



Taxation at source of certain income in Switzerland

Webinar at SUPSI, 12 May 2020

Agenda

- General introduction to Swiss taxation at source
- «Real» source withholding tax in general
- «Real» source withholding tax in particular covering:
 - Persons with tax domicile or tax residence in Switzerland (**«person category 1 subject to source withholding tax»**)
 - Persons without tax domicile or tax residence in Switzerland (**«person category 2 subject to source withholding tax»**)
- Case studies
 - Home Office
 - Secondment
 - Frontier workers
 - Artists
 - Members of board of directors
- COVID-19 tax update

General introduction to Swiss taxation at source

- Source taxation as a means to enforce a jurisdiction's ability to tax is a popular instrument to levy taxes.

- Swiss taxation at source occurs/exists in two forms:
 - Federation levies a source withholding tax on certain revenues from capital as a safeguarding tax (i.e. so called Swiss Withholding Tax);
 - Source withholding tax on certain income from individuals (also known as «real» source withholding tax since it is levied / comes instead of ordinary income taxation, i.e. it «has» a final withholding tax effect).



«Real» source withholding tax in general

- Distinction is required between:
 - Persons with a tax domicile or tax residence in Switzerland (referred to as «person category 1 subject to source withholding tax»)
 - Persons without tax domicile or tax residence in Switzerland (referred to as «person category 2 subject to source withholding tax»)



Person category 1 subject to source withholding tax

- Taxable subject:
 - Foreign employees (i.e. without Swiss citizenship);
 - Unlimited tax liability in Switzerland;
 - No long-term residence permit C (Art. 34 AuG).

- Taxable object:
 - All income from employment including secondary income, such as compensation for special services, commissions, special allowances, etc.;
 - Payments from Swiss sources (i.e. debtor must be located in Switzerland);
 - Additional income which is not subject to source withholding tax is eventually taxed by means of an additional ordinary tax assessment (e.g. foreign income from employment, investment or rental income > free allowances are applicable that vary amongst the cantons).

Person category 1 subject to source withholding tax

- Tax tariffs:
 - Federal-, cantonal-, and municipal tax as well as church tax (if levied at all) are covered in the applicable tax tariffs;
 - Deductions (e.g. social security, health, children) are considered;
 - Source withholding tax tariffs are progressive;
 - Different source withholding tax tariffs take into account the individual situation of a taxable person.
- Assessment proceedings:
 - Debtor of the taxable supply (i.e. salary) = tax substitute;
 - Withholding source tax from supplies by tax substitute;
 - Tax substitute has to transfer source withholding tax to the competent tax authority;
 - Tax substitute receives a provision for its (administrative) function as tax substitute.

Revision rules applicable for person category 1 subject to source withholding tax as per 01.01.2021



- Aim to minimize discrimination between source and ordinary taxed persons in Switzerland (recognized as violation of Free Movement Agreement between Switzerland and the European Union; cf. jurisprudence of the Federal Supreme Court);
- Irrespective of whether the gross income is above CHF 120'000 (current threshold), a subsequent ordinary tax assessment is possible upon request until 31 March of the following year;
- Decision upon request is binding until the termination of source withholding tax liability, i.e. a person subject to source withholding tax must file from now on a tax return for every subsequent tax period;
- In case of a switch to ordinary taxation a taxable person is taxed ordinarily for the entire tax period > so far taxation takes place on pro-rata-temporis basis.

Person category 2 subject to source withholding tax

- Taxable subject:
 - Individuals without tax domicile or residence In Switzerland;
 - Limited taxation due to economic affiliation;
 - Distinction amongst «category 1» and «category 2» subject to source withholding tax is laid down in Art. 98 DBG.

- Taxable object:
 - No general clause / definition exists;
 - Taxable object is individually defined for the respective sub-category (i.e. person subject to source withholding tax).

Person category 2 subject to source withholding tax

Sub-categories of persons

- Employees (Art. 91 DBG; Art. 35 (1) (lit. a) StHG):
 - Employee with foreign tax residence;
 - Citizenship no determining/decisive criteria (i.e. also Swiss citizens are subject to source withholding tax);
 - Short-term worker, weekly residents/commuters and cross-border commuters;
 - All income from employed activity;
 - Double Tax Conventions must be taken into account (and inherent limitation/allocation clauses, e.g. special regime cross-border commuters);
 - Source tax tariffs equivalent as for persons category 1 subject to source withholding tax.

- Artists / Sportsmen / Lecturers (Art. 92 DBG; Art. 35 (1) (lit. b) StHG):
 - Self-employed or employed artists, sportsmen and lecturers without tax residence in Switzerland;
 - Irrelevant whether income is received directly or collected indirectly (i.e. by a third person);
 - Gross income less expenses (lump-sum deduction of 20% foreseen) = special rule.

