Wage Tax: German Daily Wage Tax Approach Creates Double Taxation Risk for Employees of French Permanent Establishments with German Head Offices

Germany requires daily wage tax withholding for employees of French permanent establishments with a German head office when performing work in Germany

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Background

Short-term international business travel by employees, e.g. for training purposes, are generally taxable only in the employee's country of residence, provided that:

- the employee spends no more than 183 days in the foreign country within the year,
- the **employer is not resident in the host country**, and
- the wage is not paid by a permanent establishment which the employer has in the foreign country.

> *Example: A French employee of a French-resident company spends limited number of workdays in Germany at another group entity. His wage typically remains taxable in France.*

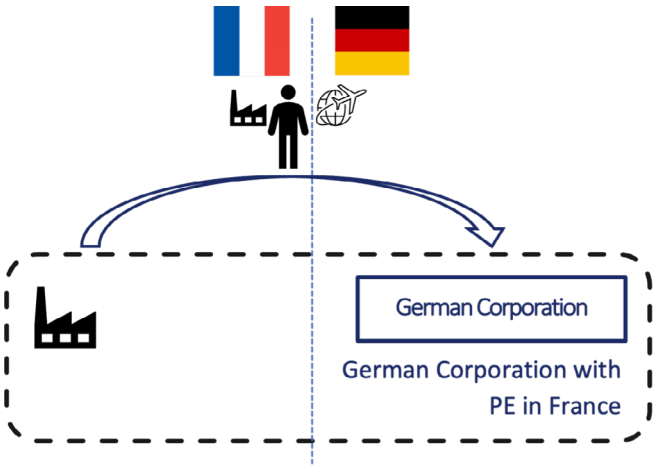
For the vast majority of employees, their country of residence will correspond with the employer's residence.

Employees of foreign (French) permanent establishments with a German head office: Daily wage tax withholding in Germany required

An exception applies where employees of French permanent establishments (PEs) with a German head office exercise their employment in Germany. According to the German tax authorities and the *Bundesfinanzhof* (highest tax court in Germany), wage tax must be withheld on a **daily basis** where this applies. With its recent ruling (case VI R 25/22), the *Bundesfinanzhof* states that a PE cannot be considered as an employer for wage tax matters. The Authorized OECD Approach (AOA) – whereby PEs should be considered as separate and independent enterprises – does not apply for the sake of wage tax matters. As a result, employees from French PEs with a German head office travelling to Germany **exercise their employment in their employer's country of residence**, and the related wage becomes taxable in Germany.

Unclear French position: No administrative guidance or case law

In the absence of administrative guidance or relevant French high-court decisions, the wage tax implications for French-German cross-border permanent establishment structures remain uncertain and come with potential double taxation risk. From a French perspective, the application of Article 13



(4) of the French–German Double Tax Treaty (aligned with Article 15 (2) of the OECD Model Tax Convention) depends largely on the interpretation of the term "employer" within the meaning of sub-paragraph (b).

In line with the OECD Commentary on Article 15, French tax practice tends to favour an analysis based on economic substance rather than solely on formal or contractual criteria. The employer may therefore be identified by reference to the unit that 1) exercises effective authority and controls over the employee's work, 2) bears the related risks and responsibilities, and 3) derives the economic benefit from the services performed. At the same time, this approach does not automatically exclude a more formal interpretation, particularly where the economic indicators are not clearly aligned.

Although a permanent establishment cannot qualify as a tax resident employer under French tax law, French tax authorities often apply a substance-over-form analysis in cross-border situations involving permanent establishments. However, in the absence of published administrative guidance or a decision of the *Conseil d'État* (highest tax court in France) on this specific issue, the French position cannot be regarded as settled. A decision of the Paris Administrative Court of Appeal dated 10th June 2022 (No. 21PA01586), which does not constitute a leading precedent, illustrates that French courts may rely on the economic and functional reality of the employment relationship when determining the employer for treaty purposes. Nevertheless, this case law does not preclude alternative interpretations in different factual circumstances.

Overall, in the current state of French law, the identification of the employer under Article 15(2) OECD remains open to interpretation and may reasonably be assessed in more than one way, depending on the specific facts and the weight given to economic versus formal criteria.

Next steps for employers

Given the increased uncertainty for German–French cross-border scenarios, employers should reassess short-term travel patterns, payroll set-ups, and documentation processes. Our team is available to support you in analyzing your current structures, identifying potential exposure areas, and implementing compliant wage tax withholding procedures.