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Minimum rate for non-residents with business income confirmed

The Supreme Tax Court has confirmed that a minimum tax rate levied on non-residents earning business income in Germany does not offend against the non-discrimination clauses of international treaties.

A US partner in a law firm drew income from an associated partnership in Germany. He was not, however, resident or active in Germany. As a non-resident, he was subject to tax on his business, or professional, income of German source at a minimum rate of 25%. He claimed that this was discriminatory, inasmuch as a German resident would not be subject to the minimum rate of taxation, but, rather, would have been able to claim the full personal allowances and other reliefs for low income. He was also disadvantaged vis-a-vis EU citizens, who, after *Gerritse* (ECJ judgment C-234/01 of June 12, 2003), were able to claim taxation on their German business income at the standard rate scale if they uplifted their income with the standard personal allowance. There was thus a breach of the non-discrimination clauses in the German/US double tax and the friendship treaties.

The Supreme Tax Court has now rejected these claims an up held the 25% minimum rate as being in conformity with the treaties cited and with Germany's other international obligations. On a personal level, the tax treaty and friendship treaty prohibitions on discrimination were by nationality, whereas the minimum taxation here at issue was based on residence. Thus, a German citizen resident in the US would also have borne tax at the 25% minimum rate in like circumstances. On a business level, there was also no discrimination, as a German resident partner with the same income as the claimant would have taxed the German portion at more than 25% in consequence of setting the German rate by reference to the world wide total (in the case in question, the partner drew only a low amount from Germany; his US earnings were far higher). There was also no conflict with EU provisions, as these would only apply to a US citizen if he were resident in the EU.

Please note that the 25% minimum rate for foreign residents with German source business income was replaced for 2008 with taxation on the standard rate scale on the German income uplifted by the standard personal allowance. Thus, there is now no difference in the taxation of business income between EU and third country residents. However, the case is still relevant in respect of the personal allowance uplift – justified by the ECJ on the principle that personal allowances are primarily a matter for the state of residence.

Supreme Tax Court judgment I R 63/10 of March 30, 2011 published on June 15

Schlagwörter

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