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By PwC Deutschland | 21 June 2022

Tax exemption under a double tax treaty - amendment after assessment final if proof is submitted in accordance with Sec. 50d (8) Sentence 2 of the German Income Tax Act

In a recent ruling, the Münster Tax Court had to decide on the income tax and treaty law treatment of a severance payment received by the plaintiff as a soldier in the British armed forces

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Background

In the case (2014 was the year of dispute), the plaintiff, who was resident in Germany, was a British national (his sole nationality) working as a soldier for the British armed forces. In addition to his current wages and pension payments which were taxed in the United Kingdom, he had received a severance payment which was not subject to taxation in the United Kingdom. In Germany tax treatment was disputed.

Decision

The Münster Tax Court ruled that the severance payment was taxable only in the UK under Art. 18 of the Double Tax Treaty between Germany and the UK (“DTT-UK”).

In the view of the Tax Court, Art. 18 DTT-UK (government service income) was an allocative norm with definitive legal effect, thus the elimination of double taxation article (Art. 23 DTT-UK) did not apply. Due to the non-application of the double taxation article, the subject-to-tax clause in Art. 23 (1) (a) subsection 1 second half-sentence of the DTT-UK did not apply either, even where the severance payment was not actually taxed in the United Kingdom.

Even if the subject-to-tax clause applied, its requirements would not be met, as the term "income" applied in the clause related to income falling - as a whole - into one of the various individual treaty classifications (here government service income under Art. 18 DTT-UK –). Thus, since the salary and the pension payments were taxed in the UK, the (government) income as a whole had been taxed in the UK, even if the income portion of the severance payment had not been subjected to tax. The wording of the subject-to-tax clause in the DTT-UK does not provide any indication that it applies to portions of income classes that were not actually taxed.

With regard to the amendment of the related income tax assessment, the Tax Court held that Section 50d (8) Sentence 2 of the German Income Tax Act (ITA) is a stand-alone corrective provision which provides for a fictitious retroactive event. There is no requirement that a retroactive event within the meaning of Section 175 (1) No. 2 General Tax Code has occurred. Under Section 50d (8) Sentence 1 ITA, if income of an unlimited taxpayer from employment is to be excluded from the German tax base under treaty law, the exemption will - irrespective of the treaty - only be allowed in the tax assessment if the taxpayer proves that the state to which the right of taxation was assigned under the treaty has waived this right of taxation or that the taxes assessed on the income in this state have been paid. Under Section 50d (8) Sentence 2 ITA, the tax assessment is also to be amended if such proof is only provided after the income has been included in an income tax assessment. Since the plaintiff provided evidence that the United Kingdom had waived its right to taxation, the tax assessment should have been amended and the severance payment should be treated as tax-exempt in Germany.

The tax-free severance payment is, however, to be taken into account when calculating the overall tax rate (progression proviso). For the purposes of the application of the progression proviso pursuant to Sec. 32b (1) Sentence 1 No. 3 ITA, it is irrelevant whether the tax exemption of income follows from an allocative norm (such as Art 18) or from the elimination of double taxation article (Art 23).

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Reference

Münster Tax Court, ruling of 28 October 2021 (8 K 939/19 E); the appeal is pending before the Supreme Tax Court under Case No. I R 48/21.

Keywords

correction of assessments, double tax treaty, tax exemption