

from employment. It might have application where the waiver by the foreign country covers only part of the income in question (see II.4, below). *a*

#### EDITOR'S NOTE

This case is concerned with German rules which provide for a tax treaty override. *b*

The pilot moved to live in Germany, but flew out of Ireland. He was subject to unlimited tax liability in Germany. He sought exemption from tax in Germany on his income as an airline pilot under the old Ireland-Germany double taxation convention, even though he was not taxable on that income in Ireland. The Bundesfinanzhof held that the domestic law rules on tax treaty override were not applicable here: an interesting example of double non-taxation. *c*

#### COMMENTARY

The case involves two German treaty override rules. Under the first provision, income from employment of a person subject to unlimited tax liability which must be excluded from the German tax base under a double taxation agreement, will, regardless of the treaty provisions, only be excluded from German taxation to the extent that the taxpayer demonstrates either that the other contracting state has waived its right of taxation or that the tax assessed on the income in the other contracting state has in fact been paid. *d*

Under the second provision income of a person subject to unlimited tax liability which must be excluded from the German tax base under a double taxation agreement, will, regardless of the treaty provisions, not be excluded from German taxation if it is exempt from taxation in the other contracting state solely because it is received by a person not subject to unlimited tax liability in that state on account of its place of residence, permanent abode, place of management, seat or similar characteristic. *e*

The conditions set by the first rule to override the treaty were not fulfilled, because it was evident that Ireland had waived its right foreseen in the treaty to tax the income of the pilot residing in Germany. In contrast, the conditions of the second rule were met since Ireland did not tax the income because the pilot was not subject to unlimited tax liability in Ireland. However, the second rule also states that it leaves unaffected the first one. Therefore, the Federal Fiscal Court decided that if a taxpayer is able to demonstrate that the other contracting state has waived its treaty right to tax by domestic legislation, the first rule will supersede the second and prevent the treaty override. *f*

The case relates to outdated law for two reasons. First, Ireland has introduced a tax on income derived in respect of an employment aboard *g*

- a* an Irish aircraft even for persons who are not subject to unlimited tax liability with effect from the tax year 2011. Thus, the second German treaty override provision is not applicable to this type of income any more. This was clarified by the German Federal Ministry of Finance in a circular of 5 December 2012. Secondly, the new German-Irish double taxation agreement includes a subject to tax clause under which Germany only exempts income from Irish sources from taxation if it is actually taxed in Ireland (art 23(2)(a)). The new treaty is applicable from 1 January 2013.
- b* Since the Federal Fiscal Court held the second treaty override rule to be inapplicable in this case it did not have to decide whether a treaty override would have been in accordance with the Federal Constitution (*Grundgesetz*). This issue is currently pending with the Federal Constitutional Court (case no 2 BvL 1/12).

*Juergen Luedicke*

- d* 11 January 2012. The following judgment was delivered.

#### JUDGMENT

*e* LEITSÄTZE

- Sind Einkünfte eines unbeschränkt Steuerpflichtigen aus nichtselbständiger Arbeit (hier: des Piloten einer irischen Fluggesellschaft) nach einem Abkommen zur Vermeidung der Doppelbesteuerung (hier: DBA-Irland) von der Bemessungsgrundlage der deutschen Steuer auszunehmen, wird
- f* nach § 50d Abs. 8 Satz 1 1. Alternative EStG 2002 (i.d.F. des StÄndG 2003) die Freistellung bei der Veranlagung ungeachtet des Abkommens nur gewährt, soweit der Steuerpflichtige nachweist, dass der Staat, dem nach dem Abkommen das Besteuerungsrecht zusteht, auf dieses Besteuerungsrecht verzichtet hat. Ist der geforderte Nachweis aber
- g* erbracht, ist die Freistellung zu gewähren. Für ihre Versagung nach § 50d Abs. 9 Satz 1 Nr. 2 EStG 2002 (i.d.F. des JStG 2007) besteht dann regelmäßig kein Raum; Abs. 8 steht zu Abs. 9 Satz 1 Nr. 2 vielmehr im Verhältnis der Spezialität.

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#### TATBESTAND

- 1 I. Der Kläger und Revisionskläger (Kläger) hatte seinen Wohnsitz im Streitjahr 2007 zunächst in England; im März jenes Jahres verzog er in die Bundesrepublik Deutschland (Deutschland).
- i* 2 Er erzielte vom April bis Dezember des Streitjahres als Pilot einer Fluggesellschaft mit Sitz in Irland einen (Brutto-)Arbeitslohn von ... EUR. Die von dem Arbeitgeber auf diesen Betrag einbehaltenen und an die zuständige irische Finanzbehörde abgeführten Steuern wurden in voller Höhe auf Antrag des Klägers an ihn erstattet.