated accordingly as active remuneration.
- 123 Lump-sum pension payments constitute recurrent remuneration of employment within the meaning of Article 15, para. 1 OECD-MA for which the country in which the work was carried out has the right of taxation. Conversely, non-recurrent pension-type payments which are paid upon termination of an employment relationship instead of an occupational pension are covered by Article 18 OECD-MA (BFH judgement of 19 September 1975, BStBl 1976 II p. 65).
- 124 In exceptional cases, a lump-sum settlement may also constitute a pension within the meaning of Article 18 OECD-MA. Distinction between remuneration under Article 15 and Article 18 OECD-MA depends on the reason for payment, not the time of payment. A retirement pension exists if a recurrent pension payment is capitalised and paid out as a lump sum (BFH judgement of 19 September 1975, BStBl 1976 II p. 65).

- 125 Reference is made to the mutual agreement procedure with Switzerland of 13 October 1992 (BMF letter dated 20 May 1997, BStBl I p. 560) for the tax treatment of lump-sum settlements in accordance with DBA-Switzerland.

#### **6.4 Non-competition clause**

- 126 Remuneration paid to the employee due to a non-competition clause is governed by Article 15 OECD-MA. The work, or desistance from work, takes place in the State in which the employee is present during the validity of the clause. If the employee spends time in several States in this period, the payment must be apportioned accordingly.
- 127 The BFH judgements of 9 September 1970, BStBl II p. 867 and of 9 November 1977, BStBl 1978 II p. 195 are obsolete in this respect. In its ruling of 12 June 1996, BStBl II p. 516, the BFH assumes that the payments for a non-competition clause relate to the future. Furthermore, in its ruling of 5 October 1994, BStBl 1995 II p. 95, the BFH rejected the notion of a place or work irrespective of the physical presence of the employee.

#### **6.5 Bonuses and other performance-related payments for the year**

- 128 Irrespective of the date of accrual, subsequent performance-related remuneration must be apportioned in accordance with the circumstances in the period for which it is granted (BFH judgement of 27 January 1972, BStBl II, p. 459) and, if applicable, exempt from tax in Germany in accordance with §50d, para. 8 EStG, and the progression proviso.

#### **6.6 Stock options**

- 129 The monetary advantage from the grant of stock options must be attributed to the income from employment in accordance with Article 15 OECD-MA. Notwithstanding this, the income which the employee generated from exercising his stock option arising from his holding or from subsequent disposal must be assessed separately.
- 130 A distinction must be made between tradable and non-tradable stock options when they are granted. A stock option is tradable if it can be traded on a stock exchange. Whether the stock option is transferable or heritable under the stock option conditions or whether it is subject to a period of embargo is irrelevant to the distinction. A stock option can be granted directly by the employer or by an enterprise associated with the group. The fact that the benefit bestowed by the third party represents salary to the employee for his work for his employer and, from the point of view of the benefactor, is bestowed in connection with said employment relationship, is crucial (BFH judgement of 24 January 2001, BStBl II p. 509).

##### **6.6.1 Tradable stock options**

- 131 The employee derives a monetary advantage from the grant of tradable stock options. This is usually granted as remuneration for work carried out in the past. The monetary advantage must thus be attributed in accordance with the circumstances at the time at which it is granted, irrespective of the time of accrual. The advantage may thus be exempt pro rata from tax in Germany, in accordance with §50d, para. 8 EStG, and the progression proviso.

## 6.6.2 Non-tradable stock options

- 132 If, within the scope of his employment relationship, an employee is granted a non-tradable stock option for the subsequent acquisition of shares at a specific purchase price, this represents the grant of an opportunity. A monetary advantage does not accrue to the beneficiary until he actually exercises the option and the quoted value of the shares exceeds the purchase price (BFH judgement of 24 January 2001, BStBl II pp. 509 and 512). The earliest possible time of exercise of the stock option is thus immaterial (BFH judgement of 20 June 2001, BStBl II p. 689). The monetary advantage is determined from the difference between the quoted value upon actual exercise of the right and the preferential price paid by the employee.
- 133 A non-tradable stock option is usually granted not to remunerate work done in the past but to create an additional performance incentive for the future. The option thus represents remuneration for the period between the grant and the earliest possible exercise of the stock option by the employee. Should the income earned by the employee in the specified period from employment abroad be tax-exempt in Germany under a DBA, the monetary advantage accruing even on actual exercise of the stock option must be apportioned to the period between the grant of the stock option and the time of the earliest possible exercise, and exempted from tax in Germany pro rata in accordance with §50d, para. 8 EStG and the progression proviso.
- 134 Should the employee already be retired at the time of the earliest possible exercise of the stock option, apportionment of the monetary advantage must be based only on the period from the grant of the stock option to the end of active employment. Insofar as the employment relationship is ended for other reasons prior to the earliest possible exercise of a stock option, the period from the grant of the stock option until the employee leaves the employment relationship determines apportionment of the monetary advantage.
- 135 The above applies notwithstanding a change in the tax liability of the employee during the specified period.
- 136 From a financial point of view, remuneration from options which are intended not for the acquisition of shares but payment of a monetary amount depending on a price development (so-called virtual share options represents remuneration for work carried out in the past. The above applies analogously.

