

# Overview of the taxation of non-resident athletes and entertainers in Switzerland

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## 1. Preliminary remarks

In a nutshell, the Swiss direct tax system comprises a network of different taxing jurisdictions. Although federal (income) tax<sup>1</sup> is levied on all resident taxpayers, each of the 26 cantons has its own tax system which has been harmonised by the FTHL<sup>2</sup>. Although these laws have significantly improved the tax harmonisation in Switzerland, cantons and communities still have a large degree of independence, especially regarding the rates of taxation<sup>3</sup>. The following summary is based on the LL.M. Master Thesis research done during the part-time LL.M. studies 2005 – 2007 of the postgraduate programme in international tax law of the Vienna University of Economics and Business Administration. The terms athletes, sportsmen and entertainers are used interchangeably and equally cover female entertainers and sportswomen. Where only one of these terms is mentioned, the others shall be included.

## 2. Tax liability

Basically, any tax liability (limited or unlimited) is based on what is called the “principle of residency”, whether on the domestic (federal and cantonal) or on the international tax level. An individual or a legal entity is liable to tax by reason of his domicile, residence, place of management or any other criterion of a similar nature. In Europe, most of the countries rely on facts such as the permanent domicile or the (qualified) abode in order to fix the criterion for an unlimited tax liability. However, there are some other states<sup>4</sup> which base the unlimited tax liability on their citizenship.

If a person (both individual and legal entity) qualifies to become resident in two states, the question has to be answered whether a double taxation takes place or not. The corresponding tax treaties, based on the treaty signed between states, should prevent double taxation on the international level. If there is no dou-

ble tax treaty, a double taxation seems to be inevitable.

### 2.1 Tax liability in Switzerland

An individual becomes subject to a limited tax liability as a non-resident according to Swiss domestic tax law<sup>5</sup> if the individual performs any professional activity in Switzerland. Neither is it relevant whether such activities are performed in a capacity as self-employed (with or without having a permanent establishment) or as employee (regardless of the length of time spent in Switzerland), nor if it is a general or only an accessory activity<sup>6</sup>. According to Art. 5 (1) lit. a DFTL; Art. 4 (1) FTHL, non-resident individuals shall be subject to federal and cantonal income tax, achieved from a personal activity performed in Switzerland<sup>7</sup>. Under Art. 5 para. 2 DFTL remunerations paid not to a non-resident individual directly but to a third party, shall also be subject to income tax. Any income which is attributable to the artist or sportsman rather than to the artist's

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<sup>1</sup> Federal Law on Direct Federal Tax (hereafter DFTL), December 14, 1990 (SR 642.11).

<sup>2</sup> Federal Law on Harmonization of the Direct Taxes of Cantons and Municipalities (hereafter FTHL), December 14, 1990 (SR 642.14).

<sup>3</sup> Tax rates remain the exclusive competence of the cantons. The FTHL is self-executing, if the cantonal laws do not comply with its contents.

<sup>4</sup> E.g., the USA.

<sup>5</sup> Art. 5 (1) lit. a DFTL; Art. 4 (2) lit. a FTHL; see also Art. 6 (2) DFTL.

<sup>6</sup> AGNER/JUNG/STEINMANN, Kommentar zum Gesetz über die direkte Bundessteuer, Zurich 2001, Art. 92 N 1 DFTL.

<sup>7</sup> Taxing income at the place of work is an exception to the general principle according to which remunerations shall be subject to tax at the place where the individual resides.

and sportsman's performance<sup>8</sup>, is not subject to limited tax liability. Whereas Art. 5 DFTL, Art. 4 FTHL govern the tax liability, Art. 92 DFTL and Art. 35 FTHL provide for the method of taxation. Due to the fact that entertainers and athletes usually only spend a short period of time in Switzerland, the withholding taxation regime is applied for this special group of taxpayers.

According to Art. 92 DFTL and Art. 35 FTHL, non-resident individuals such as artists and sportsmen are subject to a limited tax liability on Swiss sourced income earned on personal services rendered as artists and sportsmen, regardless of the length of time spent in Switzerland and regardless of whether there is a permanent establishment owned by the entertainer or athlete. Income which is attributable to an artist's or sportsman's performance in Switzerland is subject to a limited income tax.

Art. 92 DFTL is a special provision which supersedes the provisions usually applicable characterising personal income<sup>9</sup>. There exists not only a tax liability regarding income to be accrued to entertainers and athletes personally, but also if such income accrues to third parties organising the performance of the entertainer or athlete (agent, manager, etc.). This third party may be an individual, an entity, or a partnership. In practice, it is necessary to know if the entertainer or athlete directly or indirectly benefits from the income of the third party in deciding whether or not to levy taxes at source on such income<sup>10</sup>.

### 3. Taxation of entertainers and athletes

#### 3.1 Definitions

There exists no definition of entertainers and athletes in Art. 92 DFTL and Art. 35 FTHL. The term artist is described by listing various examples like stage, movie, broadcast or TV artists, musicians, performers, dancing chorus, etc., but there is no established jurisprudence which provides a definition of these terms. However, it is necessary that the performance shall be of an artistic or entertaining character, which is why cinematographers, producers, and technical personnel do not qualify as entertainers<sup>11</sup>.

Athletes are persons, who participate in athletics, tennis or football tournaments, take part jumping or horse tournaments, motor sport events, chess tournaments, etc. Athletes exercise a physical or intellectual

activity which will be practised under recognition of specific rules and in clearly defined forms of organisation. Entertainers as well as athletes perform or act (reference to "personal activity") directly or indirectly (through media, broadcast or TV) in front of public. Consequently, painters, photographers and sculptors do not belong to this specific group<sup>12</sup>. It is not relevant where the profit of the activities arises or where the performance will be commercialised, but the performance has to be rendered in Switzerland.

