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By PwC Deutschland | 30 April 2021

Recognition of charitable status of foreign foundations follows German law

In a tax court ruling, the Lower Saxony Tax Court considered the requirements applicable to a foundation established under foreign law.

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Background

The appellant was a foundation established under Austrian law which, the Court considered when applying a comparison of types, corresponded to a German corporate tax subject in terms of its economic and legal structure. Thus, the foundation fell within the scope of application of Section 2 No. 1 of the Corporation Tax Act (CTA), so that the procedure for separate determination pursuant to Section 60a (1) Sentence 1 of the German Fiscal Code Code (GFC) in conjunction with the other provisions in the GTC dealing with tax privileges for charities (cf. Sections 51 GFC et seq.) was to be applied in tandem to the procedures under corporation tax law.

The appellant held assets in Germany as well as in Austria and was recognised as a charitable organisation under Austrian law. According to its statutes, the purpose of the foundation was the promotion of art and culture, in particular of German-language political cabaret in the manner demonstrated by the life's work of the founding couple. According to the further provisions of the foundation’s statutes, the foundation was to pursue charitable and charitable objectives within the meaning of the Austrian Federal Tax Code. The appellant’s statutes did not fully comply with the model statutes according to Section 60 (1) Sentence 2 GFC.

Decision

According to the Lower Saxony Tax Court, the appellant’s statutes nevertheless met the requirements of Sections 51, 59, 60 and 61 GFC.

The starting point for the examination was solely domestic (German) law, irrespective of the fact that the corporation in question was domiciled abroad. The Federal Republic of Germany was not obliged under Union law - in particular by the fundamental freedoms - to recognise charitable status under foreign law.

Thus the standard must solely be Section 5 (1) No. 9 Sentence 1 CTA in conjunction with Sections 52 et seq. GFC. The appellant's statutes must therefore - according to Section 60 (1) Sentence 2 GFC - contain the provisions set out in Annex 1 to the GFC. However, in the opinion of the Tax Court, where the charitable status is determined abroad - against the background of the fundamental freedoms - it must be taken into consideration that typically no foreign corporation would have statutes which would meet the requirements of Section 60 (1) Sentence 2 GFC, so that the aforementioned provisions would give rise to an (indirect) discrimination against foreign corporations without there being any justification for this.

Section 60 (1) Sentence 2 GFC must therefore be interpreted restrictively in the light of the fundamental freedoms in such a way that statutes not drafted in German would also suffice if they contained materially comparable provisions.

The Tax Court was of the view that this must also apply where the statutes were written in German - as in the case in dispute - but contained formulations that deviated from the model statutes. Taking these principles into account, the Tax Court held in its decision that the tax office was obliged to issue a

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declaratory notice pursuant to Section 60a GFC.

The Tax Court allowed the appeal because the question of the interaction of foreign legal provisions (in this case the Austrian Federal Tax Code) with German provisions of charity law in the case of foreign foundations subject to limited taxation in Germany had not yet been decided by the highest courts.

Source

Lower Saxony Fiscal Court, court decision of 04 May 2020 (6 K 53/18), see the Tax Court's Newsletter 4/21; the appeal is pending before the Supreme Tax Court under Case No. V R 15/20.

Keywords

charitable status, charities, tax privilege