

**Exit tax under French law in the light of the case *de Lasteyrie du Saillant*****Philippe Marchessou<sup>1</sup>****1. The framework**

With the aim of contrasting the emigration of taxpayers intending to avoid capital gain taxation arising from the transfer of movable assets as well the solidarity wealth tax (*impôt de solidarité sur la fortune (ISF)*), the Minister of the Economy and Finance (Dominique Strauss-Kahn) of Lionel Jospin's government obtained the adoption by the Parliament of a dissuasive provision within the Finance Law for 1999<sup>2</sup>.

Said provision addressed two different categories of emigrant taxpayers:

- on one hand, company managers holding a participation in the company's capital. Such a participation was exempted from the ISF as long as their roles as managers for the company persisted<sup>3</sup>. Whenever the office ceased to exist for any reason whatsoever (retirement, resignation, etc.), then it would fall again within the scope of application of ISF<sup>4</sup>;
- on the other hand, shareholders holding a participation, directly or indirectly, both individually or together with their family, equal at least to 25% of the company's capital. In this case, the tax base formed by the increase in value assessed at the time of the shares transfer<sup>5</sup> was to be

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<sup>1</sup> The author is Professor of Tax Law at the University of Strasbourg III – Robert Schuman. Translated by Cristiana Bottazzi, PhD student in European Tax Law at the University of Bologna.

<sup>2</sup> Article 24, Law 98-1266 dated Dec. 30th 1998.

<sup>3</sup> Art. 885-O à 885-O quinquies CGI.

<sup>4</sup> Cf. barème.

<sup>5</sup> Art. 92 of CGI.

subject to a tax rate of 26% (i.e. 16% + 10% of "prélèvements sociaux"<sup>6</sup>) concerning the amounts exceeding F 50,000 (EUR 7,622) per year.

**2. The text approved by the legislator in 1998** is contained in article 167 *bis* of the CGI<sup>7</sup>. According to the mentioned provision, unrealised capital gains on movable assets held by the taxpayers are subject to taxation at the time when their tax residence is transferred outside French territory, provided that taxpayers and their family have held more than 25% of shareholdings during the previous five years. Furthermore, a mechanism of suspension of the payment is offered to taxpayers who contest the taxation. Such a benefit is granted, subject to the express request by the taxpayer together with the delivery to the competent administrative authorities, before his/her departure abroad, of proper guarantees in order to assure the collection of the due amounts. To the purpose of the above- mentioned postponement, the taxpayer shall also designate a tax representative established in France and shall declare the capital gain within thirty days before the transfer of his/her tax residence.

Subsequently to the adoption of the mentioned law, but prior to the relevant promulgation, the French *Conseil constitutionnel* was required, pursuant to article 61 of the Constitution<sup>8</sup>, to state on the legitimacy of said provision. With its statement dated December 29<sup>th</sup>, 1998<sup>9</sup>, the Court rejected the request, by declaring its incompetence to examine the compliance of a law with the provisions of a text other than the Constitution, as is the case for the EC Treaty, and in this case, its article 43<sup>10</sup>.

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<sup>6</sup> Art. 200-A, 2, del CGI.

<sup>7</sup> Art. 167 bis del CGI.

<sup>8</sup> Article 61 of the Constitution.

<sup>9</sup> *Conseil Constitutionnel*, Sentence no. 98-405DC, *RJF* 2/99, no. 194.

<sup>10</sup> EC Treaty.

