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By PwC Deutschland | 17 February 2025

Allocation of employment income of airline pilot under Double Tax Treaty with Switzerland

According to a most recent decision of the Supreme Tax Court, the income from employment of a pilot resident in Germany and who is employed in international air traffic by a Swiss-based company is only exempt from German income tax (subject to progression) to the extent that he performs his activity on Swiss soil and in Swiss airspace in accordance with the principle of territoriality.

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Background

According to **Article 15 (3) sentence 1 of the German Swiss double tax treaty (DTT)**, remuneration for dependent employment work that is carried out on board an aircraft in international traffic may be taxed in the contracting state in which the place of actual management of the air carrier is located (company state). If the remuneration is not taxed in the state of the company, it may be taxed in the state of residence pursuant to Article15 para. 3 sentence 2 DBA-Switzerland.

In accordance with **Article 24 (1) no. 1 sentence 1 letter d DTT**, salaries, wages and similar remuneration within the meaning of Article 15 shall be excluded from the German tax basis insofar as they do not fall under Article 17 (concerning entertainer, artists and athletes) , and provided that the work is performed in Switzerland.

The case of dispute dealt with the question whether an employed pilot of a Swiss airline who had his residence in Switzerland and whose center of vital interests was with his family in Germany is exempt from taxation in Germany based on the aircrew provision in Article 15 (3) DTT.

In the years of dispute, the plaintiff was working in both domestic air traffic in Switzerland and international air traffic. The tax office concluded from the flight schedules that the plaintiff had mainly been used for intra-European flights from Switzerland and to Switzerland in 2013 and mainly for long-distance flights with departure and arrival in Switzerland in 2014. It then based its 2013 tax assessment on the plaintiff's salary, 57% of which was subject to German taxation whereas the remaining 43% was treated as tax-free but taken into account when establishing the rate to be applied to the rest of the plaintiff’s income (progression proviso). In the 2014 tax assessment the tax office took 59% of the plaintiff's salary to be subject to German taxation, 41% was treated as tax-free but subject to the progression proviso.

The Berlin-Brandenburg Tax Court (of first instance) was of the opinion that the question if work was carried out in Switzerland in the case of an international flight should be considered solely on the basis whether it began or ended in Switzerland. On the other hand, no allocation should be made to sections in Switzerland or outside Switzerland. Accordingly, 100 % of the plaintiff's remuneration for 2013 and 99 % for 2014 should be attributed to the activity in Switzerland.

Decision

The Supreme Tax Court upheld the tax office's appeal. It referred the case back to the tax court of first instance for a different hearing and final decision. The tax court has correctly assumed that the right of taxation for the plaintiff's income from employment is due to Germany as the country of residence and, in addition, to Switzerland as the country of activity or the state in which the company is based. However, the tax court erred in excluding most of the income from taxation on the grounds that, within the scope of Art. 24 para. 1 no. 1 sentence 1 letter d DTT, work on board an aircraft in international traffic is to be regarded as “exercised in Switzerland” if the respective flight begins or ends in Switzerland.

The plaintiff's income from dependent work on board an aircraft in international traffic is to be excluded from

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the German tax basis only insofar as the activity was carried on the ground or in Swiss airspace. The activity is deemed to have been “exercised in Switzerland” within the meaning of Article. 24 (1) o. 1 sentence 1 letter d DTT where the plaintiff has worked on Swiss soil and in Swiss airspace. The relevant activities and the territorial connection must be demonstrated in detail by the plaintiff.

The provision of Art. 15 (3) sentence 1 DTT cannot be inferred when interpreting the definition in Art. 24 (1) number 1 sentence 1 letter d DTT of “work carried out in Switzerland”. The right to tax of the country in which the company is resident is not linked to the geographical location (place of work), but rather to the place of management of the company regardless of where the work is actually performed.

Contrary to the plaintiff's opinion, dependent work which - as in this case - falls under Art. 15 (3) sentence 1 DTT is not deemed to be carried out exclusively in the company state. The Supreme Tax Court notes that Art. 15 (3) sentence 1 DTT does not contain a fictional place of work. The provision rather distinguishes between the place of work “on board” a ship or aircraft, which is usually constantly changing geographically and is often outside the territory of the contracting states and the place of actual management of the company. However, the right of the company state to taxation is not tied to the geographical place of work, but to the place of effective management of the company, irrespective of the place where the work is performed.

Source:

Supreme Tax Court judgment of 24 October 2024 (VI R 28/22) – published on 13 February 2025.

Keywords

airlines, income from employment