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By PwC Deutschland | 26 July 2021

British university college recognized as charitable foundation

An ancient english university college may meet the requirements of a charitable foundation under German law and be exempt from corporate income tax because of its non-profit status. In its decision the Supreme Tax Court also found that the legal structure of the college is equivalent to that of a German foundation within the meaning of Sec. 80 (1) of the German Civil Code.

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Background

Corporations, associations, and estates which, according to the articles of association, exclusively and directly pursue charitable, non-profit, or religious purposes are exempt from corporation tax pursuant to Section 5 (1) No. 9 Sentence 1 Corporation Tax Act (CTA).

The case before the Supreme Tax Court dealt with the question whether a college founded in the England of 1555 should be recognized as a non-profit organization. The college was established as a "perpetual college for the study of science, sacred theology, philosophy and the good arts". The statutes of the college at that time, i.e. the act of establishment permitted by the King and Queen of England in the middle of the 16th century (the so-called "Royal Patent"), could not, by their very nature, meet the requirements of the German Fiscal Code (Fiscal Code) and correspond to the relevant statute (Sec. 60 Fiscal Code), and consequently it did also not contain any specific information on exclusivity which shall be deemed to exist if the sole pursuit of a corporation is the tax-privileged purposes set out in the statutes (as in Sec. 56 Fiscal Code).

The plaintiff (the college) received income from renting and leasing property in Germany, which the tax office took to corporate income tax. The plaintiff claimed that it fulfilled all requirements as charitable institution stated in the relevant sections of the Fiscal Code and thus the rental income should be exempt from the tax pursuant to Sec. 5 (1) No. 9 CTA. The Lower (regional) Tax Court upheld the claim. The Supreme Tax Court confirmed this earlier judgement and dismissed the appeal of the tax office.

Decision

The appellant was a foundation established under English law which, while 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 CTA, so that the procedure for separate determination pursuant to Section 60a (1) Sentence 1 Fiscal Code in conjunction with the other provisions in the Fiscal Code dealing with tax privileges for charities (cf. Sections 51 GTC et seq.) was to be applied in tandem to the procedures under corporation tax law.

The appellant’s statutes met the requirements as set forth in Sec. 52 Fiscal Code as pursuing public-benefit purposes, namely the advancement (furtherance) of science and research and religion. In the opinion of the Supreme Tax Court, this is not evident from the statutes alone, but also on the basis of the historical founding document ("Royal Patent") and the description of the purposes of the college as being established to promote the "study of the sciences, sacred theology and philosophy, as well as the good arts".

For the Supreme Tax Court, the formal violation of the Law on Foundations and Non-profit Organizations (“*Stiftungsrecht und Recht der Non-Profit-Organisationen*”) due to the lack of provisions in the statutes regarding the use of the assets in the event of the dissolution of the college was not relevant because the plaintiff successfully invoked an exemption for state-supervised foundations. The measures and powers of the English supervisory authority ("Charity Commission") are essentially comparable to the German

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foundation supervisory authority under the respective state law.

The tax office had argued that the statutes dating from the 16th century did not contain any provisions as required under German non-profit law to the effect that the college should serve exclusively charitable purposes and not follow any other (self-interested) objectives.

The Lower Tax Court, when granting the erstwhile appeal, had interpreted the articles of association in a manner reasonable to the BFH, namely that the enumeration of the charitable purposes pursued by the college, when interpreted historically in a meaningful way, was itself subject to the requirement of exclusivity. Since this legal interpretation was based on foreign (English) law, the Supreme Tax Court was barred from making its own assessment of the statutes and thus reaching a different decision.

Source:

Supreme Tax Court decision of 24 March 2021 case ref.: V R 35/18, published on 22 July 2021.

Keywords

british university college, charitable organization, foundation