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By PwC Deutschland | 25. November 2024

Restrictions for amendment of tax assessment under Section 50d (8) Income Tax Act

The correction of a final tax assessment notice pursuant to Section 50d (8) sentence 2 of the German Income Tax Act is only possible if – contrary to the provision in the double tax treaty - the employment income of an unlimited taxpayer has been wrongly included in the income tax assessment by omitting to produce proper documentation as required in Section 50d (8) Income Tax Act. It follows from this decision of the Supreme Tax Court that the possibilities of amending tax assessment under Section 50d (8) sentence 2 Income Tax Act are strictly limited and only apply in exceptional cases.

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The statutory provisions in question:

Section 175 (1) sentence 2 German Fiscal Code: *A notice of tax assessment shall be issued, cancelled, or **amended**…2. to the extent that an event which entails tax implications on periods already elapsed occurs (event with retroactive effect).*

Section 50d (8) Income Tax Act (ITA): *If, under a doble tax treaty, income from employment of an unrestricted taxpayer ist o be excluded from the German tax base, the exemption will only be allowed on assessment, notwithstanding the treaty, if the taxpayer can show either that the state to which the right of taxation falls under the treaty has waived its right to tax, or that the tax due in that state on the income has been paid. If the proof is not furnished until after the income has been included in the assessment to income tax, the tax assessment is to be amended. Section 175 (1) sentence 2 of the German Fiscal Code applies accordingly.*

Background

The plaintiff, a UK citizen, is resident in Germany. He worked as a soldier for the British armed forces and, in addition to regular wages and pension payments which were taxed in the UK, he received a severance payment which was not subject to taxation in the UK and which was a matter of dispute in Germany. Therefore, and in light of the „subject-to-tax-clause“, the plaintiff and following also the tax office increased the taxable income by the amount of the severance payment. The respective tax assessment became final (no proviso for subject to review).

Some two years later - when asked by the plaintiff - HM Revenue & Customs stated in a letter that the termination grant/pension lump sum granted to the claimant had not been taxed. Considering this, the plaintiff requested to amend the income tax assessment for the year in dispute in accordance with Section 175 (1) sentence 2 of the German Fiscal Code and to exempt the severance payment from German income tax.

The Münster Tax Court had ruled that the severance payment was only taxable in the UK in accordance with Art. 18 of the double tax treaty with the UK. It is, however, to be taken into account when calculating the overall tax rate (progression proviso).

Decision

In the opinion of the Supreme Tax Court, it is only possible to amend a final assessment notice in accordance with Section 50d (8) sentence 2 ITA if the income was included in the assessment without providing the required documentation as contained in Section 50d (8) sentence 1 ITA and if the evidence is submitted at some later time (in retrospective).

In the case in dispute, the inclusion of the severance payment as taxable income was not based on Section 50d (8) sentence 1 ITA but rather on the interpretation of the legal position (originally also held by the plaintiff) that the subject-to-tax clause of the UK double tax treaty was applicable and that there was no exemption from German tax. <

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The tax court of first instance has considered Section 50d (8) sentence 2 ITA to be an independent provision for amending tax assessment notices and sentence 2 would thus also allow a correction if the recognition of the income for German taxation in the assessment procedure was not based on Section 50d (8) sentence 1 ITA.

In contrast, the Supreme Tax Court is of the opinion that sentence 2 of the provision is only open for selective amendments in cases where proof of taxation abroad or the waiver of taxation by the foreign state required by sentence 1 is provided retrospectively. Sentence 2 does not provide for a comprehensive and retrospective review of the substantive validity of final tax assessments under treaty law. The final tax assessment could not be amended in the case in dispute.

Source:

Supreme Tax Court, decision of 1 August 2024 (VI R 34/21) – published on 21 November 2024.

Schlagwörter

correction of assessments, documentation