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By PwC Deutschland | 18. August 2023

Permanent establishment and fixed business facility for service providers

The requirements for a permanent establishment pursuant to Section 12 sentence 1 German Fiscal Code, which are also characteristic for the concept of a permanent establishment under the double tax treaty with the United Kingdom, are met if the person providing the service (here: an aircraft mechanic/engineer) is given only restricted use of site-related business facilities (here: locker and safe deposit box in common rooms on the airport premises) in the course of his services (here: maintenance work on aircraft). This was decided by the Supreme Tax Court in a most recent judgment.

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Background

During the years in dispute (2008 – 2014), the plaintiff had both a domestic residence and a residence in the United Kingdom. The foreign (UK) residence constituted his vital interests. He is an aircraft engineer and holder of licenses for the maintenance of aircraft of various types. At the same time, he is the sole shareholder and (without a written employment contract) director of X Ltd. in the UK.

X Ltd. does not have its own website or telephone number. According to the records shown in its financial statements which are prepared in the UK the plaintiff received salary payments in his capacity as a director in 2011. In 2008, Y Ltd., a company domiciled in the UK, concluded a Line Maintenance Agreements with A GmbH, an operator and charterer of aircraft domiciled in Germany, for the purpose of providing licensed aircraft maintenance personnel (and their tools). The plaintiff and Y Ltd. agreed on a " freelance contract ", in which the " freelancer " was obliged to provide aircraft-related maintenance services as a subcontractor of Y Ltd. The agreement was signed by the plaintiff with his name (without adding that he was acting as an executive of X Ltd.).

The plaintiff carried out his activities on the airport premises of A GmbH. For the engineers and mechanics working on behalf of Y Ltd., changing rooms, administrative and common areas were available on these premises (in rooms rented by Y Ltd. from A GmbH). Among other things, the employees had a locker and deposit box with a name tag to store their clothes.

The plaintiff stated that from 1 April 2008 he was carrying out a self-employed activity as an aircraft engineer, his place of residence was in Z (Germany). The income from his activity had already been taxed in the UK, as there was no permanent establishment in Germany.

The tax office took the view that the plaintiff earned income from self-employment within the meaning of Section 18 (1) No. 1 ITA from the maintenance of aircraft as of April 2008. As an aircraft engineer, he had performed his work exclusively at Z Airport and thus was subject to German income tax. The tax court of Saxony upheld the claim of the plaintiff.

Decision

The Supreme Tax Court granted the appeal and endorsed the view of the tax office. In the years in dispute, the plaintiff is subject to unrestricted tax liability in Germany pursuant to Sec. 1 (1) ITA and as a result of his domestic residence (Sec. 8 Fiscal Code).

The plaintiff falls within the scope of the UK tax treaty, as he had a residence in the UK (in addition to his residence in Germany), whereby he admittedly had closer personal and economic relationships (the center of vital interests) in the UK. Nevertheless though, taxation in Germany is not prevented under treaty law since the income from the activities of the plaintiff was generated through the use of a fixed facility or permanent establishment which was regularly available to him in Germany.

According to established case law, the existence of a permanent establishment pursuant to Sec. 12 Sentence 1 Fiscal Code assumes a lasting fixed place of business or facility at the disposition of an

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enterprise and for the purposes of its operation.

These requirements, which are also decisive under treaty law, are met if the service provider (here: the aircraft mechanic/engineer) is given only restricted use of location-based business facilities (here: locker and safe deposit box in common rooms on the airport premises) in connection with the provision of his maintenance work on aircraft.

Source:

Supreme Tax Court, decision of 7 June 2023 (I R 47/20), published on 17 August 2023.

Schlagwörter

fixed place of business, permanent establishment (PE), supply of services