#### 3.2 Taxable basis and tax rates of withheld tax

##### 3.2.1 General remarks

The taxation of an individual carrying out dependent activities differs from that of someone who is self-employed. Although the income tax rates are the same, the tax rates differ for social security purposes and the deductions allowed differ significantly for each type of tax payer. Finally, VAT aspects have to be considered, depending on the activities performed.

Self-employment (independent contractor) is characterised by the following elements<sup>13</sup>:

- Bearing an entrepreneurial risk (of gains and losses) arising out of the activity performed;
- activities performed imply some combination of capital and labour of the athlete;
- profit-orientated intention on each activity performed;

<sup>8</sup> ALTENBURGER, Taxation of non-resident entertainers/Swiss contribution, p. 131, in: International Fiscal Association, The Hague/London/Boston 1996, volume 20d (hereafter ALTENBURGER, IFA), page 132: "auftrittsbezogenes Einkommen", e.g. fee for joining an opening ceremony launching a tournament: the sportsman receives income for attending such event, but not for his personal activity. Such attendance fee would be person-related and rather than performance-related and would not be subject to limited tax liability in Switzerland.

<sup>9</sup> ALTENBURGER, supra note 8, page 132.

<sup>10</sup> ZIGERLIG/JUD, in: Kommentar zum Schweizerischen Steuerrecht I/2a, Basel, Geneva, Munich, Art. 92, N 11.

<sup>11</sup> ALTENBURGER, supra note 8, page 131.

<sup>12</sup> ZIGERLIG/JUD, supra note 10, Art. 92, N 2 ff.; RICHNER/FREI/KAUFMANN, Handkommentar zum DBG, Art. 92 N 5 ff.

<sup>13</sup> This shall not be a final enumeration of examples, characterisation shall be made on a case by case basis.

- activities are performed regularly and the individual “appears” on the “market” under his/her own label.

On the other hand, the individual that supplies services for a definite or indefinite term against compensation, supervised by and/or under the instructions of an employer shall be characterised as an employee.

A dependent employee is generally taxed on his/her world wide income, unless a double tax treaty otherwise requires. All Swiss treaties provide for a general application of the exemption system<sup>14</sup> to avoid double taxation.

### 3.2.2 Different types of income relating to activities of non-resident athletes and entertainers

Art. 92 para. 1 DFTL and Art. 35 para. 1 lit. b FTHL stipulate that tax at source is levied on gross income which is defined as all daily income<sup>15</sup> attributable to the artist's or sportsman's performance, including any extras (e.g., compensation for special services, commissions and any other income in kind, which are to be valued under social security principles).

Art. 92 para. 3 DFTL provides that any remuneration (e.g., sponsoring or advertisement fees) which is not paid directly to the artist/sportsman, but to a third party will also be subject to tax.

Difficult characterisation regarding remuneration from sponsors or advertisements, inducement payments and intellectual property related payments (e.g., income from image rights) may arise, if the performance is exercised in Switzerland<sup>16</sup> and the payment is fractionally linked to performances provided abroad.

Income received by the individual from advertising on clothes shall be taxable in Switzerland, regardless of whether the athlete acts as an employee or as a self-employed person.

### 3.2.3 Expenses

Treatment of expenses differs for self-employed individuals and employees. The latter are not allowed to deduct any costs related to the income achieved. The deductibility of costs is already accounted for in the tax rate.

Independent contractors (i.e., self-employed individuals) are allowed to deduct costs. However, deduc-

tions are only exceptionally allowed and must be directly attributable to the performance<sup>17</sup>. In order to facilitate the duties of the persons liable for assessing the tax, a flat amount of 20 % of gross income is admitted as a lump sum amount, being specified that a higher amount may be deductible if the expense is commercially justifiable. Foreign withholding taxes might be deductible as well<sup>18,19</sup>. Global expenses, related to coaches and trainers, are not deductible<sup>20</sup>. The tax rates do not take into account personal and family circumstances either.

*Federal income tax* applies a four step scale and ranges from 0,8 %, 2,4 %, 5 % to 7 %, depending on the remuneration received. *Cantonal tax rates* may be different (details: see appendix 1). However, there does not exist a similar restriction in the FTHL, several cantons (e.g. Berne, Art. 117 para. 2 StG BE) comply with the federal four step scale and apply the same system regarding cantonal income tax. Other Cantons apply different schemes (e.g. Zurich: 10 %, § 95 para 2 StG ZH). No tax at source shall be levied unless the gross income exceeds the amount of CHF 300 per calendar year or performance paid<sup>21</sup>. Cantonal

<sup>14</sup> Decision of the Chamber of Appeal (Steuerrekurskommission) I, Zurich, April 17, 1997; published in: *Der Steuerentscheid* (hereafter StE) 1997, A 31. 4, Nr. 5.

<sup>15</sup> The concept of daily income is defined more precisely in Art. 7 of the Ordinance on Withholding tax for Federal Direct Tax of October 19, 1993 (SR 642.118.2), hereafter Ordinance.

<sup>16</sup> OBERSON, in: *Internationales Steuerrecht der Schweiz, Aktuelle Situation und Perspektiven, Festschrift zum 80. Geburtstag von Walter Ryser* (hereafter Festschrift Walter Ryser); problèmes récents posés par l'imposition des artistes et sportifs non-résidents, page 170 f.

<sup>17</sup> Art. 7 para. 1 of the Ordinance, see supra note 15; Circular letter regarding Withholding tax of non resident athletes and entertainers in Switzerland, published by the Swiss Federal Tax Administration, Cipher II./4. <http://www.estv.admin.ch/data/dvs/druck/rund/d/2-019-D-2005-d-Beilage4c.pdf>.

