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By PwC Deutschland | 20 August 2015

Foreign tax credit rather than exemption does not offend against the constitution

The Supreme Tax Court has held that a treaty provision calling for double tax relief for aircrew by foreign tax credit as opposed to the exemption method for other professions does not offend against the equal rights provision of the constitution.

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The German/Austrian double tax treaty exempts employee income from taxation in the state of residence, if the other state taxes it because the work is performed there for a local employer. However, there is a special provision for aircrew, allowing taxation in the country of residence with a credit for the tax borne in the country of source. Since this led, in the circumstances, to a less favourable result for a German-resident pilot of an Austrian airline, he claimed that the treaty discriminated him as a pilot as opposed to members of other professions. This offended against the constitutional provision calling for equal treatment in like circumstances.

The Supreme Tax Court has now rejected the claim, because the circumstances were not the same for aircrew and other employees. In the view of the court, aircrew have enhanced opportunities for avoiding (or evading) taxation altogether and it was thus legitimate for two states to agree on the foreign tax credit as the instrument of avoiding double taxation, even if this was a departure from the general rule of the treaty calling for taxation of employment income in the country of source only.

Supreme Tax Court judgment I R 47/14 of May 5, 2015 published on August 19

Keywords

aircrew, double tax relief, equal treatment