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Non-residents ' real estate gains: still an imperfect tax regime (« Plus-values immobilières des non-résidents : un régime d'imposition encore imparfait »)

The real estate capital gains tax scheme provided for in article 244 bis of the CGI penalizes foreign companies which own real estate not related to the professional activity in France unlike the French companies. This difference does not seem to be justified.

Non-residents natural persons and legal persons are, subject to the non-double taxation agreements ("conventions fiscales de non-double imposition"), submitted in France because of the real estate gains which they make directly or via companies belonging to the persons under the scheme of article 8 of the CGI to a tax which takes the form of a levy the amount of which corresponds to the quality of the assignors.

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This levy presents a discharging character for natural persons acting in the context of the management of their private assets (subject to the exceptional contribution on the high incomes which may be added) and is attributable to the Corporation Tax ("l'impôt sur les sociétés") in the case of legal persons, the surplus being refundable under certain conditions.

Even if the operative part of article 244 bis A of the CGI has continued to progress in the sense of identical treatment of residents and non-residents, under pressure mainly of European Union law, it still penalizes legal persons non-residents holding real estate in FRANCE not affected or considered unaffected, to a professional activity.

A real evolution towards an identical treatment

First of all, it is about the basis of the levy

Since the non-resident transferor is subject to income tax, the capital gains subject to the levy provided for in article 244 bis A of the General Tax Code ("CGI") shall be determined under the same conditions as for taxpayers domiciled in France subject to the Income Tax, and this principle applies to all transferors, whether or not they are EU citizens.

On the other hand, when the transferor is a legal entity, the legislator has allowed a difference to be made according to whether the transferor is resident or not of a Member State of the EU or of a State party to the agreement on the Europoéen Economic Area ("EEE") having concluded with France an administrative assistance agreement regarding fight against the tax evasion and avoidance ("une convention d'assistance administrative en vue de lutter contre la fraude et l'évasion fiscales").

It is only in the first case that, for the sale carried out since 1 March 2010, article 22 of Law 200-1674 of 30 December 2009 has aligned the rules for calculating real estate gains on the scheme applicable to companies established in France, either on the corporate tax ("impôts sur société") rules.

For the others, these are the rules laid down in article 244 bis A, III-al. 1 of the CGI that remain applicable. They provide that the capital gains are determined by the difference between the

sale price of the property and its acquisition price decreased for the constructed buildings of an amount equal to 2% of its amount per full year of holding, given that the amortization of 2 % applicable to the acquisition price is determined by year of holding, calculated from calendar to date and concerns the only constructed buildings excluding land and company securities with a balance of property.

With regard to the rates

Again, the provisions evolved as a result of the adoption of article 60, I-2 of Act No. 2014-1655 of 29 December 2014. The levy rate is set at 19% for capital gains realized by:

- Natural persons ;
- Entities, organizations or bodies whose beneficiaries are taxed on behalf of the partners, in proportion to the rights held by natural persons ;
- The real estate investment funds referred to in article 239 (h) of the CGI, in proportion to the shares held by natural person.

Regarding the legal persons, the legislator resisted since it has set a common rate of law which is the normal rate of corporate tax referred to in the second paragraph of article 19 (I) of the CGI, which is currently 22, 1/3% but with regard to Legal persons residing in the EU Member State or another State or territory party to the EEA agreement having concluded with France an administrative assistance agreement with a view to fight fraud and tax evasion and not being Cooperative within the meaning of article 23-0 A of the CGI, aligned the rates of levy on the rates of Corporate Tax applicable at the date of transfer to the legal persons residing in France.

It will be convenient to recall that the Council of State ("Conseil d'Etat") had judged in the decision of October 20, 2014 that the difference in the rates applicable to the capital gain on the sale of a real estate situated in France carried out by an SCI according to whether its shareholders or non-EEA residents was contrary to the principle of free movement of capital, it is surprising that Parliament had left this distinction in the amendment to the text of article 244 bis A of the CGI by article 60 of Act 2014-1655 of December 29, 2014.