Person category 2 subject to source withholding tax

Sub-categories of persons

- Members of Board of Directors (Art. 93 DBG; Art. 35 (1) (lit. c) and (lit. d) StHG):
 - Members of board of directors;
 - **Attention:** In the international context different understanding about the responsibilities/competences of a member of the board of directors > this may lead to qualification conflicts (i.e. monistic versus dualistic system);
 - Source withholding tax is levied on bonuses, attendance fees, fixed allowances, employee participations and similar remuneration paid;
 - Analysis of the tasks of a member of the board of directors is required (strategic vs. operational involvement).
- Mortgage Creditors (Art. 94 DBG; Art. 35 (1) (lit. e) StHG):
 - Persons abroad that receive interest from claims by mortgages or pledges on real estate/property located in Switzerland;
 - Note: also legal persons are in scope;
 - In case of a foreign creditor or usufructuary the administrative burden to levy source withholding tax is repealed (no Swiss extra-territoriality!).

Person category 2 subject to source withholding tax

Further sub-categories of persons

- Recipients of pension plan benefits (public law regulated contract / private law regulated contract)

- Employees in international transports

- Recipients from employee participation instruments:
 - Persons who have been allocated or partially earned blocked or not list options, claims to employee participations instruments or not genuine employee participation instruments when they resided in Switzerland;
 - Realisation/exercise at a later point in time (after having left Switzerland);
 - Pro-rata-temporis taxation.

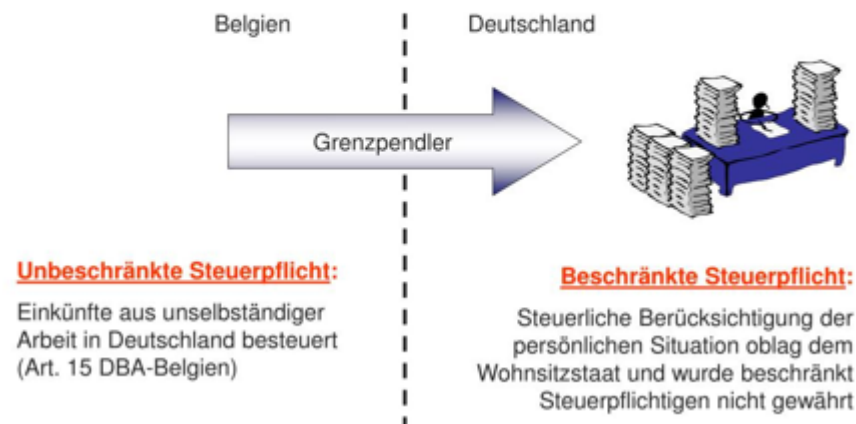
Person category 2 subject to source withholding tax

Revision rules applicable as per 01.01.2021

- Quasi-residency, i.e. who has no tax residency in Switzerland but receives most of his income from Swiss sources fulfils the conditions for a subsequent ordinary tax assessment (implementation of CJEU jurisprudence namely so called «Schumacker judgement»):
 - 90% of worldwide gross income must be derived from Swiss sources.

EuGH Urteil v. 14.02.1995, C-279/93 – Schumacker, Slg. 1995, I-225 = DB 1995, 407

