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The International Comparative Legal Guide to:

Private Client 2015

4th Edition

A practical cross-border insight into private client work

Published by Global Legal Group, in association with CDR, with contributions from:

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URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Information Press Ltd
December 2014

ISBN 978-1-910083-27-7
ISSN 2048-6863

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fourth edition of *The International Comparative Legal Guide to: Private Client*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of private client work.

It is divided into two main sections:

Nine general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting private client work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private client laws and regulations in 29 jurisdictions.

All chapters are written by leading private client lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Owen Clutton and Jonathan Conder of Macfarlanes LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Chapter 20

France

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1 Pre-entry Tax Planning

1.1 In France, what pre-entry estate and gift tax planning can be undertaken?

Since French gift and inheritance taxes are due at very high rates when either the transferor or the transferee is resident in France, when a gift is contemplated it should, in most circumstances, be completed before any of the individuals involved becomes a resident of France. Likewise a transfer into a trust should also be completed before the settlor becomes resident in France. This will allow a lower inheritance tax rate to be due upon his death (see question 6.2).

1.2 In France, what pre-entry income tax planning can be undertaken?

Because of the very high income and capital gains tax rates it might be appropriate to accelerate the realisation of foreign-source income or to realise latent capital gains by selling and repurchasing capital assets with built-in appreciation before becoming a French resident. Contributing assets into a holding company in a suitable jurisdiction may be an efficient tax planning technique to obtain a tax-free step up. Before arriving in France one can also place assets that otherwise will generate taxable income in an insurance policy which complies with French requirements.

1.3 In France, can pre-entry planning be undertaken for any other taxes?

There are no other significant taxes which require pre-entry planning. Wealth tax cannot be avoided any longer by transferring assets into a trust (see question 6.2).

2 Connection Factors

2.1 To what extent is domicile relevant in determining liability to taxation in France?

Domicile is not relevant in determining liability to taxation in France.

2.2 If domicile is relevant, how is it defined for taxation purposes?

The concept of "domicile" is not used by the French tax code. However, the French courts usually find that the law of the deceased's last domicile governs succession. Under the French Civil Code, domicile is the place where a person has his habitual residence. The place of origin has no influence on the determination of habitual residence.

2.3 To what extent is residence relevant in determining liability to taxation in France?

As a principle, individuals who are residents of France are liable to French income tax in France in respect of their worldwide income and to wealth tax in respect of all their assets wherever they are located.

2.4 If residence is relevant, how is it defined for taxation purposes?

The concept of "residence" determines the French tax authorities' right to tax. It is defined in the same way for all tax purposes (Article 4B of the French Tax Code). There are four alternative tests for determining whether an individual is treated as resident for tax purposes:

- he has his home ("*foyer*") in France;
- his primary place of residence is in France;
- he performs an activity in France; or
- he has the centre of his economic interests in France.

2.5 To what extent is nationality relevant in determining liability to taxation in France?

Nationality is not relevant in determining liability to taxation in France.

2.6 If nationality is relevant, how is it defined for taxation purposes?

This is not applicable.

3 General Taxation Regime

3.1 What gift or estate taxes apply that are relevant to persons becoming established in France?

Liability to French gift and inheritance taxes is determined by the donor's and donee's residence (or the deceased and heir's residence) as well as the location of the assets being transferred.

France does not impose an estate tax upon the transferor's estate. Inheritance tax is imposed upon the recipient and the rates vary according to the relationship between the heir and the decedent. Surviving spouses and civil partners are fully exempt from inheritance tax (but not from gift tax). The rates vary from 5% to 45% above EUR1,805,677 for direct family members (after deduction of an allowance of EUR100,000 for descendants for each 15-year period). They increase to 60% in the absence of a family relationship. Inheritance tax is due on any transfer of property upon death, whether it results from the application of intestate succession rules, the provisions of a will, or forced heirship. It is calculated on the net value of the property distributed to each heir.

Gift tax, which is imposed upon the donee, is due when all of the following conditions are fulfilled: a transfer is made without valuable consideration and with the intention to benefit the person receiving the transfer (*animus donandi*); and the donor is immediately divested of the donated property and the gift is accepted by the donee, regardless of the nature of the gift. Gift tax is calculated at the same graduated rates that apply to inheritance tax.

