Judgment Heading

138 II 300

23. Extract from the judgment of the Second Public Law Division in the case of the Federal Tax Administration against X. and the Tax Administration of the Canton of Basel-Landschaft (appeal in public law matters)
2C_614/2011 of 4 May 2012

Register

Article 3 paragraphs 1 and 2, **Article 8 paragraph 2 andArticle 9, paragraph 1 DBG**; **Art. 24 para. 1 Swiss Civil Code** ; tax domicile of a "globetrotter".
Summary of case law on the relocation of a natural person's residence abroad: The residence once established generally remains in place until a new one is acquired (E. 3.1-3.4).
Presentation of the criticism of the current practice (E. 3.5 and 2.4.2).
The principle of the unity of the legal system, legal certainty, and the prevention of legal abuses (E. 3.6.1 and 3.6.2) support the analogous application of **Art. 24 para. 1 of the** Swiss Civil Code and thus the affirmation of the continued existence of the tax domicile of a "globetrotter".
As long as the "globetrotter" does not demonstrably establish significant relationships - in the sense of residence - to a specific other location abroad, the continued existence of the Swiss tax domicile is assumed (E. 3.6.3).

Facts of the case from page 301

A. Mr. and Mrs. X. and Y. lived together in Münchenstein/BL. In January 2005, the husband (Y.) deregistered with the municipality effective March 15, 2005, and gave his new address as "Globetrotter," while the wife (X.) remained in Münchenstein. In the fall of 2006, the tax administration of the Canton of Basel-Landschaft assessed X. for cantonal and federal income tax for 2005. In doing so, it added her husband's share of the income and assets to her taxable income. This assessment was confirmed by decisions on objections dated March 13, 2007. The Tax Court of the Canton of Basel-Landschaft partially upheld X.'s appeals against these assessments in decisions dated July 6, 2007. It instructed the cantonal tax administration to reassess the wife, stating that the husband's income and, in the case of cantonal income tax, his assets should "only be considered for the purpose of determining the tax rate." The appeal subsequently filed by the cantonal tax administration with the cantonal court of Basel-Landschaft was rejected on April 9, 2008.
B. On June 4, 2008, the Federal Tax Administration (FTA) appealed the judgment of the Cantonal Court of April 9, 2008, to the Federal Supreme Court. The Federal Supreme Court dismissed the appeal in its decision of February 3, 2009 (case no. 2C_420/2008), reasoning that the judgment of the Cantonal Court constituted an interlocutory decision and that the requirements for appealing such a decision under Art. 92 et seq. of the Federal Supreme Court Act (BGG) were not met.

C. In accordance with the judgment of the Cantonal Court of 9 April 2008, the cantonal tax administration assessed X. on 24 June 2008

new and confirmed this with an objection decision of December 14, 2009. The appeals raised by the FTA concerning the direct federal tax were dismissed by the Tax Court on July 9, 2010 and by the Cantonal Court of Basel-Landschaft on April 20, 2011.

D. By appeal in public law matters dated August 4, 2011, the Federal Tax Administration (FTA) requests the Federal Supreme Court to "overturn the objection decision of the cantonal tax administration dated December 14, 2009, concerning the 2005 federal direct tax, in favor of the appeal" and to "tax the income of Y. and X. jointly in Switzerland in Münchenstein for the 2005 federal direct tax." (...)
The Federal Court upholds the appeal and confirms the objection decision of the cantonal tax administration of 13 March 2007 concerning the direct federal tax.
(Abstract)

Considerations

From the considerations:

2.

2.1 For direct federal tax purposes, married persons are generally subject to joint taxation. According to **Art. 9 para. 1 DBG** (SR 642.11), the income of spouses who are legally and factually inseparable is aggregated, irrespective of their matrimonial property regime, and tax is payable on the sum of all income (so-called factor addition). Conversely, it follows that in the case of legal or de facto separation, the income of each spouse is taxed separately (see **BGE 133 II 305** E. 4.1 p. 308; Judgments 2A.432/2004 of December 16, 2004, E. 3.2, in: StR 60/2005 p. 435; 2A.353/2006 of January 18, 2007, E. 4.1 and 4.2, in: StR 62/2007 p. 352; Message of May 25, 1983, on tax harmonization, BBl 1983 III 30 and 159; Circular No. 14 of the FTA of July 29, 1994, on family taxation under the DBG, lit. A. 2a, ASA 63 p. 284). ff., in particular 285; Art. 5 para. 2 of the Ordinance of 16 September 1992 on the time-based assessment of direct federal tax for natural persons [SR 642.117.1]).

