

Switzerland – Determination of Swiss tax residence during the Covid-19 period

Due to the travel restrictions, confinement and quarantine measures during the Covid-19 period, some individuals are stranded in a country that is not their country of residence. In this difficult context, these individuals have sometimes taken refuge in their secondary residence or with their family in Switzerland. These issues can have an impact on the right to tax between countries.

Can a person stranded in a country that is not his country of residence because of the Covid-19 result in a change of tax residence?

In order to answer this question, we provide with the OECD tax recommendations in this matter published on 3 April 2020 (1) and we analyse the determination of tax residence according to the Swiss domestic tax law (2). Please note that for the determination of the French tax residence during the Covid-19 period, see the article of Jean-Phillipe Mabru, Partner in Paris Office, on our [website](#)

1) OECD tax recommendations

If an individual is stranded for a period in a country that is not his country of residence due to the travel restrictions and quarantine measures, the OECD Secretariat's general view is that, under the bilateral tax treaty between the two countries, the individual's residence **will not change** due to such temporary dislocation.

The OECD provides an example: a person is working in a country (the "current home country") and has acquired residence status there, but they temporarily return to their "previous home country" because of the COVID-19 situation. They may either never have lost their status as resident of their previous home country under its domestic legislation, or they may regain residence status on their return.

According to the OECD, in this scenario, it is unlikely that the person would regain residence status for being temporarily and exceptionally in the previous home country. But even if the person is or becomes a resident under such rules, if a tax treaty is applicable, the person would not become a resident of that country under the tax treaty due to such temporary dislocation.

However, in cases where the personal and economic relations in the two countries are close but the tie breaker rule was in favour of the current home state, the fact that the person moved to the previous home country during the COVID-19 crisis may risk tipping the balance towards the previous home country.

According to the OECD, because the COVID-19 crisis is a period of major changes and an exceptional circumstance, in the short-term tax administrations and competent authorities will have to consider a more **normal period** of time when assessing a person's resident status.

Please note that the OECD recommendations are not restrictive for states. They are just guidelines for the interpretation of Double Tax Treaty. Therefore, an individual wouldn't be able to claim its recommendations in the domestic courts. However, in our view, the individual could refer to the Vienna Convention of 23 May 1969, which provides in Art. 31 para.1 that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Swiss Federal Court often refer to this Convention.

2) Determination of the Swiss tax residence during the Covid-19

The starting point is domestic law. This is why, the OECD recommends countries of temporary residence to apply their domestic rules as recommended above.

Indeed, if the person is resident in only one country, that is the end of the matter. If they are resident in both countries being tested, the tie-breaker rules in Article 4 of the Double Tax Treaty are applied.

The first question is to determine whether the person who is stranded in Switzerland, that is not their country of residence, can be considered as a Swiss tax resident under the Swiss domestic law.

According to Art. 3 para. 3 LIFD, individuals are subject to taxation on the basis of their personal affiliation if they have a **Swiss tax domicile** or **tax residence**.

A person is tax **resident** in Switzerland if he or she resides in Switzerland for at least 30 days and engages in gainful activity or stays in Switzerland for at least 90 days and does not engage in any gainful activity.

A person is **domiciled** in Switzerland if he or she resides (without any conditions as to duration) in the country with the intent to stay permanently (personal and economic relations in Switzerland).

Therefore, the tax residence of the persons can be considered in Switzerland if they stay in Switzerland for **more than 90 days**, or if they reside in Switzerland (regardless of the duration) and can be considered as intending to stay permanently in view of their personal and economic relations in Switzerland. The Swiss tax authorities can consider in either of these two cases that you are subject to unlimited tax liability in Switzerland.

The confinement measures during the Covid-19 period can easily exceed 90 days (March, April and May 2020). In addition, if the person has family and economic links in Switzerland, the tax authorities don't need to demonstrate a 90-day presence in Switzerland in order to consider tax residence in Switzerland. In these cases, according to Swiss law, the person could be considered a resident for tax purposes in Switzerland during the Covid-19 period.

Please note that the Swiss Tax Authorities have not yet published its views on the determination of Swiss tax residence during the Covid-19. Nevertheless, in our view, on the basis of the OECD recommendations, the Swiss Tax Authorities should not proceed with the requalification of residence on the sole fact that the individual is stranded in Switzerland because of Covid-19. However, if the individual's residence could already be challenged during a normal period (before and after the Covid-19) on the basis of different indices (centre of vital interests in Switzerland), it is possible that the place of confinement during the Covid-19 could constitute an additional evidence that could involve residence in Switzerland.

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