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The Tax Information, Exchange Agreement between France and Jersey

in force as of 11th October, 2010

Date: valid as at 28th December, 2010

This short article is a summary of certain, not all, advantages that the negotiation of this arrangement has for Jersey individuals and Trust Companies. It is not exhaustive, and a reader who wishes further information on specific implications for their personal or corporate position is invited to contact or instruct Peter Harris, peter.harris@overseaschambers.com or + 44 (0)1534 625879.

Whilst Peter has been assisting the States of Jersey and the Island's authorities in various matters underlying this article, it should not be seen or taken as an expression of the position or policy of those Island authorities, or taken as representative of the position of the French administration without specific advice from Peter.

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❖ The TIEA

The provisions of the Jersey TIEA follow an earlier model than that used by France in later negotiations. As ever, the older models are generally more flexible, and actually of greater protection to the taxpayer as to the investigation and the use of the information obtained.

If advice is needed on the actual procedure involved, and the interaction between the two competent authorities, Peter would be happy to assist further. It is essential for example that Trust accounts be prepared in a correctly presented manner to avoid the French authorities seeking to represent interests or hopes under trusts to be otherwise than they actually are. Whilst the *Poillot* decision[1] has clarified the position in 2004, in relation to discretionary trusts and was not appealed by the French administration, the various legislative amendments made to the notion of *organismes* and *entités juridiques* (juridical not legal entities), coupled with the changes in the *loi de finances rectificative pour 2010* in relation to fiscal transparency may have been designed to entrap trustees who have made the mistake of considering their trust to be a vehicle, rather than as a pure property law issue.

[1] TGI Nanterre 4 mai 2004 n° 03-9350, 2e ch., Poillot

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This is all the more relevant given the incoming assimilation of Trusts to transparent vehicles and French property law arrangements under Article 12 of the *loi de Finances rectificative* for 2010; due to come into force on 1st January, 2011. Please refer to the specific article on this website for further information and updates in the first instance, and then to Peter for further information.

Please refer to Peter for advice on specific trust issues involving French resident settlors or beneficiaries.

Peter's position is that the French administration have no idea how much French capital or income is held in or through Jersey, as evidence by the Parliamentary commissions reports, and that the issue of information exchange is in fact part of a wider Treasury agenda, which has in fact less to do with tax collection in its strict sense, but rather more with the French Government's capacity to issue bonds and state financing against French nationals' assets, and land in France held by non-resident entities or trusts.

- **Article 10: Pensions**

The TIEA is an *accord d'assistance administrative*, however, it has one provision, article 10, that sets it apart from the standard OECD model deployed in other negotiations by the French, which is a Pensions provision. This operates as a double tax provision, in the old French manner. The French used the exemption method, under prior OECD frameworks rather than Taxation with Credit historically favoured by the anglo-american contingent within the OECD to avoid double taxation. This is in effect a Tax Treaty disposition.

Under article 10, France exempts French source pension payments paid to Jersey residents, and this is reciprocated by Jersey, who will no longer apply 20% withholding to Jersey sourced pension paid to French residents. To the extent that a French pension paid to a Jersey resident is not taxed in Jersey, the French remain able to tax the payment, to that extent. As the French source payment will, by definition, be made to a non-resident, it should escape the additional social security contributions levied on domestic income payments, however the administrative instructions should make this position clear.

The reasons underlying this provision are simple: Jersey resident employees, contrary to those in Guernsey, historically have had no real guaranteed rights of residence, although this is changing, and the economic conditions in Jersey, as to earning capacity make it more attractive for some to re-emigrate to

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another jurisdiction where their pension may give them a better standard of living. Given that France is close by, and that there is property available for purchase there, the number of French second homes capable of providing retirement accommodation is significant.

The negotiation by Jersey of a specific arrangement with the French administration as to the application of article 164C should be seen in this context.

- **Article 164C**[2]

The author drafted the text of the wording in English (and in French) which has been adopted as the basis of that agreement, see: [http://www.gov.je/SiteCollectionDocuments/Tax%20and%20your%20money/LD%20TIEAFranceFinalImpact%2020090331%20KB[1].pdf](http://www.gov.je/SiteCollectionDocuments/Tax%20and%20your%20money/LD%20TIEAFranceFinalImpact%2020090331%20KB[1].pdf)

It is said incorrectly, that article 164C requires there to be a Tax Treaty in place for the possibility for exemption to work, this is not the case with the present wording of the article, which has changed.

There has been considerable confusion as to the place of article 164C within the French tax structure.

