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Article : Transmission of assets through a trust subject to article 792-0 *bis* CGI for French gift and succession duty purposes.

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Please contact Peter Harris at peter.harris@overseaschambers.com for assistance and advice in any case.

The introduction of the French trusts taxation régime has been fraught with conceptual difficulty, both in France and abroad.

Trustees unfamiliar with French taxation of successions and gift transfers will require assistance i dealing with the decease of any settlor or beneficiary considered as such by the French legislation in any case where either the deceased is resident in France or there are assets held in trust which are situated in France and subject to French succession or gift duty on a territorial basis.

This is not an exhaustive study, but is designed to enable readers to seek advice on how best to address the tax fictions created by article 792-0 *bis* CGI in both paragraph I and paragraph II

Firstly there are several general points which need airing to situate the issues:

The 2011 legislation, codified by *la loi de finances rectificative de 2011,* is intended firstly to address tax evasion and the evasion of capital into foreign structures to avoid French taxation. The repression of such issues represents French constitutional values and have to be interpreted within that relativistic context. However it is also designed to enable an extension of French taxation to cover transfers which were outside it, affecting French residents and assets in France. Thirdly, it is designed to counter the fundamental weakness in French property law definitions which enabled beneficiaries of certain American trusts to escape, not elude, Wealth Tax, as there was simply no identifiable property right, under French law, upon which an identified French discretionary beneficiary could be assessed. [1]

That said, the arbitrary nature of the deeming process for taxing fictional transfers whether lifetime or on death within a trust is now a matter of concern as people grow older.

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[1] *The law itself raises certain constitutional issues which may affect its validity and its application in certain cases. As there was no one willing to challenge it during the Parliamentary review, the issues of non-constitutionality have largely escaped notice. The non-constitutionality of public access to the Trust Register was only the tip of that iceberg*

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- The deeming attributions in article 792-0 *bis* II

These are by definition "fictional". The French administration have stated that they consider these presumptions to be generally unrebuttable or *irréfrageable*. That in itself is a constitutional issue but Constitutional validity issues aside, there are other issues which apply to the question.

Th problem is at the French tax definition of a trust follows a contractual mechanism which simply is not based on trust principles. Whilst there is academic debate in England as to whether trusts are proprietary in nature or merely give rise to personal obligations, that debate is only addresses the effect of the remedies against individuals leading to enforcement of trusts. Only that can be termed "personal obligations" of the type which the French definition presupposes. The French tax "definition" is built upon a fallacy arising from a deliberate misunderstanding.

Th e main fiction involved runs counter to trust law and practice, and merely attributes the trust assets to eth settlor or once the settlor has died to his descendants within the class of beneficiaries next in line *per stirpes*. in other words the law attempts to attribute both the Wealth Tax and also the gift or succession duty. The entire French allocation mechanism follows this old American tax mechanism of Grantor trusts. It is no more than a tax concept, not one of propertylaw.

What is more that deeming mechanism is based upon definitions of beneficiaries which in law do not always correspond to what the trust deed actually contains, or what an English lawyer would consider to be a beneficiary.

The definitions given in the *Bulletin Officiel des Impôts* clearly allow certain beneficiaries not to be treated as such within the context of the French fictional régime. What is more, it is equally possible under a specific deeming provision of the French tax code for a settlor not to be considered to be a "constituant" of the trust to the extent on death, that he had not received any benefit from a trust or intermeddled with its assets within a period of one year preceding his decease! The same applies for certain *bénéficiares réputés constituants* who are fictionally deemed to have the property in the trust when the law came into force in 2011 and the settlor had died prior to 30th July 2011.

Article 792-0 *bis* II CGI restricts the deeming provisions to areas in which the normal gift or succession declaration rules and principles do not cater for the declaration of the internal gift or succession attributions. Each case therefore has to be taken in the context of the law applicable to the trust, firstly, then the law which governs the assets, and then finally as to what internal attributions or transfers may have taken place within the trust.

It may in fact be simpler to declare the attribution as a gift or a succession.

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- The treatment of surviving spouses or the survivor of a PACSed couple.

Again, the article 792-0 bis I and II provisions are not universal. In a case where for example, a settlor dies, and the interest passes firstly to his spouse, that in normal tax terms should be subject to a spousal exemption, which should "frank out" the internal attribution within the trust, at least for the survivor. However, the administration has still to state formally that the internal attribution of say income rights over trust assets in a trust to a surviving spouse will not be taxed at the default rate of 60%.

Most commentators take the view that it follows that the spouse exemption still applies notwithstanding the default rate of 60% to non blood line "donees" or "successors" contained in article 792-0 *bis* II CGI. I would hope so, but hat can only be obtained with assistance from a qualified lawyer.

That would mean that there is an effective exemption from gift and estate duty until the death of the surviving spouse.

In those circumstances it will be possible to wind such a trust up wholly or even partially by distributing the capital to the spouse, without charge.

The issue is complicated by considerations of whether the settlor or deemed constituant is resident or not in France at the date of the deemed disposal.

Whilst no French resident in their right mind would set up a trust intended to last beyond his lifetime after 30th July, 2011 given the 60% rate applicable to gifts or succession, the spouse exemption might render such arrangements economically valid and provide an acceptable substitute for a PACS or a *communauté universelle* or *société des acquêts*.

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