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By PwC Deutschland | 08 March 2023

Taxation of stock options in the event of change of residence

Concerning the taxation of stock options the Supreme Tax Court decided that the question of residency is not to be answered by looking at the year in which the benefit was received (which was the year in dispute), but rather at the time of the plaintiff's residency abroad in the period between the grant of the options and the date on which the option could be exercised for the first time.

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Background

The case before the courts concerned the tax consequences of the exercise of stock options in the event of a change of residence. The fact that the plaintiff's income from the stock options was generally taxable under national law was not the subject of dispute. Rather it was the allocation of income from the exercise of the stock options with respect to the residency of the plaintiff during the period in dispute.

Decision

According to the Supreme Tax Court the lower tax court of Baden-Wuerttemberg (as court of first instance) had incorrectly focused on the vesting period (i.e. the time between the grant of the option and the first possible exercise of the option by the employee) for the purposes of determining the residency of the plaintiff under Art. 15, para. 1, sentence 1 DBA-USA, which refers to a "person resident in a Contracting State". Instead, only the residence within the general definition of the term "resident of a Contracting State" in Art. 4 of the US tax treaty at the time the income (benefit-in-kind) is received (accrued) is relevant in this context.

The benefit-in-kind from the exercise of the stock options, under the general rules for benefits-in-kind, is granted on a periodic basis and allocated pro rata to the respective vesting period, notwithstanding the taxation at the time the option is exercised. The period between granting the stock options and the date on which the option can be exercised for the first time is relevant here. In the case of cross-border situations, the question of an exemption of income under a tax treaty is to be answered while looking at the activity of the employee during the vesting period.

However, the Supreme Tax Court could not deliver its judgment since a final determination of the duration of the vesting period is only possible based on the specific agreements at the time the stock options were granted and other incidental circumstances of the individual case. Since this information has so far not yet been gathered, the case was referred to the lower tax court for further investigation. Furthermore, it must also be determined by the lower tax court at what time the plaintiff worked in the US, Germany and third countries during the vesting period.

Source

Supreme Tax Court, judgement of 21 December 2022 (I R 11/20) published on 2 March 2023.

Keywords

residence, stock options