**INTERNATIONAL TAXATION**

**Tax paid retrospectively by posted workers on income from employment abroad**

**Detailed description**

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1.0 WORKING WITH POSTED WORKERS ABROAD

Where Slovenian undertakings provide services using posted workers (residents and non-residents) in other countries, due regard must also be paid to the provision of Article 15 of the [international treaties on the avoidance of double taxation](https://www.fu.gov.si/davki_in_druge_dajatve/podrocja/mednarodno_obdavcenje/#c78) (hereinafter: international treaties), which govern the right to tax income from employment.[[1]](#footnote-1)

The provision of Article 15 of an international treaty gives the right to tax income from employment either solely to the income recipient’s country of residence or to both countries, i.e. the country in which the employment takes place and the country of residence. In the latter case, the country of residence is obliged to ensure that double taxation is eliminated.

More information on the taxation of posted workers’ income from employment can be found in the detailed descriptions [Taxation of income from employment under international treaties](https://www.fu.gov.si/davki_in_druge_dajatve/podrocja/mednarodno_obdavcenje/#c4654) and [Tax treatment of income of workers posted abroad](https://www.fu.gov.si/davki_in_druge_dajatve/podrocja/dohodnina/dohodnina_dohodek_iz_zaposlitve/#c4620).

1.1 Taxation of income from employment earned by Slovenian residents in another country for a Slovenian employer (posting abroad)

Article 15(1) of an international treaty lays down the basic rule concerning the taxation of income from employment, and the second paragraph provides for exceptions to the basic rule. Under the first paragraph of that article, income from employment is taxed solely in the employee’s country of residence, unless the employment takes place in the other contracting state. If the employment takes place in the other contracting state, the income may be taxed in the country in which the employment actually takes place. The second paragraph provides that, without prejudice to the provisions of the first paragraph, income received by a resident of a contracting state from employment that takes place in the other contracting state is only taxed in the former if:

1. the recipient is present in the other country for a period or periods not exceeding 183 days in any 12‑month period starting or finishing in the relevant tax year;
2. the remuneration is paid by or on behalf of an employer that is not a resident of the other country; and
3. the remuneration is not paid by the permanent place of business of the employer in the other country.

If all the above conditions of Article 15(2) of an international treaty are cumulatively fulfilled, tax is payable on the income from employment in the country of residence or where the person is resident (i.e. in Slovenia). If one of the conditions is not met, that income is taxed in the country in which the employment takes place, in accordance with the national legislation of that contracting state. In this case, Slovenia, as the country of residence, is obliged to ensure that double taxation of income is eliminated, and to take the appropriate steps set out in the international treaty to eliminate double taxation.

In this case, the Slovenian employer paying the income from employment is classed as the payer of tax in accordance with Article 58 [of the Tax Procedure Act (ZDavP‑2)](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703), and is therefore obliged to calculate and pay the income tax prepayment as withholding tax in the withholding tax return (REK form).

If in this specific case the conditions laid down in Article 15(2) of the international treaty are cumulatively met, the income from employment is taxed solely in the employee’s country of residence (i.e. in Slovenia). In that case, any tax paid abroad on such income cannot be taken into account as a deduction in the withholding tax return; a taxable person may therefore request a refund of the foreign tax from the competent tax authority abroad.

However, if the conditions set out in Article 15(2) of an international treaty are not cumulatively met (e.g. the recipient is present in another country for more than 183 days in the relevant period or their remuneration is paid by a permanent place of business operated by the Slovenian employer in the other country), the basic rule laid down in Article 15(1) of an international treaty, which provides that income may be taxed in the country in which the employment actually tales place, is taken into account when determining the right to tax income from employment. As a result, Slovenia, as the country of residence, is obliged to ensure that double taxation is eliminated through an appropriate method laid down in the international treaty. In this case, due regard is paid to Article 293 of the [ZDavP-2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703), which provides that where the income tax prepayment on the **resident’s** employment income is calculated by the payer of the tax, that payer may, in the withholding tax return for income from employment, claim a tax deduction of tax paid abroad or an exemption when the withholding tax is being calculated, subject to the payer possessing the relevant supporting evidence regarding the tax liabilities of the resident taxable person outside Slovenia, particularly regarding the amount of the tax paid abroad and the basis for the payment of tax. Documents issued by the tax authority of the foreign country, or other documents that clearly prove the existence of the tax liability or the payment of tax outside Slovenia, will be considered to be relevant supporting evidence. It should also be noted that Article 293(2) of the [ZDavP‑2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703) provides that, without prejudice to the first paragraph of that article, the payer of tax’s tax deduction or exemption in relation to the tax paid abroad is recognised when the annual income tax is being calculated and adjusted only if the payer of tax claims the tax deduction of the tax paid abroad and the exemption in the objection to the provisional income tax statement or in the income tax return in accordance with Articles 273 and 274 of the [ZDavP‑2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703).

