



# **Treaty Overrides by National Legislation**

**Federal Constitutional Court  
Order of 15 December 2015 – 2 BvL 1/12**

Dr. Stefan Wilk  
Finanzgericht Köln

# A. Relevant provisions



- Section 50d(8) Income Tax Act:  
Notwithstanding provisions to the contrary in an applicable tax treaty, the employment income of a German tax resident shall be included in the tax base unless the individual is able to demonstrate that the tax assessed on the employment income by the other State has been paid or that the other State waived its taxation rights.



## B. Facts of the case

- The plaintiff, a German resident, received income from employment exercised in Germany and Turkey. He applied for the tax exemption provided for in the double taxation treaty for the part of his income arising from his activities pursued in Turkey. However, the plaintiff did not provide the evidence required under Section 50d of the Income Tax Act. Therefore the tax authorities treated his employment income earned in Turkey as being fully taxable in Germany.

## C. Decision



1. The German Constitution provides that, in the national context, international treaties have the same rank as federal legislation, unless they fall within the scope of a more specific constitutional provision that deals with the relationship between domestic and international law and which accords a different rank to international treaties of that kind.

## C. Decision



2. The German Constitution does not limit the lawmaker's ability to revoke legal acts – including international treaties – adopted by previous legislatures.
  
3. Neither the principle of the Constitution's commitment to international law nor the rule of law entail an absolute duty to obey all rules of international law.

# D. Reasons



- Double taxation treaties are negotiated and concluded by the Federal Government but need to be ratified by the *Bundestag* including the consent of the *Bundesrat*.
- The legislature is not barred from enacting statutes even if provisions of those statutes contravene international treaties:

# D. Reasons



In particular, this capability of the legislature is based on the principle of democracy ('lex posterior derogat legi priori') and is not limited by public international law, the constitutional commitment of the German Constitution to international law or by the principle of the rule of law.

# D. Reasons



- Dissenting opinion by Justice König. In each individual statute that constitutes a treaty override the legislature must strike a balance between the principle of democracy and the principle of the rule of law in the light of the constitution's openness to international law.



# E. Conclusion



- The Federal Constitutional Court's decision has upheld, following decades of discussion, the German practice of unilateral treaty overrides in tax law.
- The constitutional principle of democracy, which includes the principle of discontinuity of parliament following elections, takes precedence.
- The decision strengthens the political power and capacity of the legislature to react immediately to unintended developments in international tax matters.



# Finanzgericht Köln

