

INCOME TAX DEDUCTION FOR EMPLOYEES NOT CONTINUOUSLY WORKING IN GERMANY -

Changes in the German Income Tax Regulations (Lohnsteuerrichtlinie - LStR) as of 2023



Somewhat concealed in the Income Tax Regulations 2023 is a change in the administrative opinion regarding the calculation of income tax deduction for employees who are not continuously working in Germany. Specifically, this concerns the question of which income tax table should be used to calculate the income tax in the case of temporary employment in Germany (R 39b.5 para. 2 LStR 2023).

If an employment relationship does not exist throughout a full month, the income received during this period is to be converted to the individual calendar days. The income tax results from the amount of the income tax day table multiplied by the number of calendar days. For tax purposes, these cases are referred to as a partial income payment period. The application of the daily income tax table results in a higher tax burden than the application of the monthly income tax table.

If the employee was only temporarily at work in Germany during a calendar month, working days falling within the income payment period for which the employee did not receive taxable wages were previously also to be counted if the employment relationship continued (R 39b.5 para. 2 sentence 3 LStR 2015). According to the previous administrative interpretation, no partial income payment period resulted for income tax purposes if an employee either starts or stops doing work abroad (work that is tax-exempt under a double taxation agreement or under the *Auslandstätigkeitserlass* (Foreign Employment Decree)) for his employer in the course of the month, or if he works part of the time in Germany and part of the time abroad during the income payment period.

Effective 2023 - despite the unchanged legislative situation - working days on which the employee received wages not subject to domestic income tax deduction should no longer be counted when calculating the income payment period (e.g. receipt of tax-exempt income under a double taxation agreement or employment in Germany on a daily basis only). This means a considerably higher income tax burden for the persons concerned, for which no legal basis is apparent in view of the, in our opinion, unambiguous wording of the law in § 39b (2) sentence 1 of the German Income Tax Act (*Einkommensteuergesetz* – EstG).



As an example, a pro rata taxable salary in Germany of EUR 1,000 based on 5 working days per month will result in a tax burden of approx. EUR 225 as of 2023. Under the previous regulation applicable until 2022, the income tax based on the monthly table would have amounted to EUR 0.

For individuals with a limited tax liability, given the basic settlement effect of the withholding, this higher tax burden will also be – in many cases - permanent in the end. For EU/EEA nationals who are resident or ordinarily resident in one of these states, an application assessment can be carried out, but this again involves greater time and effort. Moreover, an application assessment would also lead to the fact that the tax-exempt foreign income would have to be taken into account within the framework of the so-called progression proviso (determination of the applicable tax rate). The regulations also apply to taxpayers with unlimited tax liability. However, these are likely to have already made an assessment in the past, into which the higher income tax deduction will then flow in the future and be offset accordingly.

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Notwithstanding the shortage of skilled workers, the higher tax burden does not contribute to Germany's appeal as a favorable location on the labor market. Certain disputes between employers and employees cannot be ruled out.

Since the new regulation cannot be derived from the relevant legislation in this context, it may well be possible to continue to calculate the income tax on the basis of the monthly table, as has been the case to date, if the amounts involved are large enough. However, the tax office would have to be informed of this deviation from the LStR 2023. Since the tax office is unlikely to follow this due to the self-imposed obligation of the tax authorities under the LStR, an appeal would have to be lodged against a corresponding decision by the tax authorities and legal action would also have to be considered.

If the income tax is to be determined on the basis of the daily table, as now advocated by the tax authorities, a decision would have to be made as to whether the employee is to bear the income tax incurred himself or whether the employer is to assume this (net income agreement for German working days) and thus take on a corresponding additional burden. In this respect, it would have to be examined whether and how the employment contracts would have to be amended.

Please do not hesitate to consult your BDO contact person on this subject. The specialists of the Department of income tax & international personnel deployment are also available to assist you with the necessary considerations and provide support in the implementation of the measures taken.

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