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International Tax Law Summer Conference in Rust: Taxation of Flight Attendants – Case Study

INTERNATIONAL TAX LAW SUMMER CONFERENCE IN RUST: DIE BESTEUERUNG VON FLUGBEGLEITERN – FALLSTUDIE

Michael *Lang* leitete bei der siebenten International Tax Law Summer Conference (6.–10. Juli 2008) in Rust (Österreich) am 7. Juli 2008 eine Podiumsdiskussion zum Generalthema „Tax Treaties – What Happens When States Disagree? – Qualification and Classification Conflicts in Tax Treaty Law", an der mit Heinz *Jirousek*, Michael *Wichmann*, Andrew *Dawson* und Elizabeth *Karzon* hochrangige Experten der Abteilungen für Internationales Steuerrecht der österreichischen, deutschen, britischen und US-amerikanischen Finanzverwaltung teilnahmen. Die Experten diskutierten bei dieser Konferenz – nicht in amtlicher Funktion, sondern in privater Eigenschaft – Fallstudien zu DBA-Fragen, von denen eine in der Folge auszugsweise wiedergegeben ist.

I. International Tax Law Summer Conference 2008

From 6th to 10th July, 2008, the 7th International Tax Law Summer Conference was held in Rust (Austria). At the panel discussion „Tax Treaties – What Happens When States Disagree?" – chaired by Michael *Lang* – various cases on international tax law were presented and discussed from the perspective of experts from the tax administration. Heinz *Jirousek* (Head of the Department for International Tax Law, Austrian Ministry of Finance), Michael *Wichmann* (Head of Tax Treaty Policy Division, German Federal Ministry of Finance), Andrew *Dawson* (Head of Tax Treaty Team, HM Revenue & Customs, UK) and Elizabeth *Karzon* (Branch Chief, Office of the Associate Chief Counsel, USA), participated in the panel discussion, not in their official function, but in their private capacity. This contribution summarizes the main points of the discussion on a selected case.

II. Facts of the Case and Discussion

Ms *Miller* is working as a stewardess and is employed by a carrier that has its place of effective management in state A. Ms *Miller* is a resident of state B and performs her duties on flights between cities in state C. Her employer pays a salary to her.

Heinz *Jirousek*: I think that the crucial question in this case is the definition of *"international transport"*. Art. 15 para. 3 in conjunction with Art. 3 para. 1 subpara. e OECD MC defines that an *"international transport"* cannot take place solely between two places in the other contracting state. In our case we have three contracting states (states A, B, and C). If the transport takes place between two domestic places in state C, Art. 15 para. 3 DTA B/C, therefore, does not apply.

If Austria were state B, it would assume that the airplane is used in international transport because the transport takes place between places in a third state (state C) and not solely between places in the other contracting state (state A). Austria would apply Art. 15 para. 3 DTA A/B, which means that the taxation right would rest with state A, where the effective management is situated.

If Austria were state A, Ms *Miller* would only be subject to limited tax liability. The provisions of the Austrian Income Tax Act provide also a taxation right for income derived from de-

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pendent services which are not exercised but utilized in state A. Austria would, therefore, make use of the taxation right, and the income of Ms *Miller* could be taxed in Austria within the limited tax liability in accordance with Art. 15 para. 3 DTA A/B.

If Austria were state C, Ms *Miller* is only subject to limited tax liability. The dependent services rendered by Ms *Miller* are exercised within the territory of state C and, therefore, covered by the domestic taxation right of Austria. The tax treaty between state A and state C would not be applicable since Ms *Miller* is neither a resident of state A nor one of state C. The tax treaty between state B and state C would of course be applicable. However, the question is if the flights can be treated as *"international transport"*. From the perspective of state B, the employment of Ms *Miller* cannot be qualified as exercised aboard an aircraft in *"international transport"* since this is a typical case of domestic transport that would fall out of the scope of application of Art. 3 para. 1 subpara. e OECD MC. Austria would, therefore, be inclined to apply Art. 15 para. 1 DTA B/C that allocates the taxation right to state C (Austria) if Ms *Miller* stays for more than 183 days in state C. In that case, double taxation might occur between state C (Austria) and state A if state A claims the taxation right as the country where the airline company has its effective management under the tax treaty between state A and state B. This conflict would not be a typical conflict of qualification, but rather a triangular case, which may leave us with unresolved double taxation. The solution would be the *mutual agreement procedure* (MAP) according to Art. 25 para. 3 last sentence OECD MC. In a MAP between state A and state B it could be argued that state A would have no taxation right for the income derived by Ms *Miller* if she were a resident of state A. In that case, state A would lose its taxation right to state C under the DTA A/C because the aircraft flies only domestic flights in state C. It could be argued that the term *"international traffic"* should be interpreted in the context of the treaty in a sense which generally should preclude mere domestic transports in another contracting state. It would be a strange result if state A loses the taxation right in the situation where the taxpayer has the close link of residence to state A, but gains the taxation right when the taxpayer is neither resident in state A nor exercising any activities in that state. From that perspective, state C (Austria) has the more convincing taxation right, and state A should be prepared to grant tax relief for that income as a result of the MAP.

