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ECJ Advocate General Opines That Voluntary Tax Assessments May Not Be Denied To Swiss Residents (*Finanzamt Köln-Süd (Imposition sur demande d'un assujetti partiel*) (Case C-627/22) (Direct Tax)) – Details

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Advocate General Campos Sanchez-Bordona of the Court of Justice of the European Union (ECJ) opined that voluntary tax assessments may not be denied to Swiss residents. In the case of *AB v. Finanzamt Köln-Süd* (Case C-627/22), Campos Sanchez-Bordona considered the compatibility of the German rules on voluntary assessments and the European Union - Switzerland Free Movement of Persons Treaty (1999) (as amended through 2003) (the AFMP). Details of the opinion are summarized below.

(a) Facts. The taxpayer, a German national, had lived in Switzerland since 2016, where he had his sole place of residence and habitual abode, while at the same time being an employee of an undertaking with its registered office in Germany. The taxpayer worked for his German employer, either from Switzerland on a remote working basis or on business travel in Germany. For the business travels, the taxpayer used a car purchased under a lease contract not arranged by his employer and bore other costs connected with his vehicle and his business travel. In the relevant years from 2017 to 2019, the taxpayer received income from employment and income from the rental of two properties situated in Germany, before he moved his residence back to Germany. For the relevant years, the taxpayer filed an income tax return reflecting income from the rental of immovable property and earnings from employment requesting a voluntary assessment. He included as tax-deductible the business expenses connected with his activity as an employee in Germany. The Finanzamt Köln-Süd issued notices of assessment to income tax taking into account the rental income but not the income from employment. Consequently, the sums withheld on account for the settlement of German income tax were not credited and no account was taken of the expenses were declared. The taxpayer appealed against the notices of assessment.

(b) Issue. The issue of the case was whether the German rules, which provide that a German national employed by a German undertaking and resident in Switzerland may not benefit from the (voluntary assessment) mechanism which German income tax law reserves for persons resident in Germany and nationals of other EU/EEA Member States who are resident in one of those States, are compatible with the AFMP.

(c) Advocate General's Opinion. At the outset, the AG referred to the ECJ decisions in Wächtler and Ettwein and opined that the case at issue falls within the scope of the AFMP. The AG recalled that the Court held that as regards tax concessions the principle of equal treatment laid down in Article 9(2) of Annex I to the AFMP may be also relied on by a worker who is a national of a contracting party and has exercised his right to freedom of movement, with regard to his State of origin. The AG thus sees no reason why German nationals resident in Switzerland should not be able to rely on that provision as

against the German authorities. The principle of equal treatment laid down in Article 9 of Annex I to the AFMP goes beyond discrimination on grounds of nationality per se and extends to differences in treatment arising from the place of residence of employed persons covered by the AFMP, irrespective of their nationality.

The AG opined that the German rules in question are discriminatory as they result in tax treatment of residents in Switzerland which is discriminatory by comparison with that afforded to employed persons who, while pursuing an activity similar to that of the taxpayer, reside in Germany or in other EU/EEA Member States. Employed persons resident in Germany or in other EU/EEA Member States may avail themselves of the voluntary assessment mechanism in order to exclude the discharging effect of having wage tax withheld at source and obtain (if applicable) a refund of any overpayments thereof. The taxpayer, because he resides in Switzerland, cannot request a voluntary assessment, with the result that, unlike workers resident in Germany and other EU/EEA Member States, he does not qualify for the deduction of any business expenses other than the lump-sum allowance (EUR 1,000) from which all employed taxpayers in Germany benefit when it comes to the calculation of withholding tax. The difference in treatment, which is based on place of residence rather than nationality, is sufficient to deter employed persons resident in Germany from transferring their place of residence to Switzerland, pursuant to their right to freedom of movement, and continuing to receive their wages in Germany. This therefore constitutes unequal treatment prohibited by Article 9(2) of Annex I to the AFMP.

The AG further opined that the German rules in question cannot be justified by the need to ensure the imposition, payment and effective recovery of income tax in Germany, and are not necessary to forestall tax evasion. The AG noted that following the ECJ decision in Schumacker German law allowed employed persons resident in other EU/EEA Member States to avail themselves of the voluntary assessment mechanism in order to declare earnings from employment received in Germany. If that measure does not pose a problem from the point of view of ensuring the correct taxation of income from employment and does not raise any issues in terms of tax evasion, there appears to be no reason how Article 21(3) of the AFMP would provide a basis for not taking the same approach in the case of workers resident in Switzerland who also receive their wages in Germany. Residence in the latter country is not decisive for the purposes of recovering German income tax on such earnings.

The AG further rejected the German government's argument that there is an alternative procedure that would enable employed persons resident in Switzerland to obtain the same outcome as is achieved by voluntary assessment as regards tax relief on their business expenses and thus justify the unfavourable treatment of not allowing a voluntary assessment. The AG noted that the alternative procedure would enable a worker upon request to reduce the amount withheld at source by way of wage tax, taking into account business expenses in excess of the lump-sum allowance of EUR 1,000. The AG, however, recalled that according to settled case-law the possibility of opting for another tax regime is not capable of excluding the discriminatory effects of a tax regime that is contrary to EU law. That case-law postdates the signature of the AFMP but can be extrapolated to the interpretation of that agreement, since it does no more than clarify or confirm the principles established in the case-law in existence on the date of signature of the AFMP in relation to the concepts of EU law which inform that agreement. In addition, the alternative procedure referred to by the German Government is subject to time limits and conditions which preclude its comparison, from the point of view of the advantage it brings, with the voluntary assessment mechanism, and is not therefore a less restrictive alternative. The AG therefore opined that the unfavourable treatment which German law provides for in connection with the voluntary

assessment of employed persons partially liable to tax and resident in Switzerland cannot be made up for by the option available to them of seeking to have their business expenses factored into the calculation of the tax withheld at source.

The AG also rejected the German government's argument based on a reading of Article 13 of the AFMP which would allow restrictive measures in existence at the time when the AFMP was concluded to remain in force, but would not allow further such measures to be introduced. The prohibition preventing employed persons partially liable to German income tax but resident in Switzerland from availing themselves of the voluntary assessment mechanism would therefore be permissible because it was in force before the AFMP was signed. The AG opined that Article 13 of the AFMP refers to new restrictions which are prohibited, but does not protect restrictions in existence at the time when that agreement was concluded. Article 13 of the AFMP can operate only to prevent the introduction of future restrictions but it has the effect of requiring that previous restrictions be eliminated as otherwise, the liberalizing effect of the AFMP would be neutralized. The German government's argument is precluded by the wording of Article 13, by Article 16 of the AFMP and by the Court's case-law interpreting Article 13, which has gradually abolished discriminatory measures in force in the States which are parties to the AFMP which have operated to the detriment of the persons covered by that agreement.
