

Newsletter #10

April 2021



Tax news: 2021 tax filing dates, capital gains on shares, DAC 7, corporation tax consolidation etc.

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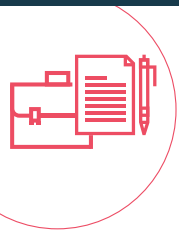
Expert Advice • Management packages: how to shield managers from tax risk

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The news from Vaslin Associés

- **Legal 500 & Chambers High Net Worth Rankings:** Vaslin Associés once again listed for its expertise in private wealth tax. Congratulations to all our colleagues for their devotion and hard work!

Click here to view [Legal 500](#) and [Chambers High Net Worth](#) rankings



2021 tax filing dates (personal income tax/ wealth tax, 3% property tax)

8 April 2021 marked the kick-off for this year's tax filings.

The deadlines for personal income tax returns filed online are as follows:

- Departments **01 to 19 & non-residents:** 11:59 p.m. on Wednesday **26 May 2021**
- Departments **20 to 54:** 11:59 p.m. on Tuesday **1 June 2021**
- Departments **55 to 976:** 11:59 p.m. on Tuesday **8 June 2021.**

For paper returns, the deadline is Thursday 20 May 2021, as postmarked.

The online platform for the 3% property tax (2746-SD returns) went live on 1 April 2021.

Taxpayers are now required to file 2746-SD returns and pay the **3% property tax** via this platform (change effective as from 1 January 2021, pursuant to Sect. 1649 *quater B quater*(XII), French tax code); the deadline for doing so is **15 May 2021.**

In order to be able to use the online platform, you first need to register. Note that the registration process can take a few days; you will be landed with a penalty if you get caught out and end up having to file a paper return so as not to miss the deadline, unless you can demonstrate good faith.

Capital gains on shares with split ownership rights

The *Conseil d'État* (France's highest administrative court) has held that when title ownership to shares is gifted as an advance on inheritance under a deed of gift containing a reinvestment clause, the wording of that clause determines who bears liability for capital gains tax. When the clause merely allows the usufructuary to reinvest sale proceeds in certain assets (e.g. shares in a non-commercial company) rather than requiring the title-owner to do so, liability for capital gains tax lies with the usufructuary rather than the title-owner if the usufructuary opts against reinvesting in such assets.

The French civil code institutes the principle that when a title-owner and usufructuary jointly sell shares, the sale price is split between them (Sect. 621). In such cases, they are each taxed on their respective portion of the capital gain. It is common practice, however, to get around this with a reinvestment clause providing that the sale proceeds are to be reinvested in new assets with the same split in ownership rights. Such 'real subrogation' transfers the full tax burden – on both the title-owner's and the usufructuary's portion of the proceeds – to the title-owner.

But the *Conseil d'État* has now held that the tax burden does not transfer to the title-owner when the proceeds are simply placed in an account with split ownership rights: they must be reinvested in a new non-fungible asset.

This calls for careful drafting of reinvestment clauses, especially the terms governing what happens to the proceeds upon completion of a sale, as this will determine who pays tax on the capital gain.

Elucidations on 'active' holding companies

In Newsletter No. 6, we explained how the French courts interpret the concept of '*holdings animatrices*', or active holding companies. The *Cour de Cassation* (France's highest ordinary court) has since handed down several more judgments on the subject.

These judgments confirm a number of points. For example, the Court has reiterated that holding companies cannot be deemed 'active' if they do not control any operating subsidiaries, even when they are 'potentially active' or are 'moving into an active role'.

The Court's latest judgments have cemented the rule that, in order to be considered 'active', a holding company must actually manage policy for its group and exercise control over its subsidiaries.

These elucidations are particularly significant for wealth tax and gift and inheritance taxes under the *Dutheil* regime.

The Court has also established a new rule, holding that the certificate issued to taxpayers is not sufficient proof of entitlement to the tax benefit. In other words, documentation alone cannot shield you from reassessment, even when you have acted in good faith. This comes as no surprise, of course: although it is important to put things down on paper, the principles documented must be reflected in practice.

Cass., Comm. Div., 3 Mar. 2021, Case No. 19-22.397 FS-PR

DAC 7: new reporting obligations for digital platforms

DAC 7, the latest iteration of the European Parliament and Council's Directive on Administrative Cooperation, brings in new reporting obligations for digital platforms.

As from 1 January 2023, digital operators will have to declare all revenue generated by sellers on their platforms to the tax authorities. Furthermore, Member States will have to automatically exchange information in this respect.

These new measures are deliberately broad in scope, designed to catch various types of revenue in a bid to more effectively counter tax avoidance and evasion. They will of course apply to all platforms, both within the EU and beyond its borders.

The reporting requirement will cover the following activities:

- property leasing,
- personal services,
- sales of goods,
- rentals of any form of transport.

