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Article : The proposed French levy on trustees under article 990J CGI

Tuesday, 26th June, 2010

Trustees, worldwide, have been following the French codification and proposed introduction of a levy or *prélèvement* on trustees with some interest in the current international clampdown on perceived tax avoidance and collection.

What is clear is that the previous French Government's intentions have yet to be taken up by the new administration following the election. However there is hesitation in the air.

Given the budgetary constraints facing the French economy, it is unlikely that the levy itself, even with non-compliance penalties, would provide a sufficient immediate resource to justify the manpower required to put the declarative and collection procedures in place, swiftly enough. What is more the proposed reinstatement of a progressive set of rates for ISF will render any fixed *prélèvement* or levy potentially either penalising or counter-productive.

In other words, there may simply not be any decrees produced implementing article 990J in the near future, which would then lie dormant, hopefully for some time. The question remains open as to the declaratory régime for the second set of requirements under article 1649AB; namely the constitution, modification and extinction of a Trust with a French connection. These matters are specific to succession duty and gift duty which may notwithstanding remain on the

One further reason for this is that the definition employed in the tax code for a trust does not fully apprehend a property law trust of the type deployed in the Anglo-American jurisdictions. It uses terminology defined by reference to the *fiducie* concept which is being elaborated as a competing property administration concept in France.

The "definition" of what a "trust" is, for the purposes of the French tax code, is defined in Article 792-0 bis *Code général des impôts*, and a further slight addition for the purposes of Wealth Tax, Succession and Gift duty. It also applies to article 995 et seq: the 3% annual tax on immovable property holding legal entities.

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 The proposed French levy on trustees under article 990J CGI 26th June, 2012

Article 792-0 bis CGI	Counsel's translation
I. 1. Pour l'application du présent code, on entend par trust l'ensemble des relations juridiques créées dans le droit d'un État autre que la France par une personne qui a la qualité de constituant, par acte entre vifs ou à cause de mort, en vue d'y placer des biens ou droits, sous le contrôle d'un administrateur, dans l'intérêt d'un ou de plusieurs bénéficiaires ou pour la réalisation d'un objectif déterminé. *2. Pour l'application du présent titre, on entend par constituant du trust soit la personne physique qui l'a constitué, soit, lorsqu'il a été constitué par une personne physique agissant à titre professionnel ou par une personne morale, la personne physique qui y a placé des biens et droits.*	*I. 1. For the application of the present code, the term trust means the whole set of legal relationships created within the law of a State other than France by a person who has the quality of constituant, by inter vivos deed par or à cause de mort, with the intendment of investing/placing in it assets or rights under the control of an administrator, in the interest of one or more beneficiaries or for the realisation of a given objective.* *2. For the application of this present title, the term constituant of a trust means either the individual who has constituted it, or, when constituted by an individual acting in a professional capacity or by an unnatural person, the individual who invested in it the assets and rights.*

Despite the administration's unfounded contention that their definition of a trust meets the classification definitions contained in the Hague Convention of 1984 on the recognition of trusts, the definition here simply does not refer to a trustee. A Trustee is vested with property as an owner; otherwise the trust is not created and does not exist. A mere reference to an *administrateur*, a French notion of contract, is insufficient to ground the resulting relationship between that intermediary or agent and their client as a trusteeship, which it is patently not. The Trustee[1] does not act as an agent for either the beneficiaries, or for that matter for the settlor, with whom legally he has not further legal relationship or obligation, saving in cases of revocable trusts, or in the specific cases of reserved powers.

The reference to the "set of legal relationships created within the law of a state other than France" depends upon those legal relationships actually being created. This creation cannot be implied merely by a further French requalification and inference.

Where a trustee is not a mere "administrator" of assets which are, after all, within his ownership and full dominion, he is not caught by this definition. A trust is not validly constituted unless the property itself is transferred; a mere delegation of control granted to some *mandataire* or *administrateur* over property or

[1] Here I include several individual trustees acting individually or as a body.

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assets retained in some other manner is insufficient. Whilst the French text refers to a form of control, it does not refer to anything similar to "dominion" in the sense of indirect ownership, or for that matter full ownership, which is a necessary part of the set of legal relationships under the foreign law definition which constitutes the trust. The French administration evidently thought that they could refer to one of the minor incidences of trusteeship in the Hague Convention of 1984, which merely defines what classification aspects of a foreign arrangement require a receiving state to recognise a trust, without needing to address the remainder.

