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By PwC Deutschland | 31 May 2011

No discrimination from incomplete exemption of living allowances of foreign officials?

An ECJ advocate general has suggested that taking the exempt foreign service allowance of a resident French civil servant into account when fixing the tax rate on her other income is not discriminatory.

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A German-resident French civil servant taught in a French school in Germany. She drew her salary and allowances from the French public purse, rendering them taxable in France under the double tax treaty. Under French law, the foreign service allowances of civil servants are tax-free. German law contains a corresponding provision for German civil servants posted abroad. The German authorities took the taxpayer's French income as a German resident into account when fixing the rate to be applied to her other, taxable income. She maintained that the exempt foreign service allowance should be ignored, as the German authorities would have disregarded in its entirety the corresponding allowance paid to a German civil servant resident in France.

The advocate general on the case before the ECJ has suggested that, despite appearances, there is, in fact no discrimination and therefore no breach of the TFEU. The treatment in Germany was no different from that of any other German resident with tax-free income from France. There was thus no discrimination of residents by nationality. The taxpayer was also not disadvantaged from having exercised her right to live elsewhere within the EU, as she would not have received the allowance at all, had she stayed in France. There was thus no hindrance on her freedom of movement, be it as citizen, be it as an employee. The apparently unequal treatment of a French civil servant serving in Germany compared to that of a German colleague sent to France was an illusion; the German foreign service allowance paid on a French assignment was fully exempt in Germany as the state bearing the cost, but would be taken into accounting when fixing the rate in France, the country of residence. Thus, there was, in reality, equal treatment when one took the tax systems of both countries in concert. This was not unreasonable, as the taxpayer had opted for treatment in Germany as a resident in order to take advantage of the German system of granting marital relief by taxing a couple as though each spouse had earned half the joint income. Had she not taken that option, the problem would not have arisen.

The ECJ case reference is C-240/10 *Schulz-Delzers* opinion of May 26, 2011.

Keywords

civil servant, foreign service allowance, other income