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Air passenger duty does not offend against EU law

The Supreme Tax Court has held that air passenger duty as levied in Germany is not prohibited under EU law and that there is no need to lay the question before the ECJ.

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A foreign airline protested against the air passenger duty levied on the number of passengers flown From German airfields. Essentially, it claimed that the duty was effectively an excise duty on fuel or energy and thus excluded by the Excise Duties Directive. Should that argument fail, it maintained the duty to be illegal due to the unauthorised state aid nature of the exceptions (incoming flights, cargo shipments, feeder flights etc.). It also saw the requirement on foreign airlines to appoint a resident tax representative as a hindrance on the free provision of services and concluded with the assertion, the excise nature of the duty led to a breach of the EU/US open skies agreement.

The Supreme Tax Court has rejected all four arguments. The duty is levied at three different rates for short, medium and long-haul flights. However, it does not differentiate between aircraft types, actual fuel consumption or pollutants emitted. It is therefore not an excise duty within the meaning of the directive. For the same reason, it did not breach the open skies agreement with the US. Whilst the court doubted that the exceptions to the duty constituted state aid, it saw the question as irrelevant to the present case, since the illegal grant of state aid to one party did not give other parties rights to the same aid. It accepted that the need to appoint a domestic tax representative might be a hindrance on the freedom to provide services, but took the position that such a hindrance would not invalidate the tax as assessed; it would merely give the airline a claim for compensation of unnecessary costs. This latter, though, was a different issue. In all four respect the EU-legal position was clear; thus there was no need to turn the ECJ for a ruling on European law.

Supreme Tax Court judgment VII R 55/13 of December 1, 2015 published on March 2, 2016

Schlagwörter

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