

Germany: Taxation of Flight and Ship Crews in International Transport

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2023

Introduction (1)

What makes a difference: Being a **Resident** or **Non-Resident** of Germany

- > A natural person with **permanent home** (“**Wohnsitz**”) or **habitual abode** (“**gewöhnlicher Aufenthalt**”) in Germany is **fully taxable** in Germany with the world wide income (=> in the following **with** national tax residence in Germany = ‘**unbeschränkte Steuerpflicht**’).
- > **Without** such **residency** in Germany a person is only liable to tax in Germany with **certain sources** of income from **German territory** (=> **without** national tax residence = ‘**beschränkte Steuerpflicht**’)
- > **Note:** Timing matters when residency is changed within calendar year

Personal criteria:

Permanent home or habitual abode in Germany ?

Income criteria:

Domestic Income as defined in Section 49 EStG ?

Further criteria:

Are the criteria for being treated like fully taxable person are fulfilled § 1 Abs. 3, § 1a EStG ?

Section § 2 AStG applicable ?

Taxation (How):

unlimited

Deemed unlimited (option)

limited

enlarged limited

none

Tax Base (What):

World wide

world wide but basically domestic income

domestic income

(enlarged) domestic income

none

Procedure:

Tax Return, credit for foreign tax possible (basic or marriage tarif)

Tax Return, credit for foreign tax possible (basic or marriage tarif)

Tax return if not deemed taxed due to source tax (only basic tarif)

Tax return if not deemed taxed due to source tax & progression foreign income (only basic tarif)

yes

no

yes

no

yes

no

yes

no

Permanent Home

§ 8 AO

**Habitual Abode**

§ 9 AO

While in the case of residence in Germany, the **permanent home** in Germany forms the center of living, **habitual abode** in Germany indicates a local focus of living, without a location-related home being maintained for it.

A person permanent home where one occupies a dwelling in circumstances which indicate that it will be retained and used as dwelling. Not only as use for visiting and recreational purposes.

Registration of residence is merely an indication.

The concept of home means rooms that are suitable and intended for permanent living ("key power"). The term "home" means rental and owned apartments, houses or even furnished rooms, etc. but usually not hotels, boarding-houses, etc.

Basically, just keeping a room in the parental home is not sufficient for a residence (guest room). Even a postal address in the parental home is not sufficient to justify a place of residence, since in these cases there is no occupancy of the home.

Problem: Always a case-by-case decision based on the individual circumstances of the case.

A person's habitual abode is where one is residing in circumstances which indicate that one is not staying in that place or area only temporarily but permanent.

A continuous stay of more than six months from the beginning in Germany is always a habitual abode.

