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Locker can constitute a fixed place of business for double tax treaty purposes

The Supreme Tax Court refused to overturn the tax court's decision to refuse leave to appeal, agreeing with the lower court that a locker can constitute a fixed place of business within the meaning of Article XI Paragraph 1 of the German/British double tax treaty.

Background

The plaintiff was an aircraft engineer with a licence to service Airbus A300 and Boeing 757 aeroplanes. He kept apartments in both Germany and the UK but held the centre of his vital interests in the UK. During the period under review, he worked as a freelance sub-contractor on behalf of a British company H –Ltd in a hangar in a German airport. H-Ltd acted as principal providing services to a German resident company E-GmbH.

Decision

The Supreme Tax Court took the view that the tax court had followed Supreme Tax Court precedent in finding that a simple right to use a room did not per se establish the existence of a fixed base. Rather additional circumstances could also be decisive, when these indicated a certain connection between the business and the place where the business activity was being carried out.

In the case before the Court the plaintiff was obliged to provide his own tools and - in a room next to the hangar at the German airport - he was provided with a locker with his name and the name of his principal (H-Ltd) for his sole use.

Leave to appeal against the decision of the tax court because of the fundamental significance of the issue could not be granted, because the higher court considered the finding of a fixed place of business correct. Throughout the period of the service contract, the plaintiff had sole and independent access to the locker, in which he kept his own tools. As such it was not necessary to consider the other questions raised by the plaintiff.

The plaintiff contended that the locker did not play a role in his business activities because he merely used it to store his tools when he did not require these for the work he was performing. The Supreme Tax Court noted with regard to this contention that the locker served to provide a safe place to keep the tools, which he needed for his business, in the periods in which he was not working: thus the locker served the business. The Court remarked that case law had ruled already that the use of a facility did not have to have a special significance for a business nor did its scope have to be extensive. Indeed subordinated business activities could give rise to a fixed place of business.

Source:

Ruling of the Supreme Tax Court of 9 January 2019 (I B 138/17) published on 29 May 2019.

Keywords

double tax treaty, fixed place of business, permanent establishment (PE)