A good deal has been read into the administration's assertion that the definition corresponds to the Hague Convention on the Recognition of Trusts of 1984. This assertion is entirely unfounded. It does not even come halfway towards corresponding to the classification definition; and, what is more, is fallacious. The drafting of article 792-0 *bis* also fails to take into consideration prior Hague Conventions in the area of contract which mention, and then exclude, trusts.

The following excerpt from the Hague Convention of 1978 on Agency, in force and ratified by France, not by the United Kingdom, is revelatory. Trustees are expressly excluded from the notion of agents, therefore by inference from that of *administrateurs*, and it is clear that the English law trust, which is a concept of the law of property, is not a form of '*contrat*', even though the property laws of France themselves are founded upon an extension of the law of "*contrat*" into the domain of property law and influence property rights. The tax definition refers to the whole set of relationships under foreign law, not under French law.

The fact that the Trust has been analysed, albeit imperfectly, by an impartial body at the Hague Conference of Private International law, in a contractual context, is probative in International law matters in France.

The Hague Convention of 14 March 1978 on the Law Applicable to Agency excluded Trustees from the definition of an agent by article 3 (b). The main issue being that it was a concept of property law, not one of the law of contract.

The roundabout analysis in the Karsten Report, part of the preliminary documentation which is of juridical interpretative importance, is set out after the Treaty exclusion:

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Article 3 *For the purposes of this Convention -* a) *an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;* b) *a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.*	*Article 3* *Aux fins de la présente Convention :* *a) l'organe, le gérant ou l'associé d'une société, d'une association ou de toute autre entité légale, dotée ou non de la personnalité morale, n'est pas considéré comme l'intermédiaire de celle-ci, dans la mesure où, dans l'exercice de ses fonctions, il agit en vertu de pouvoirs conférés par la loi ou les actes constitutifs de cette entité légale ;* *b) le trustee n'est pas considéré comme un intermédiaire agissant pour le compte du trust, du constituant ou du bénéficiaire.*
Article 4 *The law specified in this Convention shall apply whether or not it is the law of a Contracting State.*	*Article 4* *La loi désignée par la Convention s'applique même s'il s'agit de la loi d'un Etat non contractant.*

Explanatory Report on the 1978 Hague Agency Convention: Karsten Report 1978	Rapport explicatif sur la Convention - Contrats d'intermédiaires de 1978 : Rapport Karsten 1978
.../...	.../...
147 No one has succeeded in giving a completely satisfactory definition of a trust. The general idea of a trust is that one person in whom property is vested (the trustee) is compelled to hold the property for the benefit of another person or persons (the cestuis que trust or beneficiaries) or for some purposes other than his own. Both an	*147* Personne n'a jamais réussi à donner une définition entièrement satisfaisante d'un trust. L'idée générale sur laquelle repose le trust est qu'une personne (le trustee) à laquelle des biens sont confiés, est tenue de les détenir, soit au profit d'une ou plusieurs personnes (les cestuis que trust ou bénéficiaires), soit à d'autres fins qui ne lui sont

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agent and a trustee owe fiduciary duties, the agent towards his principal, the trustee towards his beneficiaries. However, a trustee differs from most kinds of agent in a number of important respects: firstly, there is usually no contractual relationship between the trustee and his beneficiaries; secondly, the trustee usually has property vested in him; and, thirdly, he usually cannot involve his beneficiaries in liability. He is the titular proprietor of the trust assets and, in relation to these, he acts as principal. Because of the special nature of a trust, it would not have been acceptable to the common law countries had the rules of the Convention been made applicable to the trustee upon the (erroneous) basis that he is an agent of the trust, of the person who has created the trust, or of the beneficiaries.	pas personnelles. Le trustee, tout comme l'intermédiaire, assume des obligations fiduciaires, l'intermédiaire envers son commettant et le trustee envers les bénéficiaires. Mais un trustee diffère de la plupart des autres intermédiaires à plusieurs égards qui revêtent une grande importance; premièrement, il n'existe en général aucun rapport contractuel entre le trustee et les bénéficiaires; deuxièmement, le trustee se voit généralement confier des biens à titre de propriété; et troisièmement, il ne peut pas en règle générale engager la responsabilité des bénéficiaires. Il est le propriétaire en titre des avoirs du trust et, en ce qui concerne ces avoirs, il agit comme un commettant. En raison de la nature particulière du trust, les pays de common law n'auraient pas pu accepter que les règles de la Convention s'appliquent au trustee en le considérant (à tort) comme le représentant du trust, ou de la personne qui a créé le trust, ou de ses bénéficiaires.
148 A trustee may, of course, be a principal within the meaning of the Convention, as when he appoints an agent to sell trust property on his behalf. It is also conceivable that in some cases he may, while acting as a trustee, be the agent of persons unconnected with the trust, as for instance, where he manages a travel agency forming part of the trust assets. In such a case, his activities as an agent would come within the Convention.	*148* Un trustee peut évidemment être un représenté au sens de la Convention, quand par exemple il a désigné un intermédiaire pour vendre pour son compte des biens appartenant au trust. Il est aussi concevable que, dans certains cas, tout en agissant en tant que trustee, il puisse être l'intermédiaire de personnes étrangères au trust; ce serait le cas par exemple s'il gérait une agence de voyage constituant une partie des avoirs du trust. En pareil cas, ses activités en tant qu'intermédiaire seraient régies par la Convention.

