

Germany: Consequences of a Treaty Override?¹

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6. Facts of the Case

1 This chapter deals with two distinct cases. The first one decided by the German Bundesverfassungsgericht and the second one decided by the German Bundesfinanzhof. Both cases analyze the effect of a treaty override.

First case: DE: BVerfG [Bundesverfassungsgericht], 15 Dec. 2015, 2 BvL 1/12, IStR, 217 (2016); see also the remarks by U. Fastenrath, *Anmerkung zur Entscheidung des BVerfG vom 15.12.2015 (Az: 2 BvL 1/12) – „Zur Frage der Zulässigkeit der Überschreitung von Völkervertragsrecht durch innerstaatliches Gesetz“*, JZ, 636 (2016); W. Haarmann, *Ist der Treaty Override nicht doch verfassungswidrig?*, BB, 2775 (2016); L. Hummel, *Anmerkung zum Beschluss des BVerfG vom 15.12.2015 – 2 BvL 1/12*, IStR, 335 (2016); C. Jochimsen, § 50d Abs. 8 Satz 1 des Einkommensteuergesetzes in der Fassung des zweiten Gesetzes zur Änderung steuerlicher Vorschriften vom 15.12.2003 (Steueränderungsgesetz 2003, BGBl. I, 2645) ist mit dem Grundgesetz vereinbar, ISR, 125 (2016); G. Kofler & A. Rust, *Verfassungskonformität von „Treaty Overrides“*, SWI, 144 (2016); E. Krüger, *Warum ein treaty override nicht verfassungswidrig ist und die möglichen Auswirkungen des BVerfG-Beschlusses*, DStZ, 790 (2016); M. Lampe, *Anmerkungen zum Treaty-Override-Beschluss des BVerfG*, BB, 1373 (2016); M. Lehner, *Treaty Override ist nicht verfassungswidrig*, IStR, 217 (2016); W. Mitschke, *Anmerkung*, DStR, 376 (2016); Musil, *Treaty Override nach der Entscheidung des BVerfG*, FR, 297 (2016); T. Scherer, *Treaty Override und Unionsrecht – ein Versuch*, IStR, 741 (2016); M. Payandeh, *Grenzen der Völkerrechtsfreundlichkeit – Der Treaty Override-Beschluss des BVerfG*, NJW, 1279 (2016); M. Stöber, *Zur verfassungs- und europarechtlichen (Un-) Zulässigkeit von Treaty Overrides*, DStR, 1889 (2016); N. Zorn, *Doppelbesteuerungsabkommen und Grundrechtsschutz*, RdW, 389 (2017).

Second case: BFH [Bundesfinanzhof], 25 May 2016, I R 64/13, IStR, 770 (2016); see also the remarks by P. Brandis, § 50d Abs. 8 EStG 2002 (i.d.F. des StÄndG 2003) – *Kein Verdrängen durch zeitlich nachfolgendes Doppelbesteuerungsabkommen*, BFH/PR, 343 (2016); Hagemann, *Zum Besteuerungsrückfall nach § 50d Abs. 8 EStG bei Doppelsässigkeit*, IStR, 816 (2016); M. Kempermann, *Anmerkung zu einer Entscheidung des BFH, Urteil vom 25.05.2016 (I R 64/13) – Zum Anwendungsvorrang des § 50d Abs. 8 EStG in der Fassung vom 15.12.2003 gegenüber einem zeitlich nachfolgenden Doppelbesteuerungsabkommen*, ISR, 361 (2016); W. Mitschke, *Anmerkung*, IStR, 773 (2016); M. Schütz, *Anwendung des § 50d Abs. 8 EStG bei zeitlich nachfolgendem DBA*, SteuK, 461 (2016).

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1. Introduction

The OECD Committee on Fiscal Affairs (CFA) defines treaty override in its recommendation of 2 October 1989 as “the enactment of domestic legislation which is intended to nullify unilaterally the application of international treaty obligations”.² The OECD discourages its Member countries from enacting legislation which would have effects that are in clear contradiction to international treaty obligations.

