SULLIVAN & CROMWELL LLP

October 21, 2019

Taxation of Non-Resident Executives of French Companies

Pursuant to the draft Finance Bill for 2020, which is currently under discussion in the French Parliament, senior executives of large French companies will automatically become subject to French tax, irrespective of their having a permanent home, habitual abode and physical presence outside of France. Such reform is expected to be enacted by the end of the year and to enter into effect with respect to fiscal year 2019.

BACKGROUND

The French Tax Code currently defines French tax residents as individuals having a permanent home, main physical presence, professional activity or center of economic interest in France. Today, executives of French companies who do not live or work regularly in France are generally not considered as French tax residents. In particular, if the chairman/CEO of the French subsidiary of a non-French multinational is based outside of France, he/she would currently generally not be subject to tax in France.

PROPOSED AMENDMENT TO TAX RESIDENCE CRITERIA

1. Scope

The proposed amendment modifies the criteria relevant to determine tax residence under French domestic tax law. The new criteria would be applicable to the following individuals:

- Senior executives (CEO and deputy CEO, chair of the board of directors or supervisory board, member of the management board and any other executive with similar functions) working for
- Companies with a corporate seat located in France, and which have
- An annual turnover in France in excess of €250 million (including through subsidiaries).

Such individuals would automatically become French tax residents under domestic law, even if they can prove that their home, family, professional activity and center of economic interest are not located in France.

According to the French tax authorities, approximately 1,500 executives could fall within the scope of the new definition.

Even though French tax authorities have presented such amendment as a mere "formalization" of existing case law, it would actually lead to a meaningful change in the existing residency rules. According to current case law, being an executive of a French company would result in deemed French tax residence only when the individual's primary professional activity was physically based in France. In principle, an executive of a French company having his or her main professional activity outside of France would not be considered as French tax resident for domestic tax purposes.

2. Tax consequences under French domestic law

Individuals who would become French tax residents pursuant to such new criteria would be subject to income tax, real estate wealth tax and gift/estate tax in France, subject to applicable tax treaties.

Regarding income tax, since French tax residents are subject to taxation on their worldwide income, any income including income from foreign sources would, in principle, be taxable in France.

In the case of real estate wealth tax, French and non-French real estate assets owned by the executive would become taxable in France.

For gift/estate tax purposes, all assets would become taxable in France, irrespective of their location, when they are given/transferred by the relevant executives or received/inherited by them.

3. Impact of double tax treaties

In case of dual tax residency, a tie-breaker rule included in most tax treaties would not attribute tax residency on the basis of a senior executive position only. As a result, since tax treaties prevail over French domestic tax rules, executives who are currently tax residents in states having signed a tax treaty with France would therefore potentially not become subject to French income tax on their worldwide income.

However, the scope of most of the tax treaties signed by France is limited to income tax. Accordingly, the consequences described above in respect of real estate wealth tax and gift/estate tax would therefore be generally applicable to executives who are within the scope of the proposed amendment.

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