The same applies to the abolition of the obligation to designate a tax representative for the sole transferors domiciled, established or constituted in an EU Member State or in another State party to the EEA Agreement which concluded with France an Administrative assistance agreement to combat fraud and tax evasion ("une convention d'assistance administrative en vue de lutter contre la fraude et l'évasion fiscal") and a mutual assistance agreement in the field of tax recovery ("une convention d'assistance mutuelle en matière de recouvrement de l'impôt").

However, differences in treatment remain for legal persons holding a real estate nor related to the professional activity.

Since the adoption of an article 43 of the Law 93-1353 of December 30,1993, the rule has remained the same, namely that the capital gains on the sale of the real estate carried out by natural or legal persons or the bodies referred to in article 244 bis A, 1-2 of the CGI, which operate in France an industrial, commercial or agricultural activity, undertaking or carry on a non-commercial occupation to which such real estate property is affected. The text, also unchanged since 1993, further specifies that the buildings must be entered, as the case may be, in the balance sheet or the Fixed assets table established for the determination of the taxable result of that activity.

The tax administration commented this provision simply by stating that the lease of the real estate (bare, furnished or equipped) cannot under any circumstances be regarded as the operation of an industrial, commercial or agricultural undertaking or the financial year of a non-commercial profession within the meaning of article 244 bis (a) of the CGI on the ground that, within the meaning of that article, the real estate used in the course of the transferor's industrial, commercial, agricultural or non-commercial activity is exclusively operations of this activity, and specifying that when the transferred property is entered on the assets of the tax balance sheet without being assigned to the exercise of such activity, the levy provided for in article 244 bis A of the CGI is due, without prejudice to the imposition of the capital gain realized according to the system of professional capital gains.

Three situations can be distinguished

The first situation is when there are the legal persons holding French buildings or shares of French-dominated property companies without operating a business in France and which since 2009 have been subject to the corporate tax ("IS") in France due to capital gains on the sale of French buildings and French SP shares.

The second is when there are the foreign legal persons who operate a business in France and who have registered to the fiscal actives of their French permanent establishment of French buildings or shares of the French SCI.

The last are finally those legal persons who operate a business in France falling within the scope of article 35 of the CGI and thus hold, in the context of this activity, French buildings or units of SP but as stocks and Not as fixed assets. In these three cases, and notwithstanding the subjection to tax on companies on the basis of a holding in France, the tax administration considers, on the ground of the text of article 244 bis A of the CGI, that the assignors are not exempt from the levy on the basis, in the first case, of the absence of exploitation in France of the assignor, in the other two cases, of the absence of assignment to the operation of the buildings or units of SPI.

The consequences

In these situations, the assignors can only claim that the levy is charged on the amount owed and, where the amount of the levy exceeds the Corporate Tax ("IS"), obtain the refund of that surplus.

This situation is not satisfactory therefore, first of all, because the principle of imputation is not of general application, since the surplus is only returned to legal persons, since the surplus is only returned to the legal entities residing in the EU state or a state or territory which has entered into a tax treaty with France which contains an administrative assistance clause in the exchange of information and the fight against fraud and tax evasion and not being uncooperative within the meaning of article 238-0 of the CGI.

But it mainly compels the foreign companies, even the companies of the European community, to make the advance of the levy pending the liquidation of the company tax. And the omission of the application of the levy is not neutral since in addition to the interest and the penalty for late payment is 10%. The legislator has maintained the application of a specific penalty, the amount of which is 25% of the levy not applied and application of which is made automatic by the administration.

However, there are situations known to the practitioners in which, in the presence of stable structurally deficient establishments (for example, the own operations of the foreign company in France or the fact that the permanent establishment is the head of Group of a tax integration, the overall result of which is in deficit, the obligation to pay the levy is akin to a forced borrowing, since on the date of transfer or contribution of the building or the securities of SPI, it may be acquired that the foreign company will not be liable for a corporate tax assessment in respect of the exercise of the sale or contribution. The situation is even more incomprehensible in the presence of a pure and simple contribution of SPI securities appearing in the assets of a permanent establishment and benefiting from the favor scheme of article 210 B of the CGI or one of an assignment of registered buildings to the assets of the French permanent establishment of a foreign SIIC referred to in article 208 of the CGI exempted from Corporate Tax ("IS") due to the capital gains on transfer to unrelated activity.