<sup>18</sup> Art. 7 para. 3 of the Ordinance, supra note 15; Decision of the Chamber of Appeal (Steuerrekurskommission) I, Zurich, April 17, 1997, StE 1997, A 31. 4, Nr. 5, consideration 5.

<sup>19</sup> Dissenting opinion (wrongly) published by MOLENAR/GRAMS, in: *Internationales Steuerrecht, Zeitschrift für europäische und internationale Steuer- und Wirtschaftsberatung*, iStR, Vol. 22, 2005, p. 763.

<sup>20</sup> According to the author's opinion such expenses shall be qualified as directly attributable to the performance and therefore be deducted from the income achieved, at least proportionally.

<sup>21</sup> Art. 12 of the Ordinance supra note 15.

tax rates<sup>22</sup> are generally progressive and lower than ordinary rates, since they take into consideration the fact that deductions related to the services generating income shall not be deducted from gross income (e.g., business expenses, contributions to old age, survivors and invalidity schemes, contributions to recognised pension plans, loss of income insurance, unemployment schemes, mandatory accident insurance).

### 3.3 Proviso of double tax treaties

Specific Swiss Double Tax Conventions provide different rules to the standard: taxation shall be allocated to the country where the performance takes place. Special rules are applicable when income accrues to third parties<sup>23</sup> instead of athletes and entertainers and whether income is derived from performances funded on a considerable scale by public funds<sup>24</sup>. However, there exist some states with which Switzerland has not concluded a double tax convention<sup>25</sup>. Regarding the OECD Model Convention, Switzerland made a reservation, especially regarding Paragraph 2 of Art. 17. Switzerland is of the opinion that Paragraph 2 should apply only to the cases where remuneration for the performance is not paid to the artiste or sportsman himself, but to another person, e.g., to what is called an artiste (rent a star or loan out) company, in such a way that the income is taxed in the state where the activity is performed neither as a personal service income to the athlete or entertainer, nor as profits of the enterprise in absence of a permanent establishment<sup>26</sup>.

## 4. Method of taxation, collection and enforcement of tax

Swiss tax on income earned by non-resident artistes and sportsmen is levied at source under the Pay As You Earn system (hereafter PAYE). As a rule, the PAYE system is applied, unless the employer (organiser or principal) is a non-resident who does not have investments in Switzerland in the form of a subsidiary, permanent establishment or fixed base. If a foreign debtor pays the income to a non-resident athlete and such income is not re-allocated to a Swiss entity or permanent establishment, the ordinary assessment procedure will be applicable to such income.

Federal and cantonal income tax regarding the remuneration received by the Swiss organizer (or princi-

pal) is levied by the latter, where the performance was rendered<sup>27</sup>. The following duties are an obligation of the payer (e.g. organiser or principal):

- The respective form has to be filed, correctly filled in, to the competent cantonal authority.
- The tax has to be withheld at maturity of the payment for the performance (including collecting the appropriate amount of all benefits in kind paid to the athlete or entertainer) and paid.

The organizer or principal is liable collecting and paying the levied tax correctly. The organizer is jointly and severally liable for the payment of the tax<sup>28</sup>. Peculation of withheld tax will be fined (max. CHF 30 000 or punished by imprisonment<sup>29</sup>). The payer is entitled to a commission for levying the tax, usually 2% to 4% of the withheld tax, depending of the cantonal provisions.

## 5. Assessment of artists and sportsmen

According to Art. 99 DFTL and Art. 32 para. 1 FTHL a wage-type withholding tax on any performance-related income is levied as a final tax. Therefore the non-resident entertainer or sportsman will not be obliged to file any income tax return based on which the tax due will be assessed<sup>30</sup>. The procedure does not provide any correction mechanism, such as the mandatory ordinary procedure or the individual correction of the tax rates<sup>31</sup>.

<sup>22</sup> Details: see appendix 1.

<sup>23</sup> Federal Court decision, dated April 18, 1986, published in *Archiv für Schweizerisches Steuerrecht (ASA)*, vol. 58., p. 516 ff.

<sup>24</sup> Tax compound, published by the Swiss Federal Tax Authorities, p. 36. <http://www.estv.admin.ch/data/ist/d/dossier/e6.pdf>, see detailed list, appendix 2.

<sup>25</sup> Monaco, Turkey, Qatar and United Arab Emirates.

<sup>26</sup> OECD Model Convention on Income and Capital, Version January 2003, Note 1 c and 16 of Art. 17 para. 2, Commentary.

<sup>27</sup> Art. 107 para. 1, lit. b DFTL.

<sup>28</sup> Tax compound, published by the Swiss Federal Tax Authorities, p. 54. <http://www.estv.admin.ch/data/ist/d/dossier/e6.pdf>; Art. 92 para. 4 and Art. 100 DFTL, Art. 37 FHTL.

<sup>29</sup> Art. 187 DFTL, Art. 56 para. 1 FHTL.

<sup>30</sup> ZIGERLIG/JUD., supra note 10, Art. 99, N 1; ALTENBURGER, IFA, supra note 8, p. 137.

<sup>31</sup> CADOSCH, The influence on Swiss tax law of the Swiss-EC agreement on the free movement of persons, Berne 2005, p. 58.

## 6. Rent a star company, payments made to a third party

As an example one could consider implementing the following tax planning idea: Sports Co, a foreign (or domestic) management company signs all the contracts regarding the performances in Switzerland. Sports Co earns all the money regarding the shows/performances provided in Switzerland. Another possibility could be that each athlete signs a contract with Sports Co. When the athlete owns the shares of the income receiving entity directly, or qualifies as an affiliated person, the full remuneration paid to the company is subject to withholding tax under Art. 92 DFTL and Art. 35 of FTHL. Yet Switzerland offers other tax advantageous possibilities regarding the tax status of foreign sportsmen and entertainers (see paragraph 8).

