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Article : **Definition of residence for those couples and households where one is not resident in France, and the income tax advantages.**

28th June, 2016.

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***This is not intended to be professional tax advice, however copyright and intellectual property are reserved in it, and any individual needing advice on this should contact Peter for further information and assistance.***

Whilst this is of significant interest for those individuals who are resident in Jersey, but whose spouses and children are resident in France, it is of general application. However, whilst this is a question of general principle, it is one of an exception to the general taxation principle of the *foyer*, and the French administration will attempt to assert that the *foyer* and the residence of the otherwise non-resident individual remain in France, if they are able to, under article 4B CGI.

This is addresses couples married in Jersey, or elsewhere under a marital property régime defining property and income relationships as the equivalent of the *séparation de biens*, as opposed to a French *communauté* régime. Couples who married in France under a default community régime or elsewhere, such as the State of New York will need to contact Peter before attempting to implement this régime.

Since the concept of *chef de famille* or head of household was removed from the Code Général des Impôts, the definition of the fiscal *foyer* has been of less extensive application.

The administration's doctrinal documentation at http://bofip.impots.gouv.fr/bofip/1911-PGP.html?ftsq=%40%2FBOI-IR-CHAMP-10%40%2F&identifiant=BOI-IR-CHAMP-10-20140625, §90 provides an insight into this slight but significant differential of treatment with those fiscal *foyers* whose members are both domiciled in France. The same rules apply to those non-married couples under what is known as a PACS or *pacte civil de solidarité*. It may also apply to

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foreign equivalents, but care will be needed in future where there is a British element which is given pan-EU recognition under EU principles.

The administrative doctrine reads as follows:

> *§80*
>
> *La notion de « chef de famille » ayant été supprimée du CGI, les époux sont placés sur un pied de stricte égalité. Ainsi, les époux ou les partenaires liés par un pacte civil de solidarité (PACS) sont en principe soumis à l'imposition commune en France, quelle que soit leur nationalité, lorsque l'un ou l'autre :*
>
> *- a en France son foyer ou le lieu de son séjour principal,*
>
> *- ou exerce en France une activité professionnelle, salariée ou non, à moins qu'il ne justifie que cette activité y est exercée à titre accessoire,*
>
> *- ou possède en France le centre de ses intérêts économiques.*
>
> *§90*
>
> *Si l'un des époux ou partenaires ne répond pas à ces critères, l'obligation fiscale du ménage ne porte que sur :*
>
> *- l'ensemble des revenus de l'époux ou du partenaire domicilié en France,*
>
> *- les revenus de source française de l'autre époux ou partenaire (sous réserve des conventions internationales).*
>
> *De même, si l'un des enfants ou des personnes invalides à charge ne répond pas aux mêmes critères, seuls ses revenus de source française sont compris dans l'imposition commune.*
>
> *Néanmoins, bien que leurs revenus de source étrangère soient exclus de la base d'imposition, ces personnes doivent être prises en compte pour la détermination du quotient familial applicable.*

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The distinction is in effect a resolution of two conflicting principles of French tax residency, and it is therefore necessary to get the factual basis right before attempting to make use of this facility.

The principle is that where one of the spouses or *Pacsés* is resident in France, the couple are in principle subject to common taxation; irrespective of their nationality when one or other:

- has their *foyer* or place of principal residence in France ("lieu de son séjour principal") note that the second can only be used where the place of the *foyer* is in doubt as between two jurisdictions, it is not an alternative;
- or carries out a professional activity, whether salaried or not, unless they show that the activity is accessory to their main occupation elsewhere;
- or has the centre of his economic interests in France (N.B."*le centre de ses intérêts économiques*", not "*intérêts vitaux*").

However that only applies to the obligation to file a joint return in France, it does not mean that the foreign source income of the non-resident spouse or partner is therefore taxed in France.

Where both spouses or partners are each French resident, both spouses' foreign source income or gains are taxable in France irrespective of whether they are remitted or not. However that is only where both spouses are resident under article 4B CGI.

