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Change of Practice in Determining Tax Residency Status of Taxable Persons

Tax residency status under Slovene Personal Income Tax Act (ZDoh-2) vs tax residency status under Double Taxation Avoidance Agreement (DTAA)

As a consequence of the judgment of the Supreme Court No X Ips 124/2015 of 11 June 2015, establishing administrative case-law practice that differs from the current one, it is important to distinguish between determining the tax residency status for the purposes of the Slovene Personal Income Tax Act (ZDoh-2) and enforcing the rights under applicable Double Taxation Avoidance Agreements (DTAAs). However, under the new practice, the Tax Authorities shall determine the person's tax residency status based solely on local legislative provisions, i.e. the Personal Income Tax Act.

Taxable persons are taxed depending on their status in a particular country – they can be considered either tax residents or tax non-residents for tax purposes. Tax residents are subject to taxation on their worldwide income (income obtained in home country and abroad), whereas non-residents are taxed based on income obtained in the state of source. The abovementioned judgment thus has a significant impact on the conduct of proceedings for determining the tax residency status of taxable persons.

In line with the previous practice, the Tax Authorities determined a person's tax residency status by taking into account the provisions of the Personal Income Tax Act as well as the DTAA rules, based on which a decision regarding the person's tax residency status has been issued. Up until now, these decisions have been issued in advance for a pre-determined tax period, i.e. on arrival of a taxable person in Slovenia or at taxable person's departure from Slovenia.

In its judgment No X Ips 124/2015 of 11 June 2015, the Supreme Court took the view that Tax Authorities shall not determine a person's tax residency status for the purposes of DTAA in advance. With this ruling, the Supreme Court departed from its position adopted in judgment No X Ips 27/2014 (delivered in March earlier this year), on the grounds that, from the perspective of DTAA application, this is not a preliminary question for Tax Authorities to resolve by issuing a legally binding decision determining the resident's tax residency status. In practical terms, this means that the decision on tax residency status shall from now on be based solely on the provisions of local legislation, i.e. on the provisions of the Personal Income Tax Act. **An individual is considered a tax resident of Slovenia if fulfilling one of the conditions laid down in Article 6 of the Personal Income Tax Act** (i.e. has a permanent domicile or a habitual abode or the center of vital interests in Slovenia or is present in Slovenia in total more than 183 days in whichever time in a tax year)**. The rights under DTAA, on the other hand, may only be implemented with regard to a specific income that a taxable person is about to receive and at a time when such income is received or declared.**

According to the interpretation given by the Court, enforcing the rights set out in Double Taxation Avoidance Agreements constitutes only a taxable person's right and not an obligation, meaning that a taxable person or the payer of the tax shall enforce his/her rights set out in the Double Taxation Avoidance Agreement upon filing his/her tax return or receiving an income, namely by submitting a relevant request (Article 260 or Article 264 of the Tax Procedure Act (ZDavP-2)). It follows from the

publication of data on the Tax Authorities' website that a taxable person is entitled to exercise the rights under DTAA in relevant procedures relating to the tax assessment for advance tax or the annual tax assessment, namely by indicating the relevant provision of the DTAA in the tax assessment for advance tax or the annual tax assessment under the relevant heading, which will prevent the taxable person to be considered a tax resident of two contracting states at the same time – in conjunction with the provision setting out the right to tax the type of income in the assessment.

So far, we understand that in practice, Tax Authorities shall decide on a case-by-case basis upon filing an income tax return whether a taxable person shall be considered a tax resident of Slovenia or of a foreign country based on the tie-breaker rules of the applicable DTAA (concluded between the two states of residence), i.e. by taking into account the actual income received. At this point, a taxable person will have the right to enforce his/her rights under the DTAA provided that he/she obtains a tax residence certificate of a foreign country and other supporting documentation which proves his/her residency status in a foreign country under DTAA (a habitual abode, personal and economic relations in a foreign country etc.). The decision-making practice within which the Tax Authorities would at the same time decide on the residency status for the purposes of DTAA and on tax assessment has not yet been established.

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