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By PwC Deutschland | 31 December 2020

No option for full tax assessment by U.S. citizen living in the EU

According to a judgment of the Supreme Tax Court, a U.S. citizen with limited tax liability in Germany is not entitled to the right of full tax assessment for income from employment even if he lives in an EU or EEA state (here: the Netherlands). The non-discrimination clause in Article 24 of the German/US double tax treaty does not give rise to a claim to equal treatment with a German national with limited tax liability.

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Background

The plaintiff is a U.S. citizen with a residence in the Netherlands. He had neither domicile nor a permanent residence in Germany. From October to the end of December 2012, he earned income from employment as an opera singer, with which he was subject to limited tax liability in Germany. Income tax was deducted at a flat rate of 25% as prescribed in Sec. 50 (2) German Income Tax Act (ITA). The income tax of limited liability taxpayers ranks as settled in respect of the employment income taxed at source, *unless* the employee is a citizen of a member state of the EU or of another state subject to the Convention on the European Economic Area (EEA). The plaintiff, who was neither, nevertheless applied for tax assessment in order to claim his income-related expenses.

Judgement

The Supreme Tax Court rejected the plaintiff's appeal as unfounded. It is true that the settlement effect of the tax deducted at source in the case of limited tax liability does not apply, inter alia, if the assessment for income tax is requested. However, according to Sec. 50 (2) sentence 7 ITA this assessment option only applies to nationals of a member state of the EU or of another state to which the EEA Agreement applies. Although the plaintiff was domiciled in the territory of a member state of the EU (the Netherlands) in the year in dispute, yet he was a citizen of the US and not (at the same time) a citizen of a member state of the EU or of another state to which the EEA Agreement applies.

Nor is there an entitlement of the plaintiff for full tax assessment under the **non-discrimination clause** in Article 24 (1) of the German/US double tax treaty. Article 24 (1) provides that a national of one Contracting State may not be subject to taxation or connected requirements in the other Contracting State which are different from, or more burdensome than, the taxes and connected requirements imposed upon a national of that other State **in the same circumstances**. A national of a Contracting State is afforded protection under this paragraph even if the national is not a resident of either Contracting State. Thus, a U.S. citizen who is resident in a third country is entitled, under this paragraph, to the same treatment in Germany as a German national who is in the same circumstances. The Supreme Tax Court went on to say that, in the context of the examination of the "**same circumstances**" within the meaning of Art. 24 (1) sentence 1 DBA-USA, not only the actual circumstances but also the legal circumstances that are decisive for the respective taxation must be considered. In the case of Sec. 50 (2) Sentence 7 ITA, these are the obligation of Germany, based on EU law (freedom of movement of employees), to create the right of assessment *and* the limitation of the freedom of movement of employees under EU law to nationals of the Member States.

Source:

Supreme Tax Court decision of 3 September 2020 (I R 80/16), published on 17 December 2020.

Keywords

employment income, limited tax liability, tax assessment