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New developments concerning the taxation of real estate capital gains earned by swiss residents

For the first time, the *Conseil d'Etat* (French Supreme Administrative Court) has, in a decision rendered on November 20, 2013^[1], confirmed that the tax treaty entered into between France and Switzerland for the avoidance of double taxation in respect of income tax and wealth tax (hereinafter the "Tax Treaty") prohibits applying to Swiss residents a taxation rate different from the rate that would be applicable to French residents.

The issue at stake concerned specifically the taxation of real estate capital gains. Indeed, under nearly all double tax treaties, the country where the relevant real estate assets are located has the right to tax the capital gains derived from the sale of real estate properties or shares of companies whose majority of assets are real estate assets.

French rules governing the levy and collection of this tax vary depending on the status of the tax payer and his/her/its place of residence^[2].

As such, natural persons residing in the European Economic Area (European Union, Island, Norway and Liechtenstein) benefit from the same tax rate as French residents, i.e. a rate of 19%, while natural persons residing in other countries, including Switzerland, are taxed at the rate of 33.1/3%.

Decisions delivered by trial courts were so far conflicting and this is the reason why the *Conseil d'Etat* was ultimately asked to settle this issue.

The *Conseil d'Etat* upheld the decision of the Paris Administrative Court of Appeals^[3] that had ruled that Swiss taxpayers ought to be refunded part of the tax that had been levied because Article 15-of the Tax Treaty provides that flat-rate withholding tax must be calculated under the same conditions, irrespective of whether the seller is a Swiss or a French resident.

The strict equality of treatment imposed by the Tax Treaty precludes the French Tax Authorities from imposing

on Swiss residents a tax higher than the tax that would have been levied on French residents.

Natural persons residing in Switzerland who paid a 33.1/3% withholding tax are therefore entitled to request the refund of part of the tax they have paid. For this purpose, a request can be filed until December 11 of the second year following that during which the tax was levied^[4].

Specifically, for taxes paid in 2011, Swiss residents have until December 31, 2013 to file a request for refund.

[1] *Conseil d'Etat*, November 20, 2013 n°361167.

[2] Article 244 bis A of the French Tax Code.

[3] Paris Administrative Court of Appeals, May 31, 2012 n°10PA04737.

[4] Article R196-1 of the Tax Procedure Handbook.

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