# France – Real estate tax alert

**Several measures included in the Finance Act for 2017 as well as in the Rectifying Finance Act for 2016 create or modify regimes that may be of interest for the real estate sector. This tax alert also sets out the main developments that occurred in 2016.**

## Modification of the 3% tax on dividends

### Previous regime

Distributions of dividend made between two tax-consolidated companies benefited from a specific exemption from the 3% tax on dividends. Such exemption was, however, not applicable notably to distributions made by French companies holding real estate assets in France to their foreign parent company. The French Constitutional Court ruled that such difference of treatment was not justified and unconstitutional.

### Measure

The French law is modified in order to comply with the decision of the French Constitutional Court.

The exemption is now applicable to distributions made in favour of parent companies holding, directly or indirectly, at least 95% of the share capital of the distributing company irrespective of whether or not the companies are members of a tax-consolidated group, by choice or by impossibility due to the fact that the parent company is incorporated abroad (it being noted that the foreign company must be incorporated in a EU country or in a country having signed with France a convention on administrative assistance to fight against tax avoidance and tax evasion).

Given the new scope of this exemption from the 3% tax on dividends, French companies should be able to distribute dividends, free of the 3% tax on dividends, to their parent company located abroad holding, directly or indirectly, at least 95% of their share capital.

→ This measure is applicable to distributions paid as from 1 January 2017.

French companies having paid the 3% tax on dividends in respect of distributions made in favour of foreign holding companies which held, at the time of the distribution, directly or indirectly, at least 95% of their share capital should consider filing refund claims of any amounts paid in 2015 and 2016.

## Decrease of the corporate income tax rate in France

### Current regime

The standard rate of corporate income tax is currently equal to 33.33%. This rate can be increased by additional contributions equal to:

- 3.3% for companies having an annual corporate income tax burden exceeding EUR 763,000 (aggregate rate of 34.43%); and
- 10.7% for companies having a turnover exceeding EUR 250 million for fiscal years closed between 31 December 2013 and 30 December 2016 (aggregate rate of 38%).

A reduced rate of 15% applies to certain companies with a turnover of less than EUR 7,630,000, not belonging to another company and with fully paid-up capital at least 75% held by natural persons. The benefit of the reduced rate is capped at an amount of profit equal to EUR 38,120.

### Modifications included in the Finance Act for 2017

The standard rate of corporate income tax is gradually reduced to 28% as follows:

| | |
|---|---|
| 2017 | Rate of 28% applicable to all SMEs[1] but limited to EUR 75,000 of profits. |
| 2018 | Rate of 28% applicable for all companies but limited to EUR 500,000 of profits. |
| 2019 | Rate of 28% applicable for all companies whose turnover is below EUR 1 billion. |
| 2020 | Rate of 28% applicable for all companies. |

In addition, the benefit from the reduced rate of 15% is extended to companies with a turnover not exceeding EUR 50 million. Such modification will be applicable for financial years open on or after 1 January 2019.

[1] To qualify as SME, within the meaning of Commission Regulation (EC) N° 800/2008, appendix I, a company must:
- Employ fewer than 250 persons; and
- Have a turnover not exceeding EUR 50 million, and/or an annual balance not exceeding EUR 43 million.

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## Reinforcement of the auditing tools of the French tax authorities

**New offsite procedure for computerised accounting**

A new offsite tax audit procedure, called the "accounting examination", has been created. Within 15 days following the notice of a tax inspection, a taxpayer will be required to send to the French tax authorities a dematerialised copy of its accounting files. Even if the procedure is offsite, the tax inspector should nevertheless exchange with the taxpayer which will benefit from the same rights as those applicable in case of a tax audit.

The French tax authorities have a 6 month period from receipt of the copy of the accounting files to send to the taxpayer a reassessment notice or to inform the latter that there will be no reassessment.

If the taxpayer fails to provide the French tax authorities with its accounting files, the accounting examination might be cancelled and an on-site tax audit for the same period can be launched.

→This measure applies as from 31 December 2016.

