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By PwC Deutschland | 12 February 2014

No treaty override for German-resident aircrew of Irish airline

The Supreme Tax Court has held that the treaty override clause in the Income Tax Act is to be ignored altogether where only part of the income is taxed in the foreign state.

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An Irish airline paid out the salary of a German resident pilot under deduction of full Irish income tax. This was in accordance with the airline clause in the double tax treaty ascribing the right to tax the employment income of flight crew to the home state of the airline. The pilot then requested and received a refund from the Irish tax office on the basis that, as a non-resident, his Irish obligation was restricted to the income actually earned in Ireland. As a result his total annual Irish liability was a very small sum. The German tax office sought to tax the exempt portion of his Irish salary under a “fall-back” clause in the Income Tax Act. The Supreme Tax Court has now confirmed that the lower court was right to refuse this claim, as the provision referred to, taken literally, only applied to cases of income items fully exempt in the other state. The salary had, however, been taxed even if only in part; thus there was no legal basis for taxing the remainder in Germany in the face of the double tax treaty provision.

It should be noted that this provision of the Income Tax Act has been laid before the Constitutional Court for a ruling on a possible clash with international law, at least where the relevant tax treaty does not contain the same fall-back provision allowing one state to exercise the taxing right of the other where the other state does not do so. It should also be noted that Irish law has changed to fully tax the salaries of the aircrew of Irish airlines regardless of where they are resident.

Supreme Tax Court resolution (refusing the tax office leave to appeal against the lower court’s judgment) I B 109/13 of December 19, 2013 published on February 12, 2014

Keywords

Irish airline, aircrew, fall back, treaty override