1.2 Taxation of income from employment earned by non-residents in another country for a Slovenian employer

Under Article 15(1) of the international treaty concluded with the income recipient’s country of residence, income from employment is taxed solely in the employee’s country of residence, unless the employment takes place in the other contracting state. This means that the right to tax income from employment is:

* the exclusive right of the income recipient’s country of residence when the employment does not take place in the other contracting state (i.e. Slovenia);
* the right is held by both contracting states, i.e. the source country (the country where the employment takes place) and the country of residence, which means that the income recipient’s country of residence must apply an appropriate method for eliminating double taxation.

Since in this specific case the resident of the other contracting state is carrying out work for a Slovenian undertaking in the territory of another country (i.e. not in Slovenia), the income recipient’s country of residence has the exclusive right to tax that income.

In this case, the Slovenian employer paying the income from employment is classed as the payer of tax in accordance with Article 58 [of the ZDavP‑2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703), and is therefore obliged to calculate and pay the income tax prepayment as withholding tax in the withholding tax return (REK form).

Non-resident income recipients who wish to benefit from international treaties (i.e. exemption from making an income tax prepayment in Slovenia) must submit to the payer of tax (payer of the income) a completed [Request for exemption from the payment of tax on income from employment (except pensions) under the provisions of the international treaties on the avoidance of double taxation (KIDO 5)](https://edavki.durs.si/EdavkiPortal/OpenPortal/CommonPages/Opdynp/PageD.aspx?category=zmanjsanje_oprostitev_fo) before the income is paid. The payer of tax submits a completed request to the competent tax authority, but does not calculate or withhold the tax on the income paid until a verified request from the tax authority is received. If the income tax has already been charged despite the exemption referred to in the international treaties, the income recipient may file a [Request for a refund of tax on other incomes under the provisions of the international treaties on the avoidance of double taxation (KIDO 12)](https://edavki.durs.si/EdavkiPortal/OpenPortal/CommonPages/Opdynp/PageD.aspx?category=vracilo_fo) with the tax authority. The tax will be refunded on the basis of that request. Confirmation that the income recipient is a resident of the other contracting state forms an integral part of the KIDO 5 or KIDO 12 form. The confirmation is issued by the competent authority of the income recipient’s country of residence.

2.0 RETROSPECTIVE PAYMENT OF TAX ON INCOME FROM EMPLOYMENT ABROAD BY POSTED WORKERS

It is frequently the case in practice that Slovenian undertakings pay tax on income from employment for workers (both Slovenian residents and non-residents) who have been posted to work in another country (e.g. Germany) in past periods retrospectively in the other country after they have paid the salary and the income tax prepayment and submitted the withholding tax return (REK-1 form) to the Financial Administration.

The foreign tax authority often subsequently finds that the conditions of an international treaty for exemption from tax in the country of posting were not fulfilled in certain past periods (e.g. the conditions of Article 15(2) of an international treaty were not cumulatively met,[[2]](#footnote-2) because the workers were present in the other country for more than 183 days during the relevant period, or the Slovenian employer had a permanent place of business in the other country at the time the services were provided using the posted workers). Consequently, the foreign tax authority subsequently assesses the tax on employment income of workers who have worked in the territory of that other country in past periods.

This leads to a situation where the Slovenian undertaking has originally paid Slovenian income tax (prepayment) on the income from employment paid to posted workers, and retrospectively paid the foreign income tax in full.

However, in such cases where tax has been paid abroad retrospectively by the Slovenian employer (payer of tax), that employer cannot correct the REK‑1 form because the calculation of the income tax prepayment was correct at the time when income was paid (calculated).

