By PwC Deutschland | 26 April 2012

No treaty override if foreign state waives right to tax

The Supreme Tax Court has held that once a foreign state has waived its treaty right to tax income, there is no scope for a treaty override clause in German law.

A German resident pilot for an Irish airline received his salary net of Irish tax under the airlines clause of the double tax treaty. At the end of the year he applied for, and obtained, a full refund of the Irish tax paid, on the grounds that he was not an Irish resident employee and had not performed any of his duties in Ireland. The German authorities attempted to tax this salary for themselves under a combination of two treaty override clauses in domestic law. Both substitute the credit method for the exemption method, the first where the (resident) taxpayer cannot show that he has paid the foreign tax on employment income or that the foreign state has waived its right to tax, and the second where any form of income is not taxable in the foreign state because of a conflict of definition or because the recipient is not resident there.

The Supreme Tax Court has held that the second of these overrides is subordinate to the first. Thus, if the taxpayer can, as in this case, show the foreign state to have waived its treaty right to taxation (the refund of the employee withholding tax deducted – PAYE), there is no scope for applying the second of these provisions, at least, as regards income from employment. Indeed the court drew the conclusion that the second part of the second override has little application in practice to employment income, unless the waiver under the first provision is less than complete. Accordingly, resident aircrew of foreign airlines have potential to earn “white” (legally untaxed) income despite the apparently uncompromising prohibition of the Income Tax Act.

Supreme Tax Court judgment of January 11, 2012 published on March 28

Keywords

treaty override