And the answer could not be that of the inability to hold the assets of the French permanent establishment of a foreign legal person of the buildings or units of SPI which would not be allocated to the holding. Such a principle does not exist and the tax authority itself has clarified that when the transferred property is entered in the assets of the balance sheet without being assigned to the exercise of such activity, the levy provided for in article 244 bis A of the CGI is due, without prejudice to the imposition of the capital gain realized according to the system of professional capital gains.

Unjustified differences in treatment

We will limit our analysis to the situation in which the foreign company operates a business in France to find on the one hand that the operative part of article d244 bis A of the CGI maintains a difference of treatment between the buildings and units of SPI whether or not they are employed in the business, when all of them are registered in the assets of the French permanent establishment (« l'établissement stable ») of the non-resident legal entity and, on the other hand, that the principle of imputation also ignores the specific nature of the activities under Scope of the RTAC. 35 of the CGI that the device of article 244 of the CGI does not appear to be correct.

Case of activities covered by article 35 of the CGI

Pursuant to the provisions of article 244 of the CGI, the profits referred to in article 35 of the CGI give rise to the collection of a levy at the normal rate of the Corporate Tax ("IS") when they are made by taxpayers for companies, in whatever form, which do not have an establishment in France (and who are not domiciled a non-cooperative state). If it releases tax payers domiciled outside France within the meaning of article 4b of the CGI of the income tax due to the sums which supported the levy, on the other hand, it is due on the amount of the money owed by the transferor for the year of Profit-making and, for legal persons and bodies resident in the EU state or a state or territory which has entered into a tax treaty with France, which contains an administrative assistance clause in respect of the exchange of Information and combating tax evasion and avoidance and not being cooperative within the meaning of S. 238-0 A of the CGI, the excess of the levy on the corporation tax is returned.

The mechanics are finally identical to the one in which, since 2009, the foreign legal persons who sale property and shares of SPI in France without operating a business in France are subject to both charges (Corporate Tax and levy of art. 24 A of CGI) under the conditions described above. It must be recalled that the Corporate Tax is due, even in the absence of French exploitation, but subject to the tax conventions of non-double taxation, in particular because of the profits mentioned in article 164 B of the CGI, i.e. profits derived of operations defined in art. 35, when they relate to commercial funds operated in France and to the real

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estate property located in France, to real estate rights relating thereto or to shares and shares of unlisted companies whose assets consist principally of such property and rights.

It follows from the very drafting of article 244 bis of the CGI that in the presence of a French exploitation the levy of article 244 bis of the CGI is not applied. It could therefore be considered that for non-residents making the same profits through a permanent establishment located in France, only the corporate tax is owed. This is not the position of the tax administration, which intends to apply the levy of article 244 bis A of the CGI on the ground that the inventories of immovable property do not constitute permanent means of exploitation allocated to professional activity.

This position must be reconciled with the decision of the Council of State of December 15, 2004, which, having before it the question of the application of the Equal Treatment clause contained in the Franco-Swiss Convention in the case of a Swiss company subject to the Withdrawal of article 244 bis of the CGI, had considered that this scheme imposed a difference of treatment not based on the nationality of the undertaking but on the existence of an establishment in France to which the real estate activity relates, since only foreign legal persons who do not have in France an activity to which would be attached the buildings which are the subject of their real estate or construction business are subject to the levy, and whose assignment is at the origin of taxable real estate profit.

It is difficult to perceive this decision as to how the same profits on inventories, which thus escape the levy of article 244 bis of the CGI, could be "caught up" on a different plate, by the levying of article 244 Bis (A) of the CGI, on the double ground that real estate stocks constitute real estate property held in France by foreign legal entities and that they are not of a professional nature since they do not constitute permanent means of exploitation allocated to Professional activity.