## 7. Relationship between Switzerland and EU Member States

The Swiss-EC Agreement on the free movement of persons entered into force as of June 1, 2002. Switzerland, therefore, gradually guarantees the free movement of persons as it already exists within the EU, including the obligation not to discriminate against EU citizens on grounds of nationality and further, to secure equal treatment of EU employees and EU self-employed persons with Swiss employees and Swiss self-employed persons respectively, with particular regard to employment, remuneration, and other working conditions. Since Switzerland agreed to accept the "acquis communautaire" which means that insofar as the application of the Agreement involves concepts of Community law, account shall be taken of the relevant case law of the European Court of Justice (ECJ). Thus, the case law of the ECJ with regard to the fundamental freedom of movement of employees interpreted through its concept of non-discrimination and prohibition of restrictions is also relevant for Switzerland<sup>32</sup>. The Swiss Supreme Court stated<sup>33</sup> already that these provisions concerning non-discrimination are self-executing, i.e., an individual may directly claim the benefits from the Agreement. The ECJ applies its concept of direct and indirect discrimination and restriction of free movement developed in other legal fields as well in fiscal case law. Although the ECJ states that residents and non residents are as a rule not comparable, Switzerland

may not rely on this statement<sup>34</sup>. Non-residents must be granted objective tax benefits and personal tax benefits equally, as decided in the Schumacker case<sup>35</sup>. Switzerland is, according to a Swiss scholar<sup>36</sup>, bound by other landmark cases, the De Lasteyrie case<sup>37</sup> and the Gerritse case<sup>38</sup>. Other scholars deny the fact that non-resident, individual taxpayers are in a comparable situation compared to resident individuals assessed ordinarily<sup>39</sup>, paying their income taxes on the ordinary tax assessment procedure, not on a withholding at source base. On 22 June 2006, Advocate General (AG) Philippe Léger of the European Court of Justice (ECJ) gave his opinion in the pending case of *Centro Equestre da Leziria Grande Lda v. Bundesamt der Finanzen*

<sup>32</sup> CADOSCH supra note 31, p. 3.

<sup>33</sup> Decision of the Swiss Supreme Court of January 17, 2003; BGE 129 II 257 ff.

<sup>34</sup> CADOSCH, supra note 32, p. 50.

<sup>35</sup> ECJ, February 14, 1995, Case C-279/93 Finanzamt Köln-Altstadt v Roland Schumacker.

<sup>36</sup> See Cipher 3.2.3 Expenses; CADOSCH, supra note 31, p. 43.

<sup>37</sup> ECJ, March 11, 2004, Case C-9/02 Hughes de Lasteyrie du Saillant v Ministère de l'Economie, des Finances et de l'Industrie: Even though this case does not refer to taxation of income but to the French exit tax, Switzerland has to consider the argument of counteracting tax avoidance as well as the rejection of disproportionate measures.

<sup>38</sup> ECJ, June 12, 2003, Case C-234/01 Finanzamt Neukölln-Nord v Arnold Gerritse: The case dealt with Arnold Gerritse, a Dutch national resident in the Netherlands who received a gross fee of DEM 6000 for performing as a self-employed drummer at a radio station in Berlin. His travel, lodging and other expenses were DEM 1000, which left him a profit of DEM 5000. Germany withheld artist tax from the gross fee at a rate of 25% plus solidarity surcharge, which increased the effective rate to 29%. Therefore DEM 1740 was deducted from the artist fee. Mr Gerritse wanted to file a normal income tax return after the year to deduct his expenses and to make use of the lower income tax rates. However, the German income tax act excluded the income of foreign artists with short-term contracts from final income tax settlement and, therefore, his tax return was rejected. The German tax authorities denied him the benefit of a tax free amount (of DEM 12000) granted to resident tax payers and deductions for expenses incurred in connection with his engagement in Germany.

<sup>39</sup> KOLB, IFF Forum für Steuerrecht, Vol. 1, 2004, p. 28, cipher 3.2; HNNY, die bilateralen Verträge, in: Schweizer Treuhänder 2000, p. 1147.

(C-345/04)<sup>40</sup>. AG finds German rules limiting deduction of expenses for non-resident artists and sportsmen discriminatory<sup>41</sup>. In sum, according to AG's opinion, the differential treatment to non-resident performers, as compared to resident performers or non-resident performers with permanent establishments in Germany, cannot be justified<sup>42</sup>.

The author agrees with Cadosch's opinion that it is doubtful whether Switzerland may continue to deny full deductions for non-resident employees, artists, and sportsmen for expenses closely related to income earned<sup>43</sup>, in order to comply with the ECJ case law regarding the non-discrimination restrictions.

## 8. Tax planning aspect: An overview of Swiss lump sum taxation

### 8.1 General

Individuals taking up residence in Switzerland for the first time in at least ten years may elect to be taxed according to the lump sum tax regime (that is called technically, "taxation according to expense"), instead of paying ordinary Swiss income tax<sup>44</sup>. Through this procedure, the new residents are required to pay taxes on only a portion of their worldwide income and assets. Lump-sum taxation will be applied at the federal level and at all cantonal levels on the same principles. The cantons differ only with respect to the duration of the right to elect lump-sum taxation.

as proportionate personnel costs, depreciation of horses and equipment and expenses for tax advice. Since 11 of 14 shows of the tour were held in Germany, *Centro Equestre* calculated 11/14 of the accounted costs as deductible, resulting in an overall loss of EUR 6,476.89. The German tax administration and Lower Finance Court denied a refund, arguing that the above-mentioned costs were mostly indirect costs which did not have a direct economic connection, and those costs with a direct economic connection did not exceed 50% of gross proceeds. In contrast to non-residents, resident artistic performers may deduct all their incurred expenses irrespective of a direct economic connection including their overhead expenses, i.e., general and administrative costs of running their business. The Federal Finance Court referred the case to the European Court of Justice (ECJ) with the questions whether it constitutes an infringement of the freedom to provide services if: expenses incurred by non-resident from providing services within the territory of the source state may only be considered if they are directly connected to the taxed income; and a refund of withholding taxes is only granted when the directly connected costs exceed 50% of the gross proceeds derived from the provided services.

