double imposition précitées doit déclarer et être imposé en Suisse sur tous les revenus provenant de l'Etat concerné à condition que la convention attribue à la Suisse le pouvoir d'imposition. Il importe de souligner que ces revenus seront traités de la même manière que ceux entrant en considération pour le calcul de contrôle. En d'autres termes, un forfaitaire souhaitant bénéficier de l'une des conventions de double imposition prévoyant le système de l'«imposition modifiée d'après la dépense» se trouvant dans l'obligation de déclarer les revenus précités ne verra pas le montant de ses impôts augmenter à la condition qu'ajoutés aux éléments à prendre en compte dans le cadre du calcul de contrôle ils n'engendrent pas un impôt supérieur à celui calculé sur ses dépenses.

En second lieu, la convention de double imposition conclue entre la Suisse et la France a fait couler beaucoup d'encre notamment de notre plume. La situation actuelle peut être résumée en quelques mots de la manière suivante. Depuis le 1er janvier 2013, la Direction générale des finances publiques françaises considère que les personnes imposées d'après la dépense ne peuvent plus bénéficier de la convention franco-suisse. Cette position n'est pas partagée par les autorités fiscales helvétiques. Par exemple, les administrations cantonales des cantons de Genève et Vaud estiment qu'un forfaitaire bénéficie de cette convention à condition que la base des dépenses sur lesquelles il est imposé en application des principes mentionnés ci-dessus soit majorée aussi bien pour le calcul des impôts cantonaux, communaux que fédéraux de 10%.

Conclusion

Nous conclurons cette contribution par trois remarques. D'une part, si la conséquence de la réforme du 28 septembre 2012 a été de renchérir le système de l'imposition d'après la dépense elle a permis que l'initiative fédérale tendant à le supprimer a été largement rejetée le 30 novembre 2014 et l'a par conséquent stabilisé politiquement. D'autre part, la Suisse n'est évidemment pas le seul pays à offrir un système fiscal attractif pour les personnes fortunées. Nous pensons évidemment au forfait italien. Cependant, le nombre des concurrents à la Suisse tend à diminuer dans la mesure où le gouvernement portugais a décidé de mettre fin aux NRH à partir du 1er janvier 2024 et que depuis le 1er janvier 2022 il est de plus en plus difficile d'obtenir un permis de séjour en Grande-Bretagne afin de bénéficier du statut de non-dom. Enfin, vu que les administrations fiscales des différents cantons sont de plus en plus scrupuleuses sur l'application des règles mentionnées ci-dessus, nous ne pouvons que conseiller aux forfaitaires de s'entourer de professionnels.

Lump sum taxation: a **regulated** and **durable** system

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Introduction

At a time when the Portuguese government has decided to abolish the NHR status that attracted a large number of wealthy individuals to that country, and when it is becoming increasingly difficult to obtain a residence visa in the United Kingdom in order to benefit from the resident non-domiciled status – which could be abolished if Labour wins the election in 2024 – it is important to give an overview of the Swiss tax regime that attracts wealthy foreign nationals.

Expenditure-based taxation, also known as lump-sum taxation, allows foreign nationals who meet certain conditions to be taxed in Switzerland not on the basis of their income and assets, but on the basis of their expenses.

Unlike the Portuguese NHR or the Italian flat-tax system, lump-sum taxation is rooted in Swiss tradition. It originated in the canton of Vaud in 1862 and was introduced in Geneva in 1928. It has existed at federal level since 1934. This system of taxation went through a period of turbulence that began on 8 February 2009, when the people of Zurich decided in a referendum, by a majority of 52.9%, to abolish this form of taxation in their canton from 1st January 2010. This period ended on 30 November 2014, when around 60% of the Swiss population rejected an initiative aimed in particular at abolishing lump-sum taxation throughout the country. In the meantime, the conditions for lump-sum taxation were tightened by Parliament on 28 September 2012, a legislative reform that came into force on 1st January 2016 for new arrivals and on 1st January 2021 for taxpayers already benefiting from this system.

Lump-sum taxation conditions

Taxpayers wishing to elect for lump-sum taxation must meet the following conditions:

a) Only taxpayers who are not Swiss nationals can qualify for lump-sum taxation. This rule excludes from the circle of potential beneficiaries Swiss nationals, dual nationals who hold both Swiss and foreign nationalities, and foreign nationals who acquire Swiss nationality.
b) Only persons who are taxed for the first time on an unlimited basis in Switzerland or after an absence of at least ten years may be granted lump-sum taxation. However, the Federal Tax Administration (FTA) has specified in section 2.3 of its Circular No. 44 of 24 July 2018 that this requirement does not apply to lump-sum taxpayers who leave Switzerland and decide to return to benefit from this system again before a period of ten years.
c) One of the conditions of lump-sum taxation is that the taxpayer who wishes to benefit from it must not be gainfully employed in Switzerland. According to the FTA, "a person who is gainfully employed in Switzerland in a principal or secondary occupation of any kind whatsoever and who derives income therefrom, in Switzerland or abroad, is not entitled to lump-sum taxation. This is particularly the case for artists, scientists, inventors, sportsmen and women and members of boards of directors who are personally gainfully employed in Switzerland" (para. 2.3 of Circular No. 44). This means that a lump-sum taxpayer may not engage in any gainful activity in Switzerland, either as an employee of a Swiss or foreign company or as a self-employed person. On the other hand, they may carry out any non-remunerated activity in Switzerland or abroad, as well as any lucrative activity abroad either as an employee or as a self-employed person. Furthermore, a lump-sum taxpayer has the right to manage his private assets by investing them in Switzerland or abroad. These investments may be remunerated, for example, in the form of interest, dividends or capital gains. However, care must be taken to ensure that the management of private assets does not become an independent gainful activity within the meaning of Swiss law.