## 6.7 Progressive retirement in accordance with the "block" model

- 137 Under certain conditions, employees have the option of halving their working time within the scope of the [German] Progressive Retirement Act. The so-called block model provides for a phase of full-time work (working phase) followed by an equally long phase of exemption from work. The employment relationship continues until the end of the exemption phase. The employer pays the employee a salary for the work done. This is increased by the bonus amount. The employee acquires entitlement to payment of a salary during the exemption phase by the work he does in the periods of full-time work.
- 138 The remuneration and bonus represent remuneration during the work and exemption phases, to which the DBA stipulations apply in accordance with Article 15 OECD-MA. The exemption phase uniformly constitutes a period of subsequent payment of salary. This must be apportioned to the State of residence and the State in which the work is carried out during the work phase, in accordance with apportionment of the remuneration.

139

Example 3:

Background situation: Employee A works for his employer B, which is domiciled in Germany. Progressive retirement in accordance with the block model is agreed between A and B for 2001 and 2002, i.e. the first year consists of the work phase and the second year the exemption from work phase.

Case 1:

In 2001, A works in Korea for 60 agreed working days in a permanent establishment of many years' standing belonging to his employer. The permanent establishment pays his salary during this period. A works in Germany for the other 180 agreed working days. A retains his residence in Germany. A spends all of the exemption from work phase in Germany.

In 2001, 60/240 of his remuneration is taxable in Korea, the State in which the work is carried out, as the condition of Article 15, para. 2c DBA-Korea was not fulfilled. Germany exempts such remuneration from tax, in accordance with §50d, para. 8 EStG and the progression proviso (Article 23, para. 1a DBA-Korea). The remaining 180/240 of the remuneration is taxable in Germany. 60/240 of A's remuneration in 2002 is taxable in Korea and 180/240 in Germany, in accordance with the apportionment during the work phase.

Case 2:

A is resident in Denmark during the work phase and during the exemption from work phase within the meaning of the DBA-Denmark. He works exclusively in Germany during the work phase.

As A spent more than 183 days in Germany in 2001, the full remuneration is taxable in Germany, the State in which the work is carried out (Article 15, para. 1 DBA-Denmark).

The right of taxation in the exemption from work phase corresponds to the apportionment between the State of residence of A and the State in which the work is carried out during the work phase. Accordingly, only Germany has the right of taxation, including in 2002.

Case 3:

In 2001, A has his residence in Germany and also works exclusively in Germany. A moves to Spain at the beginning of 2002.

A has unlimited tax liability in Germany in 2001. A DBA case does not exist. In 2002, only Germany has the right of taxation, as the work was carried out in Germany in 2001 (Article 15, para. 1 DBA-Spain).

## 7. Specific features in the case of professional drivers

### 7.1 General

140 Professional drivers are present in or at their vehicle while carrying out their work. The vehicle is therefore their ordinary place of work. The place in which a professional driver carries out his work depends on the place in which the vehicle is present or is travelling. Professional drivers within the meaning of this document include delivery drivers, but not commercial travellers. Journeys between the driver's place of residence and the site of the vehicle are not included in the professional activity of the professional driver within the meaning of the DBA.

### 7.2 The professional driver and employer are domiciled in Germany; the salary is not borne by a foreign permanent establishment

141 The scope of application of the DBA is not affected insofar as the remuneration from employment applies to work carried out by the professional driver in Germany. The professional driver's remuneration is subject to unlimited income tax in Germany.

142 Insofar the professional driver carries out his work in another State, the question of in which of the two Contracting States the income earned abroad is taxable must be considered on the basis of the 183-day clause.