<sup>40</sup> IBFD Tax News Service, 4 August 2006; (a) Facts. *Centro Equestre* is a company established under Portuguese law with its registered seat and central management in Portugal and no permanent establishment in Germany. In 1996 it earned income from a tour of equestrian shows through several European countries including Germany. Under the German Income Tax Act (ITA), *Centro Equestre* was taxed as a non-resident on income from sources in Germany with a final withholding tax of the then applicable rate of 45% on gross income from artistic performances. However, the tax in excess of 50% of net income (proceeds less expenses which have a direct economic connection to the performances in Germany) was refundable, subject to the condition that these expenses exceeded 50% of gross proceeds. When *Centro Equestre* claimed a refund, it produced a certified Portuguese balance sheet including overhead expenses such

<sup>41</sup> IBFD Tax News Service, August 4, 2006; According to the AG, it is in line with the territoriality principle to only consider income and expenses connected to the taxable activity of a non-resident within the source state. He pointed out that the German rules treat residents and non-residents differently, since they require a direct economic connection between expenses and taxed income to exist only for non-residents, whereas the same is not applicable to residents; and related expenses to exceed 50% of the gross proceeds to be deductible for a non-resident, whereas resident taxpayers are not subject to this condition.

<sup>42</sup> IBFD Tax News Service, August 4, 2006; The AG referred to the Gerritse case (C-234/01), and considered that the principles set out therein equally apply to companies. The German government also argued that allowing the same type of expenses to be deducted would lead to a double deduction, since the non-resident could also make use of the deduction in Portugal. The AG rejected this argument observing that although the tax treaty between Germany and Portugal provides for a tax credit in Portugal with respect to the German tax levied on the German-source income of Portuguese performers, this allows Portugal to review which expenses were deducted in Germany. In addition, by applying for a refund, the taxpayer consents to a notification of the expenses, which were deducted, to the residence state. Therefore, no danger of a double deduction exists. *Note*. Germany had abandoned the condition requiring expenses to exceed 50% of the gross proceeds after the Gerritse case; however, the condition limiting the deduction to direct expenses as opposed to allowing a deduction of all expenses with a causal link to the activities taxable in Germany is still in place.

<sup>43</sup> See Ciper 3.2.3 *Expenses*; CADOSCH, supra note 31, p. 43.

<sup>44</sup> Art. 14 DFTL, Art. 6 FTHL; ASA vol. 70, p. 575; Circular letter no. 9, Dec. 3, 1993, published by the Swiss Federal tax administration, <http://www.estv.admin.ch/data/dvs/druck/kreis/d/w95-009d.pdf>.

## 8.2 Personal requirements

### 8.2.1 Residence in Switzerland

An individual shall fulfil all of the following requirements to be eligible to elect lump-sum taxation:

- To establish a tax domicile or tax residence in Switzerland.
- To be taking up residence in Switzerland for the first time or re-establishing residence in the country following a non-residency period of at least ten years.
- Not to be gainfully employed or self-employed in Switzerland.

Individuals who are gainfully employed or self-employed in Switzerland are ineligible for lump-sum taxation. The place of work is decisive in this regard. Artists and athletes who engage in gainful activity in Switzerland are not entitled to elect taxation based on living expenses. Some cantons allow lump sum arrangements on a long term basis, others only until the end of the tax period of the individual's return to Switzerland. If the above mentioned conditions are met, the individual is allowed to decide annually whether he wants to be assessed on the lump sum basis or not.

If the taxable income decreases below the ruled lump sum basis, the athlete/entertainer is allowed to abandon the lump sum taxation. However if the taxable income increases during the subsequent assessment period, the sportsman is allowed again to opt for the lump sum taxation<sup>45</sup>.

### 8.2.2 Residence permit

Non-working foreigners who wish to establish a tax domicile or tax residence in Switzerland must obtain a residence permit from the immigration police. Based on the bilateral agreements with the EU, EU citizens who are not gainfully employed or self-employed in Switzerland are entitled to a residence permit if they possess sufficient financial means to cover the length of their stay and if they have health insurance as well as accident insurance. With respect to citizens of countries outside of the EU, the immigration authorities in Switzerland may decide at their own discretion whether or not to grant a residence permit.

### 8.2.3 Living expenses

Instead of being taxed on a worldwide income and net wealth, individuals are able to opt to be taxed according to the annual cost of their living expenses. However, since living expenses are difficult to determine in practice, by way of simplification these expenses are estimated on the basis of rent, rental value (in the case of ownership) or boarding costs. The living expenses are defined as being five times the rent or rental value of the individual's housing accommodation. In the case of individuals who do not maintain a separate household, the living expenses are defined as being two times the cost of full room and board<sup>46</sup>.

### 8.2.4 Comparative calculation

However, there are some restrictions to be considered. Firstly, the income tax payable shall be at least equal to the ordinary tax computed on all income from Swiss sources, i.e., on total gross income from real estate situated in Switzerland, from financial assets invested in Switzerland, from intellectual property rights exploited in Switzerland, as well as from retirement benefits, annuities, and pensions from Swiss sources. Moreover, foreign source income for which the taxpayer claims relief under a double tax treaty is also taken into account. The living expenses fundamentally form the basis for the tax calculation.

In other words: It is the ordinary tax on the higher of either actual expense or five times rent or Swiss income and net wealth. Secondly the lump sum amount must take account of all foreign source income for which the individual wants to claim the benefits of Double Tax Conventions concluded by Switzerland.