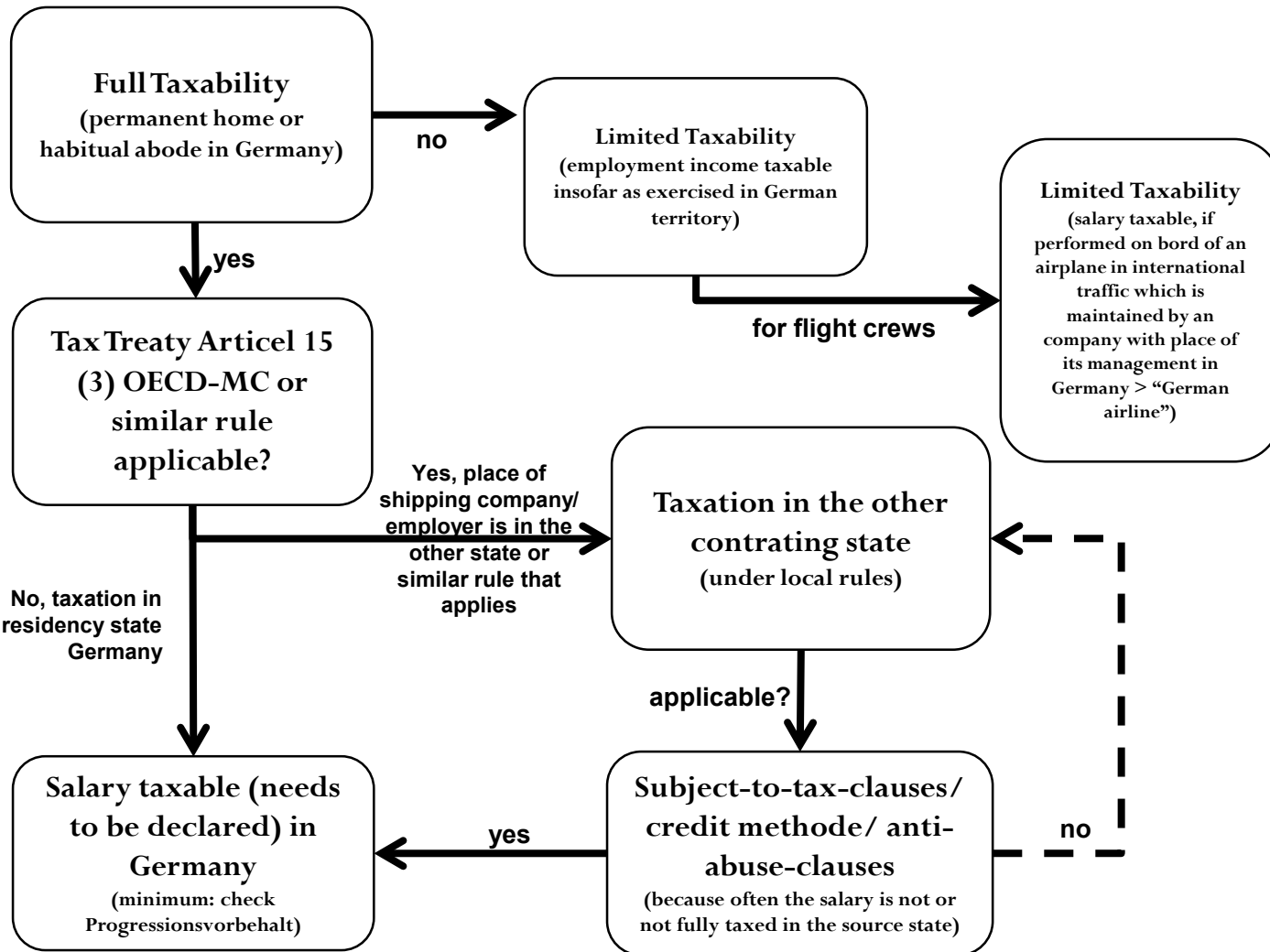
However, it must be a temporally contiguous stay.

Several short-term stays may not be added together when determining the 6 months period.

The assessment of whether there are a series of short stays or only brief interruptions to a long stay must be based on the recognizable intention of the taxpayer.

Problem: Always a case-by-case decision based on the individual circumstances of the case.

[Compare for further details here \(in German\): BMF Amtliches AO-Handbuch \(bundesfinanzministerium.de\)](https://www.bundesfinanzministerium.de)



Introduction (2)

Distinction: German source income (for none-residents)

->**Ships** under **German flag** do belong to German territory for tax purposes as long as they are within German territory (incl. 12-mile-zone) or in high seas belonging to no state; ships are not deemed German (tax) territory in case they are operating in territorial sea of a foreign state.

In contrast: Ships under **foreign flags** are only deemed German (tax) territory while operating in German territory.

->**German territory:** Continental waters, harbors and territorial sea (12-mile-zone). Special rules possible for certain activities on continental shelf/ exclusive economic zone.

Without Tax Residency in Germany

„Beschränkte Steuerpflicht“

§ 49 (1) Nr. 4a EStG

Salary taxable insofar as performed in German territory, hence depending from ship route

(Gehalt insoweit steuerpflichtig als in deutschem Territorium ausgeübt, was von Schiffsroute abhängt)



Ship under foreign flag
*(Schiff unter ausländischer
Flagge)*

Ship under German flag
*(Schiff unter deutscher
Flagge)*



**Ship in German Harbour, Waterways or 12-
Mile-Zone**
*(Schiff fährt in deutschen Häfen, Wasserstraßen,
Küstenmeer)*

**Ship in international
seas**
*(Schiff fährt in
Internationaler See)*

I.

Crew members with tax residence in Germany

Crew members with tax residence in Germany (1)

- > **Residents of Germany** (all nationalities) are always taxable in Germany with their **world wide income** under German tax rules!!!
- > **Taxable in Germany** are salaries earned on board of a ship or aircraft in international transport regardless where it was operated and where the employer is situated ie also if employer is situated outside of Germany (flag of ship usually not important while taxed on world wide income tax basis).
- > In practice **tax treaty** protection only possible in rare or special cases and often only if proof can be provided that salary was (effectively) taxed outside Germany > In conclusion: Germany is tax wise no good place to live for ship crews!

- > **Mind**: Almost always obligation to file **income tax return** in Germany! > also, if you suppose your salary is not taxable in Germany!

Crew members with tax residence in Germany (2)

Ship–Cook Decision - Lower Tax Court of Baden Württemberg of 22 July 2008, 4 K 1296/08 - German cook hired by US company under law of Bermuda on cruising ships under Bermudian flag; lived on board and only returned for short periods to Germany in-between different assignments; received net payment on board of ship in cash.