Michael *Wichmann*: I think the German perspective would be fairly close to the Austrian position, and I would not apply Art. 15 para. 3 OECD MC here. The practical issue for Germany would be – in the event that Art. 15 para. 3 OECD MC would apply and state A had the taxation right due to the place of effective management – whether this state was able to apply its taxation right to activities performed outside its own territory or not. If this were not the case, double non-taxation could arise. Until some years ago, Germany could only tax employment activities performed within the country, and we included in some of our tax treaties a special *"fall-back"* clause (e. g. in the tax treaties with Norway and Switzerland). As long as Germany would not be able to exercise the taxation right, it would fall back to the other contracting state. Germany amended the rules on limited tax liability and is now fully able to exercise its taxation rights under Art. 15 para. 3 OECD MC. As a consequence, in some of our tax treaties the taxation right for non-resident pilots employed by a German carrier automatically changed because the *"fall-back"* clauses did no longer apply.

Michael *Lang*: I wonder whether such an exemption could raise a state aid issue. Usually I am sceptical whether tax treaty exemptions could really raise a state aid issue. In this case, however, we have a rule that covers a certain business activity. So it might be different.

Michael *Wichmann*: Another main aspect is the concept of Art. 8 OECD MC. The concept is mainly influenced by the practical idea that you shouldn't have to count the minutes spent in different territories on a cross-border flight to allocate taxation rights. Performing an ac-

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tivity exclusively in one country would not pose this problem; therefore, I would not see this as a case for Art. 15 para. 3 OECD MC. However, if applied, I would allocate the taxation right to state A, where the effective management of the airline is located, irrespective of the triangular nature of the case. But this is, of course, a question of mutual agreement negotiation.

Michael *Lang*: Does Germany apply the credit or the exemption method for Art. 15 para. 3 OECD MC?

Michael *Wichmann*: For Art. 15 para. 3 OECD MC Germany basically applies the exemption method, but we would switch back by domestic law to the credit method under certain conditions to avoid undue double non-taxation.

Elizabeth *Karzon*: The US takes a different view, mainly because the US doesn't apply the OECD MC language of Art. 15 para. 3. The US taxes are based on the residence of the crew member and not based on where the enterprise has its place of effective management. As a practical matter, however, the US doesn't see many non-resident stewardesses performing services on flights solely within the US. Our cabotage rules make it impossible for foreign airlines to pick up passengers in the US and deliver them to another city in the US.

Andrew *Dawson*: The problem in this case is that you have three states. Each of them has a taxation right. Who steps back? I think this is a case where you have to resolve the issue through Art. 25 para. 3 last sentence OECD MC. The UK adopts the same position as the US with rather less success, but it is our preference to argue in negotiations that we should tax on the basis of the residence of the crew members. It does not make sense to bring into the issue the residence of the carrier. Another question appears if the residence of the carrier differs from its place of effective management under Art. 8 OECD MC, but we don't want to discuss this topic today.

Quellenentlastung bei Ausschüttung an eine deutsche Holdinggesellschaft

(BMF) – Hat Ende November 2005 die österreichische Tochtergesellschaft an ihre zu 100 % beteiligte deutsche Holding-Muttergesellschaft eine Gewinnausschüttung unter Einbehaltung der Kapitalertragsteuer vorgenommen und ist in der Folge von der österreichischen Finanzverwaltung auf der Grundlage von § 94a EStG die Berechtigung der deutschen Holdinggesellschaft zur Steuerentlastung in Österreich anerkannt und die Kapitalertragsteuer bescheidmäßig rückerstattet worden, dann bestehen im Grunde keine Bedenken, wenn analog zur Regelung des § 3 Abs. 2 DBA-Entlastungsverordnung in den folgenden drei Jahren das Rückzahlungsverfahren vermieden und die KESt-Entlastung anlässlich der Gewinnausschüttung vorgenommen wird; dies allerdings unter der Voraussetzung, dass im Gefolge der finanzamtlichen Rückzahlung in den maßgebenden Verhältnissen keine wesentlichen Änderungen eintreten. Eine solche Änderung wäre gegeben, wenn nach dem finanzamtlich erledigten Rückerstattungsantrag Gewinnausschüttungen in einer Höhe getätigt werden, die bei Weitem den dem amtlich kontrollierten Rückzahlungsverfahren zugrunde liegenden Ausschüttungsbetrag übersteigen (EAS 2772).

Findet daher im November 2008 eine weitere Gewinnausschüttung in etwa der gleichen Höhe wie im Jahr 2005 statt, kann diese Gewinnausschüttung auf der Grundlage von Vordruck ZS-QU2 KESt-frei erfolgen, weil die finanzamtliche KESt-Rückerstattung im Jahr 2005 eine Entlastung vom potenziellen Verdacht einer künstlichen Zwischenschaltung der die Gewinnausschüttung empfangenden deutschen Holdinggesellschaft zur Folge hatte und hiermit eine dreijährige Ausstrahlwirkung dieser Beurteilung verbunden war. *(EAS 3016 v. 18. 11. 2008)*