### 8.2.5 Modified lump sum taxation

According to the Double Tax Conventions (DTCs) concluded between Switzerland and Belgium, Germany, Italy, Norway, Austria, Canada and the USA, individuals who elect to be taxed in Switzerland based on living expenses are not considered to be qualified as residents

<sup>45</sup> Art. 14 para. 2 DFTL; LOCHER, Kommentar zum DBG, Bundesgesetz über die direkte Bundessteuer, I. Teil, Therwil/Basel 2001, Note 4 to Art. 14.

<sup>46</sup> Art. 1 of the Ordinance regarding lump sum taxation of Federal income tax (SR 642.123).

of Switzerland. Hence, individuals who elect lump-sum taxation are not able to claim the relief from foreign withholding taxes provided for in the DTCs.

If an artiste or sportsman earns income reduced by a withheld tax at source of one of the above-mentioned countries, Switzerland applies what is called *modified lump sum taxation*. For individuals who elect lump sum taxation in order to be eligible to claim relief from foreign withholding taxes, all income derived from the respective treaty country and assigned to Switzerland on the basis of the DTC must be included in the comparative calculation.

## 9. Summary

Basically, non-resident athletes and entertainers are treated differently tax-wise than other individuals subject to unlimited Swiss income taxes. Furthermore, cross-boarder activities of sportsmen are treated differently as well, in the light of the relevant DTC and the ECJ case law. Foreign athletes and entertainers who are not yet resident and performing any business-related activity in Switzerland, should consider the possibility of the advantageous Swiss lump sum taxation which grants an attractive option for foreign, successful sportsmen and artistes.

### Appendix 1: Rates of Tax withheld at source (chart)

Canton	Tax at source in % of the gross income, after deducting an unspecified global deduction, amounting up to 20% of the gross income				Remarks
	until CHF 200 per day (incl. 0.8% federal income tax)	CHF 201 - 1000 per day (incl. 2.4% federal income tax)	CHF 1001 - 3000 per day (incl. 5% federal income tax)	more than CHF 3000 per day (incl. 7% federal income tax)	
ZH	10.8	12.4	15.0	17.0	
BE	8.8	14.4	23.0	32.0	
LU	10.	12.0	15.0	20.0	
UR	10.8	16.4	23.0	29.0	
SZ	8.8	14.4	21.0	27.0	
OW	10.0	12.0	15.0	20.0	
NW	12.8	14.4	17.0	19.0	
GL	10.8	17.4	25.0	32.0	
ZG	8.0	12.0	16.0	20.0	
FR	9.8	15.4	23.0	29.0	
SO	8.0	12.0	18.0	25.0	
BS	9.0	15.0	21.0	27.0	
BL	10.0	15.0	20.0	25.0	
SH	15.0	20.0	25.0	30.0	
AR	8.8	14.4	21.0	27.0	
AI	10.8	12.4	15.0	17.0	
SG	9.8	14.4	20.0	25.0	
GR	12.8	14.4	17.0	19.0	
AG	9.8	11.4	18.5	20.5	
TG	18.0	18.0	18.0	18.0	
TI	15.0	20.0	25.0	30.0	
VD	10.0	15.0	20.0	25.0	
VS	8.8	14.4	21.0	27.0	
NE	10.0	15.0	20.0	25.0	
GE	10.0	12.0 (1) 15.0 (2) 17.4	20.0	25.0	1) apart CHF 201-500 2) apart CHF 501-1000
JU	10.8	17.4	25.0	32.0	



## II Appendix 2: Swiss Double Tax Treaties (chart)

Name of treaty partner	Date treaty signed	Date treaty	Provision-based subject to tax in the State where the individual performs (at place of work)	Provision-based performance related income shall be taxed even if it is paid to a 3rd party, i.e., loan out company	Variations from OECD Model
Albania	November 12, 1999	December 21, 2000	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>3</sup> – exception for income derived from performances funded on a considerable scale directly or indirectly by public funds
Argentina	April 23, 1997	Came not yet into force – provisionally applicable as of January 1, 2001	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>1</sup> – exception for NPO's for income derived from performances funded on a considerable scale by public funds of the residence state
Australia	February 28, 1980	February 13, 1981	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>1</sup>
Austria	January 30, 1974	December 4, 1974	yes	no, but similar provision like 17 (2) contained already in 17 (1)	17 (1) shall be applicable notwithstanding anybody is granted a benefit by the artist/sportman – exception for income derived from performances funded on a considerable scale by public funds of the residence state
Belarus	April 26, 1999	December 28, 1999	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>3</sup>
Belgium	August 28, 1978	September 11, 1980	yes	yes	exception for artistes for income derived from performances funded on a considerable scale directly or indirectly by public funds
Bulgaria	October 28, 1991	November 10, 1993	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>3</sup> – exception for professionals for income derived from performances funded on a considerable scale directly or indirectly by public funds
Canada	March 5, 1997	April 21, 1998	yes	yes	17 (2) only in cases of abuse <sup>1</sup>

1) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly in the profits of that other person in any manner

2) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly control that other person

3) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly in the profits of that other person in any manner

4) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman participate directly in the profits of that other person in any manner

