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By PwC Deutschland | 23 November 2023

Advocate General: Refusal of option for full income tax assessment for German citizen living in Switzerland

The Cologne Tax Court is of the opinion that the preclusion of German employees resident in Switzerland for full assessment of German income tax is contrary to EU law and had referred the case to the ECJ for a preliminary ruling. In his Opinion, the Advocate General considers that the German regulation contravenes the Agreement for the Free Movement of Persons between the EU and Switzerland.

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Background

The plaintiff is a German citizen and was resident in Switzerland during the years in dispute. He received a salary from his employment with a German employer. He worked both in his (Swiss) home office and outside as field staff within Germany. He incurred considerable income-related expenses that were not reimbursed by his employer. For the monthly wage tax withholding the entire gross salary was taxed in Germany. The tax office refused the request of the plaintiff for a full income tax assessment. More details of the case and the decision of the Cologne Tax Court for a preliminary ruling to be found **here**.

Opinion

In his Opinion, the AG finds that the German regulation whereby employees who are resident in Switzerland and subject to limited income tax liability in Germany are denied the application for full income tax assessment to claim deduction of income-related expenses and offsetting German wage tax withheld by way of tax credit, whereby such option is available to residents of other Member States of the EU or the EEA (European Economic Area), is contrary to the Agreement for the Free Movement of Persons between the EU and Switzerland (AFMP).

The objective of that agreement is to bring about, for the benefit of nationals of the Member States of the European Union and of Switzerland, 'the free movement of persons in the territory of the contracting parties'.

The judgments in the cases ***Wächtler*** and ***Ettwein*** are inconclusive insofar, as they extend the principle laid down in Article 9 of Annex I to the AFMP to situations of inequality brought about by the place of residence. It is only logical that the case-law should evolve in this way, since the principle of equal treatment is a concept of EU law which existed on the date when the AFMP was signed.

Following the erstwhile *Schumacker* ruling from 14 February 1995 (case ref.: **C-279/93**), Germany allowed employees resident in other member states of the EU and the EEA who are subject to limited income tax liability in Germany an application for tax assessment (and to deduct income-related expenses). From a tax point of view, they were to be treated in the same way as employees resident in Germany who are subject to unlimited income tax liability. The further development of the judgment *Schumacker* should support the extension of the voluntary assessment mechanism to employed persons partially liable to German income tax who are resident in Switzerland to benefit from the equal treatment provided for in the AFMP. Such persons would otherwise be the subject of tax discrimination.

Ultimately, the unfavorable treatment under German law cannot be 'made up for' by the option available to the employed persons partially liable to tax and resident in Switzerland of seeking to have their business expenses factored into the calculation of the tax withheld at source.

"Standstill" clause ("grandfather" clause) of Article 13

In the opinion of the AG, Article 13 of the AFMP refers to *new* restrictions (which are prohibited) but *does not protect restrictions in existence* at the time when that agreement was concluded. It can operate only to

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prevent the introduction of future restrictions, but it has the effect of requiring that previous restrictions be eliminated: otherwise, the liberalizing effect of the AFMP would be neutralized.

The *a contrario interpretation* ("argument from the contrary") of Article 13 of the AFMP advocated by the German Government is not acceptable. It is precluded by the wording of that provision, by Article 16 of the AFMP and by the Court's case-law interpreting Article 13, which has gradually abolished discriminatory measures in force in the States Parties to the AFMP which have operated to the detriment of the persons covered by that agreement. Retaining restrictions in existence at the time when the AFMP was concluded would be incompatible with the objectives of the agreement itself and would constitute a limit to its interpretation that would be difficult to negotiate.

Source:

ECJ case reference **C?627/22** *Finanzamt Köln-Süd (Imposition sur demande d'un assujetti partiel)* - Opinion of 16 November 2023.

Keywords

free movement of persons, tax assessment