When the donor (or deceased) is a resident of France or when the donee (or heir) has been so for at least six out of the preceding 10 years, all movable and real estate property (wherever situated) transferred without valuable consideration is liable to tax in France.

When the donor (or deceased) and the donee (or heir) are both resident outside of France, only movable and real property situated in France are liable to French gift or inheritance taxes in these circumstances.

Tax treaties may modify the above rules (see section 9).

3.2 How and to what extent are persons who become established in France liable to income tax?

As a principle, individuals who are residents of France are liable to French income tax in France in respect of their worldwide income. As a general rule income tax is progressive, with a marginal rate of 45% (for the fraction of taxable income over EUR151,200). In addition to income tax, additional so-called social contributions are due in respect of savings income and income from capital assets at an effective flat rate of 15.5%.

A supplementary contribution also applies to individuals' high annual income, at a rate of 3% for the fraction of income between EUR250,000 and EUR500,000 for single taxpayers (between EUR500,000 and EUR1,000,000 for couples subject to joint taxation), and 4% for the fraction of income over EUR500,000 for single taxpayers (over EUR1,000,000 for couples subject to joint taxation). This contribution is assessed on the individuals' reference tax income ("*revenu fiscal de référence*"), corresponding to the net annual amount of all income and capital gains, including capital gains on the sale of real estate and exceptional income. This contribution applies to both French residents and non-residents whose French reference tax income exceeds the above thresholds.

3.3 What other direct taxes (if any) apply to persons who become established in France?

Capital gains tax

Although France does not levy a separate general capital gains tax as such (such as, for example, in the UK), some specific gains of a capital nature are subject to income tax. As a general rule, only capital gains realised at the time of a sale or exchange for valuable consideration are taxable. Unrealised capital gains can, however, be taxable under the so-called "exit tax". The taxable base and applicable tax rates depend on the nature of the property and whether the gains are made by individuals who are resident in France or not.

As a general rule, French-resident individuals are taxed on realised capital gains upon the sale of movable assets and real estate property (regardless of where the property is located) at the global rate of 34.5% for 2014 (19% plus social contributions at the rate of 15.5%). Capital gains on the sale of the main residence are, however, tax-exempt and capital gains on the sale of other real properties can be reduced by yearly allowances applying as from the 6th year of ownership.

The yearly allowance is 6% from the 6th year of ownership up to the 21st year and 4th for the 22nd. As a consequence, after 22 years holding capital gains on property are fully exempt from capital gains tax. However capital gains are only exempt from social contributions after 30 years of ownership.

An additional tax assessed on capital gains exceeding EUR50,000 realised upon the sale of real property by both French residents and non-residents also applies since 1 January 2013. This tax applies to the whole amount of the capital gain at a flat rate varying from 2% to 6% (for capital gains exceeding EUR260,000).

Since 1 January 2012, as a general rule, French residents' capital gains on shares and securities are now subject to the standard income tax progressive rates (with a marginal rate of 45%) plus 15.5% social contributions. However, for the purpose of determining the taxable net gain, the Finance Bill for 2014 provides that as from 1 January 2013, such gains will benefit from annual allowances at the following rates: 50% if the shares are held for a period from two to eight years and 65% if the shares are held for at least eight years.

Non-resident individuals' capital gains on the sale of real estate are only taxed in France when the property transferred is situated in France. They are determined on the same basis as for a French resident. The taxable capital gain is the difference between the sale price and the purchase price plus purchase costs and is subject to a withholding tax of 33.3%, reduced to 19% for a resident of a EEA Member State and increased to 75% (since 1 January 2013) for residents of a non-cooperative state.

As a general rule, the same treatment also applies to the sale of shares in a company (French or foreign) whose assets mainly consist of real property.

Since 18 August 2012, non-resident individuals' capital gains on the sale of French real estate property are also subject to social contributions at the rate of 15.5%. An infraction procedure has, however, been initiated before the EUCJ against this tax in respect of EEA residents.

