

Special
Edition
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Finance
Act

Newsletter

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#8



Overview of key measures from the French Finance Act and Social Security Financing Act for 2021 ...2-4



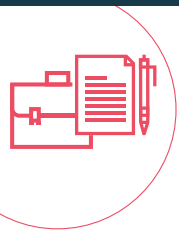
International taxation: towards an anti-GAFA interpretation of the concept of permanent establishment ...5



Greetings : Vaslin Associés wishes you a Happy New Year!

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Overview of key measures from the French Finance Act and Social Security Financing Act for 2021

Overview of key measures from the French Finance Act and Social Security Financing Act for 2021.

In this newsletter, we present the provisions that stood out for us.

Taxation of French-source employment income for non-residents: repeal of reform that would have resulted in increased taxation.

The Finance Act for 2019 introduced a reform of non-residents' taxation, with a view to aligning it with that of French residents.

Under the reform, initially due to enter into effect as from 1 January 2020, the withholding tax (WHT) on French-source employment income was increased to a flat rate of 30% (as opposed to the previous progressive rates of 0%, 12% and 20%). The reform also provided for a new deduction mechanism and ended the rule that the WHT (at least at the lower rates) constituted a non-resident's final tax liability.

The Finance Act for 2020 subsequently postponed implementation for the most part to 1 January 2021.

Under Section 4 of the Finance Act for 2021, **this reform**, which would have increased the tax burden for non-residents on their French-source income (salaries, pensions), **has now been abandoned.**

The previous WHT rates of 0%, 12% and 20% therefore continue to apply to such income, with the lower rates of 0% and 12% constituting a final tax liability, as previously.

Partial deductibility of spousal support

In light of the French Constitutional Court's ruling of 31 January 2020 (Cons. Const. 31 Jan. 2020, Case No. 2019-824, preliminary ruling), the Finance Act for 2021 has amended the taxation of spousal support paid in part as a lump sum and in part as monthly payments over no more than 12 months: payers can now claim the 25% tax credit that had previously only been available for lump-sum payments of the full amount.

Gradual removal of the 25% penalty for non-membership of an OGA

The French tax authorities automatically increase the income tax base for self-employed individuals by 25% if their accounts have not been certified by an organisme de gestion agréé (accredited management body).

This penalty will be reduced to 20% for 2020 income, 15% for 2021 income and 10% for 2022 income, and will disappear entirely for taxation of income from 2023 onwards.

Introduction of a tax credit for landlords that offer rent holidays to tenants badly hit by the restrictions imposed as part of the public health state of emergency in response to the Covid-19 pandemic (Section 20)

> See our previous Newsletter

Flat tax: 25% penalty on deemed distributions and income deemed hidden

Previously, the 25% increase for tax-base purposes only applied to deemed distributions and income deemed hidden when the beneficiary had elected for taxation under the progressive income tax rates.

When the 30% flat tax was introduced, the legislator ‘forgot’ to include a reference to the provisions on this penalty (i.e. Section 158(7), French tax code). This ‘mistake’ prevented the French tax authorities from applying the penalty when levying the flat tax – as specifically indicated in their official guidelines (BOFIP BOI-RPPM-RCM-20-10-20-10, sections 120 and 130).

The same ‘omission’ was repeated in respect of the exceptional surtax on high-income earners (CEHR), the tax base for which is the taxpayer’s income from the previous year.

This correction is therefore unwelcome news, especially for settlors and deemed settlors of trusts covered by Section 123 bis of the French tax code.

In short, as from taxation of their 2020 income, such settlors, as well as beneficiaries of any hidden or excessive sums, will see their income tax base and CEHR base increased by this 25% penalty (note that the base for social contributions is not affected, however).

Capital reduction followed by an increase: deductibility of losses

In principle, only losses on disposals of shares can be deducted, for income tax

purposes, from capital gains of the same nature.

There is already an exception to this rule, however, for capital losses deriving from the cancellation of shares as part of collective proceedings.