The French administration's *doctrine* is therefore translated as follows:

The actual taxation is based upon the following principle, where one of the spouses or partners does not fall within these criteria - i.e. is non-resident under art 4B CGI - the tax liability of the household ("*ménage*", not "*foyer*") is limited to :

- all the revenues of the spouse or partner "*domicilié*" in France ; and only
- the French source revenues of the other (non-resident) spouse or partner (subject to extensions or restrictions of French taxing rights under international treaties); not their non-French source income.

In other words, foreign income of the non-resident spouse in principle is not to be carried to the couple's French income tax return. The fact that there may be a *ménage* or a partial *foyer* in

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France, does not mean that the couple's entire world wide income and gains are thereby included in the French tax basis. However that individual has to be non-resident, and has to be able to prove it; and also that the marriage is effectively a separatist property régime. It is that point hat needs strict attention: if the "non-resident" has indicia that render them resident under article 4B CGI, then their overseas income will be included in the French tax basis, and therefore taxed twice, without credit for foreign income tax paid. *Here the Jersey resident will need to show that they have a residence in Jersey available to them in their own name. It is more difficult to prove an actual *foyer* in Jersey where the residence for example is rented for the employee by an employer, or is provided rent-free. In any event it will be essential in the first instance that the Jersey resident spouse's tax notice show their Jersey residential address, and that will probably also be checked in any investigation. The benefit of the exemption needs to be obtained on a factual and documentary basis which is sufficient to override any distinction between the French comparative freedom of residence and the Jersey restrictions on residential and housing qualifications.

This exceptional "carve-out" of the tax basis also applies to foreign source income and gains of non-resident children or other individuals "*en charge*", of the couple: only the non-resident's French source income or gains are included in the household's French income tax return. Not their foreign source income or gains.

However, although their foreign source income is excluded, the non-resident individuals are counted for the application of the quotient familial; the "*parts*" system, and therefore increase that significant advantage.

One important point, the existence of the foreign source income or gains of the non-resident partner does not mean that the resident partner's income and gains are subjected to the effective rate of tax that it would have been were the foreign source income to have been included; "*le*

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*taux effectif*". That particular régime is an exceptional Tax Treaty and international civil servant régime, and has to be specifically directed at a given case. It therefore does not apply here.

It does mean that a French individual working in Jersey has to constitute a fiscal residence in the Island, and has to take great care over not returning to France for significant periods. In other words, care over all of the three residence criteria at article 4B CGI is needed.

The Wealth Tax ramifications of this principle are slightly different. Any use of a trust in these circumstances has to be carefully weighed and disciplined as were the French resident spouse and children to be beneficiaries, the full French trust régime will become applicable. Care will be needed to carve the non-resident spouse out to the article 792-0 bis I 1 CGI definition.

Whilst Employer pension plan arrangements may be treated as being outside the trust régime, and it has been confirmed on an informal basis that self-funded schemes can also benefit from the exclusion, again these arrangements will need to be reviewed.

Note also that the provisions of the TIEA between France and Jersey - not the Guernsey TIEA - relating to the reciprocal exemption of pensions paid to residents of the other contracting State or territory (article 10) are not affected by Brexit considerations.

Self employed individuals, such as lawyers or accountants can benefit from these provisions, but there are sufficient separate issues arising out of self -employment for the indications gien to require specific advice on a case by case basis.

Now the French Conseil d'Etat has struck down the article 164C CGI deemed income assessment of three time annual rental value of French property owned by non-residents, any attempt to collect this as French source income, within the above household common assessment system should be vigourously resisted.

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Following the recent blacklisting scare and its removal on 17th January, 2014, the local French administration, particularly that in Saint-Brieuc, will be checking those with Jersey connections. However, as relations between the Jersey administration and the central French administration have improved since that débacle, it may be possible to raise any issues between the administrations at a central level in order to have the local French tax offices brought into line on any wayward application of the principle. There may be less leeway on the factual assessment of the situation, which will be in the hands of those local offices.

Contact Peter Harris for an initial assessment of your situation, and further advice.

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