A non-resident individual's capital gains from the sale of securities or shares are taxed only if his participation, together with the participation of his or her spouse, ascendants (that is, those from whom a person is descended, for example parents and grandparents) and descendants, exceeds 25% of the shareholding in a resident company subject to corporate income tax at any time during the five previous years. Since 1 January 2013, the tax rate is 45%.

Tax treaties may provide for exemptions.

Wealth tax

Resident taxpayers are also liable to wealth tax on their worldwide assets whereas non-resident taxpayers are only liable to wealth tax on their French assets. In particular, non-residents are subject to wealth tax on their capital assets located in France, with the exemption of financial investments ("*placements financiers*") made in France (e.g. shares, securities, bonds, deposits). Most treaties impose French wealth tax on property situated in France.

Wealth tax is payable only by individuals whose private wealth, after deduction of debts, exceeds a certain limit on 1 January each year (EUR1,300,000 for 2014).

The wealth tax payable for 2014 is determined by applying to the individuals' taxable assets over EUR800,000 the following sliding scale:

- Up to EUR800,000: 0%
- EUR800,000 to EUR1,300,000: 0.50%
- EUR1,300,000 to EUR2,570,000: 0.70%
- EUR2,570,000 to EUR5,000,000: 1%
- EUR5,000,000 to EUR10,000,000: 1.25%
- More than EUR10,000,000: 1.50%

Since 2013, a cap has been reintroduced with the effect of limiting the overall amount of taxes (wealth tax plus income tax) paid in respect of a given fiscal year to 75% of the net income received during this fiscal year.

3.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in France?

French legislation has applied the VAT Sixth Community Directive since 1 January 1979. Article 256, I of the FTC provides that the sale of goods, delivery of assets and the supply of services for payment by a taxpayer are subject to VAT. This extremely broad definition contains a certain number of exceptions which are set out in the FTC. However, some exempt transactions may be rendered taxable if the appropriate elections are made.

The standard rate is 20%. A reduced VAT rate of 10% applies to certain goods and services (agriculturally-based products, non-reimbursable medications, etc.) and a reduced VAT rate of 5% applies to basic necessities such as food products, etc. Nevertheless, a number of specific rates should be added to this list (newspapers, for example) as well as the various specific rates applicable in Corsica and the overseas territories.

3.5 Are there any anti-avoidance taxation provisions that apply to the offshore arrangements of persons who have become established in France?

There are numerous anti-avoidance taxation provisions in France. First, the concept of abnormal acts of management and the abuse of law theory (see question 3.6) empower the tax authorities to reassess transactions which are deemed artificial or having no purpose other than to reduce taxation. There are also specific anti-avoidance provisions that apply directly to offshore arrangements.

The CFC legislation provides that resident individuals who directly or indirectly own 10% more than a foreign entity established in a low tax jurisdiction are taxable on a *pro rata* share of the income realised by the foreign entity whether or not distributed. Moreover if the entity is located in a so-called non-cooperative state the 10% participation requirement is deemed to be met.

3.6 Is there any general anti-avoidance or anti-abuse rule to counteract tax advantages?

As a general rule, under the abuse of law theory, fictitious acts or acts which seek the benefit of the literal application of laws, that are contrary to the objectives intended by the Parliament, and that are exclusively tax-driven, are not binding on the tax authorities. Sham transactions, and real transactions of which the only motivation is to avoid or reduce the tax which would otherwise be due, are caught.

Nevertheless, when two legal solutions are possible every taxpayer has the right to choose the less heavily taxed option.

4 Taxation Issues on Inward Investment

4.1 What liabilities are there to direct taxes on the remittance of assets or funds into France?

A French resident is taxed on his worldwide income irrespective of whether or not the income is remitted in France. Remittance of assets or funds into France does not attract direct taxes *per se*.

4.2 What taxes are there on the importation of assets into France, including excise taxes?

Importation of assets into France gives rise to VAT. The current standard rate is 20%. Certain goods may also be subject to customs duties or excise duties when they are imported from outside the European Union.

