Germany: Tax treaty override provision in line with constitution

In a decision dated 15 December 2015 (and published on 12 February 2016), Germany’s constitutional court confirmed that the legislature can enact tax treaty override provisions that aim to secure Germany’s taxation rights, despite treaty provisions to the contrary. The federal tax court (BFH) had referred the case to the constitutional court in 2014 – that court has the sole authority to determine whether domestic laws contradict constitutional principles (for prior coverage, see World Tax Advisor, 28 February 2014).


Tax treaties in Germany are not “self-executing.” For a tax treaty to become applicable, it must be transposed into German domestic law, which requires the consent of both the upper and lower houses of parliament. Once transposed, a treaty will have equal status with “ordinary” domestic tax law; in other words, the treaty will not supersede ordinary domestic law, or vice versa. Because of this equality of status, the prevailing opinion has been that the German legislature has the power to subsequently enact rules that override the provisions in Germany’s existing tax treaties.

The case involved a German resident individual who earned income from employment exercised in Germany and in Turkey. Based on the relevant provision in the 1985 Germany-Turkey tax treaty (which has been superseded by a new treaty dating from 2011), Germany granted the individual an exemption from German tax for the employment income earned in Turkey (such income could be taken into account only for purposes of determining the applicable German tax rate).

The treaty override provision in section 50d (8) of the Income Tax Code allows Germany to impose tax (despite provisions to the contrary in an applicable tax treaty) on the employment income of a German tax resident if the individual is unable to demonstrate that the employment income was actually taxed and the assessed tax was paid in the contracting state, or that the other state specifically waived its taxation rights. In the case before the court, the taxpayer did not provide such evidence and, therefore, the tax authorities treated the employment income earned in Turkey as being fully taxable in Germany, despite provisions to the contrary in the Germany-Turkey tax treaty.

The BFH noted in its decision referring the case to the constitutional court that the interaction between tax treaty law and domestic tax law needed to be refined. According to the BFH, although a treaty and German domestic law rank equally, the negotiated provisions in a treaty limit the legislature’s latitude to introduce measures that deviate from the treaty.

In its decision, the constitutional court made a detailed analysis of the relationship between tax treaties and ordinary domestic law, and concluded that tax treaties do not rank superior to ordinary domestic law. For ordinary domestic law, however, the “lex posterior derogat legi priori” principle (a later law repeals the former law) applies, which means that the legislature can unilaterally introduce rules that deviate from earlier provisions in a tax treaty.

The constitutional court’s decision likely will affect several similar pending cases involving the treaty override provisions, and the court is likely to reach the same conclusions in these cases.