A treaty override constitutes a clear violation of the *pacta sunt servanda* principle enshrined in article 26 of the Vienna Convention on the Law of Treaties (VCLT) which states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” According to article 60(1) of the VCLT, a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

Although a country which enacts treaty overriding legislation clearly violates its public international law obligation such violation does not automatically lead to the invalidity of the legislation. Each country has the sovereign power to decide whether a domestic law that is contrary to a treaty remains applicable or not. The validity of domestic law in violation of a treaty is a question for the constitutional law of each country. In some countries treaty overrides do not lead to the invalidity of the domestic law, in other countries a treaty override is not possible as a domestic law which violates a treaty is invalid.³

For instance, in the United States and in the United Kingdom a domestic law can override a treaty. According to article VI cl. 2 of the US constitution, treaties and the laws of the United States are “the supreme law of the land”. This means that federal legislation and treaties have the same rank. As a consequence, federal laws can invalidate or violate a treaty, and this later law has a binding effect domestically. In *Whitney v. Robertson* (1888), the Supreme Court held that “if the two are inconsistent, the one last in time will control the other”.⁴ In the United Kingdom the doctrine of parliamentary sovereignty allows parliament to enact legislation which prevails over a treaty in domestic law.⁵

2 See the recommendation of the Council of 2 Oct. 1989, <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=83&Lang=en&Book=False> (last retrieved August 2017).

3 For a good country overview see e.g. M. Mikic, *Selective Bibliography on Tax Treaty Override*, ET, 475 (2013); S. Sachdeva, *Tax Treaty Overrides: A Comparative Study of the Monist and the Dualist Approaches*, Intertax, 180 (2013).

4 See US: Supreme Court, 9 Jan. 1888, *Whitney v. Robertson*, 124 US 190 (194); see also sec. 7852(d)(1) IRC.

5 See UK: PC [Privy Council], 29 April 1970, *Woodend Rubber Antiques Co. Limited v. CIR*, [1971] AC 321, PC; 1 Jan. 1987, *Padmore v. IRC*, [1987] STC 36; see also J. Schwarz, *Schwarz on Tax Treaties*, 4th edition, p. 40 et seq (CCH 2015).

By contrast, in both Japan and the Netherlands, the constitution grants the treaty priority over domestic law.⁶ In these countries a treaty override is not possible.

In Germany, the legal status of a domestic law which violates a treaty has remained unclear for a long time. Germany is a dualist country. Treaties have to be implemented into domestic law. The internal applicability of a treaty is achieved through enactment of implementing legislation.⁷

The German constitution states in article 25 that the general principles of public international law have priority over domestic law. However, whether one can conclude that *e contrario* treaties do not have priority over domestic law has been disputed. Section 2 of the General Tax Act states that treaties trump over domestic law. However, as this provision only has the rank of domestic law, the legislature can easily modify it. A treaty overriding law can be regarded as an implicit modification of this provision. In the past, German courts have come to different results. While the Bundesfinanzhof (BFH) has held on several occasions that a treaty override was possible, the Finanzgericht of Cologne has concluded that a treaty overriding law was void.⁸

In the case at hand, the Court of First Instance regarded the treaty overriding law as domestically valid.⁹ However, the BFH was convinced that the law violated the German constitution, namely the rule of law principle, the principle of equality, the idea that obligations of international public law have to be respected and the general freedom of action. It therefore asked the Constitutional Court for a preliminary ruling.¹⁰ In German law, only the Constitutional Court is entitled to invalidate a domestic law if it is contrary to the constitution.¹¹

2. Facts of the case

An individual resident in Germany earned income from employment in both Germany and Turkey. According to the first sentence of article 23(1)(a) in connection with article 15(1) of the Germany-Turkey Income Tax Treaty (1989), Germany had to exempt the income earned in Turkey. However, section 50d of

6 See art. 98(2) of the Japanese constitution and art. 94 of the Dutch constitution.

7 See K. Vogel & A. Rust, *Klaus Vogel on Double Taxation Conventions A Commentary to the OECD-, UN and US Model Conventions for the Avoidance of Double Taxation on Income and Capital With Particular Reference to German Treaty Practice*, 4th edition, Introduction m.no. 44 (Kluwer 2015); see art. 59(2) German Constitution.