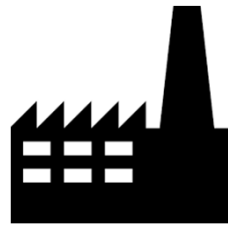
Der Fall „Schumacker“



Case studies source withholding tax

Home-Office

X AG

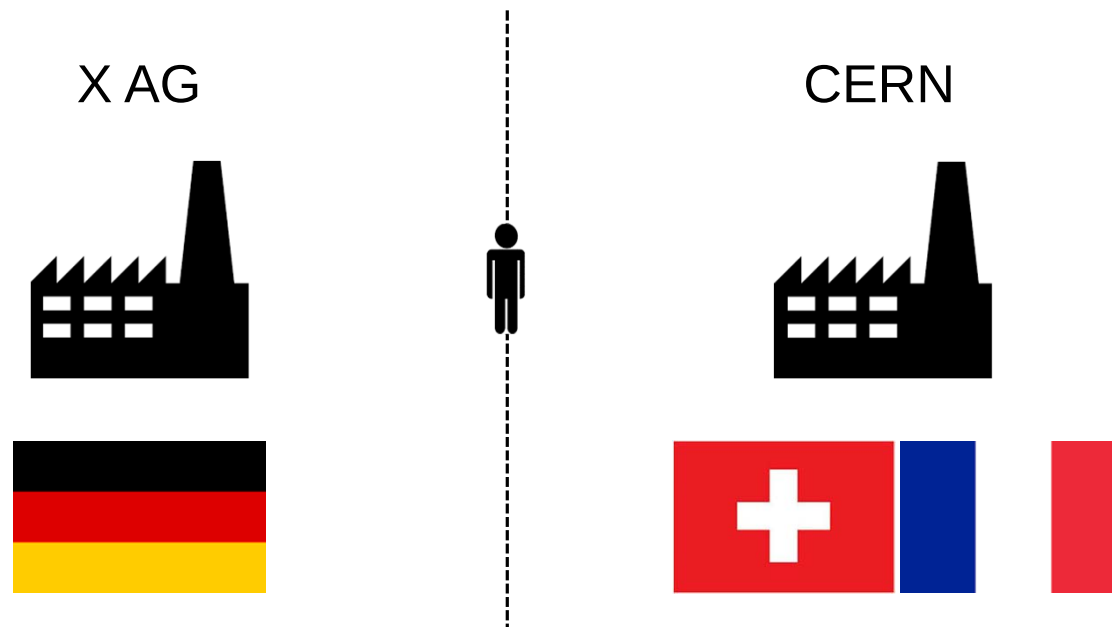


Home Office



- German working contract;
- Employee of X AG having its place of business in Germany;
- From to time to time employee shall work in the German offices of X AG;
- Center of vital interests / habitual abode in CH;
- German citizen without long-term residence permit C.

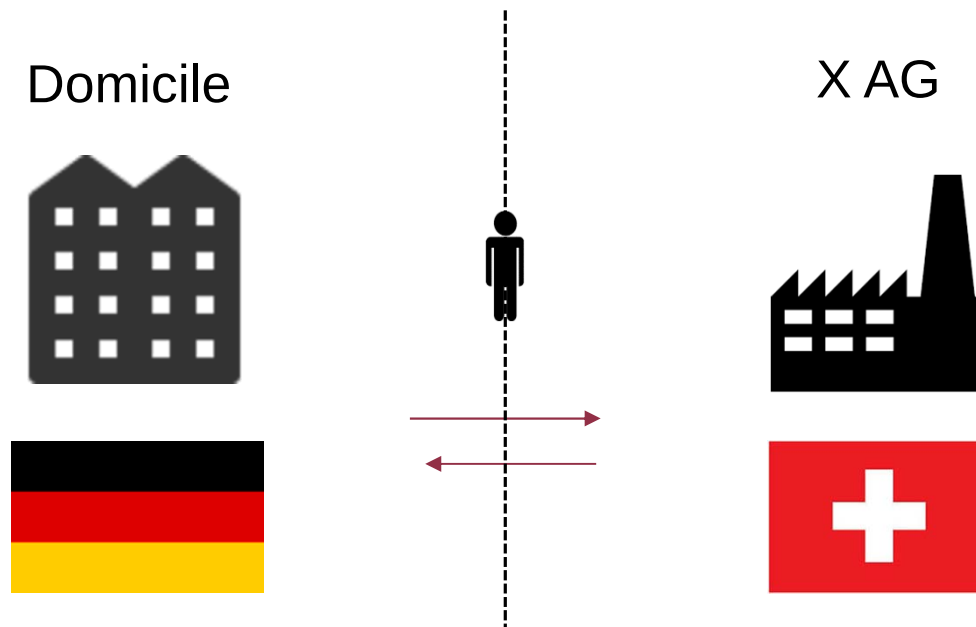
Case studies source withholding tax Secondment



- X AG is a external service provider at CERN;
- Employee is resident in Germany (center of vital interests in GER);
- Employee will presumably work (physically) 95% of his work in France and 5% in Switzerland;
- Project is expected to last for one year;
- Employees stays in a Swiss hotel during the week.

Case studies source withholding tax

Cross-border commuters



- Employee lives in Freiburg i. Br. (GER);
- Employee at X AG with place of business in Zurich;
- Employee does not regularly return to his German residence.

Case studies source withholding tax Artists

Residence



Zurich Filmfestival



- Actress S is invited to Zurich Filmfestival;
- S is a US (tax) resident;
- S receives CHF 100,000 for her appearance at/on stage;
- Management of actress is of the opinion that exclusively the state of residence (i.e. US) may tax her salary.

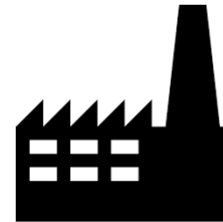
Case studies source withholding tax

Member of board of directors

Residence



Z AG



- Z AG with place of business in Switzerland;
- X is resident in Germany and shall become new member of the board of directors of Z AG.

COVID-19 tax update

Covered impact on source withholding tax



- Home Office situation
 - Triggering a permanent establishment abroad?
 - Income tax consequences for affected employees working from their home office abroad?
 - Recent developments (Swiss position, new bilateral consultation agreements, OECD recommendations, etc.)

Grazie per l'attenzione!

Dr. Julian Kläser, MLaw
Senior Associate
+41 44 396 91 44
julian.klaeser@mll-legal.com