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By PwC Deutschland | 16 January 2023

No charitable status for Austrian foundation

The recognition of a foreign foundation as a charitable foundation is based solely on German law. In its ruling, the Supreme Tax Court further states that the German legislator is not obliged under EU law to recognize a non-profit status established under foreign law.

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Background

The appellant was a foundation established under Austrian law which, 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 the restricted tax liability under Section 2 No. 1 of the Corporation Tax Act (CTA) for “corporations, associations and estates with neither a domestic seat nor place of management with respect to their domestic income”.

The appellant held assets in Germany as well as in Austria and was recognized as a charitable organization under Austrian law. The appellant’s statutes did not fully comply with the model statutes as provided in Section 60 (1) Sentence 2 of the German Fiscal Code (GFC). The Lower Saxony Tax Court granted the appeal and held that the appellant’s statutes nevertheless met the requirements of Sections 51, 59, 60 and 61 GFC and were thus to be recognized as charitable status.

More details of the case in dispute and the decision of the lower tax court to be found **here**.

Decision of the Supreme Tax Court

The Supreme Tax Court reversed the decision of the lower tax court and held that it had wrongly endorsed the compliance with statute-related preconditions pursuant to Sec. 60a (1) Sentence 1 GFC.

The recognition of a foreign foundation as a charitable (non-profit) organization is governed solely by German law. The German legislator is not obliged under EU law to recognize a foreign charitable status.

Pursuant to Section 60 (1) Sentence 1 in conjunction with Section 59 GFC, the purposes of the statutes and the way they are to be achieved must be defined as precisely as possible to verify whether the statutory requirements for tax exemption (formal compliance with the statutes) are met. According to Section 59 GFC tax privileges shall be granted if the purpose pursued by the corporation is stated in the statutes, the act of foundation or other articles of association and that this purpose fulfils the requirements of sections 52 to 55 GTC and that it is pursued exclusively and directly. If therefore a (harmful) non-privileged purpose is pursued in addition to a charitable purpose, the articles of association violate the requirement of exclusivity in Sec. 56 GFC, as the sole pursuit of a corporation is to be the tax-privileged purpose set out in the statutes.

- The statutes in the case at hand, with their reference to the pursuit of charitable goals and the favoring of artists who "demonstrably need a financial contribution in order to be able to practice their art," do not meet these requirements. The appellant's articles of association do not contain any further specifications as to the charitable activities.

- Neither the Austrian Fiscal Code nor the Articles of Association provide a definition of the group of persons in need which is comparable to the requirements under the GFC.

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- The purpose of the articles of association is to enable the tax authorities to easily and properly verify if conditions for a tax concession have been met. For this reason, the purpose of the articles of association and the way in which it is to be achieved must be specified as far as possible which has not been the case here.

In summary the Supreme Tax Court held that – considering the above - it is therefore irrelevant whether the appellant corresponds to a foundation under national law when applying the comparison of types.

Source

Supreme Tax Court, decision of 18 August 2022 (V R 15/20), published on 12 January 2023.

Keywords

charitable status, foreign foundation