143 The 183-day period must be calculated separately for each Contracting State. Contrary to the stipulations of no. 4.2.2, the driving work carried out by a professional driver also entails days

spent in transit through a State being taken into account as full days spent in said State in calculation of the 183-day period. Should the driver cross several States in one day, said day counts as a full day of presence in each of such States for the purposes of determining the 183-day period.

144 The statements under nos. 5.2 to 5.5 apply analogously to apportionment of the salary.

145

Example:

Professional driver A who is resident in Munich begins his journey on Monday morning in Munich and drives through Austria to Italy. He returns from there via Switzerland to Munich on the same day.

Days spent by professional drivers in transit must be taken into account as full days spent in the respective State, so one day must be counted each for Austria, Italy and Switzerland for determining the 183-day period.

### **7.3 The professional driver is resident in Germany; the employer is domiciled abroad or the salary is paid by a foreign permanent establishment**

146 In cases in which the professional driver is resident in Germany but his employer is domiciled in the other Contracting State, his remuneration from employment is taxable in Germany, insofar as it relates to his work in Germany.

147 Insofar as the professional driver carries out his work in the State in which the employer is domiciled, application of Article 15, para. 2 OECD-MA is precluded, as the conditions of Article 15, para. 2b OECD-MA are not fulfilled. Each time a professional driver works in the State in which the employer is domiciled, tax is payable in said State, as the State in which the work is carried out (Article 15, para. 1, OECD-MA).

148 If the professional driver works in a third State, i.e. neither in Germany nor in the State in which the employer is domiciled, remuneration paid for work carried out in the third State is taxable in Germany, as the State in which the professional driver is resident, in the proportion to the work carried out in the State in which the employer is domiciled (Article 21, para. 1 OECD-MA). If there is a DBA with the respective third State, it must be considered which State has the right of taxation in relation to said State under said DBA. Insofar as the work is carried out on no more than 183 days in the respective third State, Germany usually retains the right of taxation. Article 15, para. 2b and Article 23, para. 2 DBA Norway constitute an exception.

149 The above apply analogously to cases in which the employer is resident in Germany and the remuneration is paid by a permanent establishment abroad, cf. no. 4.4.

150 Reference is made to the mutual agreement with Luxembourg of 8 March 2005, BStBl I p. 696.

151

Example:

A, who is resident in Germany, works as a professional driver for his employer, domiciled in Austria. In 2001, A worked in Germany throughout the year. A spent only two working days in Austria and two working days in Italy. A is not a cross-border commuter within the meaning of Article 15, para. 6 DBA-Austria.

The remuneration for work carried out on working days on which A worked in Germany is taxable in Germany as the State in which A is resident (Article 15, para. 1, DBA-Austria). Remuneration for work carried out on working days spent in Italy is also taxed in Germany, as A did not spend more than 183 days in Italy (Article 15, paras. 1 and 2, DBA-Italy). On the other hand, the remuneration for work carried out on working days on which A worked in Austria is taxable in Austria (Article 15, para. 1, DBA-Austria). German exempts such income from tax, in accordance with §50d, para. 8 EStG and the progression proviso (Article 23, para. 1 DBA-Austria).

#### **7.4 Special stipulation in DBA-Turkey**

- 152 Notwithstanding the above, remuneration from employment carried out on board a road vehicle in international traffic is taxable in the Contracting State in which the registered office of the enterprise is situated, under Article 15, para. 3 DBA-Turkey.

#### **8. Staff on ships and aircraft**

- 153 Treaties usually contain special provisions in accordance with Article 15, para. 3 OECD-MA on the remuneration of staff on board a ship or aircraft in international traffic or aboard a boat engaged in inland waterway transport. Such remuneration is taxable in the Contracting State in which the place of effective management of the enterprise which operates the ship or aircraft is located.
- 154 Notwithstanding this, DBA-Liberia and DBA Trinidad and Tobago do not expressly stipulate apportionment of the right of taxation of remuneration from employment of staff on board ships and aircraft. The general stipulations of Article 15, paras. 1 and 2 DBA-Liberia or of Article 15, paras. 1 and 2 DBA-Trinidad and Tobago are thus applicable. Insofar as a ship sailing under the Liberian flag or the flag of Trinidad and Tobago, on the sovereign territory of Liberia or of Trinidad and Tobago or on the high seas, Liberia or Trinidad and Tobago is to be regarded as the State in which the staff on board the ship is working. Such remuneration is thus taxable in Liberia or Trinidad and Tobago. However, Liberia does not exercise its right of taxation (see also no. 3.3 of the BMF letter of 21 July 2005, BStBl I p. 821).

