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By PwC Deutschland | 20 August 2015

No unilateral treaty override confirmed

The Supreme Tax Court has followed its previous case law in holding that the provision calling for taxation of treaty-exempt income if the other state does not exercise its right to taxation can only be applied if permitted by the treaty.

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A German resident pilot of a US airline, but based in London claimed that his salary was exempt from German taxation under the aircrew provision of the German/UK tax treaty then in force (taxation in the country of the airline). The tax office accepted the contention without further ado, but then applied the domestic treaty override provision when the pilot failed to show evidence of actual UK taxation.

The Supreme Tax Court has now reaffirmed its previous case law to the effect that the treaty override provision calling for domestic taxation of treaty-exempt income if the other state does not exercise its taxation right (avoidance of “white” income) can only be applied if foreseen by the treaty. At the time, this was not the case (it now is). However, it could not decide the case finally, as there was doubt as to which treaty applied. This was for the lower court to clarify. If the London operation of the US airline ranked as a British airline under English law, the UK treaty would apply and the income in question could only be taxed by the UK authorities. If, however, English law regarded the London operation as part of the US airline, the German/US treaty would apply. Since that treaty foresees taxation of aircrew salaries in the country of residence, the taxation right would fall to Germany regardless of any question of treaty override.

Supreme Tax Court judgment I R 68/14 of May 20, 2015 published on August 19

Keywords

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