### 3. The “course” of Hughes de Lasteyrie du Saillant

Potentially concerned with the described measure, Mr Hughes de Lasteyrie du Saillant decided not to immediately undergo the tax levy in accordance with said norm, so as to be entitled to subsequently activate a fiscal lawsuit (whose duration up to the Supreme Court is approximately ten years,) for the matters pertaining to the measure itself. On the contrary, he adopted the following strategy:

- A. Mr Hughes de Lasteyrie du Saillant applied to the *Conseil d'Etat* for the annulment of decree dated July 6<sup>th</sup>, 1999 (no. 99-590)<sup>11</sup> on the ground of excess of power, this decree being issued for the execution of the mentioned provision of the CGI and codified under article 91 *undecies* of Annex II of the Code<sup>12</sup>.
- B. Following up a resolution of the *Assemblée* in date December 14<sup>th</sup>, 2001<sup>13</sup>, the *Conseil d'Etat* decided to refer a preliminary ruling to the Court of Justice. By this way, the *Conseil d'Etat* shared the conclusions of its government commissioner, Mr Guillame Goulard, who remarked that the Court of Justice had never pronounced any opinion on the validity of any similar provision with regard to article 43 of the Treaty. In the light of the above, and in consideration of the existence of similar provisions also in other Countries, the government commissioner argued that said provision was probably contrasting with the freedom of establishment – then the *Conseil d'Etat* would have been entitled to annul it. Nevertheless, he suggested that the Court of Justice should be allowed to pronounce its opinion on the scope of the discretionary margin allowed by EC law to Member States with reference to the freedom of establishment; in fact, should the French provision be censured, then any other Member State providing for similar rules would have to modify them accordingly.

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<sup>11</sup> Decree July 6th 1999 (no. 99-590).

<sup>12</sup> Article 91 *undecies* of annex II of the Code.

<sup>13</sup> Resolution no. 211341, RJF 2/02, no. 160.

The *Conseil d'Etat* agreed with its government commissioner and, therefore, referred the question to the Court of Justice. It is worth pointing out that the challenged decree merely implemented the law, i.e. it did not specify nor add anything different or new with respect to the text of the law.

C. The reply by the Court of Justice<sup>14</sup> and by its Advocate General J. Mischo<sup>15</sup> did not fully satisfy the expectations expressed by the government commissioner at the *Conseil d'Etat*, since both the Court and the Advocate General restricted themselves to certify the absolute irregularity of the French provision with regard to the freedom of establishment, as it was grounded on a conclusive presumption of tax avoidance or tax fraud.

D. French consequences of the ECJ judgment:

On November 10<sup>th</sup>, 2004<sup>16</sup>, the *Conseil d'Etat* annulled the decree dated July 6<sup>th</sup>, 1999 with a judgment grounded on the said ECJ judgment. The aim was to deprive *de facto* article 167 CGI (i.e. the law provision being implemented by means of the mentioned decree) of its juridical support. In fact, the *Conseil d'Etat* remarked that, as a consequence of the interpretation of article 43 of EC Treaty provided by the Court of Justice, provisions of article 167 *bis* CGI were not applicable to taxpayers who exercise their freedom of establishment by transferring their tax residence to another Member State, and therefore, decree dated July 6<sup>th</sup>, 1999 had to be annulled as far as it implemented a law deemed not to comply with a provision of the EC Treaty. Consequently, upon governmental initiative, article 167 *bis* CGI was immediately repealed by Parliament<sup>17</sup>.

Within five years, Hughes de Lasteyrie du Saillant thus obtained a wider result than the one he would have expected with the typical procedure of a tax lawsuit at the expiring of the ten-year period. The mentioned abrogation had in fact an *erga omnes* effect.

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<sup>14</sup> ECJ judgment C-9/02, March 11<sup>th</sup> 2004.

<sup>15</sup> Advocate General Opinion C-9/02, March 13<sup>th</sup> 2003.

<sup>16</sup> Sentence no. 211341, RJF 2/05, no. 135.

<sup>17</sup> Article 19, Law no. 2004-1484 dated Dec. 30<sup>th</sup> 2004.

**4. Conclusions**

French tax authorities, which had inspired the drafting of the text, were surprised by the strategy adopted by Hughes de Lasterye du Saillant. Said authorities had thought that most taxpayers concerned with the matter would choose the classical way of dispute in the framework of a tax lawsuit, jointly with a request for the suspension of payment. Finally, they did not even try a reformulation of the text compliant with requirements imposed by the EC Treaty, for example excluding Member States from its field of application.