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Non-resident entitled to deduct annuity from related income

The ECJ has held that a non-resident with German property income must be entitled to deduct the cost of an annuity if the annuity would not have been paid without the acquisition of the property.

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A German resident mother settled German property on her two sons, receiving an annuity promise in return. One son was resident in Germany and was able to deduct his share of the annuity payments as a personal expense. The other son was resident in Belgium and had no entitlement to a German deduction for personal expenses against his German source income - the rent received - taxable locally under the rules for non-residents. It is settled case law in Germany, that annuities paid to family members in return for, or in connection with, property settlements are too remote from the income expectations to justify deduction as business expenses. The Belgian resident son saw the distinction as effective discrimination restricting his right to free movement of capital and turned to the courts for redress.

The ECJ has now held that the Belgian son has, indeed suffered discrimination affecting his freedom of capital movement. No social or other overriding argument has been advanced in support of this discrimination, although the German government did suggest that the non-resident was not in a comparable position to that of a resident. An annuity paid to support a family member was a personal matter, dependent upon the personal circumstances of those concerned, but not on the income realised or realisable. The court, however, took the view that correlation in amount was less important than correlation in fact. Had the sons not accepted the annuity commitment, they would not have been granted the property and therefore would not have received any income. The resident son was able to tax his income net of his annuity burden; the non-resident was not. This distinction was unacceptable.

The ECJ case reference is C-450/09 *Schröder* judgment of March 31, 2011.

Schlagwörter

annuity, non-residents, property