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Federal Tax Administration
Lukas Schneider
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Bern, 28th of September 2023

Statement on the consultation draft of a federal law on the taxation of mobile work in international context

Dear Mr Schneider

We thank you kindly for the opportunity to comment on the above-mentioned Federal Council consultation draft of 9 June 2023.

1. Short position

SwissHoldings welcomes the Federal Council's initiative to create a taxation competence for activities of cross-border workers carried out in a foreign home office. However, we strongly reject the proposed comprehensive taxation right of Switzerland for all employees of Swiss companies, including those who work permanently abroad. The proposed regulation would lead to numerous unintentional and irreversible double taxations with the countries in which the employees of Swiss companies work. Instead, SwissHoldings proposes a targeted taxation competence for home office situations of cross-border workers. We consider the proposed adjustment of the taxation competence for self-employed persons to be unnecessary. It should not be pursued further in order to avoid ambiguities and demarcation difficulties with other legal provisions of Swiss tax law.

2. General

SwissHoldings welcomes the efforts of the Federal Council to also grant foreign cross-border commuters (hereinafter referred to as cross-border commuters) the opportunity to work from home. Home office offers both employers and employees several advantages, relieves the burden on our transport infrastructure and protects the environment. SwissHoldings therefore supports such agreements as the one with France. At the same time, these advantages for employers and employees should not be at the expense of the Swiss tax revenue, or the loss of revenue from direct federal and cantonal taxes should be kept within narrow limits.

The case law of the Federal Supreme Court on domestic law (Art. 5 para. 1 let. a DBG on direct federal tax and Art. 4 para. 2 let. a StHG on cantonal taxes) sets strict limits on the income taxation of employees without Swiss residence (e.g. foreign cross-border commuters). Even if the employer is located in Switzerland, income taxation by the Confederation and the cantons is only possible if such employees physically perform their work in Switzerland. A bilateral double taxation agreement (DTA), which assigns taxation to Switzerland, cannot change this ruling on domestic law. Taxation by the Confederation and the cantons presupposes that (i.) domestic law provides for Swiss taxation and (ii.) the bilateral double taxation agreement also assigns taxation to Switzerland. For cross-border commuters of Swiss employers living abroad, there is no domestic right of taxation regarding the salary for the work performed in the foreign home office. The aim of the present consultation draft is to close this taxation gap. SwissHoldings fully supports this approach.

3. Regarding E-Art. 5 para. 1 let. abis DBG and E-Art. 4 para. 2 subpara. abis StHG - no overriding regulation leading to double taxation

When closing the domestic taxation gap, however, it must be ensured that no excessive regulation is adopted that would also apply to other situations. In other words, care must be taken to ensure that a targeted solution is adopted for home office situations of cross-border commuters. In particular, it should be avoided that international double taxation occurs. Especially in relation to countries with which Switzerland has no DTA, such double taxation should be avoided at all costs. In the absence of a DTA, double taxation cannot be eliminated due to competing domestic taxation rules of the states concerned. Double taxation cases with DTA states should also be avoided as far as possible, since in the event of profound differences of opinion between the states concerned and the absence of an arbitration clause in the DTA, these cannot be resolved either, or only after complex negotiations lasting years.

The Swiss economy is closely intertwined internationally and earns every second franc abroad. Some of our member companies even generate more than 95 per cent of their turnover abroad. In the course of their regular business activities, employees are regularly posted abroad for longer periods by their Swiss employers. Such postings to foreign countries can last from several months to several years, which is why there can regularly be a change of residence to the foreign country. In many cases, the employment contract with the Swiss employer remains in force and the salary continues to be paid by the Swiss employer despite the work for a foreign subsidiary or a foreign company. Of course, in the case of such longer postings abroad, the salary must be taxed in the country of employment and passed on to the foreign subsidiary or transferred to the permanent establishment.

The Federal Council's proposed regulation provides for a tax liability for any gainful employment performed for an employer with its registered office, actual administration or place of business in Switzerland. The regulation is not limited to home office situations of cross-border workers. It also

applies to postings abroad by Swiss employers. If the foreign state is a non-DTA country, the Federal Council's proposal is very likely to lead to double taxation, which cannot be eliminated in the absence of a DTA. In the case of conflicts of interpretation of the concept of employer (formal employer versus economic employer), the proposed regulation could lead to increased double taxation even with DTA states, which could only be eliminated with a great deal of effort and (consulting) costs - if at all. These are cases of employees with a global function in the group who live abroad and are employed by a foreign group company (formal employer) (i.e. employment contract with foreign group company). The (physical) performance of work mainly takes place abroad. Due to their global function, these employees have a reporting line to the Swiss management company for which the employees work. The Swiss management company thus has the right to issue instructions to the employees. In addition, the salary costs (with cost mark-up) of these employees are charged to the Swiss management company. Should the Swiss tax authorities consider the Swiss management company as the economic (de facto) employer, the proposed regulation could lead to double taxation, as the physical presence of the employee in Switzerland is no longer necessary for income taxation. In our opinion, this could result in a large number of disputes with other countries, some of which may not be resolved at all or only after several years. Such double taxation must be avoided at all costs for an internationally networked business location such as Switzerland. In addition, Swiss-Holdings is of the opinion that especially in the case of long-term assignments (including change of residence abroad), taxation of the corresponding salary in Switzerland is not objectively justifiable. In contrast to home office cases, we are of the opinion that in such cases the salary may only be taxed by the other state. This is also in line with the corresponding provisions of Article 5 paragraph 1 let. a DBG and Article 4 paragraph 2 let. a StHG, which prescribe taxation in Switzerland in the opposite case (posting of an employee by a foreign employer to Switzerland).

4. Clarification of the consultation proposal

SwissHoldings is therefore of the opinion that the consultation proposal must be adapted so that posting situations and similar constellations do not lead to taxation in Switzerland. To this end, we propose a clarification or limitation of E-article 5 paragraph 1 letter abis DBG and E-article 4 paragraph 2 letter abis StHG to home office situations. The focus should be on home office activities of employees in their foreign residence or a similar facility (holiday home, coworkspace, etc.). Furthermore, employees who usually work in their employer's facilities in Switzerland (cross-border commuters) should be covered. Employees who work exclusively in a home office abroad or who are compelled to work several days a week in a home office regularly establish a permanent establishment abroad (i.e. automatic taxation right of the foreign state or no Swiss taxation right under the Federal Tax Act and the Federal Tax Act).

5. Regarding E-Art. 5 para. 1 let. a DBG and E-Art. 4 para. 2 let. a StHG - avoidance of ambiguities and delimitation difficulties

Article 5 paragraph 1 let. a DBG and the identical Article 4 paragraph 2 let. a StHG according to the

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current wording are interpreted by tax practice in such a way that the two provisions only establish economic affiliation in Switzerland for dependent employees. The consultation proposal explicitly includes a taxation competence based on economic affiliation for dependent and self-employed gainful activities. We do not consider this extension to be expedient. The economic affiliation for self-employed persons is clearly and unambiguously derived from Article 4 DBG and Article 4 paragraph 1 StHG. A double legal basis with nota bene different requirements leads at best to ambiguities and delimitation difficulties. We therefore propose to refrain from amending the aforementioned provisions.

We thank you kindly for your consideration of our concerns. Should you wish to adopt legislative proposals from other submissions, we would be grateful if you could discuss them with us so that they can be critically examined and unintended tax consequences can be avoided.

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