

Permanent Establishment due to Cross-Border Home Office Activities? A look abroad.

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The corona pandemic has kept the world on its feet for more than two years. In addition to the health, social and economic consequences, the corona pandemic has also had a significant impact on the world of work. Since the outbreak of the pandemic, for example, the terms *remote working* or *home office* have been on everyone's lips and are now an integral part of companies all over the world. This is reason enough to take a look at the tax consequences at home and abroad.

From a tax perspective, the question arises in particular as to whether the exercise of a permanent, cross-border home office activity, i.e. working in a home office abroad, leads to a – generally undesirable – permanent establishment of the employer abroad for income tax purposes.

At the beginning of the corona pandemic, the Federal Republic of Germany concluded so-called consultation agreements with some neighboring countries (Switzerland, Austria etc.) in order to avoid negative tax consequences for taxpayers. In addition to simplification regulations for cross-border commuters, for example, the consultation agreements also contained clarifications on the cross-border home office activities of employees.

In this context, the consultation agreements stipulated in particular that an employee who only carries out activities in the home office due to the measures to combat the corona pandemic does not regularly establish a permanent establishment for income tax purposes for the employer within the meaning of the respective double taxation treaty.

However, the above-mentioned consultation agreements expired with effect from June 30, 2022 and are therefore no longer applicable. The question now arises as to how the individual states will deal with the issue of home offices and permanent establishments for income tax purposes in the future. Accordingly, it is worth taking a look at other European countries and the existing regulations there.

The majority of European countries seem to take a rather strict line in this respect. For example, Denmark, Greece and some Eastern European countries assume under certain conditions, e.g. if the home office activity is of a certain duration, that employees working in a foreign home office establish a permanent establishment of the employer abroad.

In Switzerland, meanwhile, an opposite trend is emerging. The Swiss Tax Conference recently published its opinion regarding the establishment of a permanent establishment through a home office. It is of the opinion that a permanent establishment does not exist if an employee pursues a home office activity in a canton other than that of the employer. It remains to be seen and hoped that this opinion will have a signal effect also on cross-border situations.

In addition, a positive trend is also emerging in Austria. In a recent ruling, the Austrian Supreme Administrative Court had to decide when the employer has the power to dispose of a fixed place of business. Based on the ruling, it is to be hoped that the Austrian tax authorities will change their view on the subject of home offices and permanent establishments in the future and will no longer assume a permanent establishment in these cases.

If the conditions for a permanent establishment for income tax purposes are met, this leads to a considerable administrative effort for the company. For example, the domestic company must register abroad for income tax purposes and file tax returns. For this purpose, the foreign permanent establishment profit must be carefully determined. Otherwise, there is a risk of double taxation and significant additional tax burdens. In addition, there may also be effects on wage tax and social security.

Due to the complexity and the different legal interpretations of the respective countries, it is always advisable in such cases to carry out a full examination of the tax consequences in the countries involved in advance.

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