

# Audit of the supervision of direct federal tax, expenditure-based taxation

## Federal Tax Administration

### Key facts

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The Federal Act on Direct Federal Taxation (DFTA) permits expenditure-based (lump-sum) taxation for foreign nationals who have not been subject to unlimited taxation in Switzerland for the previous ten years and who are not gainfully employed here. At the end of 2018, some 4,557 taxpayers benefited from this simplified tax regime. They contributed CHF 234 million to direct federal tax receipts.

The Swiss Federal Audit Office (SFAO) examined the survey of the cantons conducted by the Federal Tax Administration (FTA) in 2019 to verify the correct and uniform application of Article 14 of the DFTA regarding lump-sum taxation. It also assessed whether the FTA's supervision of this tax was appropriate.

In the SFAO's view, the FTA's investigation was conducted in an appropriate and thorough manner. It found that implementation was not fully compliant with the law in several cantons. The checks carried out by the FTA from 2019 onwards allowed several tax cases to be settled and corrected. Other issues will have to be followed up on through to 2023, such as the inclusion of global expenditure in the tax calculation. In the SFAO's view, there is still uncertainty regarding the tax treatment of board members with significant shareholdings in Swiss companies.

### Differences in the way the DFTA is applied

The FTA's investigation identified practices that were partially compliant with the DFTA, as well as cases that required correction. The main issue was the lack of calculation or documentation of expenditure for 14 cantons. In addition, the FTA identified at least five cases of harmful gainful activity, i.e. cases that do not permit lump-sum taxation. Additional investigations will be necessary for some taxpayers.

The conditions for allowing the activities of board members of a Swiss company to be subject to lump sum-taxation vary in terms of restrictions, depending on the canton. Ten cantons allow fee revenue up to a certain limit (generally CHF 10,000 to CHF 12,000 per year). The FTA reminded the cantons of the conditions for allowing lump-sum taxation for this type of activity.

Given the fact that two legal opinions reached different conclusions, the SFAO believes that there is uncertainty about the tax situation of board members of Swiss companies with significant shareholdings. In the SFAO's view, this situation should be clarified by a court of law by means of an appeal by the FTA in one of the relevant cases.

The FTA rejected the corresponding recommendation number 1. In support of its position, the FTA referred to motion 20.3850 "No lump-sum taxation in the case of serving on a board of directors", which is currently pending in Parliament, and to the Federal Council's position. The Federal Council rejected the motion on the grounds that serving on a board of directors should not in itself preclude lump-sum taxation.

The SFAO disagreed with the rejection of the recommendation and submitted it to the Federal Department of Finance (FDF) in accordance with the procedure set out in Article 12 paragraph 3 of the Federal Audit Office Act (FAOA). In its response, the FDF supported the rejection of the recommendation and likewise referred to pending motion 20.3850. As the SFAO remains convinced of the importance of the recommendation, it has also submitted the decision of the FDF to the Federal Council in accordance with Article 12 paragraph 3 of the FAOA. The Federal Office of Justice initiated the procedure before the Federal Council in a manner similar to that laid down in Article 75 of the Administrative Procedure Act. As it takes time for the decision to be made, the SFAO decided to conclude its audit report based on the current status.

### **FTA supervision has led to an improvement in the situation**

This first investigation by the FTA into lump-sum taxation was useful. It was absolutely necessary given the problems identified and the political sensitivity of the subject. The results of the investigation and the clarifications made by the FTA are a good basis for the cantons to work on, enabling them to correct and improve their practices.

However, the SFAO noted that the FTA should exercise its right to obtain the tax notifications for cases that need to be corrected. In addition, in cases of differences in interpretation with the cantons, it must assert the rights of the Confederation.

**Original text in French**