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Swiss company “delegate” is tax treaty director

The Supreme Tax Court has held that a German resident “delegate” of the board of a Swiss company is a director within the meaning of the double tax treaty.

The German/Swiss double tax treaty provides that executive directors and their deputies tax their remuneration in the country of the company in which they hold office unless their duties are necessarily fully discharged abroad. This contrasts with the position of commuters (taxed in the country of residence) and with that of other employees (taxed in the country of residence in respect of work performed there and in third countries). The German tax office saw a German resident board member of a Swiss company in full time employment on duties mainly performed abroad (for this reason he did not qualify as a commuter) as a non-executive director subject to Swiss taxation on his employment income only to the extent he actually carried out his work there. Since most of his work was done abroad (buying plastics from chemical plants in Eastern Europe and selling them to Western European users), the German tax office was effectively insisting that most of his employment remuneration be taxed in Germany. The individual, on the other hand, maintained that as a board “delegate” he was effectively an executive director subject to Swiss taxation on his employment income.

Under Swiss company law, the board, “administrative council”, is responsible both for the supervision of management and for taking major executive decisions. It can, however, delegate some or all of its executive responsibilities to a named individual. This “delegate” has a formal legal position and his appointment is entered in the trade registry. In the case at issue, the taxpayer was a member of the board and had been appointed “delegate with wide-ranging powers of representation. However, his employment contract predated both appointments.

The Supreme Tax Court has now held that the managerial powers and responsibilities of a “delegate” were at least equal to those of a deputy executive director. Accordingly, his remuneration as earned in that capacity fell under the tax treaty provision for executive directors and was taxable in Switzerland, the country of the company. The tax office suggested that part of his remuneration had been paid for a non-executive function and should be taxed in the country of residence under the directors’ fees article of the treaty. However, the court saw no grounds or basis for making a split, as nothing had been agreed in terms of remuneration for the non-executive function. The other non-executive directors also received no specific remuneration in that capacity. The employment contract was substantially unchanged from the time before the board appointment, and it was not, in the view of the court, unreasonable for an employee to accept appointment on an honorary basis.

Supreme Tax Court judgment I R 23/10 of March 14, 2011 published on July 20

Schlagwörter

Swiss company, delegate, director