Two points are worth highlighting. Firstly, some cantons are very restrictive when it comes to gainful employment abroad. Indeed, some of them do not accept a lump-sum taxpayer holding an executive salaried position outside Switzerland. Secondly, a recurring question which divides the legal doctrine and on which there is no case law from the Federal Court is whether a lum-sum taxpayer can be a director of a Swiss company. Without entering into a debate that goes beyond the scope of this contribution, we recommend that lump-sum taxpayers should not hold such a position unless they have obtained the agreement of the tax authorities of their canton of domicile.

Calculation of the tax due by the taxpayer

The basic principle is that instead of paying tax on income and wealth, the lump-sum payer pays tax calculated on the basis of expenditure.

The first step is for taxpayers to complete a form listing their annual expenses and those of their dependants.

Once this amount is determined, it is important to note that it may not in any case be lower that two thresholds. First, the amount of expenses must not be less than seven times the annual rent or rental value of the taxpayer's property, and for those staying in either a hotel or a retirement home, not less than three times the annual cost of board and lodging. Furthermore, in all cases, this sum must not be less than CHF 421,700 for federal tax and an amount determined by each canton for cantonal and communal taxes (this minimum amount is CHF 445,116 in Geneva, CHF 437,600 in the canton of Vaud and CHF 250,000 in the canton of Valais).

Finally, it is up to the cantons, using a method of their choice, to impose a wealth tax on the taxpayer's assets, on a flat-rate basis. For example, the cantons of Geneva and Vaud have simply chosen to increase by 10% the amount on which the taxpayer is taxed in application of the principles mentioned above.

In practical terms, this means that a married couple taxed on the minimum amounts will pay an annual sum of around CHF 159,000 in Lausanne, around CHF 152,500 in Geneva and around CHF 104,000 in Verbier.

Control calculation

Once the tax due by the taxpayer has been calculated, this amount is compared each year with an amount calculated on the basis of a certain number of items. It is important to emphasise that once this control calculation has been made between the tax due on the basis of expenditure and the tax due on the basis of the items taken into account for this calculation, only the higher of the two amounts is due. The two amounts are not cumulative.

The elements to be taken into consideration for the control calculation are as follows:

1) The taxpayer's real estate assets located in Switzerland and income thereof.
2) Movable property in Switzerland and income thereof.
3) Movable capital held in Switzerland, including debts secured by the pledge of a property and income thereof.
4) Copyrights, patents and similar rights being used in Switzerland and income thereof.
5) Swiss-source pensions and annuities.
6) Income for which the taxpayer claims partial or total relief from foreign tax under a double taxation treaty concluded by Switzerland.

Lump-sum taxation and double taxation treaties

In principle, lump-sum taxpayers may benefit from double taxation agreements without any particular restrictions. However, the application of a number of them raises particular questions.

Firstly, the treaties concluded by Switzerland with Germany, Austria, Belgium, Canada, the United States, Italy and Norway provide for a system known as "modified lump-sum taxation". A lump-sum taxpayer who wishes to benefit from one of the aforementioned double taxation agreements must declare and be taxed in Switzerland on all income arising in the State in question, provided that the agreement grants Switzerland the right to tax. It is important to emphasise that this income will be treated in the same way as that taken into consideration for the control calculation. In other words, a lump-sum taxpayer wishing to benefit from one of the double taxation treaties providing for the system of "modified lump-sum taxation" who is obliged to declare the aforementioned income will not see the amount of his tax increase on condition that, when added to the elements to be taken into account in the control calculation, they do not give rise to a tax higher than that calculated on his expenditure.

Secondly, the double taxation agreement between Switzerland and France has been the subject of much discussion, not least by us. The current situation can be summarised as follows. Since 1 January 2013, the French Directorate General of Public Finances has taken the view that lump-sum taxpayers may no longer benefit from the Franco-Swiss treaty. This position is not shared by the Swiss tax authorities. For example, the cantonal administrations of Geneva and Vaud consider that a lump-sum taxpayer benefits from this agreement provided that the expenditure base on which he is taxed in application of the principles mentioned above is increased by 10% for the calculation of cantonal, communal and federal taxes.

Conclusion

We will conclude this contribution with three remarks. First, while the consequence of the reform of 28 September 2012 was to make the system of lump-sum taxation more expensive, it meant that the federal initiative to abolish it was largely rejected on 30 November 2014 and consequently stabilised it politically. On the other hand, Switzerland is obviously not the only country to offer an attractive tax system for wealthy individuals, with the Italian flat-rate system being highly competitive. However, the number of competitors to Switzerland is tending to diminish insofar as the Portuguese government has decided to put an end to the NHR regime as of 1 January 2024 and since 1 January 2021 it has been increasingly difficult to obtain a residence visa in the United Kingdom in order to benefit from res non-dom status. Finally, as the tax authorities in the various cantons are becoming increasingly strict about applying the above-mentioned rules, we can only advise lump-sum taxpayers to seek professional guidance. ■