

France; Switzerland

Residence Status Under Tax Treaty Is Irrelevant for Domestic Withholding Tax Purposes, Supreme Court Says

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Report from our correspondent Pierre Burg

The residence status of taxpayers for applying withholding tax on salaries depends on domestic criteria only, not on their residence status under tax treaties. Consequently, the withholding tax does not apply to taxpayers who are considered as resident in France under domestic law, even if those taxpayers are considered as non-resident under the applicable tax treaty.

The French Supreme Administrative Court (*Conseil d'Etat*) provided this clarification in judgment No. [469771](#) published on 5 February 2024 in a case involving a Swiss individual seconded to France for professional purposes.

The individual was seconded to France for 3 years as the CEO of a French company. He was considered as having his "fiscal domicile" in France under French domestic law, because his main professional activity was exercised in France. However, the individual was considered as resident in Switzerland under the [France - Switzerland Income and Capital Tax Treaty \(1966\)](#), in so far as his family stayed in this country.

The French employer of the individual levied the withholding tax applicable to French-source salaries paid to employees who are not domiciled in France, pursuant to article 182 A of the General Tax Code (*Code général des impôts*, CGI).

A dispute emerged on the fraction of salaries taxable in France. The employer argued that salaries corresponding to the activity exercised out of France (e.g. home office from Switzerland) were not taxable in France pursuant to the France-Switzerland tax treaty. The tax authorities and lower courts (first-instance court and administrative court of appeal) considered on the contrary that all salaries were taxable in France, irrespective of where the activity was exercised.

The taxpayer submitted the case to the Supreme Court, which first analysed ex officio whether the withholding tax was applicable at all. The Court found that salaries paid to a taxpayer who is considered as domiciled in France under domestic law may not be subject to the withholding tax, irrespective of the fact that the taxpayer is considered as resident of another country under the applicable tax treaty.

In the case at hand, the employer was therefore not liable to any withholding tax, as it was not disputed that the employee was fiscally domiciled in France under the domestic "professional activity" criterion. The Court annulled the lower court's judgments as well as all withholding tax reassessments made by the tax authorities.

Note: Not applying the withholding tax does not lead to an exemption of the salaries. Non-resident taxpayers must file each year an income tax return mentioning the salaries (and other income, if any) earned in France during the previous civil year.

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