No any difference of treatment should exist between foreign legal entities et French legal entities since they carry out the same activity in France producing the real estate profit under the article 35 of the General Tax Code (“CGI”).

Thus, it seems to us that the thinking about the field of application of the article 224 bis of the CGI, which includes real estate stocks, is not necessarily limited and that the position of the Tax Administration is not without contestation the contestable character, without obligation to consider that it is only a quality of the foreign entity that would justify whichever would be an activity carried out in France, the obligation to carry a an accountable or refundable levy.

The abovementioned situation is not actually very different to the one of the foreign entities which are carrying out an activity in France which is not relevant to the article 35 of the CGI and which holds the active of their French stable entity ("establishment stable") of the real estate property or of the share of the SPI is not prohibited.

Which is a Justification of a different treatment

The question is if the difference in the treatment between the foreign entities carrying out their activity in France and French entities in the same situation is justified.

It should be recalled that there is a necessity under threat of sanction for the foreign company operating a business in France of fulfilling of an obligation, on the sole base that its head office is located abroad, make the advance of the levy (we refer only to the non-resident legal entities admitted to impute the levy on the Corporate Tax) and to collect the refund when necessary, whereas a company carrying on the same activity but having its head office located in France would be subject only to the Corporate Tax.

Since the argument of inequality of treatment based on nationality seems to be discarded, it is probably not in the framework of the non-double taxation conventions that there is a need to seek answers. The Community's land is therefore left in the context of restrictions on the movement of capital or freedom of establishment.

The issue of the cash disadvantage in a taxation system could be seen as not constituting a difference in treatment characterizing a restriction on the freedom of movement of capital. Thus, the Council of State judged in GBL ENERGY in the decision of the May 9 2012 (CE plén. 9-5-2012 n° 342221, Sté "GBL Energy : RJF 7/12 n°774). The question was whether a

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foreign company could escape the French withholding tax on French-source dividends on the ground that it was in deficit, whereas a French company would not bear taxes in such a situation. The Council of State held that if there was a time lag between the collection of withholding tax on dividends paid to the non-resident company and the taxation against the company established in France for the period in which its results become benefit, however, this was only a lag that proceeds from a different technique of taxing dividends collected by the company depending on whether it is non-resident or resident and that the only cash disadvantage that Includes withholding at source for non-resident society can thus be viewed as constituting a difference in treatment characterizing a restriction on the freedom of movement of capital.

This decision cannot be considered as bringing end any debate. This is reflected in the reference by the Council of State to the ECJ of several damaging issues in cases where deficit companies established in the European Union had borne deductions at the source of French-source dividends.

Furthermore, the reasoning of GBL ENERGY's decision appears to be inapplicable when, by construction, corporate tax is not due to a tax system or a specific provision. The question is whether a company structurally subtracted from tax by French law at the rate of the operation under consideration is in the same situation, in view of the requirements of the Fundamental Freedoms, than a company that only temporarily escapes it (for example, its deficit situation).

The question that also arises is whether, in the end, it is not mere financial considerations referring to tax collection and the particular risk of non-recovery in the presence of a foreign legal person who would justify the Maintenance of the difference in treatment. However, if it is admitted in European Union law that the necessity from the part of the State to ensure the effective recovery of tax is an overriding reason of general interest which could justify a restriction on the principle of freedom of Movement of capital, it is still necessary that this recovery be genuinely compromised. This is not the case in the presence of companies under foreign law whose states of residence are signatories to bilateral agreements on mutual assistance in the recovery of tax debts, multilateral conventions designed specifically to provide administrative assistance in tax matters, such as the Convention on Mutual

Administrative Assistance in tax matters, drawn up by the Council of Europe and the OECD, or, within the EU, specific guidelines for Mutual assistance in the collection of tax debts, for example Council Directive 2010/24/EU of March 16, 2010.

The evolution of article 244 bis (A) of the CGI is therefore is not completed and the legislator should endeavor to abolish the differences in treatment which thus unjustifiably persist.

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