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By PwC Deutschland | 09. November 2023

Refusal of ECJ referral by Supreme Tax Court to be directly appealed before Constitutional Court

The Supreme Tax Court decided that an action for annulment which merely asserts a breach of the obligation to refer the matter to the European Court of Justice (ECJ) is not admissible. This will - as a result - simplify the route to the Constitutional Court. Taxpayers who are of the opinion that the Supreme Tax Court was wrong not to refer their case to the ECJ for a preliminary ruling on a question of Union law can henceforth appeal directly to the Constitutional Court without first submitting a complaint for that matter to the Supreme Tax Court.

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Background

The plaintiff is a foreign corporation with its registered office in an EU Member State. He also organized sports betting in Germany during the period in dispute. The plaintiff was engaged in court proceedings claiming that the taxation of sports betting was contrary to EU law and also unconstitutional. The proceedings were neither successful at the lower tax court nor before the Supreme Tax Court. In the proceedings before the Supreme Tax Court, the plaintiff raised numerous breaches of EU law and requested that the proceedings be submitted to the ECJ for a preliminary ruling.

Since the Supreme Tax Court did not accept the plaintiff's arguments and refused referral to the ECJ, the plaintiff brought an action for annulment before that court complaining an irregular composition of the Senate as grounds for reopening the case. In his view, the contested decision violates Art. 101 (1) sentence 2 Basic Law (GG), which provides that no one may be removed from the jurisdiction of his lawful judge, and that the Supreme Tax Court arbitrarily and unjustifiably violated its obligation to refer legal issues to the ECJ.

As a result, the claimant felt deprived of its statutory right to a legally competent judge in an unconstitutional manner. The statutory right to a competent judge ensures, among other things, that it can be determined in advance which is the court and the panel of competent jurisdiction.

Decision

The Supreme Tax Court dismissed the action for annulment. An action for annulment could be lodged, among other things, if the court was not properly composed, e.g., in the event of violations regarding the allocation/distribution of its duties and responsibilities.

The improper handling of an obligation for referral, on the other hand, cannot be brought forward by way of an action for annulment. Therefore, if a plaintiff has suggested a referral to the ECJ in court proceedings and the court of last instance does not agree, the plaintiff can present what he considers to be a breach of the obligation for referral directly by way of a constitutional complaint to the Federal Constitutional Court.

The action for annulment within the meaning of Section 579 of the German Code of Civil Procedure (ZPO) is, among other things, a legal means to enable a transgression of the principle of legal validity (suspension of *the res judicata effect*). It is to be applied only in strictly limited and exceptional cases where the most serious deficiencies in the proceedings or serious substantive errors speak against the validity of the judgment and the parties' trust in the basis of the judgment is thereby shaken in an unacceptable way. Hence, it is not possible to re-examine a legal question that has already been answered by the court in the main proceedings.

Source:

Supreme Tax Court judgment of 10 October 2023 (IX K 1/21), published on 2 November 2023

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