2.2 In the present case, the respondent's husband deregistered in Münchenstein during 2005, while she did not. Even if the spouses thereby established different residences, this alone does not mean that the marriage is legally or factually separated and therefore separate taxation is required (cf. **BGE 121 I 14** E. 5c p. 19; Judgment

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2P.2/2003 of 7 January 2004 E. 2.4.1, in: ASA 73 p. 420). Further conditions must be met for such taxation; In particular, no marital relationship may exist anymore (cf. judgments 2A.433/2000 of 12 July 2001, para. 2b, in: ASA 71 p. 558; 2A.432/2004 of 16 December 2004, para. 3.2, in: StR 60/2005 p. 435; 2C_523/2007 of 5 February 2008, para. 2.3, in: StR 63/2008 p. 364; the aforementioned circular no. 14, lit. A. 2b and c as well as B. 1b, ASA 63 pp. 286-288).

According to the undisputed findings of the lower court, the spouses continue to maintain their marital relationship. They even support themselves from their joint resources. Therefore, a separation of the marriage cannot be assumed, so that, in principle – as required by the Federal Tax Administration – a aggregation of factors must take place with regard to the respondent and her husband (see Art. 15 of the aforementioned Ordinance of 16 September 1992 [SR 642.117.1]). However, the respondent argues that her husband – unlike her – has not had a tax residence in Switzerland since 16 March 2005.

2.3 If one spouse has a foreign residence, despite a legally and factually intact marriage, only the spouse residing in Switzerland is subject to unlimited tax liability in Switzerland, and only the latter's income is taxed. The income of the spouse residing abroad is only to be considered for the purpose of determining the applicable income tax rate (see the aforementioned judgment 2C_523/2007, para. 2.2, in: StR 63/2008, p. 364; the aforementioned Circular No. 14, lit. B. 1a and b, ASA 63, pp. 287 et seq.; Christine Jacques, in: Commentaire romand, Impôt fédéral direct, Yersin/Noël [eds.], 2008, para. 15 on **Art. 9 DBG** ; Peter Locher, Commentary on the DBG, 2001, paras. 22 et seq. on **Art. 9 DBG** ; also regarding military tax: **BGE 73 I 408** , para. 2, pp. 409 et seq.; **75 I 385** , para. 3, p. 388). f).

2.4 In the present case, however, all parties to the proceedings correctly assume that the respondent's husband did not establish a residence abroad and did not become subject to unlimited tax liability in another country. They disagree, however, on the consequences.

2.4.1 Referring to the established case law of the Federal Supreme Court (see references in section 3.3 below), the Federal Tax Administration and the cantonal tax administration are of the opinion that **Art. 24 para. 1 of the Swiss Civil Code (ZGB)** should be applied. According to this provision, once established,

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A person's residence must remain in place until they acquire a new residence.

Accordingly, the respondent's husband would be treated as if he continued to reside in Münchenstein, Switzerland. This would also necessitate the aforementioned addition of factors pursuant to **Art. 9 para. 1 DBG** .

2.4.2 The Cantonal Court, the Cantonal Tax Court, and the respondent, however, maintain that the connection to a fictitious domicile is not provided for in tax law. Maintaining tax liability despite abandoning domicile requires, due to the strict application of the principle of legality in tax law, a specific definition at the level of tax legislation. Without an explicit statutory reference to **Art. 24 of the Swiss Civil Code** (ZGB) , an analogous application of this provision is precluded or at least questionable. Tax domicile according to **Art. 3 para. 2** of the Federal Direct Tax Act (DBG) is an independent concept separate from civil law. In principle, only the actual residence is decisive, or rather, the determining factor is whether a shift in the center of personal interests from Switzerland to a foreign country has taken place (similarly BAUER-BALMELLI/OMLIN, in: Commentary on Swiss Tax Law, Zweifel/Athanas [eds.], Vol. I/2a, 2nd ed. 2008, No. 23 on **Art. 8 DBG** ; HÖHN/WALDBURGER, Tax Law, Vol. I, 9th ed. 2001, § 13 No. 24; ROBERT WALDBURGER, Case Law in 2010, IFF Forum for Tax Law 2011, pp. 297 ff.; PETER AGNER AND OTHERS, Commentary on the Federal Direct Tax Act, Supplementary Volume, 2000, No. 2a on **Art. 3 DBG** ; FELIX RICHNER AND OTHERS, Concise Commentary on the DBG, 2nd ed. 2009, N. 10 on **Art. 3 DBG** ; FELIX RICHNER et al., Commentary on the Harmonised Zurich Tax Law, 2nd ed. 2006, N. 16 on **§ 3 StG** /ZH; FELIX RICHNER, The Tax Law Case Law of the Federal Supreme Court in 2010 for Natural Persons, ASA 80 p. 38 f.; MARKUS REICH, Tax Law, 2nd ed. 2012, § 11 N. 18; JEAN-BLAISE PASCHOUD, in: Commentaire romand, Impôt fédéral direct, N. 17 on **Art. 8 DBG** ; DANIEL STAEHELIN, in: Basler Kommentar, Civil Code, Vol. I, 4th ed. 2010, N. 5 on **Art. 24 ZGB**).

