

13th September, 2011

Foreign companies owing French immovable property: taxation of foreign share transfers as French land through Registration duty changes. Entry into force on 1st November, 2011.

The principle adopted since the 1990s in France has always been that a company, French or foreign whose balance sheet comprises more than 50% French land is considered to be French land, and its shares and interest taxed accordingly. For example, the statutory references in Wealth tax, Income tax, Capital gains tax, inheritance and gift duty all deploy the concept of a *société à prépondérance immobilière* as a taxable item, and transfers of shares in such an *entité* as effectively a transfer of French land.

However, whilst the principle has always been in place, the actual mechanisms for taxing such shares have been limited.

The *projet de loi de finances rectificative pour 2011 n°2* has been voted by the Sénat, this will introduce the change **from 1st November, 2011**. The French administration have taken the current budgetary crisis as an opportunity to extend the declaratory net.

The change renders any transfer of shares or equivalent rights in a foreign company qualifying as a *société à prépondérance immobilière* subject to a registration requirement in France, subject to penalties. This applies whether the actual transfer takes place in France or abroad. The rate applicable will be 5% ad valorem.

Any such transfer of shares abroad is required to be registered by a notary in France, on the land register, within one month, or two months in the case of an adjudication at which point the stamp duty will be payable.

The actual procedures have yet to be published and will no doubt be analysed with attention. The question of whether a foreign company is *à prépondérance immobilière* at the time of transfer or at a prior or later date will doubtless be addressed, to curtail avoidance by temporary increase of assets by foreign or movable assets.

One point is that quoted foreign companies will probably not be affected, as they tend to be excluded from the definition in the various sectors of the legislation which are also affected: the *Code monétaire et financier* in particular.

To all intents and purposes, this renders any transfers of shares or assimilated rights in a foreign *personne morale* partially transparent on the French land register for all purposes: Capital gains tax, Income Tax, Wealth tax, succession and gift duties, etc. The administration can check transfers against the declarations required or undertakings given under the 3% annual tax on foreign *sociétés à prépondérance immobilière*.

Taken with the changes in the taxation of foreign trusts, the remaining areas for relative confidentiality of holdings are becoming less attractive and more expensive. However, it remains possible to have a certain degree of confidentiality, at an increased cost. There is as yet no indication that a transfer of an interest in a trust will be chargeable, as there is nothing that can be assimilated to a share or even a *part of a société de personnes*.

Care should be taken with TIEAs, as, contrary to certain Double Tax Treaties, these will provide the French administration with information on such taxable transfers on request. There is little need for tax recovery assistance

13th September, 2011

provisions here, as the administration will simply attach a tax lien to the property or properties owned by the entity concerned.

The stamp duty is just that. It is ad valorem on *cessions*. Its application to gifts or other gratuitous transfers is less clear.

Its compatibility with European law and in particular the freedom of movement of capital, guaranteed under article 63 et seq. TFEU has yet to be tested. A criticism of the law could usefully be placed before the Commission to see to what extent the duty is permissible.

Whilst there may be Constitutional issues as to the actual scope of *droits d'enregistrement*, these are likely to be parried by the notion of “*assiette matérielle des droits*”, interpreted as meaning that the real basis is the land, not the location of entity covering it. However, this does “look through” the transaction to a point that defy the nature of a stamp duty.

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