

Federal Supreme Court Rules on Calculation of Applicable Wage Withholding Tax Rate

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In a recently published decision of 24 April 2023 (9C_676/2022), the Federal Supreme Court (FSC) ruled on the calculation of the applicable rate for determining the wage withholding tax (WHT).

(a) Facts. In the years 2012 and 2013, the taxpayer in question was resident in France and worked as a doctor in France and Switzerland. The taxpayer's employer deducted the WHT from the taxpayer's salary. The WHT amounted to CHF 372.10 (2012) and CHF 1,965.10 (2013). The cantonal tax administration of Geneva confirmed this in a decision that became legally binding. In 2014, the cantonal tax administration of Geneva introduced supplementary tax and tax evasion proceedings for the tax years 2004-2013 since the employer had not annualized the taxpayer's income to determine the tax rate. Consequently, the taxpayer claimed an amendment to the tax rate and sent more information about his income in France to the tax administration of Geneva. Subsequently, the cantonal tax administration of Geneva changed its own decisions on the WHT for the tax years 2012 and 2013, and set the tax rate based on the total worldwide income. It then cancelled these decisions and ruled that WHT was based on the annualized income in Switzerland. The income earned outside Switzerland was not part of the calculation. The newly calculated WHT amounted to CHF 18,043.95 (2012) and CHF 14,145.60 (2013). The taxpayer objected to these decisions, which was declined by the cantonal instances. As a result, the taxpayer appealed to the FSC arguing that the WHT should have been calculated based on the tax rate for the worldwide income.

(b) Legal background. The WHT is regulated in the Federal Direct Tax Law (FDTL), the Tax Harmonisation Act (THA) and the cantonal tax law of Geneva (TLG). Employees working but living outside of Switzerland are subject to WHT. Taxes are calculated on the gross income and cover the federal tax, the cantonal tax, and the municipal tax. If income from work is affected, it is the taxpayer's employer as debtor who levies and pays the wage WHT. If the amount of WHT is not enough or the WHT has not been deducted at all, the tax office will request the debtor to pay the difference. If the decision on the amount of WHT is already legally binding, the tax office will launch supplementary tax proceedings. The taxpayer, on the other hand, is entitled to file an objection or an appeal against the decision of the tax office.

(c) Issue. The issue was the assessment of the tax basis for calculating the wage WHT.

(d) Decision. The FSC held that neither the FDTL nor the THA or the TLG contains any provisions regarding the regulation of the applicable tax rate for wage WHT for taxpayers working but not resident in Switzerland. Therefore, the annualization of the taxpayer's income in 2012 and 2013 lacked a legal basis and could not be considered for determining the WHT rate. Nor could the tax rate be calculated based on the global income (article 7(1) of the FDTL and corresponding tax law of the canton of Geneva). This principle is only applicable to taxpayers assessed in the ordinary tax assessment procedure. The principle does not apply to workers resident outside Switzerland who are subject to wage WHT in

Switzerland. Instead, the tax rate for wage WHT is based on the gross income earned in Switzerland. Accordingly, the FSC admitted the taxpayer's appeal, annulled the decision of the previous instance and obliged the cantonal tax administration to recalculate the wage WHT based on the gross income in the respective tax periods.

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