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Lump-sum taxation: Franco-Swiss analysis of the latest developments

The last few months have been marked by interesting judicial developments relating to the system of lump-sum taxation in the Franco-Swiss context. The present publication is an opportunity to review the tax concepts involved and to take stock of the state of the debate on both sides of the border.

Over the past year, the system of lump-sum taxation, more commonly known as the "*forfait fiscal*", has been the subject of interesting legal developments on both sides of the Franco-Swiss border.

First, two judgments rendered by the French Courts of Appeal[1] confirmed that persons taxed under the lump-sum tax regime in Switzerland could not benefit from the Franco-Swiss Double Taxation Agreement (DTA).

It should be noted that the DTA offers quite significant benefits given that the person who invokes its provisions, avoids being considered as resident in both States, which could lead to double taxation.

Secondly, the Swiss Federal Court issued two notable decisions[2] authorizing the exchange of information which concerns the tax regime (ordinary or lump-sum) under which Swiss taxpayers, who are the subject of a request for exchange by a foreign administration, are taxed. These decisions hold in particular that the tax regime is information that is considered as "*probably relevant*" and thus can be the subject of the exchange. However, the amount of the level of the expenditure under lump-sum tax regime should not be exchanged because it does not give any indication of the amount of income.

The combination of these jurisprudences is worrying for lump-sum taxpayers in Switzerland who have fairly close links with France (family, residence, regular stays, nationality, etc.).

As a reminder, lump-sum taxation is a specific personal income tax regime for persons of foreign (non-Swiss) nationality who take up residence in Switzerland for the first time or after an absence of at least ten years and are not engaged in any gainful activity. The tax base is determined on a flat-rate basis according to the taxpayers' annual expenditure. However, it must be above certain thresholds provided for by federal law.

Given its appearance, this regime is intended for wealthy people who do not have a gainful employment in Switzerland. This type of people is generally characterized by their mobility.

The Franco-Swiss DTA has a particular feature because it expressly provides for the exclusion from its scope of any person who is "*taxable in[a] State only on a flat-rate basis determined on the basis of the rental value of the residence or residences he owns in the territory of that State*". For a long time, the French and Swiss tax administrations had a common interpretation of this provision according to which it was clear that persons taxed under the Swiss lump-sum tax regime were concerned. This common interpretation also provided for a tolerance for Swiss taxpayers who paid a lump-sum plus about 30%: they could be considered as Swiss tax residents within the meaning of the DTA.

France unilaterally abandoned this interpretation in 2012. Since then, it has been very clear that, in the spirit of the French administration, taxpayers taxed under the lump-sum tax regime are no longer covered by the DTA.

In this context, the decisions rendered by the Swiss Federal Court offer a positive perspective for the French tax administration, which will be able to learn about the taxation system of Swiss taxpayers known to its internal services before starting a tax audit.

In the absence of conventional protection, if such a taxpayer has close links with France, the French tax administration could, without restriction, consider such taxpayer as a French resident.

To limit this risk, it is recommended that persons potentially concerned assure that their exposure to French tax law is regularly monitored by Franco-Swiss tax experts.

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[1] CA Reims, Ch. Civ 1ère sect., 4 décembre 2018, 17/03068 ; CAA Nancy 11 avril 2019, 17NC03049

[2] TF, IIe Cour de droit public, 1er février 2019, 2C 625/2018 ; TF, IIe Cour de droit public, 2C_764/2018 du 7 juin 2019