**New penalties applicable in case of failure to provide the French tax authorities with a copy of the computerised accounting**

A fine of EUR 5,000 or, in case of a reassessment leading to a higher amount, an increase of 10% of the amounts reassessed, is now applicable in case of failure by a company to provide the French tax authorities with documents, data and processing during a tax audit.

These penalties and surcharges are also applicable if the taxpayer does not remit the documents on time or is not in compliance with the standard forms of such documents.

→ This measure applies to tax audits for which notices of a tax audit are sent as from 1 January 2017.

**New on-site audit for requests for VAT refunds**

The French tax authorities now have the power to go on-site to investigate VAT refunds claims filed by taxpayers. The French tax authorities have a 60-day period from their first intervention on-site to render their decision, it being noted that such decision cannot be rendered more than 4 months after the notification to the taxpayer of an on-site audit.

The absence of decision from the French tax authorities within this 4 month period will amount to a tacit acceptance of the VAT refund claim.

Any decision to reject the request for a VAT refund must be justified.

This new procedure is aimed at accelerating the refund of VAT credits.

→ This measure applies to VAT refund claims filed as from 1 January 2017.

## Lowering of the threshold of the companies subject to the filing of the simplified declaration relating to transfer pricing

**Previous regime**

In addition to the preparation of a full transfer pricing documentation, companies (i) having a total net sales (before taxes), or total gross assets, at least equal to EUR 400m; or (ii) holding, directly or indirectly, at the closing date of the fiscal year, more than 50% of the capital or voting rights in a legal person having such turnover or gross assets; or (iii) being, on the closing date of the fiscal year, more than 50% held, directly or indirectly, by such legal person; or (iv) belonging to a French tax consolidated group that includes at least a legal person that meets one or more of the aforementioned criteria, must file a simplified transfer pricing documentation, at the latest six months following the deadline for filing their corporate income tax return (i.e., nine months following the closing of the relevant fiscal year).

**Modification included in the Sapin II Law**

The threshold of EUR 400m is lowered to EUR 50m in respect of the simplified transfer pricing documentation requirement.

→ This measure is effective for fiscal years closed on or after 31 December 2016.

## Reinforcement of the specific regime applicable to sales followed by a transformation of professional premises into accommodation

**Previous regime**

Companies subject to corporate income tax in France which sell office and/or commercial premises to be converted into residential accommodations benefit from a 19% reduced rate of corporate income tax on the gain recorded.

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The purchaser must complete the transformation works within a 3 year period from closing of the fiscal year during which it has acquired the premises.

**Measure**

The Finance Act for 2017 extends the specific regime to gains realised upon the sale of industrial premises to be transformed into residential accommodation.

French law, however, does not provide any definition of the term of "industrial premises", but one can consider from the Parliamentary debates that the specific regime should include industrial wastelands (even if the transformation implies a demolition followed by a reconstruction), but not storage premises, which should remain out of the scope of the specific regime.

The Finance Act for 2017 also increases the time period available for the purchaser to complete the transformation works, from 3 to 4 years upon closing of the fiscal year during which it has acquired the premises.

→ This measure is applicable to transfers of premises realised on or after 1 January 2017, it being noted that the expiration date of this specific regime has not been modified and remains set at 31 December 2017.

## Introduction of an instalment for the tax on commercial premises (Tascom)

**Previous regime**

Retail stores whose sales area exceeds 400 square meters are subject to the tax on commercial premises (Tascom). In addition, retail stores having a sales area higher than 2,500 square meters are subject to a 50% surcharge of Tascom.

The taxable event is the existence of a retail store on 1 January of the year in respect of which this tax is due. The Tascom must be both reported and paid to the French tax authorities each year before 15 June.

**Measure**

The Finance Act for 2017 introduces a mandatory instalment of Tascom for companies subject to the 50% surcharge. The instalment, equal to 50% of the amount due in respect of the year during which the instalment is paid, must be reported and paid at the same time of the Tascom due in respect of the current year. The instalment can be offset against the amount of Tascom due in respect of the following year.

→ This measure implies that companies having retail stores with a sales area higher than 2,500 square meters will have to pay during calendar year 2017 both the Tascom due in respect of 2017 and the instalment relating to 2018.