Name of treaty partner	Date treaty signed	Date treaty	Provision-based subject to tax in the State where the individual performs (at place of work)	Provision-based performance related income shall be taxed even if it is paid to a 3rd party, i.e., loan out company	Variations from OECD Model
China	July 6, 1990	August 28, 1991	yes	yes	exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities
Côte d'Ivoire	November 23, 1987	November 30, 1990	yes	yes	exception for artistes for income derived from performances funded on a considerable scale directly or indirectly by public funds
Czech Republic	December 4, 1995	October 23, 1996	yes	yes	exception for income derived from performances funded on a considerable scale directly or indirectly by public funds
Denmark	November 23, 1973	Oktober 15, 1974	yes	yes	no variations
Ecuador	November 28, 1994	December 22, 1995	yes	yes	no variations
Egypt	May 20, 1987	July 14, 1988	yes	yes	no variations
Estonia	June 11, 2002	July 12, 2004	yes	yes	exception for income derived from performances funded on a considerable scale directly or indirectly by public funds of one or both of the contracting states, their political subdivisions or local authorities
Finland	December 16, 1991	December 26, 1993	yes	yes	17 (2) only in cases of abuse ("artistie company") <sup>1</sup>
France	September 9, 1966	July 26, 1967	yes	yes	exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions, local authorities or body corporates of public law
Germany	August 11, 1971	December 29, 1972	yes	yes	exception for professional artistes for income derived from performances funded on a con-siderable scale directly or indirectly by public funds of the residence state
Great Britain	December 8, 1977	October 7, 1978	yes	yes	exception for artistes for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities

Name of treaty partner	Date treaty signed	Date treaty	Provision-based subject to tax in the State where the individual performs (at place of work)	Provision-based performance related income shall be taxed even if it is paid to a 3rd party, i.e., loan out company	Variations from OECD Model
Greece	June 16, 1983	January 22, 1985	yes	yes	no variations
Hungary	April 9, 1981	June 27, 1982	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>1</sup> – exception for income derived from performances funded on a considerable scale directly or indirectly by public funds
Iceland	June 3, 1988	June 20, 1989	yes	yes	no variations
India	November 2, 1994	December 30, 1994	yes	yes	exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions, local authorities or body corporates of public law
Indonesia	August 29, 1988	October 24, 1989	yes	yes	exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities
Iran	October 27, 2002	December 31, 2003	yes	yes	exception for income derived from performances funded on a considerable scale directly or indirectly by public funds of the residence state, its political subdivisions or local authorities
Ireland	November 8, 1966	February 16, 1968	yes	yes	no variations
Israel	July 2, 2003	December 22, 2003	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>2</sup> – exception for income derived from performances funded on a considerable scale directly or indirectly by public funds of the residence state, its political subdivisions or local authorities

1) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly in the profits of that other person in any manner

2) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly control that other person

3) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly in the profits of that other person in any manner

4) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman participate directly in the profits of that other person in any manner

Name of treaty partner	Date treaty signed	Date treaty	Provision-based subject to tax in the State where the individual performs (at place of work)	Provision-based performance related income shall be taxed even if it is paid to a 3rd party, i.e., loan out company	Variations from OECD Model
Italy	March 9, 1976	March 27, 1979	yes	yes	Art 10 and 11 (Dividend and Interest) shall not be applicable if the beneficial owner of the dividend and interest is a resident company of a contracting state, owning more than 25 per cent of the capital of the paying company, resident in the other contracting state and if performing its business activities particularly in the field of arts or sports performed collaterally or directly by artists such as theatre, motion picture, radio or television, musicians or sportsmen
Jamaika	December 6, 1994	December 27, 1995	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>1</sup> – exception for performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities
Japan	January 19, 1971	December 26, 1971	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>2</sup>
Kasachstan	October 21, 1999	November 24, 2000	yes	yes	17 (2) only in cases of abuse ("artistic company") <sup>1</sup> – exception for performances funded on a considerable scale by public funds of the residence state
Kyrgyzistan	January 26, 2001	June 5, 2002	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>1</sup> – exception for performances funded on a considerable scale by public funds of the residence state
Korea Republic	February 12, 1980	April 22, 1981	yes	yes	exception for performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities
Kroatien	March 12, 1999	December 20, 1999	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>1</sup> – exception for income derived from performances funded on a considerable scale by public funds of the residence state
Kuwait	February 16, 1999	May 31, 2000	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>2</sup>
Latvia	January 31, 2002	December 18, 2002	yes	yes	exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities

Name of treaty partner	Date treaty signed	Date treaty	Provision-based subject to tax in the State where the individual performs (at place of work)	Provision-based performance related income shall be taxed even if it is paid to a 3rd party, i.e., loan out company	Variations from OECD Model
Liechtenstein	June 22, 1995	December 17, 1996	no	no	No comprehensive DTT
Lithuania	May 27, 2002	December 18, 2002	yes	yes	exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities
Luxemburg	January 21, 1993	February 19, 1994	yes	yes	17 (2) only in cases of abuse ("artistic company") <sup>1)</sup>
Malaysia	December 30, 1974	January 8, 1976	yes	yes	exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities
Morocco	March 31, 1993	July 27, 1995	yes	no	exception for performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities
Macedonia	April 14, 2000	December 27, 2000	yes	yes	17 (2) only in cases of abuse ("artistic company") <sup>3)-</sup> exception for income derived from performances funded on a considerable scale by public funds of the residence state
Mexiko	August 3, 1993	September 8, 1994	yes	yes	17 (2) only in cases of abuse ("artistic company") <sup>1)</sup>
Moldova	January 13, 1999	August 22, 2000	yes	yes	17 (2) only in cases of abuse ("artistic company") <sup>3)</sup>
Mongolia	September 20, 1999	June 25, 2002	yes	yes	w/17 (2) only in cases of abuse ("artistic company") <sup>3)-</sup> exception for performances funded on a considerable scale directly or indirectly by public funds of the residence state

1) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly in the profits of that other person in any manner

2) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly control that other person

3) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly in the profits of that other person in any manner

4) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman participate directly in the profits of that other person in any manner

