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A successful outcome of our challenge against the French tax regime on trusts

Summary: Our QPC has resulted in a reservation of interpretation that transforms the irrebuttable presumption of taxation to the Net Wealth Tax (« ISF ») of trust property in the name of the settlor into a rebuttable one with the limitation that this proof cannot result from the irrevocable and discretionary features of the trust. The tax administration, under the supervision of the tax judge, will have to define the conditions for the application of this reservation, in particular the nature of the supporting documents to be provided to show that the settlor has not retained any contributory capacity following the transfer of the assets in a trust.

By a decision n ° 2017-679 QPC of December 15, 2017, the French Constitutional Council considered Section 885 G ter of the French Tax Code (« CGI ») to be compliant with the Constitution, but attached to its decision the following reservation of interpretation: « the settlor must have the possibility of demonstrating that the assets, rights and products in trust do not confer on him any contributory capacity, resulting in particular from the direct or indirect benefits he derives from these assets, rights or products ». This same provision specifies that this proof cannot result solely from the irrevocable and discretionary nature.

The fact that the law was declared to be compliant with the Constitution means that the tax administration are empowered by the Law to include in the wealth tax basis the assets put in trust in the name of the settlor - or the deemed settlor - of the trust.

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However, the reservation of interpretation based on Article 13 of the Bill of the Rights of 1789 (Principle of Equality before Public Burden) transforms this presumption, which was hitherto irrebuttable, into a simple one to which the settlor can defeat by demonstrating that the assets put in trust do not give him any contributive capacity.

The Council makes two important points in this regard.

Firstly that this ability may result in particular – the list is not limited – in direct or indirect benefits that the settlor derives from these assets. This is a significant improvement for the tax administration compared to the situation prior to the 2011 Law.

A direct advantage is easy to recognize: it is for the settlor to be able to get from the trust the payment of sums of any kind, provided, however, that this power results from a prerogative and not from a simple discretionary power of the trustee. An indirect benefit is less so. One may think that it aims at the situation where the settlor could obtain from the trustee that it provides to its own creditors guarantees on the property in trust.

The second is that this question cannot only be dealt with theoretically by examining the trust deed. This means, in our view, that if the trustee has granted the settlor direct or indirect benefits and even though he was not compelled to do it, the settlor shall be deemed to have retained on the trust property a contributory capacity rendering him taxable on the fortune represented by these assets. However, one could expect, in the case of an annual tax, that this situation will be assessed solely on the basis of the facts of the previous year and not once and for all.

The Constitutional Council has set the framework, but it is the responsibility of the tax administration, under the control of the tax judge (ie. the judicial judge),

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to settle the difficulties of application of the reservation on a case-by-case basis.

Let us hope that the tax administration will adopt a wide range of views in the assessment of this reservation, in particular as regards the proofs to be provided by the settlor, in order to avoid cluttering the courts with disputes where the settlor can demonstrate, by means of a certificate from the trustee, that no sum from the property placed in trust has been paid to him.

It now remains for the Council to introduce the same reservation of interpretation for the coming Property Tax (« IFI ») which will replace the wealth tax, the future Section 970 of the CGI containing exactly the same provision as Section 885 G ter. Let us hope that the Members of Parliament will seize the opportunity to incorporate in the new provisions of Section 970 of the CGI the reservation of interpretation now applicable for the wealth tax.

Cette note d'information générale ne saurait s'assimiler ou se substituer à une consultation juridique. Elle ne saurait remplacer un entretien privé avec un avocat qui, après étude des circonstances de fait et de droit propres à chaque dossier individuel, sera en mesure d'apporter une solution précise et adaptée à chaque dossier compte tenu de ses spécificités.