Decision: Still resident of Germany as permanent home was at all times available in Germany (core issue!) -> No tax treaty applicable, neither UK nor USA -> Ergo: no tax treaty protection possible. -> Taxable with world wide income in Germany; not decisive that no German employer liable for salary tax withholding procedure.

Conclusion: If a home in Germany is unavoidable, e.g. family staying at home while working on board of ship, mind your tax obligations! If German residency (permanent home or habitual abode) is avoided see further under section without tax residency' for tax consequences.

Crew members with tax residence in Germany (3)

- > Check **tax treaty protection**: Bilateral tax treaties similar to article 15 (3) OECD Model Convention **“remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic (...), may be taxed in the (. .) state in which the place of effective management of the enterprise is situated.”**
- > In other words: If a shipping company or airline has its place of effective management outside Germany, Germany may (but not necessarily will) be restricted to tax this salary (exemption versus credit method, subject-to-tax clause etc).
- > Note: The application of this general rule depends from individual facts and circumstances and the interpretation and wording of the requirements of article 15 (3) OECD Model Convention (-> difficulty to make general statement). Moreover bilateral tax treaties may apply different rules or wording (e.g. US 2008, UK 2010, Netherlands 2012 etc.)!

> This rule applies “notwithstanding the preceding provisions” so forgot the 183 days rule in this context > its not important for seafarers in most cases

Crew members with tax residence in Germany (4)

-> Even when Germany should not have taxation rights on first sight according to a tax treaty Germany may (partially) tax the salary according to national **subject to tax clauses** (Sec 50d (8) and (9) Income Tax Code).

In other words: Where the salary or part of it is not taxed in the state of the shipping company (equals employer jurisdiction and several other requirements are fulfilled) Germany may apply national **treaty override** rules (not finally clarified yet if unconstitutional, constitutional court decision currently pending).

-> If taxed in Germany: **credit** for foreign tax (if any) paid possible under rules of unilateral credit method (Sec. 34c & 34d Income Tax Code);

Crew members with tax residence in Germany (5)

- > **Example:** German (resident) ship-captain hired by shipping company with effective place of management in foreign jurisdiction working on ship for that company in international transport.
- > Taxable in Germany but Germany may be restricted to tax salary of captain due to tax treaty as taxation right granted to foreign state where shipping company (employer) has its place of effective management. -> but: see next slide.

Crew members with tax residence in Germany (3)

- > Many **Pitfalls**: interpretation of tax treaty requirements, triangular cases, differences in wording of bilateral tax treaties, **hiring-out-of-labor cases** (very problematic! > crewing company versus ship operator), tax exemption or credit method as per tax treaty; subject-to-tax clauses unilateral as well as per tax treaty etc (should be checked based on individual facts and circumstances).
- > One very critical issue: If salary or parts of it is not taxed in jurisdiction of shipping company -> Germany may retain its taxation rights -> unilateral **subject to tax clauses § 50d (9) EStG** -> disputed -> pending and outstanding Federal Tax Court decisions -> tax filing obligation -> proof needs to be provided if taxed in source jurisdiction

Crew members with tax residence in Germany (3)

Some special (good) cases & tax jurisdictions for German tax residents:

-> **Cyprus employer/shipping company:**

Disputed, several tax court cases pending, since 2020 Cyprus tonnage tax system exempts alle seafarers on ships of EU flag from tax in Cyprus

-> **Liberia flagged ship and/or employer:**

No rule similar to Article 15 (3) OECD-MA in bilateral tax treaty > exceptionally 183 day rule applies (see background slight) > counts falso or days when Liberia flagged ship is in international sea

II.

Crew members without tax residence in Germany

Crew members without tax residency in Germany (1)

-> Taxable is salary only **insofar** as derived from **German sources** as defined in Sec. 49 German Income Tax Code ie employment exercised in German territory (Sec. 49 (1) 4 a)

-> special rule for flight crews (but not ship crews) -> also taxable if exercised on board of an **airplane** in international traffic belonging to an enterprise with place of effective management in Germany (Sec. 49 (1) 4e)

-> Ship crews: Taxable as far as an employment was **exercised** on or in **German territory**. Likely therefore only an proportional amount of the salary of ship crew members in international traffic, i.e. when ship was in German territory (ship with other flag) or in German or international territory (when ship under German flag); if necessary on an estimated basis, i.e. that portion earned within German territory while working on board of ship.

-> Usually **no obligation** to submit **tax return**, i.e. salary tax becoming final but **certain exceptions** possible.