Name of treaty partner	Date treaty signed	Date treaty	Provision-based subject to tax in the State where the individual performs (at place of work)	Provision-based performance related income shall be taxed even if it is paid to a 3rd party, i.e., loan out company	Variations from OECD Model
Netherlands	November 12, 1951	January 9, 1952	no	no	Art. 5 (1): just applicable regarding independent personal services provided by entertainers; sportsmen are taxed according to paragraph 1 if their performance is made regularly through a fixed place of business; regarding employment income: «international hiring-out of labor rule» according to Art. 6 DTT NL applicable
Norway	September 7, 1987	May 2, 1989	yes	yes	no variations
Pakistan	December 30, 1959	October 13, 1960	no	no	no provisions regarding athletes and entertainers; Art. 1X para V declares paragraph 1 and 2 not applicable regarding athletes and entertainers; independent professional income and employment income: taxation at the place of activity
Philippines	June 24, 1998	April 30, 2001	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>2</sup> — exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities
Poland	September 2, 1991	September 25, 1992	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>3</sup> — exception for income derived from performances funded on a considerable scale directly or indirectly by public funds
Romania	October 25, 1993	December 27, 1994	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>3</sup> — exception for income derived from performances funded on a considerable scale directly or indirectly by public funds
Russia	November 15, 1995	April 18, 1997	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>4</sup>
Sweden	May 7, 1965	June 6, 1966	yes	no, but similar provision like 17 (2) contained already in 17 (1)	similar provision like 17 (2) only applicable if entertainer or sportsman is employed by third party

Name of treaty partner	Date treaty signed	Date treaty	Provision-based subject to tax in the State where the individual performs (at place of work)	Provision-based performance related income shall be taxed even if it is paid to a 3rd party, i.e., loan out company	Variations from OECD Model
Singapore	November 25, 1975	December 17, 1976	yes	yes, but in subparagraph 3	exception for income derived from performances funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities. In contrast, the same exception applies in 17 (3) for income derived from performances funded by public funds in general (not restricted to public funds of the residence state)
Slovakia	February 14, 1997	December 23, 1997	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>3</sup>
Slovenia	June 12, 1996	December 1, 1997	yes	yes	exception for income derived from performances funded on a considerable scale directly or indirectly by public funds
Spain	April 26, 1966	February 2, 1967	yes	yes	no variations
Sri Lanka	January 11, 1983	September 14, 1984	yes	yes	no variations
South Africa	July 3, 1967	July 11, 1968	yes	no, but similar provision like 17 (2) contained already in 17 (1)	similar provision like 17 (2) only applicable if entertainer or sportsman is employed by third party
Thailand	February 12, 1996	December 19, 1996	yes	yes	exception for income derived from performances of the entertainer or sportsman or a company of a contracting state, if its visit or the company is funded on a considerable scale by public funds of the residence state, its political subdivisions or local authorities

1) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly in the profits of that other person in any manner

2) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto directly or indirectly control that other person

3) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly in the profits of that other person in any manner

4) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman participate directly in the profits of that other person in any manner

Name of treaty partner	Date treaty signed	Date treaty	Provision-based subject to tax in the State where the individual performs (at place of work)	Provision-based performance related income shall be taxed even if it is paid to a 3rd party, i.e., loan out company	Variations from OECD Model
Trinidad & Tobago	February 1, 1973	March 20, 1974	yes	no, but similar provision like 17 (2) contained already in 17 (1)	similar provision like 17 (2) only applicable if entertainer or sportsman is employed by third party
Tunisia	February 10, 1994	April 28, 1995	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>1</sup>
Ukraina	October 30, 2000	February 22, 2002	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>2</sup> – exception for income derived from performances funded on a considerable scale directly or indirectly by public funds
Uzbekistan	April 3, 2002	August 15, 2003	yes	yes	no variations
USA	October 2, 1996	December 19, 1997	yes	yes	17 (1) only applicable, if gross income from the activity in one tax year does not exceed US\$ 10 000 (or equivalent in Swiss Francs). 17 (2) applicable, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly in the profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions, or other distributions.
Venezuela	December 20, 1996	December 23, 1997	yes	yes	17 (2) only in cases of abuse ("artiste company") <sup>1</sup>
Vietnam	May 6, 1996	October 12, 1997	yes	yes	no variations

- 1) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly in the profits of that other person in any manner
- 2) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly or indirectly control that other person
- 3) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman nor persons related thereto participate directly in the profits of that other person in any manner
- 4) 17 (2) applicable only, unless it is established that neither the entertainer or sportsman participate directly in the profits of that other person in any manner



Die Besteuerung von Sportlern und Entertainern, die nicht in der Schweiz ansässig sind, gab in den letzten Wochen und Monaten zu reden. Einerseits nahm der Kanton Zürich im Zusammenhang mit dem «Jahrhundert-Konzert» der Rolling Stones im August 2006 in Dübendorf mehrere hunderttausend Franken an Quellensteuern ein. Andererseits ist im Kanton Bern ein Streit zwischen dem europäischen Fussballverband UEFA und den Steuerbehörden bereits voll im Gang. Der Fussballverband verweigert Steuerabgaben auf Prämien der Spieler von Ajax Amsterdam, Arsenal und Sparta Prag, resultierend aus den Champions-League-Spielen des FC Thun.

Der Aufsatz geht in den Grundzügen auf die Besteuerung betreffend die in der Schweiz erzielten Einkommen von Künstlern und Sportlern, die ihren Wohnsitz nicht in der Schweiz haben, ein. Weiter nimmt er Bezug auf die Rechtsprechung des Europäischen Gerichtshofes und behandelt die Thematik, ob – und wenn ja, gestützt worauf – die entsprechenden Urteile auch für die Schweiz relevant sind.

In einem abschliessenden Exkurs wird die Möglichkeit der Pauschalbesteuerung als Planungsinstrument für ausländische Athleten und Entertainer, die in die Schweiz ziehen wollen, aber im Inland keiner Erwerbstätigkeit nachgehen, erläutert.