

# GMS Flash Alert

2024-113 | May 17, 2024

## France – Finance Ministry Clarifies Its Stance on Nonresident Withholding

The French Finance Ministry recently announced<sup>1</sup> that it would ignore a contrary decision of the State Council<sup>2</sup> regarding “the primacy of the notion of resident in conventional law over that of tax domicile in domestic law” for withholding tax purposes and that it would introduce a measure to that effect in the next budget law.

### WHY THIS MATTERS

The French domestic criteria for French tax residence require a careful analysis of an individual’s circumstances. For instance, individuals may be considered French tax resident if their main professional activity is carried out in France.

Nonresident withholding tax is a tax applied to income such as employment and pensions earned in France by nonresidents. It is important for employers to understand their compliance obligations in relation to non-French tax resident individuals that are taxable in France.

### Court Case: Residence under Treaty Versus Residence under Domestic Law

The initial court case and subsequent appeal<sup>3</sup> were about the determination of French-sourced income. The French Tax Administration contested the pro-rata basis that the employer had used to calculate the taxable basis for withholding tax purposes, based on actual time spent working in France. It sought instead to tax the entire remuneration of its director and not just the part related to French work-days.

The case eventually ended up in front of the State Council (*Conseil d’Etat*). However instead of taking a stand on the question asked, the Council took a step aside. It questioned the relevance of applying the nonresident withholding tax to the case at hand.

In the ruling, it made a distinction between tax domicile within the meaning of French law and tax residence within the meaning of international conventions. Therefore, a person residing abroad for tax purposes, but who meets one of the French tax domicile criteria, in this case a non-ancillary professional activity in France, could not be subject to withholding tax because the latter only applies to people who do not have their

domestic tax domicile in France. In this context, it would be up to the employer to adapt the way in which it deducts tax at source depending on whether the employee, in view of his or her personal situation, is to be regarded as having his or her tax domicile in France.

The decision thus runs counter to the French Tax Administration's own guidance on the articulation of tax treaties and territorial rules under domestic law.<sup>4</sup>

## KPMG AVOCATS INSIGHTS

The French Tax Administration justified its announcement by the need to provide “legal certainty” to employers and to state clearly the primacy of the notion of “resident” in conventional law over that of “tax domicile” in domestic law.

Notwithstanding the particular facts of the case in question, it is important for employers of non-French tax-resident employees to understand their tax obligations in France and to consult with their tax adviser if they have any questions or need assistance dealing with these obligations.

### FOOTNOTES:

1 *Ministère de l'Économie, des Finances et de la Souveraineté industrielle et numérique* (in French), "Maintien du champ d'application de la retenue à la source sur les traitements, salaires, pensions et rentes viagères prévue à l'article 182 A du code général des impôts" at: <https://presse.economie.gouv.fr/maintien-du-champ-dapplication-de-la-retenu-a-la-source-sur-les-traitements-salaires-pensions-et-rentes-viageres-prevue-a-larticle-182-a-du-code-general-des-impots/>.

2 *Conseil d'État, 8ème - 3ème chambres réunies, 05/02/2024, 469771* (State Council Decision n° 469771 of 5 February 2024) (in French) at: <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000049097078>.

3 *Jugement n° 1702568 du 24 juillet 2020 Tribunal administratif de Cergy-Pontoise* (Judgment 1702568 of 24 July 2020 Cergy-Pontoise Administrative Tribunal) (unpublished) and *CAA de VERSAILLES, 1ère chambre, 18/10/2022, 20VE02479* (Administrative Court of Appeal of Versailles 18 October 2022 20VE02479) (in French) at: <https://www.legifrance.gouv.fr/juri/id/CETATEXT000046472916>.

4 *Bulletin Officiel des Finances Publiques – Impôts* (Official Public Finance Bulletin – Taxes) (in French) "INT - Dispositions communes - Droit conventionnel - Articulation des conventions fiscales internationales avec les règles de territorialité de droit interne - En matière d'impôt sur le revenu" at: <https://bofip.impots.gouv.fr/bofip/2427-PGP.html/identifiant%3DBOI-INT-DG-20-10-10-20120912>.

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## Contact us

For additional information or assistance, please contact your local GMS or People Services professional or one of the following professionals with the KPMG International member firm in France:



**Alain Loehr**  
**Partner**

Tel. +33 (0)1 55 68 48 32  
[alainloehr@kpmgavocats.fr](mailto:alainloehr@kpmgavocats.fr)



**Ann Atchade**  
**Partner**

Tel. +33 (0)1 55 68 48 46  
[annatchade@kpmgavocats.fr](mailto:annatchade@kpmgavocats.fr)

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