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Discretionary trusts under the new French trust régime: initial thoughts n°2.

 Thursday, 19th January, 2012

I wrote on Monday : "The *loi de finances rectificative pour 2011* in its article 14 has attempted to correlate French fiduciary notions in relation to foreign concepts. In doing so, it has rendered any attempt to give legal certainty to clients a theoretical impossibility. This is no more than an initial set of thoughts as to how this attempt can be turned against its perpetrators, who frankly deserve no mercy or quarter and probably expect neither."

One of the reasons that the settlor based system of taxation proposed by the French is being heavily criticised is its inherent apparent conceptual ambiguity, and rightly so.

Whilst article 792-0 bis clearly makes the distinction between the Constituant, who is deemed to have retained a taxable estate in the assets and rights transferred during his life, and then refers to the surviving beneficiary or beneficiaries as stepping into the deceased Constituant's vacated shoes; the legislation then does not repeat this fundamental distinction in the remaining operative articles, referring simply in most cases, but not all, merely to *bénéficiaries*.

These articles include in particular the Wealth tax, the corresponding *prélèvement* and the responsibility for collection and payment articles, which refer merely to *bénéficiaire*, without an overt reference to a "reputed constituant " *bénéficiaire* -in the *Constituant*'s shoes- as opposed to others. The difficulty is that the article 729-0 *bis* definition of a trust refers to *beneficiaries* necessarily, before defining the allocation of the fictional fiscal estate which is later attributed to the *Constituant*, or if deceased, to the *bénéficiaire*(s) stepping into his shoes as deemed or "reputed" constituant(s).

The result is that the Wealth tax *prélèvement* or assessment article can be read either way. In a worst case scenario, it can be interpreted as creating a double set of estates, one for beneficiaries

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living in France and one for a non-resident or resident Constituant, both fiscal entitlements being taxable. As the entire system of assessment is a fictional one, it would be helpful to have a continuous and single unambiguous line of logic referring to the Constituant as deemed owner, or to the *bénéficiaire* supposed to replace him on death. Whilst it is tempting to assert that it must be so, there is no absolute guarantee that a tax inspector will allow taxable material to slip through his hands, where for example an "unvested" member of a discretionary class is resident in France, and the *Constituant* outside. Whilst article 885G specifically refers to the wealth tax liability falling on one of the constituent or otherwise a beneficiary reputed to be the *constituant* after their decease, this distinction has to be inferred into the *prélèvement* collection provision in 990J.

Clarification of this point would be welcome, as a large part of the current anxiety being expressed by French resident *bénéficiaires* of foreign trusts could be resolved, without further emigration or obstacles to their moving to France. If the settlor is still alive, whether resident or non-resident, then the trust fund and its assets would form part of his fiscal estate and there would be no dispersal of the deemed estate depending on whether the living settlor was resident or non-resident. It would also render the overall taxation of French situs assets of a foreign settlor coherent, and avoid double taxation risks where there were beneficiaries in France during his lifetime.

I stress that these are general thoughts, and would iterate that no action should be taken merely on the basis of these ideas alone. Whilst perhaps a call to stand firm, as to concept, it is not advice or opinion, and professional advice should be taken as to specific cases, as each will turn on its factual situation. Such, after all, is the law of trusts, the law of equity and the law of property. Were these contractual law or common law, then perhaps the

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French might have had a better hope of success. Unfortunately, the observer might feel that it is now down to ignorant administrative "bullying" to which the only civic antidote is legal advice and advised action.

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