4.3 Are there any particular tax issues in relation to the purchase of residential properties?

France places no restrictions on non-French residents acquiring French real estate property. From a tax standpoint it is essential to understand that using a legal entity, whether it is French (such as a SCI) or foreign (such as a Luxembourg Soparfi) and whether it is held absolutely or in trust, to hold a French property does not avoid French taxes. This is because French tax law applies a concept known as a "*société à prépondérance immobilière*" (real estate investment company) under which French and foreign companies which mainly own a real estate property in France are treated in the same way as the property itself.

Purchase tax

Whether the buyer is a French resident or not, the purchase of a residential property located in France is subject to transfer duties amounting to approximately 5.09% on the transfer price and related expenses. In addition, notaries' fees are payable, bringing the total rate to approximately 6%. The purchase of the shares of a company (whether French or foreign) owning French real property directly or indirectly with a value representing more than 50% of the total French assets of the company is also subject to transfer duties at the rate of 5%.

Inheritance/gift tax

As a general rule, whether a French real property is owned directly or via one or more companies, inheritance/gift taxes are payable in France even if the ultimate owner is non-resident.

Capital gains tax

A non-resident individual's capital gains on the sale of real estate are taxable in France when the property is located in France. When the gain is taxable the tax rate depends on the country of residence of the seller (see question 3.3).

Wealth tax

The concept of "*société à prépondérance immobilière*" also applies with regard to wealth tax. As a consequence, non-resident individuals owning French real property by means of several intermediate companies (French or foreign) remain subject to wealth tax in France.

The 3% annual tax

Although legal entities are not subject to wealth tax, all legal entities (i.e. both French and foreign) which directly or indirectly own real property in France are subject to an annual tax of 3% levied on the market value of the property. If there is a chain of ownership, the tax is only avoided if each company involved in the structure benefits from an exemption. If several companies in the chain do not benefit from an exemption, the 3% tax is only payable by the legal entity which is the nearest to the property which is not exempt. Under most circumstances, in order to avoid the 3% tax the ultimate beneficial owner should disclose his identity.

5 Succession Planning

5.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in France?

Succession to an intestate's movable property is governed by the law of the individual's domicile at the time of the death (see question 2.2).

There are two main forms of wills under French law:

- Holographic will: this must be handwritten by the testator but does not need to be witnessed. This is the most common type of will.
- Authentic will: this must be made in the presence of a notary ("*notaire*") and two witnesses.

As a general rule, French law permits a foreign person who is not domiciled in France to make a will under the law of any country, provided it is valid under the law of that country.

5.2 Are there particular rules that apply to real estate held in France or elsewhere?

Succession to an intestate's immovable property is governed by the law of the country where it is situated.

French courts never refer succession questions concerning immovable property situated in France back to the foreign national's home country.

6 Trusts and Foundations

6.1 Are trusts recognised in France?

The concept of trust is alien to the French Civil Code. French law has no doctrine of trusts. There is no distinction between legal and equitable ownership. Therefore, creating a trust under French law is impossible. The French *fiducie*, adopted in February 2007, is a very different institution and cannot be seen as an alternative structure to the common law trust, either conceptually or functionally.

Although it is not possible to create a trust under French law, French courts recognise the effects in France of common-law trusts, provided they comply with the mandatory rules of French law (see question 6.3).

6.2 If trusts are recognised in France, how are they taxed in France?

Up until the adoption of the law of 29th July 2011 (the New Law), France had no tax legislation dealing with the tax treatment of trusts in respect of gift and inheritance taxes as well as wealth tax. As a consequence, trusts benefited from a very favourable tax treatment in France.

However, to counter the exploitation of what were perceived as loopholes, the New Law introduced a comprehensive gift, inheritance and wealth tax regime for the taxation of trusts.

Income tax

The income tax treatment of trusts has been left unchanged by the New Law. French income tax generally is imposed only when distributions of income are made to French resident beneficiaries; therefore income generally may be accumulated in a trust without French income tax also being due.

Inheritance or gift tax

Under French law the transfer of assets into trust does not give rise to transfer taxes.

Since 31 July 2011, inheritance or gift tax applies either:

- at the time the trust assets are transferred to the beneficiaries; or
- on the death of the settlor (if earlier).

The beneficiaries are liable for the payment of gift or inheritance tax, which is assessed on the value of the trust assets at the time. The tax rate is determined in accordance with the relationship between the settlor and the beneficiary.

