

Tax Alert

Human Capital ALERTS

New rules for cross-border worker taxation in Vaud

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The Vaud authorities have recently clarified that the border worker-status (no Swiss source tax) does not apply, if the individual spends more than 45 nights per annum outside his country of residency (Switzerland and third countries), which is a new restriction.

Swiss employers must be aware that in certain cases French tax residents may become subject to Swiss source tax on their Swiss employment income, even if they are not residing in Switzerland.

Principle of taxation for cross-border workers

Foreign employees who reside in neighbouring France ("cross-border workers") are tax exempt in Switzerland, if they fulfil the conditions outlined in the Agreement of April 11, 1983 between different Swiss cantons and France. These cantons are Berne, Solothurn, Basel (City & Land), Vaud, Valais, Neuchâtel & Jura, but not Geneva. Accordingly, companies based in one of those cantons that employ French tax residents for professional activity basically do not need to withhold tax at source on the employment income.

The Agreement defines the cross-border worker as a person residing in one State and working in another State for an employ-

er established in that other State and returning in principle each day to his/her State of residence. However, the Swiss and French tax authorities have admitted that throughout any given year, a cross-border commuter, who is working full-time, is allowed to spend up to 45 nights per year outside his/her residence country.

New interpretation regarding the 45-nights requirement

Until recently, the understanding of the Vaud tax authorities was that the individual was not allowed to spend more than 45 nights *in Switzerland*, but it has now been communicated that the 45 nights relate not only to Switzerland but also to any other third country. Obviously this limit does not include vacation days.

In essence, a cross-border worker who travels extensively to other countries than France and Switzerland does not qualify for Swiss Source tax exemption.

Consequences for Swiss employers

As a result of this new interpretation, Swiss employers must check whether the conditions for the source tax exemption are fulfilled for every single individual. This verification contains two elements. On the one hand, a recent regulation requires the individual to have form 2041-AS signed by the French authorities and remitted to the Swiss employer. This form certifies that the individual

is resident of France. In case the Swiss employer does not receive this form, he must withhold source tax. On the other hand, the employer must also verify whether the 45-nights rule is fulfilled. Indeed, it will be difficult for the employer to argue that he is not aware where the employee spends his nights, when the foreign business trips are evidenced by the monthly expense reports. Accordingly, if the conditions for exemption are not fulfilled, the Swiss employer has to withhold source tax on the entire salary, regardless how many nights the employee has actually spent outside the country of residency (France).

Consequences for the employee

Employees who do not qualify as cross-border workers according to this new understanding of the April 11 1983 Agreement, are subject to Swiss source tax on the entire salary paid in Switzerland.

As French tax resident, the individual is also subject to French income tax on his worldwide income. Therefore, employment income earned for professional activities carried out in Switzerland, which has already been taxed at source, must be reported on the French tax return.

If double taxation can be avoided in the end, the individual has however take two different actions, one in France and one in Switzerland.

In France, the double taxation is avoided because the French tax authorities grant a tax credit method. The tax credit corresponds to the French tax calculated on the Swiss employment income and is independent of actual Swiss taxes withheld at source. To obtain the tax credit, the relevant income must be declared on a specific form (n° 2047).

In Switzerland, the employee must file a request for adjustment of the Swiss source tax (deadline is March 31 of the subsequent year). This request allows the reimbursement of the portion of Swiss tax that relates to work days in third countries.

Cash planning finally is a delicate issue in these cases, as taxes have to be paid upfront (at least the Swiss source tax), whereas the credits/reimbursements only occur many months later.

Next steps

Employer with operations in one of the mentioned cantons that employ cross-border workers with frequent activities in third countries must verify whether this new understanding leads to a source tax liability. Our specialists in our Human Capital teams are at your disposal to analyse more in depth the consequence of these new rules for your company.

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