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COULD A NON-SWISS TAX RESIDENT INDIVIDUAL BECOME SUBJECT TO SWISS UNLIMITED TAX LIABILITY ON THE BASIS OF HIS OR HER EXTENDED STAY IN SWITZERLAND?

The purpose of this article is to answer the above question in general terms, on the basis of Swiss national tax legislation and case-law. In particular, we refer to the Federal Supreme Court Judgment No. 2C-186/2020 of 28 December 2020.

A natural person resident abroad (this applies to Swiss citizens and/or foreign citizens) who stays in Switzerland for a longer period of time within one year (with or without gainful activity, i.e. on holiday), could, under certain circumstances and depending from the duration of stay in Switzerland, become subject to unlimited tax liability according to Swiss tax law (limited to the tax-relevant duration of the stay).

This article does not consider the special COVID-19 provisions between Switzerland and neighboring countries.

1. The legal basis in accordance to Swiss federal law:

Article 3 of the Federal Act on Direct Federal Taxation (DBG) states that:

- 1. Natural persons are taxable on the basis of personal affiliation if they have their tax domicile or residence in Switzerland.*
- 2. A person has a tax residence in Switzerland if he/she resides here with the intention of remaining permanently or if federal law assigns him/her a special legal residence here.*
- 3. A person has a tax residence in Switzerland if, in spite of temporary interruptions, he or she*
 - a) stays for at least 30 days and is engaged in a gainfully activity;*
 - b) stays for at least 90 days without a gainful activity.*
- 4. A person who is domiciled abroad and who resides in Switzerland solely to attend a school or to care in a medical center does not constitute a tax residency or tax a domicile.*

In the Tax Harmonisation Act, the wording of Article 3 DBG is adopted mutatis mutandis:

Article 3 StHG

- 1. Natural persons are taxable on the basis of personal affiliation if they are domiciled in the canton or if they reside in the canton for **at least 30 days with lucrative activity, respectively at least 90 days without carrying out an economic activity, despite of a temporary interruption.***

- 2. A person has a tax domicile in the canton if he/she resides here with the intention of remaining permanently or if federal law assigns him a special legal residence.*

Residence and work permit:

In principle, a stay in Switzerland with or without gainful activity of 90 days or more must be regulated with a B stay permit. Gainful activities of less than three months in a calendar year do not require a permit for EU/EFTA nationals, these must be regulated via the so-called notification procedure.

Different rules apply to third-country nationals (see www.sem.admin.ch).

2. Establishment of a stay under tax law

(exceptions stay for the purpose of attending a school or for care in a medical center)

The assumption for the purpose of establishing a tax relevant stay presupposes **only the effective physical presence** in Switzerland, while the establishment of the tax residence also presupposes the subjective element of the intention to remain permanently.

According to doctrine and case law, the required minimum length of stay of 90 days in Switzerland/ in the respective canton must be more or less contiguous, i.e. the 90 days of stay must be in one or in a small number of blocks.

Decisive for the calculation of the unlimited tax liability in the event of a qualified taxable stay (upon reaching the required minimum period of stay) are the effective days spent in Switzerland. In the opinion of the Federal Supreme Court, the actual days spent in Switzerland are the days on which the person has stayed on the territory of Switzerland for 24 hours; commenced days (days bordering on a 24-hour day) are also counted.

Whether temporary interruptions of the stay duration are relevant (or interrupt the minimum duration of 90 days) is ascertained considering the overall circumstances. If the person continues to have a factual and spatial relationship with Switzerland that goes beyond physical presence, the tax liability may in principle continue to exist for the days during which Switzerland is temporarily left. The Federal Supreme Court has stated that the tax liability can in principle continue even for the days on which one is temporarily absent from Switzerland.

3. How would be a "temporary interruption" counted?

As already mentioned in Chapter 2 described above, the question of what qualifies as a temporary interruption must be assessed in the context of the overall circumstances. The duration of the interruption in relation to the length of stay before and after the interruption seems to be decisive for the Federal Supreme Court, although a clear limit is not given.

A maximum limit of the duration of the interruption seems to be between one and two months, while a significant interruption period (which could interrupt the 90-days duration) could be between 2 and 3 months.

Case study that could justify a taxable stay in Switzerland: stay in holiday apartment 60 days (uninterrupted), absence 15 days abroad, subsequent further uninterrupted stay in the holiday apartment for 45 days.

4. Case study from the Basel tax book:

A married couple owned an important stately home with land in a municipality in the canton of Basel-Land, near the French border. In a French municipality, an equally important home was their property, which they mostly inhabited, but without registering there. The property in Switzerland was only used sporadically, was planned for sale and later also sold, where it was designated as a family residence within the meaning of Art. 169 of the Swiss Civil Code.

According to the investigation of the facts, the couple stayed 60 times a year over night in the Swiss property to check the home and the garden.

Case solution: The number of overnight stays spread over the whole year does not meet the requirement of a more or less contiguous stay of days (UBI of 8. November 2007 No 2C_303/2007, E 3).

5. Conclusions under Swiss national law:

if an individual resident abroad stays in Switzerland for at least 30 days with gainful activity or at least 90 days without gainful employment, there is a risk that a taxable stay will be established in Switzerland, which may trigger unlimited taxation pro rata temporis in accordance with Swiss tax law.

Depending on the overall context, temporary interruptions can also be qualified as a continuation of the tax relevant stay.

If an individual also owns his or her own holiday apartment or home, there is a closer factual and spatial relationship with Switzerland.

The burden of proof that there is no taxable stay lies with the individual.

However, a significant limitation of the Swiss unlimited taxing right during the period of the taxable stay arises due to the foreign tax residence of the individual in a country with which Switzerland has concluded a treaty for the avoidance of double taxation. If the overriding supranational agreement can be claimed, Switzerland's right to tax is usually superseded by the right of taxation of the country of residence of the individual.

Main source of this article: Stefan Oesterhelt, Aus der Rechtsprechung im Jahr 2020/2021 in IFF Forum für Steuerrecht 2021

For further information on the above, please do not hesitate to contact us

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