If it is not possible to ascertain the shares of the beneficiaries in the trust fund on the death of the settlor, the trustee and the beneficiaries are jointly liable for the payment of tax, at the rate of:

- 45%, if the class of beneficiaries only contains descendants of the settlor.
- 60%, if the class of beneficiaries contains non-descendants.

The 60% rate will always apply if the trust either:

- is governed by the law of other non cooperative states or territories; or
- was settled by a French resident after 11 May 2011.

Wealth tax

Since 1 January 2012, the settlor (or the beneficiaries treated as "deemed settlors") must pay French wealth tax on assets held in any kind of trust (including an irrevocable discretionary trust) if either:

- the settlor (or the beneficiary "deemed settlor") is a French resident; or
- the trust fund contains taxable French assets.

After the death of the settlor, the beneficiaries who become "deemed settlors" are subject to wealth tax.

A specific tax applicable to trusts is also being introduced, at the current rate of 1.5%. A catch-all provision provides that the trustee is liable for this tax jointly with the settlor and the beneficiaries if either the:

- Trust assets are not included in the settlor's or the beneficiaries' estates for wealth tax purposes.
- Trust assets have not been disclosed to the tax authorities when the settlor is not liable to wealth tax.

6.3 If trusts are recognised, how are trusts affected by succession and forced heirship rules in France?

A certain portion of the estate called the "reserve" is reserved for certain heirs under the so-called forced heirship rules. Any reserved heir may request the application of these rules in the event that they are infringed by a will or by the provisions of a trust. It is important to note that this rule only concerns real estate property situated in France and movable property where the settlor is domiciled in France at the time of death. Since the heirs may waive the application of the forced heirship rule, the mere existence of the reserve cannot make the existence of a trust invalid *per se* unless the only purpose of the trust was to defraud reserved heirs. As a general rule, in the event that a trust does not comply with the reserve, the penalty is a reduction of the assets held in trust for non-reserved heirs.

6.4 Are foundations recognised in France?

Foundations ("*fondations*") cannot be used in France for estate planning purposes and are controlled by a representative of the government. They only acquire legal personality and the right to receive gifts or legacies upon special authorisation, which can only be granted under very strict conditions and provided that the only purpose of the foundation is to promote public welfare. Foundations can only be set up for cultural, scientific or charitable purposes and cannot thus be considered as a substitute for trusts (except, to a limited extent, in the case of charitable trusts).

6.5 If foundations are recognised, how are they taxed in France?

As a general rule, a favourable tax regime applies to public utility foundations. Article 206-5 of the French Tax Code (FTC) provides that public utility foundations benefit from a corporate tax exemption in respect of their income deriving from non-profit activities.

Individuals making donations to public utility foundations and foundations under the aegis of a public utility foundation can deduct 60% of the contribution from their French income tax, up to 20% of the donor's taxable income.

6.6 If foundations are recognised, how are foundations affected by succession and forced heirship rules in France?

Private foundations are not recognised. Gifts to foreign foundations are subject to the rules governing forced heirship (see question 6.3).

7 Immigration Issues

7.1 What restrictions or qualifications does France impose for entry into the country?

In principle, foreign nationals entering and staying on French territory must be in possession of a valid entry and stay visa, unless exempt from this requirement. Visa exemption depends on the individual's nationality, the possession of a residence permit for France or a Schengen State, the duration of the stay and where on French territory the individual intends to stay.

Citizens from the EU and the EEA can live in France without requiring a work permit. As a general rule any non-EU national (over the age of 18) who wishes to stay in France for more than three months to work, study, or reside without employment must have a residence permit.

7.2 Does France have any investor and other special categories for entry?

In order to attract immigrants with special skills or education, the procedure to obtain a residence permit is simplified for certain categories, including executives working for multinationals, scientists and regulated professions.

7.3 What are the requirements in France in order to qualify for nationality?

French nationality is acquired by operation of law or by naturalisation. Anyone born anywhere of a French father or mother is French ("*jus sanguinis*"). Anyone born in France of unknown parents or to at least one foreign parent who is also born in France automatically acquires French nationality ("*double jus soli*"). Unlike the United States, one does not acquire French citizenship by virtue of birth in France only; residency must be proven. A child born in France from foreign parents may acquire French nationality under certain conditions. A person aged 18 and over may apply for French citizenship by naturalisation after five years' habitual and continuous residence in France. In addition it is required that the applicant has his or her primary source of income in France during the five-year period. The residence period may be waived or shortened under certain circumstances.

