By PwC Deutschland | 30. Oktober 2022

No option for full income tax assessment for German citizen living in Switzerland?

According to the Cologne Tax Court, the preclusion of German employees resident in Switzerland for full assessment of German income tax is contrary to EU law. The court has referred the case to the European Court of Justice (ECJ) for a preliminary ruling with respect to the Agreement for the Free Movement of Persons between the EU and Switzerland.

Background

The plaintiff is a German citizen and was resident in Switzerland during the years in dispute. He received a salary from his employment with a German employer. He worked both in his (Swiss) home office and outside as field staff within Germany. He incurred considerable income-related expenses that were not reimbursed by his employer. For the monthly wage tax withholding the entire gross salary was taxed in Germany.

German rule: The income tax of limited liability taxpayers (such as the plaintiff in the main proceedings) ranks as settled in respect of the employment income taxed at source unless the employee is a citizen of a member state of the EU or of another state subject to the Convention on the European Economic Area (EEA). More specifically, under Sec. 50(2) Sentence 7 Income Tax Act the application for full income tax assessment is reserved only for nationals of the EU or EEA who are also resident in either one of these states. The plaintiff, who was neither, nevertheless applied for tax assessment to claim his income-related expenses, which the tax office refused.

Decision

The Cologne Tax Court held that the exclusion of the plaintiff for a full income tax assessment contravened the principle of non-discrimination contained in the Agreement for the Free Movement of Persons between the EU and Switzerland (AFMP). The plaintiff enjoys the right to be granted the same living, employment and working conditions as German residents with respect to Germany as the "State of employment".

The tax court regards his opinion to be in line with previous ECJ case law on matters of AFMP, especially the judgment of 28 February 2013 in the case *Ettwein vs. Finanzamt Konstanz,* C-425/11. Here, the ECJ held that - under certain circumstances and in accordance with the applicable provisions - nationals of a contracting party may also assert rights derived from the agreement towards their own country (ECJ judgment "Ettwein" para. 33).

The ECJ judgment "Ettwein": *Mr and Mrs Ettwein had both worked on a self-employed basis, Mrs Ettwein as a business consultant and her husband as an artist. They received all their income in Germany. In August 2007 the couple, who until then resided in Lindau (Germany), transferred their residence to Switzerland. They continued, however, to carry on their business activities in Germany and to receive almost all their income in Germany. With a view to the calculation of tax on their income for the 2008 tax year, Mr and Mrs Ettwein requested, as in previous tax years, to be taxed jointly, that is, by the 'splitting' method, stating that they had not obtained any taxable income in Switzerland. The ECJ concluded that the situation of Mr and Mrs Ettwein falls within the scope of the AFMP. This were also to follow from Article 24(1) of Annex I to the AFMP, which lays down a right of residence, namely the right of nationals of one contracting party to establish their residence in the territory of the other contracting party regardless of the pursuit of an economic activity.*

Contrary to the opinion of the tax office the Cologne Tax Court, in the current case, went on to say that the

question of equal treatment according to the German/Swiss double tax agreement is of no relevance here since the plaintiff already falls within the scope of application and protection of the FMPA.

Ultimately, the tax office had called into play the unequal treatment provided in the “Standstill” clause (“grandfather” clause) of Article 13 of the AFMP: “The contracting parties undertake not to adopt any further restrictive measures vis-à-vis each other's nationals in fields covered by this Agreement”. By reverse conclusion, the tax office considers the (German) restrictions existing at the time of the conclusion of the agreement to be permissible. In the opinion of the tax court, however, the “standstill” clause doesn’t go that far: The wording of the provision does not address the justification of *existing* restrictions. It rather "only" regulates the prohibition for introducing *new* restrictions.

Source

Cologne Tax Court, decision of 20 September 2022 (case ref. 15 K 646/20); the case is pending before the ECJ under the file number (case ref.) C-627/22 *Finanzamt Köln-Süd*.

Note:

In a similar decision of 3 September 2020 (I R 80/16) the Supreme Tax Court held that a U.S. citizen with limited tax liability in Germany is not entitled to the right of full tax assessment for income from employment even if he lives in an EU or EEA state (here: the Netherlands). For more details on this case please refer to our **blog post** of 31 December 2020.

Schlagwörter

employment income, free movement of persons, limited tax liability, tax assessment