The main point to note is that it applies to French nationals resident outside France, owning properties directly or indirectly in France, and is also applied on the basis of *égalité* to foreigners in the same position. French nationals can, under certain conditions declare that they suffer tax in their state of residence equal

[2] CGI art 164C in 2010 : *Les personnes qui n'ont pas leur domicile fiscal en France mais qui y disposent d'une ou plusieurs habitations, à quelque titre que ce soit, directement ou sous le couvert d'un tiers, sont assujetties à l'impôt sur le revenu sur une base égale à trois fois la valeur locative réelle de cette ou de ces habitations à moins que les revenus de source française des intéressés ne soient supérieurs à cette base, auquel cas le montant de ces revenus sert de base à l'impôt.*

Les dispositions du premier alinéa ne s'appliquent pas aux contribuables de nationalité française qui justifient être soumis dans le pays où ils ont leur domicile fiscal à un impôt personnel sur l'ensemble de leurs revenus et si cet impôt est au moins égal aux deux tiers de celui qu'ils auraient à supporter en France sur la même base d'imposition. De même, elles ne s'appliquent pas, l'année du transfert du domicile fiscal hors de France et les deux années suivantes, aux contribuables de nationalité française qui justifient que ce transfert a été motivé par des impératifs d'ordre professionnel et que leur domicile fiscal était situé en France de manière continue pendant les quatre années qui précèdent celle du transfert.

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to at least 2/3rds of the French tax that would have been due on that income[3], providing that they justify it. The French administration cannot now object that they have no means of verifying the information. They have to be subject to tax in Jersey on the whole of their revenue, which means that persons ordinarily resident in the Island generally satisfy his condition.

The agreement reached is significant in that it elevates British nationals, resident within Jersey including "Channel Islanders" to the same status as French nationals, without the need of a treaty containing a non-discrimination clause, to obtain in effect better treatment than that to which British nationals resident in the United Kingdom can currently expect. The French documentation giving administrative effect to this agreement is anticipated soon. Whilst non-discrimination clauses are generally contained in Tax Treaties, and also in other international agreements, the side agreement with Jersey will be equivalent to an administrative tolerance or instruction, conditional on the TIEA being affective.

However, the capacity of the French administration to assess on the basis of article 164C has been compromised in the past by the fact that an investigation can only be launched where there has been an insufficient or erroneous declaration. Despite administrative instructions to the contrary, there is no *cas* (line) on either the French 2010 income tax declaration or its computerised version enabling the taxpayer to actually make a return of this liability, which the administration is required to insert under a combination of articles 173.1. and 248 CGI. The reason being that the calculation of the allowances applicable, which are different from those applicable to a French resident taxpayer, have not yet been integrated into the "online" tax return. As a result, the formal requirements enabling the administration to assess are only satisfied if the taxpayer actually makes a declaration in the incorrect manner proposed by the administration on its Website [4], thereby exposing themselves to the *taxation d'office* procedure.

In order to enforce liability, for lack of declaration, the administration is required to send a *mise en demeure* summoning the taxpayer to respond within thirty days. They generally require that a declaration be filed. However, it is at this point that care needs to e taken, if the client wishes to proceed on the basis that no

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[3] Peter is able to provide the actual income base upon which any article 164C assessment has to be based. Contrary to certain assertions, the French statute refers to the State of residence's basis of assessment, *l'ensemble de ses revenus*, not to what the basis of the French assessment would have been were the non-resident to have been resident in France for the year in question. Care should be taken here in relation to trust income and capital gains, and their date of realisation. In any event, the TIEA will only give access to income as it has to be declared to the Comptroller, therefore not gains. However, the impact of the deemed distribution policy under "Zero-Ten"s has to be considered here as a possible excerpt.

[4] The French administrations website admits this without actually saying so and encourages taxpayers to make what is technically a false return of the details enabling them to tax, on plain paper, with a signed declaration. Cf Notice 2041-E.

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declaration can be made, as the income tax declaration does not have a line upon which to declare the deemed income, either on the Internet or on the paper declarations.

Where the taxpayer fails to respond correctly to a *mise en demeure*, or a summons to file from the administration within a period of thirty days, the administration can the proceed to a *taxation d'office*, in other words put the taxpayer in a defined tax position and require payment of the tax it has assessed.

Any response to a *mise en demeure* has to be carefully worded to escape liability[5], and make it clear that the reason for non-declaration was that there was no possibility of filing a correct one.

Peter stresses here that whilst this is a general outline he will not accept responsibility for any reliance placed on this explanation, unless he has been instructed, and unless he has given a formal opinion to a taxpayer on their specific position on a fully informed basis. Note the disclaimer applicable on this website to which reference is made.

Given the ability of the administration to take tax liens over property, Peter stresses that before any action is taken in this area, advice is needed, both as to this position, and as the complication where there are other sources of French income to declare on the same declaration. In that case the declaration has to be carefully prepared, as the other source income can compensate any technical liability under article 164C. Whilst some foreign advisers apparently recommend taxpayers to take the route requested and advised by the administration, for fear of non-compliance with principle, there is actually no means whereby a declaration of the deemed income liability under article 164C can be made in correct form in accordance with French tax administrative law. There may be a liability in principle, but it may not actually be assessable or recoverable.

There may be modifications in the 2010 tax return, which has yet to be released.

[5] The jurisprudence enabling the administration to invoke a *taxation d'office* and to require the appointment of a fiscal representative in France for the sole lack of a declaration was under the régime prior to the change in 1977.