Article 293 of the [ZDavP‑2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703) governs the claiming of a deduction of tax paid abroad or the claiming of an exemption from withholding tax. The first paragraph provides that where the prepayment of income tax on a resident’s income from employment is calculated by the payer of tax in the withholding tax return, an exemption or a deduction in relation to tax paid abroad may be claimed, without prejudice to Articles 273 and 274 of the act or to the law governing taxation, when calculating the withholding tax, provided that the payer of tax has adequate supporting evidence regarding the tax liability of the resident taxable person outside Slovenia, in particular the amount of tax paid abroad and the basis for payment of the tax.

With regard to the provision of Article 293(1) of the [ZDavP‑2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703), an employer that is a payer of tax may take into account the deduction of tax paid abroad or the exemption when calculating the withholding tax only if it has adequate supporting evidence of payment of tax abroad at the time the salary was paid.

Since the payer of tax (employer) abroad cannot count the retrospective tax paid on behalf of the worker as a deduction from the salary paid, they may recover it from the worker, or the tax thus paid can be treated as income of the worker for tax purposes as income from an employment relationship.

The following describes how tax paid abroad is taken into account from the point of view of a posted worker who is classed as a resident of Slovenia and a worker classed as a non-resident of Slovenia under the [Income Tax Act (ZDoh‑2)](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4697).

2.1 Claiming of tax paid abroad by a posted worker who is resident in Slovenia under the ZDoh‑2

Under Article 293(2) of the ZDavP‑2, without prejudice to the first paragraph of that article the taxable person’s tax deduction or exemption in relation to the tax paid abroad is recognised when the annual income tax is being calculated, and adjusted only if the payer of tax claims the tax deduction of the tax paid abroad and the exemption in the objection to the provisional income tax statement or in the income tax return in accordance with Articles 273 and 274 of the ZDavP‑2. The objection or return must be accompanied by credible supporting evidence of the amount of tax definitively and actually paid abroad.

A taxable person (worker posted abroad who is resident in Slovenia) may therefore claim the tax paid abroad in an objection to the provisional income tax statement drawn up and sent by the tax authority for the taxable person no later than by 31 May of the current year for the previous year. If the provisional income tax statement is not delivered to the taxable person by 15 June of the current year for the previous year, the taxable person claims the tax paid abroad in the tax return for assessing income tax, which must be filed by 31 July of the current year for the previous year, or at the latest in an appeal against the decision issued on the basis of the tax return.

A taxable person resident in Slovenia who has already been issued with a final income tax assessment decision for the previous assessment year must submit an application for the reopening of the income tax procedure to the competent tax authority, together with the relevant supporting evidence, in order to claim the tax retrospectively paid abroad. An application for the reopening of the procedure must be filed within six months of the day on which the taxable person was able to present new facts and evidence. The application may be filed within five years of the day the decision was delivered.

2.2 Claiming tax paid abroad by a posted worker who is a non-resident of Slovenia under the ZDoh‑2

A posted worker who is a non-resident of Slovenia may claim a tax refund if Slovenia has concluded an international treaty with their country of residence and the conditions for the tax refund are met on the basis of the provisions of the international treaty in question (i.e. Slovenia has no right to tax the income).

Since in this specific case the resident of the other contracting state is carrying out work for a Slovenian undertaking in the territory of another country (i.e. not in Slovenia), the income recipient’s country of residence has the exclusive right to tax that income. The method of claiming benefits under the international treaties in such cases is described in more detail in point 1.2 above.

A non-resident posted worker may therefore claim a refund of tax charged and paid in Slovenia in previous tax periods on income from employment relating to work performed in the territory of another country in the manner provided for in Article 262 of the [ZDavP-2](http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703) by filing a KIDO 12 claim, while they may claim the tax paid in the other country (i.e. the country to which they were posted) in their country of residence.

1. In some international treaties, income from employment is regulated in Article 14. [↑](#footnote-ref-1)
2. If all the conditions laid down in Article 15(2) of an international treaty are cumulatively met, tax will be payable on the income from employment in the country of residence or the country in which the person is resident. If one of the conditions is not met, that income is taxed in the country in which the employment takes place, in accordance with the national legislation of that contracting state. [↑](#footnote-ref-2)