8 DE: BFH, 13 July 1994, I R 120/93, BStBl. II, 129 (1995); BFH, 21 May 1997, I R 79/96, IStR, 432 (1997); FG Köln [Finanzgericht Köln], 14 March 2000, 8 K 543/99, EFG, 1006 (2000): „Nach Auffassung des Senats ist eine auf einem nicht rechtmäßigen, d.h. gegen ein DBA verstoßendes Gesetz beruhende Besteuerung ihrerseits rechtswidrig.“

9 DE: FG Rheinland-Pfalz [Finanzgericht Rheinland-Pfalz], 30 June 2009, 6 K 1415/09, EFG, 1649 (2009).

10 DE: Bundesfinanzhof, 10 January 2012, I R 66/09, DStR, 949 (2012).

11 See art. 100 of the German Constitution.

the German Income Tax Act (ITA) states that the exemption can only be granted if the taxpayer has either paid the taxes due or proves that the income is not taxable under the law of the other state. In the case at hand, the taxpayer did not furnish this proof. He considered that the treaty overriding provision of section 50d was unconstitutional and, therefore, invalid.

3. The Court's Decision

The German Constitutional Court held that a treaty override does not violate the German constitution. In Germany, treaty implementing legislation has the same rank as domestic law. As a consequence, the treaty implementing legislation can be overridden by other domestic law.

As its main argument, the court referred to article 25 of the German constitution according to which the general principles of public international law have priority over domestic law while article 59(2) of the German constitution states that treaties are implemented into domestic law. The court concluded that the constitution provides for a hierarchy of norms. This hierarchy should not be reversed by relying on the rule of law or other constitutional principles.

The Constitutional Court recognized that public law obligations should generally be respected. However, it did not consider this to mean that the legislature does not have the power to deviate from public law obligations in particular circumstances. The taxpayer also relied on the rule of law principle. In his view, the principle binds all branches of government to respect the law. A government would lose its credibility if it required its citizens to abide to the law set by the legislature, while itself acting contrary to public law obligations it has agreed upon. The Constitutional Court had two counter-arguments to this reasoning. First it referred to the hierarchy of norms established by articles 25 and 59(2) of the constitution. If each treaty override were to lead to a violation of the rule of law then treaties would have the same rank as the general principles of public law; a result which was clearly not intended by the drafters of the constitution. Second, the rule of law principle has to be balanced with the principle of democracy. One legislature cannot bind future legislatures. Each parliament must have the power to legislate freely on the issues which it believes to be relevant. It must also have the power to deviate from the policy of former parliaments. If a parliament could no longer decide on issues covered by treaties concluded by a former parliament then its legislative power would be at risk.

The Constitutional Court did not acknowledge any violation of the principal of equality either. It was true that income from employment was treated in a different way to other types of income, as section 50d of the ITA only applies to income from employment. However, different treatment could be justified by valid reasons in the general interest. Here the court came to the conclusion that tax on in-

come from employment is at high risk of being evaded. It is, therefore, not unreasonable to have specific anti-evasion rules for employment income only.

4. Comments on the Court's Reasoning

The judgment was not decided unanimously. Judge König wrote a dissenting opinion. She argued that the legislature has to respect the rule of law. The principle of the rule of law requires that all branches of government respect the law including the general principles of international law and treaties. A breach of the treaty is not a general option available to the legislature. In each particular case the rule of law principle has to be balanced against the principle of democracy. As a result, treaty overriding legislation might be valid in some circumstances but not in other circumstances. All facts and circumstances have to be taken into account: how important the treaty overriding legislation is, how necessary it is to act immediately and whether it is possible to terminate the treaty within a reasonable time.¹²

5. Conclusion

The dissenting opinion of Judge König seems to be very convincing as it finds a compromise between the rule of law principle and the principle of democracy. However, the majority opinion clearly states that treaty override is domestically valid in all situations. *Karlsruhe locuta causa finita*¹³. This judgment of the Constitutional Court is certainly one of the most important decisions in the area of tax law. It is highly unlikely that the Constitutional Court will change its opinion in the coming years. As a consequence, a treaty override – while constituting a violation of public international law – will remain valid for domestic law purposes.

6. Facts of the Case

Only a few months after the decision of the Constitutional Court the German Bundesfinanzhof had to decide in a different case whether treaty overriding legislation only effects old treaties or whether it also has priority over treaties concluded after the enactment of the domestic law. The case concerned a taxpayer resident in Germany. In 2008, she spent more than 183 days in Azerbaijan where she worked on a mission for the Organization for Security and Co-operation in Europe (OSCE). For her work she received a daily allowance from the OSCE. The tax administration subjected her world-wide income including the daily allowance to tax. It was undisputed that the daily allowance did not benefit from any

12 See also the references to K. Vogel, *Wortbruch im Verfassungsrecht*, JZ, 167 (1997); A. Rust & E. Reimer, *Treaty Override im deutschen internationalen Steuerrecht*, IStR, 847 (2005).

