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By PwC Deutschland | 30 September 2026

Federal Constitutional Court: Discontinuance of two constitutional review proceedings on payroll tax provisions

In a recent decision the Second Senate of the Federal Constitutional Court discontinued proceedings arising from two referrals by the Supreme Court under Article 100(1) of the Constitution in relation to flat rate payroll tax on withdrawals from pay-as-you-go supplementary pension schemes.

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The referrals concerned payroll tax provisions in Section 40b(4) and Section 40b(5), first sentence of the Income Tax Act, the latter read in conjunction with Section 40(3), first sentence, Income Tax Act. These provisions apply when an employer must make a special payment under Section 19(1), first sentence, no. 3, second sentence, Income Tax Act after an employee withdraws from a pay-as-you-go supplementary pension scheme. The employer must withhold payroll tax at a flat rate of 15% of the special payment, is liable for that tax and ultimately bears the charge.

In two cases concerning the 2008 tax year, the Sixth Senate of the Supreme Court considered this procedure unconstitutional. By orders of 14 November 2013, it therefore stayed the proceedings before it and asked the Federal Constitutional Court to rule on the constitutionality of the provisions.

The rapporteur indicated that the referrals were unlikely to satisfy the requirements of Article 100(1) of the Constitution and Section 80(2), first sentence, of the Federal Constitutional Court Act. In particular, the referrals did not clearly establish whether the relevant payments constituted employment income. They also lacked an adequate assessment of the legal framework and case law governing the conditions under which the payments were made.

After receiving this observation and hearing the parties, the Supreme Court withdrew its referrals. As a result, the Second Senate of the Federal Constitutional Court discontinued the proceedings before it.

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Decision of 5 August 2026 – 2 BvL 7/14, 2 BvL 8/14

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