

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

Due to 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. Such decisions can have an impact on the allocation of the right to tax between the country of normal tax residence and the country of temporary refuge.

Can a person stranded in a country that is not his normal country of residence, because of the Covid-19 crisis, be considered to have changed his or her tax residence?

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

1. 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 tax 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 he temporarily returns to his "previous home country" because of the COVID-19 situation. He may either never have lost his status as resident of his previous home country under its domestic legislation, or he may regain residence status upon his 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 with 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 tax residence status.

Please note that the OECD recommendations are not restrictive for member states. They are merely guidelines for the interpretation of Double Tax Treaties. Therefore, an individual wouldn't be able to directly claim any rights based on the OECD recommendations in 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, for example, often refer to this Convention.

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

The starting point is any tax residence is in 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. However, if such person is 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 a Swiss tax resident under Swiss domestic law.

According to Art. 3 para. 1 of the Swiss Direct Federal Tax Law (DFTL), individuals are subject to Swiss worldwide taxation (i.e., unlimited tax liability) on the basis of their personal affiliation if they have a Swiss **tax domicile** or **tax residence**.

According to Art. 3 para. 3 DFTL, a person is tax **resident** of Switzerland if he or she resides in Switzerland, without notable interruption, for at least 30 days and engages in a gainful activity or stays in Switzerland for at least 90 days without engaging 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 there permanently (i.e. with strong personal and economic relations with Switzerland).

Therefore, the tax residence of persons can be considered in Switzerland if (a) they stay in Switzerland for more than 90 days (or 30 days if working in or from Switzerland), or if (b) 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 with Switzerland. The Swiss tax authorities will generally consider in either of these two cases that the person in question is subject to unlimited (worldwide) tax liability in Switzerland.

The confinement measures during the Covid-19 period can easily exceed 90 days (e.g. March, April and May 2020). In addition, if the person has family in and economic links with Switzerland, the tax authorities don't even 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 their 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 based on the sole fact that the individual is stranded in Switzerland because of the 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 indications (e.g. centre of vital interests in Switzerland), it is possible that the place of confinement during the Covid-19 could constitute an additional evidence that the person in question has taken up tax residence in Switzerland.

We advise our clients on this issue, both in normal times and in times of crisis. We will be glad to assist you if you have any specific questions or require any assistance.

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