According to the lower court, reference is made to civil law only in special cases, whereby the special legal domicile of dependent persons under **Art. 25 of the Swiss Civil Code** is also to be defined as their tax domicile. However, in the tax sphere,

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The application of the presumption of residence under **Article 24 of the Swiss Civil Code (ZGB)** requires an examination of whether it is appropriate to the individual case. This is not the case here. **Article 24 ZGB** presumes that the person concerned intends to establish a new residence. However, the respondent's husband does not intend to do so in the near future. Furthermore, he has no connection to any specific location within the territory of the Swiss tax jurisdiction. He is currently abroad on his sailboat. The file contains no indication that he will return to Switzerland in the near future. Since his wife visits him regularly on the boat, it must be assumed that he intends to remain abroad and has not merely left Switzerland temporarily. It is inadmissible to conclude that this is merely a temporary interruption of his stay in Switzerland simply because he has not established a new residence abroad. Therefore, the husband's income should only be used to determine the tax rate for the income of the wife residing in the country.

3.

3.1 According to **Art. 3 para. 1 of the Federal Direct Tax Act (DBG)** , natural persons are liable to tax on the basis of personal affiliation if they have their tax domicile or residence in Switzerland. A person has such a domicile if they reside here with the intention of remaining permanently or if federal law assigns them a special legal domicile here (**Art. 3 para. 2 DBG**). A person has tax residence in Switzerland if, notwithstanding temporary interruptions, they remain in Switzerland for at least 30 days and are gainfully employed, or remain here for at least 90 days without gainful employment (**Art. 3 para. 3 DBG**). According to **Art. 8 para. 2 DBG,** tax liability in Switzerland ends, among other things, when the taxpayer leaves Switzerland.

3.2 The Federal Supreme Court has repeatedly held that a person's domicile is the place where the center of their vital interests is actually located. This is determined by the totality of objective, external circumstances from which these interests can be discerned, not by the merely expressed wishes of the taxpayer. The tax domicile is therefore not freely selectable; a purely emotional preference for one place or another is irrelevant (**BGE 132 I 29).**

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E. 4 p. 35 ff.; **BGE 125 I 54** E. 2 p. 56; **BGE 123 I 289** E. 2a and b p. 293 f.; Judgments 2C_627/2011 of 7 March 2012 E. 4.1; 2C_355/2010 of 7 December 2010 E. 4.1, in: StE 2011 B 11.1 No. 22).

3.3 The Federal Supreme Court has consistently held that, for a transfer of residence abroad, it is not sufficient to sever ties with the previous residence; rather, the decisive factor is that, based on all the circumstances, a new residence has been established. Although the Federal Act on Direct Federal Taxation – unlike Article 4 paragraph 1 of the Federal Council Decree of December 9, 1940, on the Levying of a Direct Federal Tax (BdBSt; BS 6 350; in force until December 31, 1994) – no longer expressly refers to the Civil Code for the purpose of reclassifying tax residence (**Articles 23-26 of the Swiss Civil Code**The legal content of this term has not changed and largely follows the concept of residence in the Swiss Civil Code (see the Federal Council's Message of May 25, 1983, on tax harmonization, Federal Gazette 1983 III 86 and 155): The principle remains that no one can have a residence in more than one place simultaneously. Likewise, as under the old law, a residence once established generally remains in effect until a new one is acquired (so-called "rémanence du domicile"). Therefore, it is irrelevant when the taxpayer deregistered from or left their previous place of residence. If they go abroad, they must pay federal direct tax until they can demonstrably prove that they have established a new residence abroad. A different interpretation would entail an unacceptably high risk of abuse (Judgments 2A.475/2003 of July 26, 2004, paras. 2.1 and 2.2, in: RDAF 2005 II 103; 2A.337/2000 of February 6, 2001, paras. 2b and c; 2A.388/1998 of May 3, 2000, para. 5a, in: StR 55/2000 p. 509; subsequently confirmed in consistent practice by judgments 2C_627/2011 of

