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ECJ confirms German extended limited tax liability

The ECJ has held that the continued liability to German tax on German sources income of a former resident is not discrimination prohibited by community law.

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The Foreign Tax Act provides for continuing liability to German tax for former residents on their German source income if they continue to hold significant economic interests in Germany after their move abroad to a low tax country. This “extended limited tax liability” applies for the five years following the year of the move by persons with five years of previous residency. Double taxation is avoided by crediting the foreign tax paid against the German liability. A similar rule is included in the double tax treaty with Switzerland, although the treaty explicitly exempts Swiss nationals.

A previously long-term resident German national moved to Switzerland, but continued to work for his German employer, in part from his Swiss home. The German tax office continued to regard him as fully taxable in Germany on his German employment income under the “extended limited tax liability” provision. The taxpayer protested on the grounds that the exemption for Swiss nationals discriminated against him on the grounds of nationality at variance with the non-discrimination provision of the EU/Swiss accord on the free movement of workers.

The ECJ has now pointed out that member states are free to arrange their own direct tax affairs – including treaty relations – provided they do so with respect for the basic EU freedoms. The continued “extended limited tax liability” was not a breach of the EU/Swiss accord as that latter explicitly excluded bilateral tax treaties with member states from its scope. The taxpayer did not suffer any disadvantage from his move to Switzerland, since his overall liability remained the same, the Swiss tax being credited against the German liability. That he would have had an overall lower liability, had he been a Swiss national was irrelevant, given that the purpose of the double tax treaties was to avoid the same income being taxed twice and not to ensure the most favourable tax regime for each taxpayer. Accordingly, there was no breach of any fundamental EU freedom.

The ECJ case reference is C-241/14 *Bukovansky* judgment of November 19, 2015.

Schlagwörter

Foreign Taxes Act, discrimination, former resident