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By PwC Deutschland | 16 February 2016

Treaty override constitutional

The Constitutional Court has held the treaty override provisions of the Income Tax Act making treaty exemption dependent upon proof of taxation or explicit exemption in the other state do not breach the formal provisions of the constitution if they took effect after enactment of the treaty.

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A German resident earned employment income in both Germany and Turkey. Under the then valid double tax treaty, employment income was taxable only in the country where the work was performed. Exempt income was taken into account in the country of residence to set the rate to be applied to the income taxable there. However, the Income Tax Act also contains treaty override provisions making treaty exemption conditional on proof of taxation – or of its explicit exemption – in the other country. The taxpayer in the case at issue failed to provide any evidence of Turkish taxation and the tax office assessed him to income tax on his entire employment income. He protested that the tax treaty did not contain any such fall-back provision and that Turkish taxation was solely a matter for the Turkish authorities. Any German attempt to tax the Turkish source employment income would be in breach of the treaty and thus of the constitutional clause acknowledging respect for international treaties.

The Constitutional Court has now held that the constitution requires respect for international treaties, but does not give their individual treaty provisions precedence over German statutes. Rather, the two rank equally, so a later statute can override a treaty provision in the same way as domestic conflicts between statutes are resolved – specific before general (not relevant here) and the later statute supersedes the earlier one. The override provisions of the Income Tax Act were enacted after the entry into force of the then double tax treaty with Turkey and thus took precedence in the event of a clash.

In the meantime, the Turkish tax treaty has been replaced with a new text – with an override clause in common with most of Germany's more recent treaties – with effect from January 1, 2011. Two further cases on the treaty override are pending before Constitutional Court.

Constitutional Court resolution 2BvL 1/12 of December 15, 2015 published on February 12, 2006

Keywords

constitution, double tax treaty, treaty override