7.4 Are there any taxation implications in obtaining nationality in France?

There are no taxation implications in obtaining French nationality.

8 Taxation of Corporate Vehicles

8.1 What is the test for a corporation to be taxable in France?

Corporations are subject to French corporate tax on profits of any business carried out in France, irrespective of whether or not they are registered in France.

8.2 How are branches of foreign corporations taxed in France?

In addition to corporation tax, French branches of foreign corporations are also subject to a 30% branch tax. This tax is not due by French branches of EU corporations or when it is waived by a tax treaty.

9 Tax Treaties

9.1 Has France entered into income tax and capital gains tax treaties and, if so, what is their impact?

France has entered into income tax and capital gains tax treaties with more than 130 countries. Although as a general rule their main objective is to avoid double taxation, the more recent treaties also aim to prevent tax evasion through the exchange of information and to provide for mutual assistance in the collection of taxes.

9.2 Do the income tax and capital gains tax treaties generally follow the OECD or another model?

The vast majority of the tax treaties follow the OECD model.

9.3 Has France entered into estate and gift tax treaties and, if so, what is their impact?

France has signed 35 estate tax treaties which seek to prevent double taxation, but only seven of which also concern gift tax.

When a tax treaty applies, it defines each state's entitlement to tax by reference to the deceased's residence as well as providing the means for avoiding double taxation.

One of the general principles of the estate and gift tax treaties is that the country in which the donor or decedent was domiciled may tax the estate or gifts of that individual on a worldwide basis but must credit tax paid in the other country with respect to certain types of property located in such other country.

There are, however, a number of exceptions to the premise that the country of domicile will be the main taxing country. One of the main exceptions relates to real property which may be taxed in the country where it is located. It should be noted that this is a primary taxing right, but not always an exclusive one. Thus, for example, the protocol signed on 8 December 2004 between France and the USA allows the USA to tax the transfer of French real property.

Moreover, the same protocol specifically includes in the definition of "real property", shares and other rights in a company or legal person the assets of which consist directly or indirectly for at least 50% of real property situated in one of the treaty countries.

9.4 Do the estate or gift tax treaties generally follow the OECD or another model?

These treaties generally follow the OECD model, with a few exceptions in respect to older treaties.

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Jean-Marc Tirard is one of the founding partners of Tirard, Naudin. He is recognised as an authority in French and international tax law and has considerable experience in tax and estate planning for French and foreign high-net-worth individuals; he has published many articles and books on these subjects, both in French and in English. Mr. Tirard is the co-founder of the French branch of STEP as well as chairman of the Tax Commission of the French Committee of the International Chamber of Commerce and co-chairman of the International Tax Committee of the same organisation. He is a member of the International Academy of Estate and Trust Law and a Fellow of the American College of Trust and Estate Counsel. He is rated as one of the leading tax and private client French lawyers in various surveys (Euromoney, International Tax Review, Chambers, Who's Who Legal, etc.) and was named Outstanding European Individual of the Year by the Citywealth Magic Circle Awards 2009.

TIRARD, NAUDIN
SOCIÉTÉ D'AVOCATS

Tirard, Naudin is a highly reputed Paris-based boutique law firm that specialises in international tax and estate planning (including trusts), tax representation and litigation in all aspects of French taxation with a particular emphasis on international tax issues. The firm's experience in the trust field is virtually unique in France. Its client base includes corporate clients, who come both for its special expertise in negotiating with the French tax authorities and for its experience of structuring international transactions. It also acts for high-net-worth private clients and their families who need help in resolving complex tax and inheritance issues. In addition, it has considerable expertise in property tax issues and the creation of efficient structures for non-resident investors. Many of the firm's clients are referred by leading law and accounting firms and other professional organisations worldwide, and it also acts regularly as "lawyer's lawyers", providing specialist support for other firms and their clients.

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