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International Tax

France Tax Alert

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Bill to combat tax avoidance approved

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On 5 November 2013, France's National Assembly and Senate approved a bill to combat tax fraud and major economic and financial crimes. The bill contains a number of targeted and highly technical measures against tax avoidance and evasion and also would amend France's transfer pricing rules and the rules on non-cooperative states and territories (NCST). The bill still must be validated by the French constitutional court before it can become effective, which is expected to take place in the near future.

This alert focuses on the main measures of the bill that could impact multinational companies.

Expanded transfer pricing documentation requirements

France's current transfer pricing rules (found in article L13AA of the Tax Procedure Code) require taxpayers that satisfy certain criteria to provide contemporaneous transfer pricing documentation if so requested during the course of a tax audit. Failure to provide the documentation can result in a penalty amounting to up to 5% of the reassessment. Companies that satisfy one of the following conditions are subject to the contemporaneous documentation requirement:

- The entity has gross annual turnover or gross assets equal to or exceeding EUR 400 million;
- The entity owns, directly or indirectly, at least 50% of a company that meets the EUR 400 million criteria;
- More than 50% of the entity's capital or voting rights are owned, directly or indirectly, by French or foreign entities that meet the EUR 400 million criteria;
- The entity benefits from France's worldwide tax consolidation regime; or
- The entity is in a consolidated tax group in France and at least one group company meets any of the above criteria.

The bill would introduce a new transfer pricing documentation requirement that would apply to all legal entities (including French permanent establishments of foreign companies) already subject to the contemporaneous documentation requirement. According to the bill, taxpayers would be required to submit additional documentation within six months following the filing of the annual income tax return. For example, a taxpayer with a 31 December 2013 fiscal year-

end would have to submit additional documentation no later than November 2014, i.e. six months after the May deadline for filing the return.

This new documentation would have to include the following:

1) General information about the group and group-related companies:
    - A general description of all business activities, including any changes that took place during the previous fiscal year;
    - A list of the principal intangible assets, including patents, brands, commercial names and know-how related to the French entity; and
    - A general description of the group's transfer pricing policy and any changes that took place during the previous fiscal year.
2) Specific information regarding the French affiliate:
    - A description of all of the taxpayer's activities, including any changes that took place during the previous fiscal year;
    - A summary of transactions with other related parties, classified by types of transaction and by amount, when the aggregated amount per type of transaction exceeds EUR 100 000; and
    - A description of the method(s) used to determine the taxpayer's transfer pricing policy (in accordance with the arm's length principle), including the main method used and any changes that took place during the previous fiscal year.

As noted above, this new transfer pricing disclosure requirement would not replace the transfer pricing documentation obligation that currently exists under French tax audit procedures and that encompasses a broader set of information and analysis. The new disclosure requirement should be considered a new and recurring obligation.

It is also worth noting that, during discussions of the Draft Finance Bill for 2014, other changes may be adopted that would affect the transfer pricing documentation requirements.

Expansion of criteria for inclusion on/removal from blacklist

France maintains a blacklist of NCSTs to combat tax evasion and fraud through the use of tax havens. Transactions with jurisdictions on the blacklist are subject to more restrictive measures than transactions with non-blacklist countries (for example, the participation exemption for dividends and capital gains is unavailable, a higher rate of withholding tax (75%) applies to dividends, interest and royalties paid to an entity in an NCST, etc.)

Several conditions must be satisfied for a jurisdiction to be included on the blacklist:

- It must not be an EU member state;
- It must have been reviewed by the OECD with respect to transparency and exchange of information on tax matters;
- It must not have concluded a tax information exchange agreement (TIEA) with France; and
- It must not have concluded more than 12 TIEAs with other countries.

France's blacklist currently is updated annually to remove jurisdictions that, among other criteria, have concluded an agreement with France (as of 1 January

of the year under review) that allows for an exchange of information and/or to add jurisdictions considered to lack the necessary exchange of information.

The bill would tighten the criteria for a jurisdiction to qualify for removal from the blacklist. Under the new rules, as from 1 January 2016, a jurisdiction would have to conclude a TIEA with France that allows an *automatic* exchange of information (i.e. an exchange that is possible only "upon request" would be not sufficient). Correspondingly, countries refusing to accept the automatic exchange of information requirement could be added to the NCST list.

Creditor rights in full transfer of assets cases

Under current law, when there has been a full transfer of assets (dissolution without liquidation or "TUP"), creditors are entitled to lodge an objection to the dissolution of the company within 30 days from the publication of the deal in the official gazette. The bill would extend this time limit to 60 days.

The new measure aims at improving the effectiveness of creditors' rights to object. The 30-day limit is considered too short because by the time a transfer of assets is reported to the tax authorities, the objection deadline often has already expired.

Expanded rights of tax auditors

The bill includes a measure that would allow tax auditors to take copies of documents they review during the course of a tax audit. Under current rules, tax auditors are not entitled to take copies of the documents they review—they only have the right to examine such documentation at the taxpayer's premises (unless otherwise requested by the taxpayer). Notably, the new rules would not expand the scope of documents that can be reviewed by tax inspectors, but they would entitle inspectors to take copies of documents they have access to.

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