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149 Sometimes in common law countries an agent who has made a secret profit arising in some manner from the agency, for example by exploiting for his own advantage confidential information acquired by him by virtue of his relationship with his principal, is made to account to the principal for the profit on the basis that he is holding it for his benefit as a constructive trustee. Here, the device of the constructive trust is used as a particular remedy to enforce the agent's fiduciary obligations towards his principal. The agent is nonetheless an agent, and as such he is clearly within the Convention. .../...	*149* Il arrive, dans des pays de common law, qu'un intermédiaire ait pu réaliser un profit clandestin a l'occasion d'un rapport de représentation, par exemple, s'il a exploite a son profit personnel des informations confidentielles qu'il a obtenues grâce a ses relations avec le représenté: il est dans cc cas tenu de rendre compte de cc profit au représenté, car il est considéré comme un constructive trustee qui cherche garder cc profit pour lui seul. Cc procédé ingénieux du constructive trust pernet de contraindre l'intermédiaire exécuter ses obligations financières envers le commettant. n'en demeure pas moins un intermédiaire et, A ce titre, la Convention lui est incontestablement applicable. .../...

This explanation of the distinction is important as France has ratified the convention and is therefore bound by it, since its coming into force. Effectively, it is now very difficult for the French government to argue that a Trustee is an "administrator", in other words an agent, when it has made reference to a set of legal relationships under foreign law which, in themselves are excluded from the notion of an agency agreement in the private international law context. Such a Treaty has constitutional superiority to a Code in French law, and, given that the tax code makes reference to a foreign law in a tax definition, it imports that element of Private International law "into the loop" of the tax definition.

The French drafting is limited by the terminology it employs to a contractual *fiducie*, not to the outright transfer of property ownership to a trustee implicit in a trust, without which the trust does not exist. There is no transfer of ownership to a mere administrator in an Anglo-American context.

It may be therefore that the only offshore arrangements which the French administration will feel comfortable about attacking through this measure is the *fiducie* such as those practiced out of

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Luxembourg, or the quasi contractual set of combinations in Switzerland using management contracts coupled with trusts under foreign law.

When consulted on the *projet de loi de finances rectificative pour 2011*, the French *Chancellerie*, Ministry of Justice, apparently made some unpublished reserves as to the legitimacy of the definition in article 792-0 bis CGI, which would indicate some potential hesitancy from the previous government promoting it.

Given recent changes in awareness of what trusts actually do, this may act as a sufficient dissuasion for the present Government to put off the issue of decrees implementing the levy arrangements indefinitely, once the administrative teams are constituted in the various Governments departments concerned. However that may not apply to the other set of declarations under article 1649AB as to constitution, modification or extinction.

Certainly the exponential amount of paper, its analysis, and the otiose management and exploitation which the levy would generate, the effort involved may well outweigh the cost and expense of management and collection of the proposed levy. Particularly when such foreign arrangements such as English law insurance policies and home ownership issues are superficially, but not realistically caught by the definition. There are other means of raising revenue quickly, rather than working through a false assumption that everything foreign is evasive and therefore taxable, to little or no result.

For example, the French government might decide to reinstate the proposal for an increased rate on French property owned by non-residents, which was only blocked by the influence of M. Sarkozy's non-resident constituency.

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