In view of a ruling from the Conseil d’État (France’s highest administrative court) dated 22 November 2019 (Case No. 431867), the legislator has now extended this exception to capital reductions performed to absorb a company’s losses (when equal to or exceeding shareholders’ equity), in accordance with Sections L223-42 and L225-248 of the French commercial code.

The Conseil d’État invalidated the French tax authorities’ guidelines in this respect, based on the public rapporteur’s finding that there could not be said to exist a “clear intent on the part of the legislator in defining the scope laid down under Section 150-0 D(12). There does not therefore appear to be an objective and reasonable justification, in line with the aims of the law, for this difference in treatment.”

Taxpayers can file a claim, based on this ruling, for the deduction of any such losses sustained prior to 1 January 2020, subject to the limitation bar.

Reinstatement of the possibility to spread capital gains on sale-and-leaseback transactions (Section 33)

When a company sells real estate to a leasing company, immediately recovering possession under a leaseback arrangement, it can elect to spread its capital gain on the sale over the term of its lease (up to a period of 15 years).

This new measure applies to leaseback transactions completed between 1 January 2021 and 30 June 2023, provided the lessee company has accepted the corresponding financing agreement between 28 September 2020 and 31 December 2022.

A similar measure applied to disposals completed between 23 April 2009 and 31 December 2012.

A sale-and-leaseback could be a wise choice for some companies in the current context, allowing them to dispose of real-estate assets to free up cash flow on their productive activities. At the very least, it could help certain companies survive the crisis.

> See the Expert Advice section of our first Newsletter

Introduction of an optional VAT group regime (Section 162)

As from 1 January 2022, it will be possible to set up a VAT group in France (effective as from 1 January 2023). The group will be treated as a single taxable person for VAT purposes, making any economic transactions between its members neutral from a VAT standpoint.

Following in the footsteps of 19 other EU Member States, France has thus transposed Article 11 of the EU VAT Directive, which aims to simplify the management of VAT and enhance its neutrality in terms of organisational choices within a group.

French VAT groups will be entirely discretionary, meaning that members of a group can be chosen freely from among any eligible entities. In that joining a VAT group may have an impact on deduction rights, we advise clients to consider carefully before including real-estate entities within a VAT group alongside other members that are not able to deduct all of their input VAT.

VAT groups could, however, prove a useful tool for certain real-estate entities such as investment funds, offering simplified intra-fund management and recovery of VAT.



International taxation: towards an anti- GAFA interpretation of the concept of permanent establishment

In a plenary sitting on 11 December 2020, the Conseil d'État (France's highest administrative court) ruled that an Irish company, Conversant International Ltd, had a permanent establishment in France. This represented a significant departure from precedent (the Court having previously upheld a more literal and restrictive interpretation of the concept), reflecting the development of the digital economy and paving the way for more frequent recognition of permanent establishments in France.

Although France has adopted the broad definition of permanent establishment given under Article 12 of the OECD's Multilateral Instrument, not all states offer reciprocity in this respect. The Conseil d'État's ruling could mark a first step towards unilateral application of the definition.

The case involved a fully-owned Irish subsidiary (Conversant International Ltd) of a US parent company. Conversant International offered digital marketing services, particularly in Europe, through Valueclick France SARL. Under a services agreement, Valueclick France provided the Irish company with marketing assistance as well as management services and back-office and administrative assistance, in return for costs plus 8%.

Further to a tax audit, the French tax authorities concluded that Conversant

International carried out taxable activities in France through a permanent establishment, namely Valueclick France. They therefore required Conversant International to pay French corporation tax and VAT.

The Conseil d'État interpreted Article 4 of the France-Ireland double tax treaty in light of the OECD's commentary on its Model Convention, according to which a foreign company can be deemed to have a permanent establishment in France when it "merely rubber stamps" contracts prepared for it by the French company, regardless of which entity ultimately signs the contracts.

For VAT purposes, a permanent establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources enabling it to provide the services in question without outside assistance. The Conseil d'État held that this condition was satisfied in the case considered, in that Valueclick France had the technical resources in France enabling it to provide the services to Conversant International without outside assistance.

*CE, 11 Dec. 2020, Case No. 420174,
Conversant International Ltd*

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