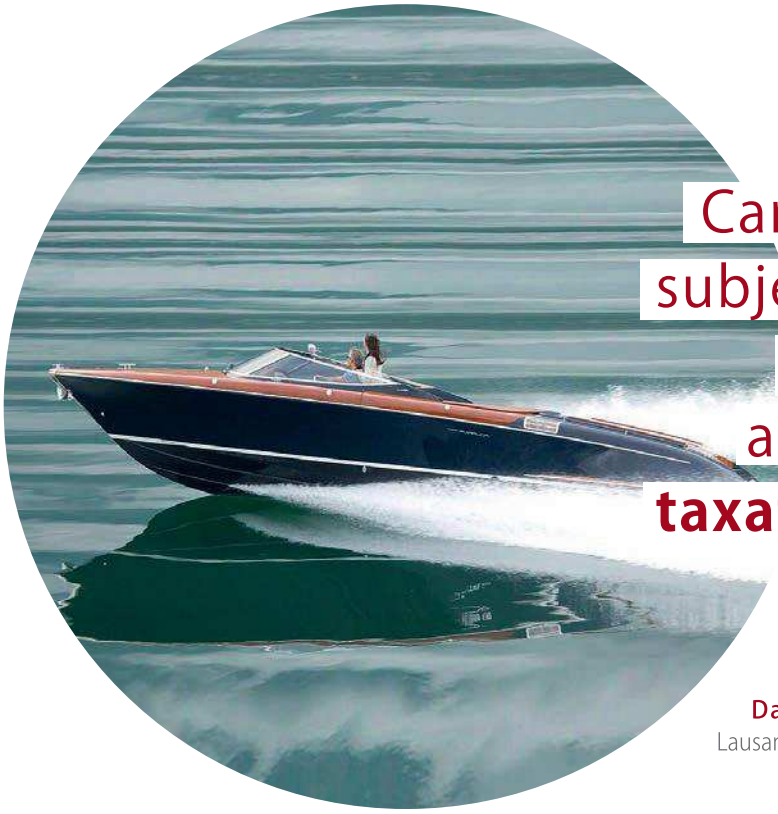

Can a **taxpayer** who is subject to **lump sum taxation** take advantage of **double taxation** agreements?

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Swiss tax law offers the possibility for foreign nationals meeting certain conditions to be taxed not on their wealth and income, but on their expenses. This system, legally called taxation on expenditure, is also known as lump sum taxation.

In principle, lump sum taxpayers can benefit from double taxation agreements (DTA) without any particular restrictions (section 5.1 of Circular No. 44 of the Federal Tax Administration (FTA) of 24 July 2018). However, the application of a number of DTAs raises specific questions. These are, on the one hand, the agreement between Switzerland and France and, on the other hand, the agreements between Switzerland and Germany, Austria, Belgium, Canada, the United States, Italy and Norway.

Benefitting from a double taxation treaty generally offers two advantages to the taxpayer. Firstly, it allows him to benefit from treaty rules concerning the determination of his tax residence. These rules are sometimes more favourable than those provided for by the domestic law of the country in which he risks being classified as a tax resident. Secondly, the use of a double taxation treaty may allow for full or partial tax relief on foreign withholding taxes.

We would like to draw the reader's attention to the fact that claiming partial or total relief of foreign tax under a double taxation agreement entails that the income will be taken into account in the control calculation for a lump sum tax payer. Indeed, once the tax intended to replace income tax at federal level and the cantonal and municipal taxes intended to replace both income and wealth tax have been calculated, these amounts must be compared each year with those calculated on a number of items, including the amounts for which a double taxation agreement has been used to obtain partial or total relief from foreign tax. It is important to note that once the tax on the basis of expenses and the tax on the basis of items relevant to the control calculation have been calculated, only the higher amount of the two is due. These amounts are not cumulative. The practical consequence for the taxpayer is that before claiming any relief, it is essential to calculate whether it is better for him to pay tax at source abroad, or to be taxed on the control calculation.

The Double Taxation Agreement between Switzerland and France

According to Article 4 par. 6 let. b of the Franco-Swiss Double Taxation Agreement of 9 September 1966, an

individual is not considered as resident of a Contracting State within the meaning of the Agreement if he is taxable in that State only on a flat-rate basis determined according to the rental value of the residence or residences he owns in the territory of that State. According to a circular of 29 February 1968 addressed by the AFC to the cantonal tax administrations, discussions between the Swiss and French tax administrations gave rise to what was called the "*forfait majoré* (increased lump sum)". In practice, this meant that if the lump sum taxpayer accepted that the amount on which he was taxed was increased by 30%, the French tax authorities considered that he could benefit from the double taxation agreement. For erroneous reasons that we have criticised on numerous occasions, the French Directorate General of Public Finances unilaterally denounced this agreement on 26 December 2012 and decided that, starting from 1st January 2013, the Franco-Swiss Agreement no longer applied to lump sum taxpayers, regardless of whether or not they paid an increased lump sum.

Although the decision of the French tax authorities is all the more open to criticism since the reform of lump sum taxation has come into force, it is prudent to take note of the French decision and to consider that lump sum taxpayers no longer benefit from the Franco-Swiss Agreement. The main consequence of this decision is that in order to determine whether a lump sum taxpayer can be requalified in France as a French tax resident, it is necessary to apply Article 4B of the French General Tax Code which stipulates, in its first paragraph, that the following persons are considered as having their tax domicile in France: those who have their home or main place of residence in France; those who carry out a professional activity in France, whether salaried or not, unless they can justify that this activity is a minor activity; and those who have the centre of their economic interests in France It should be pointed out that the Franco-Swiss Agreement was more advantageous for the taxpayer, as it provides in Article 4 par. 2 that the essential criterion to be taken into consideration in determining the tax residence of a person is the centre of his vital interests, i.e. the place with which the personal relations are closest, without taking into account the centre of economic interests.

Switzerland's double taxation agreements with Austria, Belgium, Canada, Germany, Italy, Norway and the United States

The treaties concluded by Switzerland with the above-mentioned states provide for a system known as "modified lump sum taxation".

A lump sum taxpayer who wishes to benefit from a double taxation treaty providing for this system must declare and be taxed in Switzerland at the federal, cantonal and municipal levels on all income from that state, provided that the treaty grants Switzerland the power to tax. For example, a lump sum taxpayer wishing to benefit from the Belgo-Swiss Agreement must declare and be taxed in Switzerland on a dividend from a Belgian source, but not on a director's fees paid by a company located in that State. Indeed, according to the Belgo-Swiss Agreement, the former must be taxed in Switzerland, while the latter must be taxed in Belgium.

It is important to emphasise that this income will be treated in the same way as the income relevant for the control calculation outlined above. In other words, a lump sum taxpayer wishing to benefit from a double taxation agreement providing for modified taxation on the basis of expenditure who is obliged to declare the above-mentioned income will not see his taxes increase provided that, when added to the items to be taken into account in the control calculation, they do not give rise to a higher tax than that calculated on his lump sum.

Conclusion

In conclusion, we stress that it is very important that the taxpayer who wishes either to use a double taxation agreement to claim a partial or total relief of foreign tax or to benefit from a double taxation agreement providing for modified lump sum taxation ensures that this will not have negative financial consequences due to the control calculation. It is also important that he ensure that his bank(s) do not claim relief without his knowledge.

As for the Franco-Swiss Agreement, we can only repeat that it would be important for Switzerland and France to agree on the application of the Agreement to lump sum payments. ■