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By PwC Deutschland | 25 March 2024

Withholding tax on income of foreign artists performing in Germany

In a recent ruling, the Supreme Tax Court has commented on the tax treatment of fees paid to artists with limited tax liability for their performances in Germany. A key criterion for tax deduction at source is the intention to make a profit and the commercial objective of the performances in Germany.

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Background

The plaintiff is a limited liability company under Austrian law with its registered office in Austria. During the period in dispute from 1996 to 1999, it operated a concert management company. For cultural events held in Germany, it hired artists or groups of artists, some of whom were neither domiciled nor permanently resident in Germany. For each event, the plaintiff concluded a contract for work with the respective event organizers, under which the latter agreed to remunerate the plaintiff. In a further step another contract was concluded with the respective foreign artists, in which the plaintiff in turn undertook to pay a performance fee to the artists.

The tax office issued notices of liability against the plaintiff because of its failure to declare and pay the withholding tax on behalf of the artists. The plaintiff argued that the foreign artists and artist groups had for the most part performed without the intention of making a profit because they were either financed by their home countries or are non-profit organizations.

Decision

The Supreme Tax Court did not agree and rejected the appeal brought by the plaintiff. Income for domestic performances of artists with no residence or usual abode in Germany is subject to limited tax liability by way of deduction at source. Limited tax liability for artists comprises, i. a., income from independent professional services carried out or realized in Germany according to Section 1 subsection 4 ITA in connection with Sec. 49 subsection 1 no. 3 Income Tax Act (ITA) or income from a trade or business earned from artistic, sporting, cultural or similar performances (Sec. 49 subsection 1 no. 2 letter d ITA). One prerequisite to qualify as income from business or from independent professional services is the taxpayer's intention to realize profits.

Even remuneration debtors who - such as the plaintiff - have neither their registered office nor a permanent establishment in Germany are obliged to deduct tax at source. The law does not contain any restrictions in this regard. Rather, it is sufficient that remuneration is paid to artists for a performance in Germany that is subject to limited tax liability. Offering of artistic events in Germany justifies the obligation to withhold tax on account of the artists. The way in which the tax deduction as such is handled administratively is not relevant.

Taxpayer's intention to realize profits: In the opinion of the Supreme Tax Court there is no doubt that the foreign ensembles engaged by the plaintiff had also carried out their activities in Germany with the intention of making a profit as required for the tax deduction at source. This is supported by the fact that they were professional theater and music groups that toured through Europe. They mainly played popular operas, operettas and musicals that appealed to the broader public and which therefore promised the greatest possible commercial success. Moreover, the debtor of the remuneration usually lacks in-depth knowledge of the details and the entirety of the economic activities of his contractual partner and the intentions pursued by the latter. It would therefore be rather difficult for him to assess his partner's intention to realize profits with sufficient certainty.

No impact of tax treaty rules for tax deduction at source: The tax treaties concluded by Germany often

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contain clauses according to which the right of taxation for artists' or athletes' remuneration - as an exception to the general rule - is not granted to the contracting state in which the performance takes place, but rather to the state of residence of the artist or athlete if his stay abroad was financed entirely or predominantly from public funds of the state of residence. However, the Supreme Tax Court states that such clauses are not relevant for the tax deduction pursuant to Section 50d para. 1 sentence 1 ITA because tax deduction applies irrespective of restrictions provided in tax treaties of the German power to impose taxes.

No conflict with EU principles and constitutional law: The system of tax deduction at source pursuant to Section 50a (4) sentence 1 no. 1 ITA as applicable for the years 1996 through 1999 for artists with limited tax liability regarding the earnings for their domestic performances as well as any subsequent notices of liability against the person liable for the remuneration, are in compliance with both the provisions of the EU concerning the freedom to provide services and the principle of equality under Article 3 (1) of the German Basic Law.

Overriding EU law allows expense deduction for non-resident limited taxpayers: In accordance with Section 50a (4) sentence 4 ITA in the version applicable for the years in dispute, no deductions of costs and expenses from the earnings were permitted. However, due to the precedence of Union law this does not apply if the restricted liability taxpayer is a citizen of a member state of the EU or the European Economic Area (EEA). In October 2006 the ECJ has held in the Scorpio case C-290/04 that community law required that the withholding tax on the income earned by nationals resident in other EU or EEA countries must take the related expenses of earning that income into account. Hence, such expenses incurred in direct commercial connection can be deducted from the earnings if they have been reported to the debtor of the remuneration. The German legislator has later implemented the ECJ case law in an amended version of Section 50a (currently para. 3 in Section 50a ITA).

Reference:

Supreme Tax Court, judgment of 25 October 2023 (I R 35/21), published on 21 March 2024.

Keywords

foreign artist, limited taxpayer