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By PwC Deutschland | 10 August 2025

No amendment of tax assessment in case of conflict with higher-ranking tax law

The Supreme Tax Court most recently decided that a tax assessment issued on a provisional basis pursuant to Section 165 (1) sentence 2 no. 3 of the German Fiscal Code cannot be amended to the disadvantage of the taxpayer with a reference to Section 165 (2) Fiscal Code.

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Legal background

Section 165 Fiscal Code (dealing with provisional tax assessments, suspension of tax assessments) provides that a tax may be assessed provisionally where there is uncertainty as to whether the prerequisites required for the tax to come into effect have been met. This is also to apply, i. a., where the compatibility of a tax law with primary law is the subject of proceedings before the Court of Justice of the European Union, the Federal Constitutional Court or a highest federal court“ (Section 165 para. 1 sentence 2 no. 3 Fiscal Code). The tax authority may cancel or amend a tax assessment to the extent that it has assessed the tax on a provisional basis. When the uncertainty and the reason for the provisional status has been eliminated, the tax assessment shall be cancelled, amended or declared final; any suspended tax assessment shall be subsequently continued. (Section 165 para. 2 Fiscal Code).

Case of dispute

In 2010, the plaintiff completed a three-month training course to qualify as a paramedic. Between 2011 and 2016, she studied medicine. In 2015 and 2016, she claimed her study costs as training costs which led to negative income from employment. The tax office took the corresponding negative income into account in the income tax assessment for both years. The tax assessment notices were issued on a provisional basis pursuant to Section 165 (1) sentence 2 no. 3 Fiscal Code regarding the deductibility of expenses for vocational training. The provisional note concerned the question of whether Section 4 (9) and Section 9 (6) of the Income Tax Act (ITA) were compatible with higher-ranking law. The Federal Constitutional Court answered this question in the affirmative in 2019. In 2021, the tax office amended the income tax assessments for 2015 and 2016 in accordance with Section 165 (2) Fiscal Code for other reasons, namely because the training as a paramedic did not last for twelve months as required in Section 9 (6) ITA. Therefore, the expenses for the studies could not be deducted as income-related expenses. The Cologne Tax Court, however, had granted the appeal brought by the plaintiff.

Decision

The Supreme Tax Court confirmed the view of the court of first instance and dismissed the tax office's appeal as unfounded.

Section 165 (2) sentences 1 and 2 Fiscal Code does not permit the correction of an unlawful tax assessment which was earmarked as provisonal pursuant to Section 165(1) sentence 2 no. 3 Fiscal Code (**neither** to the disadvantage **nor to the benefit** of the taxpayer).

According to the clear wording of Section 165 (2) sentence 1 Fiscal Code, the tax authorities are permitted to make changes only "insofar" as they have provisionally assessed the tax. Section 165 (2) Fiscal Code is therefore not a general correction

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provision concerning the legitimacy of a tax assessment. Rather, the fact that a tax has been provisionally assessed only allows for changes to the extent that they correspond to the scope for change as set out in the provisional assessment notice.

If the assessment of income tax has been provisional - as in the case of dispute – due to proceedings pending before the Federal Constitutional Court regarding the compatibility of a certan tax statute with higher-ranking law, the income tax assessment can therefore only be revoked or amended in the event of a decision by the Federal Constitutional Court confirming incompatibility with higher-ranking law.

If the Federal Constitutional Court confirms that the tax law - in the present case Section 4 (9) and Section 9 (6) ITA - is compatible with higher-ranking law, there is no need for a correction - **a correction** of the tax assessment **is therefore not possible**. Conversely, the provisional assessment **must be amended** in the taxpayer‘s favor should the Federal Constitutional Court declare the tax law affecting the taxpayer to be incompatible with the constitution.

Source:

Supreme Tax Court decision of 29 April 2025 VI R 14/23 - published on 7 August 2025.

Keywords

correction of assessments, provisional assessment, tax amendments