13 The German Constitutional Court is based in Karlsruhe.

tax exemption in domestic law. However, the taxpayer argued that the daily allowance should be exempt from tax by reason of the first sentence of article 23(1)(a) of the Azerbaijan-Germany Income and Capital Tax Treaty (2004) in connection with article 15(1) second sentence, of the same tax treaty.¹⁴ While the tax administration acknowledged that the treaty provisions applied to the situation at hand, it denied the exemption on the basis of a treaty overriding provision in German domestic tax law. Section 50(d)(8) of the German ITA states

[i]f income from dependent personal services of a resident taxpayer is exempt from taxation by virtue of a tax treaty then the treaty exemption will be granted – irrespective of the treaty – only where the taxpayer proves that the income is not taxable in the other contracting state or that he has already paid the taxes due in the other contracting state.¹⁵

The taxpayer did not prove that the income was exempt from tax in Azerbaijan or that she had already paid her taxes in Azerbaijan. However, the taxpayer argued that the treaty did not require such proof and that the treaty had priority over section 50(d)(8) ITA as it was concluded after section 50(d)(8) ITA entered into force. According to the taxpayer, the treaty should prevail over the domestic tax provision due to the later in time rule (*lex posterior derogat legi generali*). The taxpayer went to court and the Finanzgericht Hamburg decided in her favour and reversed the decision of the tax administration.¹⁶ It argued, in the main, that both treaties and domestic tax law have the same rank. The court assumed that the legislature generally wants to respect its public law obligations. While the legislature is entitled to override treaties – and here the court referred to a prior decision of the Bundesfinanzhof¹⁷ – it will generally avoid a breach of a treaty. Therefore, leg-

14 *Convention between the Republic of Azerbaijan and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital*, art. 15(1) (25 Aug. 2004) [hereinafter *Azerbaijan-Germany Tax Treaty*] has the following wording: “Subject to the provisions of Articles 16-19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.”

Art. 23(1)(a) first sentence Azerbaijan-Germany Tax Treaty has the following wording: “Tax shall be determined in the case of a resident of the Federal Republic of Germany as follows: There shall be exempted from the assessment basis of the German tax any item of income arising in the Republic of Azerbaijan and any element of capital situated in the Republic of Azerbaijan which, according to this Convention, may be taxed in the Republic of Azerbaijan and which are not dealt with in subparagraph (b).”

15 In the German original version the exact wording is: “Sind Einkünfte eines unbeschränkt Steuerpflichtigen aus nichtselbständiger Arbeit (§ 19) nach einem Abkommen zur Vermeidung der Doppelbesteuerung von der Bemessungsgrundlage der deutschen Steuer auszunehmen, wird 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 oder dass die in diesem Staat auf die Einkünfte festgesetzten Steuern entrichtet wurden.”

16 DE: FG Hamburg [Finanzgericht Hamburg], 21 Aug. 2013, 1 K 87/12, EFG, 1932 (2013).

17 DE: BFH, 10 January 2012, 1 R 66/09, BFHE 236, 304. The Constitutional Court confirmed that the legislature is entitled to override treaties, see Part 3.

islation overriding a treaty has to be explicit. The national law must clearly state that a treaty override is desired. If such clear statement is lacking the national law should be interpreted in such a way that it avoids a treaty override. In the absence of a clear statement in the domestic law the tax treaty should prevail over the domestic law. In the case at hand the domestic law contains an explicit provision stating that it overrides treaties. The Finanzgericht Hamburg interpreted this provision such that it only overrode existing treaties and was silent with regard to future treaties. Consequently, future treaties have priority over the treaty overriding provision. The court also compared the wording of several treaties concluded after the enactment of section 50(d)(8) of the ITA. In some treaties the exact wording of section 50(d)(8) ITA was reiterated while other treaties did not make the application of the exemption method dependent on whether the taxpayer can prove that the income is not taxable in the other state or that he has already paid the taxes due. This different wording led the court to conclude that treaties that did not reiterate section 50(d)(8) of the ITA intended to grant exemption without any exception.

The tax administration appealed against the decision of the Finanzgericht Hamburg.