DAC 7 aims to give tax authorities more powers to identify and track revenue generated through digital platforms so as to be able to tax it accordingly.

Corporation tax consolidation: exception to the year-long holding requirement for tax consolidation

The first paragraph of Section 223 A(I) of the French tax code stipulates that, for corporation tax purposes, a parent company can form a group with those of its subsidiaries in which it has held a stake of 95% or more throughout the financial year, making itself the sole taxpayer for their combined profits. This 95% threshold is assessed on the basis of all shareholdings, both direct and indirect (i.e. through other group members or intermediary companies).

1. This means that when a group parent acquires 95% or more of a company or increases its shareholding in an existing subsidiary to 95% or more in any given financial year, it cannot consolidate that company until the following year.
2. In an advance tax ruling issued on 24 March 2021, the French tax authorities softened this rule by adding an exception. From now on, when one company, on the first day of its financial year, acquires shares in another company that was not previously in a tax group, the two companies can form a tax-consolidated group as from that first year. This is of course provided all other criteria for group membership are met.
3. This follows on from the authorities' existing practice of allowing companies that leave one tax group to join another (whether pre-existing or set up at the time of the acquisition) to be tax-consolidated with their new parent immediately, again provided the transaction takes place on the first day of their new parent's financial year.
4. In order to benefit from this new exception, the companies in question must meet all other criteria for group membership. These include a requirement for all group members to have the same financial year. Consequently, the exception will only apply when the acquisition coincides with the first day of the financial year for both companies.
5. Under this new exception, a company acquiring 95% or more of another on 1 January in year N can set up a tax-consolidated group with its new subsidiary immediately – provided they meet the other criteria for group membership – without having to wait for the next year to roll around. This exception covers companies that were not already part of a tax group prior to their acquisition.

How it works: Companies A and B have the same financial year (1 January to 31 December). Company A acquires all shares in Company B on 1 January in year N. Provided the two companies meet all other criteria, Company A can form a tax-consolidated group with Company B as from 1 January, year N.



EXPERT ADVICE • Management packages: how to shield managers from tax risk

The main risk associated with management packages is of the tax authorities reclassifying certain income as a component of the manager's salary. Although rare, it is also not unheard of for them to invoke abuse of law. The traditional defence against such claims has focused on demonstrating the financial risk borne by the

A recent judgment from the *Conseil d'État* (France's highest administrative court) (*CE, 12 Feb. 2020, Case No. 421444*) established an important point in this respect: in ascertaining whether income from a sale of shares should be treated as part of a manager's salary, the tax authorities must look at whether such income derives from the manager's professional activity or their investment. This means that the true nature of the income now trumps the question of how much risk the manager bears.

There are various ways in which to grant managers benefits based on future performance:

1. Larger companies tend to favour **free share awards**, although the associated tax regime is not as advantageous as it once was. Managers do not pay for the shares awarded and therefore bear no financial risk. As for the company, it can control its own level of risk by placing certain conditions on vesting to ensure it won't find itself in a tight corner at a later date. This option is not always a good fit for smaller companies, however: free shares cannot be awarded to managers holding a stake of more than 10% in their employer's capital.
2. **Share warrants** offer their holders

the option of subscribing shares at a future date. The number of shares they can subscribe will depend on the company's internal rate of return (IRR) or multiple on investment. Share warrants are particularly at risk of being reclassified as a component of salary, however – increasingly so in light of recent case-law. Another disadvantage is that they can no longer be held as part of a 'PEA' (French equity savings plan).

3. **Preference shares** can be a good solution. Such shares carry reduced dividend and voting rights as compared to ordinary shares, but the subscription price is lower to reflect this and they can be converted to ordinary shares after a period of time, subject to the company achieving a target IRR.
4. **Lastly, reverse ratchet mechanisms**, designed to counter the dilutive effects of convertible bonds awarded to managers that were among the initial investors, can offer considerable advantages in certain circumstances. For example, there is no cap on the manager's gains and no risk of their indirect gains being reclassified for tax or social-security purposes (particularly reassuring in the current environment).

Legal expertise for all your private and professional wealth management needs

An independent French law firm, Vaslin Associés is trusted by a wide range of entrepreneurs, business leaders, family businesses and other private clients. We work closely with them to provide assistance on all legal, tax and asset-management matters.

With an all-French team spread across our four offices in Paris, Geneva, London and Brussels, we offer functional solutions to all of your French and cross-border issues, calling on the expertise of specialist partner firms in other countries where necessary.

We take a resolutely practical approach in our legal advice, providing comprehensive solutions and supporting our clients from the initial identification of their needs right through to implementation of our recommendations, tailored to their risk sensitivity.



Vaslin Associés has won recognition for the expertise and responsiveness of our people, as well as the quality of their work.

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