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By PwC Deutschland | 06. August 2024

Update: ECJ confirms option for full income tax assessment to apply also for German citizens living in Switzerland

The European Court of Justice decided that the refusal of the option for full income tax assessment for German citizens living in Switzerland contravenes the principle of non-discrimination contained in the Agreement for the Free Movement of Persons between the EU and Switzerland.

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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 incurred considerable employment-related expenses that were not reimbursed by his employer. For the monthly wage tax withholding the entire gross salary was taxed in Germany. The tax office refused the request of the plaintiff for a full income tax assessment.

The **Cologne Tax Court** sees a conflict with EU law and has referred the case to the ECJ for a preliminary ruling. In his Opinion of 16 November 2023, the **Advocate General** found that the German regulation contravenes the Agreement on the Free Movement of Persons between the EU and Switzerland (AFMP). More details to be found in our **blog post of 23 November 2023**.

ECJ decision

The ECJ held that the relevant provisions of the AFMP preclude legislation of a Member State (such as Germany) that reserves to taxpayers who are nationals of that Member State, of another Member State or of nationals of the European Economic Area (EEA) and who reside in the territory of one of those States the right to opt for a voluntary tax assessment procedure as regards the income from employment (…) but does not confer such an option on, inter alia, a national of the first Member State who resides in Switzerland and who receives income from employment in that Member State.

Details of the Court's findings:

First of all, the Court considers that the plaintiff in the main proceedings falls within the scope of the AFMP as an employed cross-border commuter (worker) within the meaning of Article 7 of Annex to the AFMP (3) or, if the condition relating to the return to the place of residence is not satisfied, as an employed person within the meaning of Article 6 of that annex. Here, the ECJ notes that it is for the referring tax court to determine whether the condition of returning to the place of residence, laid down in Article 7(1) of Annex I to the AFMP, is satisfied in the situation at issue.

The German legislation establishes, as regards the possibility of obtaining a tax concession such as the right to opt for voluntary tax assessment, a **difference in treatment** on the basis of the residence of the employed person, since a German national is unable to claim that right of option on account of his status as an employed person residing in Switzerland.

Although such different treatment is permitted in tax matters, according to Article 21(2) of the AFMP, in respect of taxpayers in a non-comparable situation, that provision cannot serve as a basis for the refusal of a tax advantage to an employee solely on the ground that his residence is in Switzerland and not in Germany, since the German legislation equates the situation of resident taxpayers with the situation of certain non-resident taxpayers and there is no evidence to show that the residence of a taxpayer specifically in Switzerland would make his situation objectively different from that of a taxpayer resident in Germany.

Moreover, neither Article 21(3) of the AFMP nor the reliance on an overriding reason in the public interest

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relating to the alleged need to ensure the coherence of the German tax system can justify such a difference in treatment in the present case. First, the refusal of taxation upon request does not appear to be appropriate for ensuring the effective taxation, payment and collection of taxes or for preventing tax avoidance and, second, there is no direct link between the benefit of taxation upon request and the offsetting of that advantage by a specific tax levy.

The German government argued that the refusal to allow employed persons who reside in Switzerland and work in Germany to benefit from the voluntary assessment scheme is not contrary to the AFMP on account of the **standstill clause in Article 13 of the AFMP**, which must be interpreted in accordance withArticle 64 TFEU. This view was not shared by the ECJ as Article 13 of the AFMP is, in that regard, substantially different from Article 64 TFEU, which expressly provides that the provisions of Article 63 TFEU are to be without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or EU law adopted in respect of certain movements of capital to or from third countries.

Update (6 August 2024)

In a most recent circular of 5 August 2024 the Federal Tax Office - in agreement with the highest tax authorities of the German Federal States- held that an application for income tax assessment is also to be granted if the applicant is a national of a member state of the European Union or another state to which the Agreement on the European Economic Area (EEA) applies and this person is domiciled or habitually resident in the Swiss Confederation. - The ministerial decree is to be applied in all open cases.

ECJ, judgment of 30 May 2024 (**C?627/22**), *Finanzamt Köln-Süd*.

Schlagwörter

free movement of workers, tax assessment