#### **9. Reversionary clauses**

- 155 To prevent remuneration not being taxed in either Contracting State, some treaties contain clauses which are intended to guarantee taxation in at least one of the two States. Such clauses have different forms in the treaties, but are primarily "subject to tax" or "remittance base" clauses.

##### **9.1 "Subject to tax" clause**

- 156 In some conventions, it is generally stipulated that remuneration for the purposes of the DBA is only deemed to originate from the other Contracting State if it is taxed there. If this is not the case, the right of taxation reverts to the State of residence. If Germany is the State of residence in such cases, the remuneration will not be tax-exempt in Germany. Under the BFH judgement of 17 December 2003, BStBl 2004 II p. 260, the "subject to tax" clause must be applied to income from employment under the following DBAs only:

Para. 16d of the Protocol to DBA-Italy;  
Article 15, para. 4 DBA-Austria;  
Article 15, para. 4 DBA-Switzerland;  
Article 14, para. 2d DBA-Singapore;

- 157 If the "subject to tax" clause is to be applied, the following applies:

If the remuneration is taxed abroad under the provisions of the DBA, the extent to which it is registered for tax abroad or whether all portions of the income entail a specific obligation to pay tax there within the scope of the foreign assessment, is irrelevant for exemption from German tax (BFH judgement of 27 August 1997, BStBl 1998 II p. 58). Taxation abroad must also be assumed if the foreign tax relates to allowances, or offsetting or deduction of losses, or if the remuneration in question entails negative income when taxed abroad.

- 158 If such clauses exist, the taxpayer must provide evidence within the scope of his increased duty to cooperate under §90, para. 2 AO that the remuneration was taxed abroad. Should such evidence not be provided, the foreign remuneration must be taxed in Germany. Should evidence of taxation be provided later, the income tax advice must be amended under §175, para. 1, sentence 1, no. 2 AO (BFH judgement of 11 June 1996, BStBl 1997 II p. 117).

## **9.2 "Remittance base" clause**

- 159 Under domestic legislation in some States, foreign remuneration of persons resident there may only be taxed there if it is remitted there from abroad or drawn there. Treaties with the UK (Art. II para. 2), Ireland (Art. II para. 2), Israel (Art. 2 para. 2), Jamaica (Art. 3 para. 3), Malaysia (Protocol to the DBA, no. 2), Singapore (Art. 21), Trinidad und Tobago (Protocol to the DBA no. 1a) and Cyprus (Protocol to the DBA no. 2) accordingly make provision for the source state only granting exemption or tax relief insofar as the remuneration as been remitted to the State of residence or drawn there and is thus taxable there. The source State restricts the tax exemption or relief which it is to grant on the remuneration remitted to or drawn in the State of residence. Specific features of the respective differing clauses must be observed.
- 160 Tax exemption also requires evidence of taxation by the foreign State in which the work was carried out in cases of "remittance base" clauses (BFH judgement of 29 November 2000, BStBl 2001 II p. 195).

## **10. Mutual agreements**

- 161 Mutual agreements between the responsible authorities of the Contracting States are not affected by the above stipulations.
- 162 Insofar as double taxation arises through application of the above principles, the party covered by the treaty reserves the right to apply for institution of a mutual agreement procedure (BMF letter of 13 July 2006, BStBl I p. 461).

## **11. Withdrawal of administrative instructions**

- 163 The BMF letters of 5 January 1994, BStBl I p. 11, 5 July 1995, BStBl I p. 373 and 20 April 2000, BStBl I p. 483 (BMF letter on the taxation of salary in accordance with the double taxation treaties; Application of the 183-day clause), and the BMF letter of 13 March 2002, BStBl I p. 485 (BMF letter on the taxation of professional drivers who have a Luxembourg employer and are resident in Germany), are withdrawn.

## **12. Initial application**

- 164 The above stipulations are applicable in all cases which are not yet non-appealable.
- 165 There is no doubt in the cases covered by no. 6.2 that the period between the grant and the actual exercise of stock options is to be assumed as the period of gain if the accrual of the monetary advantage took place prior to 1 January 2006.
- 166 This letter is published in the Federal Tax Gazette.

By order  
Müller-Gatermann