7. The Court's Decision

The Bundesfinanzhof granted the appeal and decided in favour of the tax administration.¹⁸ It held that the treaty overriding legislation also had priority over treaties that were concluded after the treaty overriding legislation entered into force.

The court argued that the wording “irrespective of the treaty” did not distinguish between treaties concluded before the enactment of the provision and treaties concluded after the enactment of the provision. The wording should be interpreted in such a way that it covers all treaties – independent of the date of their conclusion.

The Bundesfinanzhof also dealt with the different wording contained in the treaties concluded after the enactment of section 50(d)(8) of the ITA. The court stated that it does not matter whether some treaties reiterate the wording of the domestic anti-abuse provision while other treaties do not contain a similar anti-abuse provision. The fact that some treaties include an anti-avoidance provision similar to section 50(d)(8) of the ITA does not mean that *e contrario* the Azerbaijan-Germany tax treaty would exclude the application of the domestic treaty overriding provision. Such *argumentum e contrario* would lead to the result that the domestic anti-avoidance rule only applies if explicitly confirmed in the treaty.

¹⁸ DE: BFH, 25 May 2016, I R 64/13, IStR, 770 (2016).

Moreover, the court also referred to the judgment of the Constitutional Court. The Constitutional Court had held in its decision on whether a treaty override is in line with the constitution, that the legislature clearly intended to give priority to section 50(d)(8) of the ITA over tax treaties irrespective of the chronology.¹⁹

8. Comments on the Court's Reasoning

While the judgment of the Finanzgericht Hamburg relied on some good arguments, at the end of the day the reasoning of the Bundesfinanzhof seems to be more convincing.²⁰ It would seem arbitrary to apply the anti-abuse provision of section 50d(8) of the ITA only where the tax treaty was concluded before the enactment of that provision. The timing of the conclusion of the treaty should not be the decisive factor for the application of section 50(d)(8).

If the legislature believed it necessary to close a loophole and to avoid double non-taxation arising from the application of the exemption method in tax treaties, it cannot be assumed that it wanted to fight abusive behaviour only in relation to countries with which Germany had concluded a treaty before the enactment of section 50(d)(8) of the ITA while tolerating double non-taxation in all situations where the tax treaty was concluded after the enactment of that section.

Tax provisions have to be interpreted in light of the constitution. The principle of equality enshrined in article 3 of the German Constitution requires that similar situations are treated similarly unless there is a valid reason for different treatment. The timing of the conclusion of the tax treaty does not seem to be a valid reason for different treatment.²¹

9. Conclusion

Both the judgment of the Constitutional Court and the judgment of the Bundesfinanzhof dealt with questions of treaty override. The leading judgment of the Constitutional Court clarified that the legislature has the power to override treaties. Domestic tax provisions which override treaties are valid and do not violate the constitution. However, it should not be lightly assumed that the legislative intention was to override treaties. Instead a clear derogation from the tax treaty is required in the national law.

19 See DE: BVerfG, 15 Dec. 2015, 2 BvL 1/12, IStR, 217 (2016) (see already part 3) para. 88: „Im vorliegenden Fall kommt hinzu, dass der Gesetzgeber in § 50d(8) EStG seinen Willen zur Abkommensüberschreibung (Treaty Override) eindeutig zum Ausdruck gebracht hat („ungeachtet des Abkommens“), so dass weder mit Blick auf den Rang noch auf die Zeit noch auf die Spezialität der Regelung Zweifel am Vorrang des § 50d(8) S. 1 EStG vor inhaltlich abweichenden völkerrechtlichen Vereinbarungen in Doppelbesteuerungsabkommen bestehen.“

20 See also W. Mitschke, *Anmerkung*, IStR, 773 (2016); G. Frotscher, *Treaty Override – causa finita?* IStR, 561 (2016).

21 G. Frotscher, *Treaty Override – causa finita?* IStR, 566 (2016).

The Bundesfinanzhof has now decided that treaty overriding provisions not only have effect for tax treaties concluded before the enactment of the treaty overriding provision but will also prevail over future tax treaties.

It is to be hoped that the German legislature makes use of its treaty overriding power only on rare occasions. It would be preferable if Germany avoids such breaches of its public international law obligations and tries to renegotiate its treaties or – if this is not possible – to terminate treaties in accordance with article 31 of the OECD Model Tax Convention.