March 7, 2012, para. 4.1; 2C_472/2010 of January 18, 2011, para. 2.2, in: StE 2011 A 32 No. 17; 2C_355/2010 of December 7, 2010, E. 4.1, in: StE 2011 B 11.1 No. 22; 2C_484/2009 of September 30, 2010, E. 3.4, in: RtiD 2011 I, p. 538; similarly: ARNOLD/MEIER/SPINNLER, Steuerpflicht bei Auslandbezug [Tax Liability with Foreign Connections], ASA 70, p. 8; ARNOLD/BERGER, Steuerpflicht bei Auslandbezug [Tax Liability with Foreign Connections], in: Ausländerrecht [Immigration Law], Peter Uebersax et al. [eds.], 2nd ed. 2009, para. 20.18 ff.; DANIEL DE VRIES REILINGH, Le droit fiscal intercantonal et le droit fiscal international de la Suisse [Intercantonal and International Swiss Tax Law], 2011, p. 252; *idem* , Le domicile des personnes physiques en droit fiscal [The Domicile of Individuals under Tax Law] intercantonal et international, ASA 70 pp. 282-284; AGNER/JUNG/STEINMANN, Commentary on the Law on

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the direct federal tax, 1995, N. 2 to **Art. 3 DBG** ; PETER LOCHER, Introduction to the International Tax Law of Switzerland, 3rd ed. 2005, p. 229; **Art. 24 para. 1 ZGB** in the sense of a presumption that can be rebutted by counter-evidence: PETER LOCHER, Commentary on the DBG, 2001, N. 9, 13 and 61 to **Art. 3 DBG**).

3.4 The tax authorities are required to investigate the factual elements constituting tax residence ex officio (**Art. 123 para. 1 DBG**). Tax residence, as a tax-establishing fact, must generally be proven by the tax authorities. However, the taxpayer is obligated to cooperate and, in particular, to provide comprehensive information about the circumstances relevant for taxation (see **Art. 124 ff. DBG**). Therefore, the taxpayer must demonstrate that a change of residence has occurred. This includes not only the final severance of ties to the previous residence, but also a description of the circumstances that led to the establishment of the new residence (Judgments 2C_355/2010 of December 7, 2010, para. 4.1, in: StE 2011 B 11.1 No. 22; 2A.350/1990 of March 15, 1991, para. 3a, in: ASA 60 p. 499; 2P.145/1998 of September 29, 1999, para. 3c, in: Pra 2000 No. 7 p. 29; see also the aforementioned judgment 2A.475/2003, para. 2.3).

3.5 The existing case law of the Federal Supreme Court has been subject to some criticism in legal scholarship (see the literature references in section 2.4.2 above). Among other things, it is argued that the message on tax harmonization cited in this context is not sufficiently clear to establish that the legal situation concerning **Art. 24 of the Swiss Civil Code** (ZGB) existing under the aforementioned Federal Council decision (BdBSt) should continue to apply under the current Federal Tax Act (DBG). Furthermore, reference is made – as was also the case with the lower court – to a decision of the Federal Supreme Court which held, with regard to the then-applicable Thurgau Tax Act, that it neither expressly nor implicitly referred to **Art. 24 para. 1 ZGB** ; therefore, it was deemed arbitrary to rely on this provision (Judgment P.1535/1980 of June 24, 1983, published in: ASA 54 p. 225). The same conclusion must also apply to **Art. 3 para. 2 DBG**

. **3.6** The arguments put forward by the lower court or the legal opinions cited in section E. 2.4.2 are not suitable to deviate from the established case law of the Federal Supreme Court:

3.6.1 Firstly, contrary to the opinion of the lower court, the application of **Art. 24 para. 1 of** the Swiss Civil Code does not require that the person concerned intends to establish a new residence.

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to justify. Rather **, Article 24 of the Swiss Civil Code (ZGB)** is the positive legal anchoring of the principle that a natural person must have a domicile. In principle, every person should be assigned a domicile. No one should be able to evade legal consequences by claiming that they have no domicile anywhere (EUGEN BUCHER, Berner Kommentar, 3rd ed. 1976, Nos. 1 f. and 15 to **Art. 24 ZGB** ; cf. also AUGUST EGGER, Zürcher Kommentar, 2nd ed. 1930, No. 1 to **Art. 24 ZGB**). The Basler Kommentar zum ZGB (3rd ed. 2006), cited by the lower court in this context, does not lead to a different conclusion. There (in N. 5 to **Art. 24 of the Swiss Civil Code** , as well as in the 4th edition 2010) it is stated, with sole reference to a decision of a cantonal court, that the fictitious domicile according to **Art. 24 of the Swiss Civil Code** does not apply in tax law; however, this is not justified by the fact that the application of **Art. 24 para. 1 of the Swiss Civil Code** requires that the person concerned intends to establish a new domicile.