## The fourth amendment of the France-Luxembourg double tax treaty finally enters into force

The main provisions of the amendment signed by France and Luxembourg on 5 September 2014 finally entered into force on 1 January 2017. This amendment notably provides that capital gains realised upon the sale of shares of a company predominantly invested in real estate will be taxable in the State where the real estate assets are located.

This amendment marks the end of double exemption schemes in which Luxembourg companies were able to sell shares in French companies predominantly invested in real estate without paying capital gains tax in France or in Luxembourg.

Since 1 January 2017, any gains realised by a Luxembourg company upon the disposal of shares in a French company whose assets are made of more than 50% of their value of real estate assets located in France, or whose value is derived for more than 50% from real estate assets (held directly or indirectly through the interposition of one or several companies, fiduciary estate, institutions or entities) are only taxable in France.

## The end of tax-free step-ups in France?

In a court decision dated 6 July 2016, the French Supreme Administrative Court apparently added a new condition for the application of the application of the "Quemener" regime, which allows companies to implement tax-free step-up of French real estate assets held through French SCIs.

The court decision specifies that the Quemener adjustments should only apply where the same gain (i.e., the gain on the SCI shares and the gain deriving from the step-up of the SCI's asset) has been taxed twice at the level of the SCI's partner.

To benefit from the Quemener adjustments, a taxpayer must evidence the fact that it could bear an effective double taxation, it being noted that the French Supreme Administrative Court has not explained what is an effective double taxation.

It seems that there are two possible interpretations. In the first one, the Quemener adjustments should not be applicable if the global operation (including notably the dissolution without liquidation) does not trigger any effective taxation of the capital gains of the step-up of the shares of the absorbed entity.

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In the second interpretation, which seems to have major support, the condition of the effective double taxation should be met if, without the implementation of the Quemener adjustments, the gain arising from the step-up would be taxable twice, i.e. as a taxable income of the SCI (taxed at the level of the partner) and as a gain on the SCI shares.

The definitive impact of this court decision is not yet known but if it turns out that such case law effectively prevent the Quemener adjustments in case of dissolution without liquidation, which doesn't effectively trigger a double taxation at the level of the absorbing entity, the companies might have an interest in implementing, before proceeding to the dissolution without liquidation, either a dividend distribution of the capital gains realised (in case of sale of the real estate asset) or a re-evaluation of the taxable value of the assets of the company which is going to be dissolved.

## Immovable assets: a new definition applicable since 1 January 2017 for VAT purposes

A new EU regulation came into force on 1 January 2017 and applies directly in each EU Member State. According to this autonomous EU definition of immovable property for VAT purposes, an immovable property can either be:

- any specific part of the earth, on or below its surface, over which title and possession can be created;
- any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved;
- any item that has been installed and makes up an integral part of a building or construction without which the building or construction is incomplete, such as doors, windows, roofs, staircases and lifts; or
- any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction.

This new definition significantly broadens the scope of the notion of immovable assets, notably to include equipment and machines for which the European Commission specified that it should cover items which are used during a certain time in the course of the economic activity for the purpose of which they have been acquired and which have been installed in a building or construction in such a way that it cannot be moved without destroying or altering the building or construction.

The enlargement of the definition of immovable assets will notably impact various questions linked to the place of supply of specific services linked to immovable assets and in respect of VAT regularisations.

## Sale of a vacant building and exemption of VAT

A ministerial answer dated 8 March 2016 confirmed that the sale of a building, temporarily vacant at the time of the sale, made between two taxable persons, can benefit from the VAT exemption provided for by article 257 bis of the French tax code if the seller is able to evidence that it was actively seeking a tenant.

According to the ministerial answer, the duration of the vacancy, as well as the reasons why the tenant left the building, are irrelevant when determining whether a transfer is eligible to the benefit of the VAT exemption.

The vacancy of the premises may notably be explained by real estate market conditions, change of tenants, refurbishment works or damages on the building.

**In order to secure the benefit of the VAT exemption, the seller must be able to evidence that, at the time of the sale, it was actively seeking one or several tenants. On the other hand, the purchaser will need to carry on the real estate leasing activity of the seller and subject it to VAT.**


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