-> Possible right to reclaim unlawful deductions

> **The big difference: German resident ship crew usually taxable in Germany; while not resident ship crew usually not taxable in Germany (or only very limited especially if ship has no German flag).**

Crew members without tax residency in Germany (2)

- > **Example:** A captain (a **German national** but without tax residence in Germany) works for a **German shipping** company on board of a ship under **foreign flag** in international traffic (completely outside German territory) -> the salary is not taxable in Germany.
- > **Example:** A captain (a **German national** but without tax residence in Germany) works for a **German shipping** company on board of an ship under **foreign flag** in international traffic (including German territory) -> the salary is not taxable in Germany except the (estimated) portion exercised on German territory; the German shipping company will need to deduct proportional German salary taxes.
- > **Example:** A ship-engineer (a **foreign national** without tax residence in Germany) works for a **German shipping** company on board of an ship under **foreign flag** in international traffic outside German territory -> the salary is not taxable in Germany.
- > **Example:** A ship-engineer (a **foreign national** without residence in Germany) works for a **German shipping** company on board of an ship under **German flag** in international traffic including German territory and in international sea -> the salary is only taxable as far as earned in German territory or in international sea; the German shipping company will need to deduct proportional German salary taxes.

Crew members without tax residency in Germany (3)

-> **Since 2007**: Sec. 49 (1) No. 4e Income Tax Code contains a **special rule** for crew members on board of an **airplane** in international traffic where the **airline has its place of effective management in Germany** as those salaries are fully taxable in Germany. Note: This rule does **not** apply for **shipping crews!**

-> Compare Federal Notice of 19.04.2006, Schr. Betr. Beschränkte Steuerpflicht von Bordpersonal inländischer Fluggesellschaften; Bericht der Bundesregierung; introduced to combat increasing number of German flight crews taking residency outside Germany to avoid German taxation).

Crew members without tax residency in Germany (4)

-> **Example:** A flight-captain (a **German national** but without tax residence in Germany) works for a **German airline** on board of an airplane in **international traffic** (completely outside German territory)-> the salary is taxable in Germany.

-> **Example:** A flight attendant (a **German national** but without tax residence in Germany) works for a **foreign airline** on board of an airplane in international traffic outside German territory -> the salary is not taxable in Germany while the place of effective management of the airline is not in Germany and the employment was completely exercised outside Germany.

-> **Example:** A flight-captain (a **German national** but without tax residence in Germany) works for a **foreign airline** on board of an airplane in international traffic (including starts and departures from German territory) -> the salary is not taxable in Germany except the (estimated) portion exercised in German territory.

Crew members without tax residency in Germany (5)

-> **Treaty Protection:** Bilateral tax treaties similar to article 15 (3) OECD Model Convention *“remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic (...), may be taxed in the (. . .) state in which the place of effective management of the enterprise is situated.”*

In other words: If a shipping company or airline has its place of effective management outside Germany, Germany likely being restricted to tax this salary.

Note: The application of this general rule depends from the individual facts and circumstances and the interpretation and wording of the requirements article 15 (3) OECD Model Convention (-> difficulty to make general statement). Moreover bilateral tax treaties may apply different rules or wording (US 2008, UK 2010, Netherlands 2012 etc.)!

Crew members without tax residency in Germany (5)

- > **Example:** A captain (a **German national** but without tax residence in Germany) works for a **foreign airline** on board of an airplane in international traffic (including starts and departures from German territory) -> the salary is not taxable in Germany but in the state where the airline has its place of its effective management, at least where rules similar to article 15 (3) OECD MC apply.
- > **Example:** A flight-captain (a **German national** but without tax residence in Germany) works for a **German airline** with place of effective management in Germany on board of an airplane in international traffic (completely outside German territory)-> the salary is taxable in Germany (assumption is that Germany has also taxation right according to tax treaty article 15(3) OECD-MC)!

Further Information:

Booklet in German:

„Deutschland: Zur Besteuerung von
Bordpersonal an Bord von Schiffen und
Flugzeugen im internationalen Verkehr 2019“

www.grin.de



Rüdiger Urbahns

Zur Besteuerung von Bordpersonal an Bord
von Schiffen und Flugzeugen im
internationalen Verkehr 2019

Besteuerung nach nationalem und internationalem Steuerrecht,
Werbungskosten und weitere steuerliche Hinweise

Fachbuch



Impressum

Diplom Finanzwirt (FH) □ Master of International Taxation

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Status: Jan. 2023

Yes, tax laws are complex and difficult to understand and that is the reason why it make sense to discuss your individual situation with an tax expert. Please feel free to contact me if you want to know more!