On the other hand, it may be true that income tax law generally focuses on actual residence (see section 3.2 above). Accordingly, the first version of **Art. 3 para. 2 DBG** indicates that a tax domicile exists in Switzerland if the person concerned resides there with the intention of remaining permanently. However, according to the second version of this provision, federal law can also assign a domicile to a person and thus deviate from their actual place of residence (e.g., pursuant to **Art. 25 of the Swiss Civil Code** for children under parental care or persons under guardianship; see Locher, Commentary on the DBG, Nos. 21 ff. on **Art. 3 DBG**). This makes it clear that actual residence is not the sole determining factor in income tax law. In view of the express reference to federal law, contrary to the opinion of the lower court (see contested decision E. 5.5.1), the principle of legality applicable in tax law (see **Art. 127 para. 1 BV** ; **BGE 131 II 562** E. 3.1 p. 565) is also upheld.

3.6.2 The principle of the unity of the legal system supports the analogous application of **Article 24 paragraph 1 of the Swiss Civil Code (ZGB)** in international relations. While tax law may, in exceptional cases, deviate from the civil law concept of domicile if special reasons exist, no such reasons are apparent in the present factual and legal situation. The mere fact that the Federal Direct Tax Act (DBG), unlike the Federal Direct Tax Act (BdBSt), no longer expressly refers to**Articles 23-26 of the Swiss Civil Code**Simply referring to it is definitely not enough, especially since

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The legislative materials also do not indicate that the legislator intended to effect a substantive change by deleting the reference. Furthermore, as long as no new domicile is effectively established, legitimate doubts may persist as to whether the old domicile has truly and definitively been abandoned. The solution advocated here is therefore supported by legal certainty. In particular, relying on the civil law provision of **Art. 24 para. 1 of the Swiss Civil Code (ZGB)** provides a simple and predictable regulation. As mentioned in the Federal Supreme Court ruling 2A.475/2003 (section 2.2), which has already been cited, this regulation also allows for the effective prevention of abuses of rights.

Insofar as the lower court relies on the judgment P.1535/1980 of June 24, 1983, it overlooks the fact that **Art. 3 para. 2 DBG** – unlike the Thurgau tax law in force at the time – explicitly refers to a "legal domicile" assigned by federal law. Moreover, the appellant's husband has maintained ties to his homeland in various respects. In particular, he could return at any time to the marital home where his wife lives. This is precisely where the present case differs from the situation in case P.1535/1980, in which the defendant was single and also employed in a specific country, leading to the presumption that he had the closest connections to his foreign place of work (see also **BGE 125 I 54** E. 2b/bb p. 57).

3.6.3 In the present case, the taxpayer is a 62-year-old globetrotter. While he currently denies any intention of returning, if, for example, his health were to deteriorate or he were to encounter serious financial difficulties, he would hardly be able or willing to remain "traveling" or "at sea." As long as he does not have a permanent, fixed residence abroad, there is therefore no point of reference around which his life could be refocused. Under these circumstances, it is not objectionable to assume the continued existence of his Swiss tax domicile, as long as he does not demonstrably establish significant ties—in the sense of residence—to a specific other location abroad. Such exemptions are recognized, for example, if the taxpayer is taxed abroad or provides proof that he is exempt from taxation (see the aforementioned judgment 2C_484/2009 of 30 September 2010, section 3.4).

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3.6.4 The analogous application of **Art. 24 para. 1 of the Swiss Civil Code (ZGB)** and thus the affirmation of the continued existence of the tax domicile in Switzerland also appears appropriate, as there are legitimate doubts as to whether the respondent's husband actually relinquished his residence in Münchenstein during the 2005 tax period. Although he claims not to have returned to Münchenstein after deregistering in 2005, his marriage continues not only legally but also in practice. As mentioned, the couple supports themselves from their joint resources. Furthermore, the respondent's husband has maintained health insurance in Switzerland. He also handles various services he uses there (such as credit card, banking, and telephone). The couple also owns real estate in Switzerland. Moreover, the husband has not definitively turned his back on Switzerland in a personal sense, as he visits relatives and acquaintances there from time to time, according to the respondent.

4. If, as explained above, the husband's tax domicile in Münchenstein continued to exist in 2005, the spouses' income for that tax period must be taxed jointly, as the cantonal tax administration had originally done. Consequently, the contested decision of the Cantonal Court, which provides for separate taxation of the income, is contrary to federal law. It must therefore be overturned; however, the objection decision of the cantonal tax administration of March 13, 2007, must be upheld.