

Newsletter No.

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Federal Council opens consultation on the taxation of home offices abroad

Income generated by employees working remotely from their homes abroad should be taxable in Switzerland, provided that Switzerland has the right of taxation under an international treaty. This bill will secure tax revenues in Switzerland. A legal basis should be given for an agreement with France. The Federal Council submitted the revision of national tax law for consultation at its meeting on 9 June 2023.



By **Maurus Winzap**
lic. iur., LL.M., Attorney at Law / Certified
Tax Expert
Partner
Direct phone: +41 58 658 56 05
maurus.winzap@walderwyss.com



By **Fabienne Limacher**
MLaw, LL.M., Attorney at Law / Certified
Tax Expert
Partner
Direct phone: +41 58 658 52 81
fabienne.limacher@walderwyss.com

Background

The push towards digitalisation and new communication technologies in recent years has furthered the demand for more home office in the labour market. The COVID-19 pandemic reinforced this trend of working from home, especially in the tertiary sector. Intergovernmental developments have provided the immediate trigger for this legislative proposal.

Traditionally, double taxation agreements (DTAs) are based on the principle that income is taxable at the place where the employment is exercised. Consequently, cross-border commuters from abroad pay withholding tax on their income earned in Switzerland. If they work from home, the applicable treaties provide that the foreign state of residence may tax such income earned from home.

In a supplementary agreement to the double taxation agreement (DTA), Switzerland and France agreed at the end of last year that cross-border commuters should pay withholding tax on all income earned in Switzerland from 1 January 2023, provided that no more than 40 per cent of the individual working hours are spent working remotely from home in France. The agreement will be definitively signed on 30 June 2023.

Content of Proposal

In the course of the solution reached with France on the allocation of the right of taxation of home office work performed abroad, it is key to ensure this on the national level as well.

This is because Switzerland's right of taxation of income earned in Switzerland is generally conditional on the absence of a treaty restricting the latter on the one hand and a taxable event under domestic law on the other hand. If a double taxation agreement or a cross-border commuter agreement assigns the right of taxation to Switzerland, but the work is not

physically performed in Switzerland, Switzerland will generally not be entitled to exploit its right to impose taxation in accordance with the applicable case law of the Swiss Supreme Court.

With regard to withholding tax for employees without tax residence or domicile in Switzerland, the preliminary draft introduces a national tax base for activities without a mandatory physical presence on the premises of the Swiss employer. Accordingly, physical presence in Switzerland is no prerequisite for withholding tax being levied on employment income of employees residing abroad.

If an explicit taxation basis for foreign home offices is created in national law, the certification of home office days worked takes on considerable importance. Cooperation between employees and employers to this end appears indispensable.

Developments on the level of treaty-based regulations

Article 15, paragraph 1 OECD-MTC, the wording of which is generally adopted in the DTAs concluded by Switzerland, stipulates that salaries, wages and similar remuneration received by a resident of a Contracting State from employment may only be taxed in that State (State of residence) unless the work is carried out in the other Contracting State (State of performance). As for non-DTA states, Switzerland has an independent and unrestricted right of taxation in the event of a physical presence in Switzerland.

The DTAs concluded with the neighbouring countries Italy, France, Germany, Austria and Liechtenstein currently do not contain any general provisions pursuant to which the taxation of foreign home office work is assigned to the Swiss place of work. Accordingly, the new basic standard can only have a specific effect if Switzerland is granted the right to tax

foreign home office work in a treaty. A significant first step in this direction has been taken with France.

Entry into Force

If the supplementary agreement to the DTA with France can take effect as planned on 1 January 2025, the Federal Council will ensure that the amendments to national law also enter into force on 1 January 2025.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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