When is tax planning becoming aggressive in France?

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Abstract

Based on the adage '*Fraus omnia corrumpit*' and shaped by the French Courts and Legislator for more than 150 years, the abuse of law doctrine applies to all taxes against all taxpayers in respect of domestic and international tax planning. It allows the French Tax Authorities to sanction tax planning qualified as aggressive in disregarding any legal arrangement and raising taxes when the transaction is either considered to be artificial, fictitious or simulated, or purely tax motivated and the taxpayer obtained an improper tax benefit by a literal application of the relevant tax rules while disregarding the spirit of such rules.

Introduction

The ambit of this article is to try answering the question 'When is tax planning becoming aggressive in France?'. It should be placed in the context of the discussions, which occurred during the session of The International Academy of Trust and Estate Law in Lisbon on 26 May 2018, comparing the situation in Civil Law and Common Law countries.

When is tax planning becoming aggressive? A comparison between civil law and common law countries

As a preliminary remark, the subject of our discussions in Lisbon was not to identify the difference between tax avoidance and tax evasion.

In a nutshell, tax evasion is escaping the payment of taxes due by breaking the letter of the law. The difficulty is that avoiding the payment of taxes, without breaking the law, does not necessarily mean that it is considered as 'acceptable tax planning'.

All democratic countries agree that nobody should pay more taxes than pre-existing law provides for a taxable transaction. This view has been shared by the national courts of various countries. For example, in the case of *Gregory v Helvering* (1934),[1] the US Court of Appeal stated that:

> Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the treasury; there is not even a patriotic duty to one's taxes.

In other words, paying taxes is a legal duty prescribed by law. It is not something required based on morality

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1. *Helvering v. Gregory US Courts of Appeals* (2nd Cir 1934) 19 March 1934, no 324; 69 F 2d 809.

doi:10.1093/tandt/tty163
Advance Access publication 4 December 2018

of fairness. The *Cour de Cassation* (French Supreme Civil Court) made the same affirmation in 1854.[2]

As a consequence, tax planning is and should be legal. Having said that, tax planning might still be problematic when it is considered as being 'abusive' or 'aggressive'.

France was the precursor in the field of challenging legal operations that are aimed to avoid taxes (see section 1). This is not so surprising in the country of the enlightenment, where 'the Spirit of Laws' was developed in 1748 by Montesquieu![3]

However, the so-called 'aggressive tax planning' has recently become a key issue in many jurisdictions, as well as in the international tax agenda.

Our topic in Lisbon was trying to find out when tax planning for individuals is deemed to become aggressive and under what circumstances tax authorities have the power to challenge reduction of taxes as a result of perfectly legal actions of the taxpayer.

We selected three Civil Law countries (France, Germany, and Switzerland), which use the doctrine of 'abuse of law', and three Common Law countries (Australia, Canada, and the USA), which know either General Anti-Avoidance Rules (GAAR) or judicial anti-avoidance rules.

We compared the civil law doctrines of abuse of law with GAAR used in the six countries represented, discussing under what circumstances they apply, what are their common denominators, what are the consequences of their successful application, what are the rules protecting the taxpayers, and should aggressive tax planning arrangements be reported. The answers to these various questions relating to France are developed below. We also illustrated our discussion by several practical examples and topic case laws.

We finally came to the conclusion that, despite the different approach in Civil Law and in Common Law countries, regarding aggressive tax planning, one may no longer affirm that 'What is not forbidden is permitted!'

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Introduction

In France, as in many other countries of Civil Law and Common Law tradition,[4] the main issue in respect of tax planning is no longer drawing the line between tax avoidance and tax evasion. The latter is a criminal offence which will not be dealt with in this article.

As a general rule, it is easy to identify whether or not an arrangement is contrary to the black letter of the law and is, then, obviously illegal. It is much more difficult to identify when the red line between legitimate tax planning and the so-called 'abusive' or 'aggressive' tax planning is crossed.

In France, this is the case when an 'abuse of law' is deemed to occur. The doctrine, which was developed by case law before becoming a statutory provision in the tax code, has been applied by the French tax authorities for a long time although recently much more frequently.

The abuse of law procedure is a GAAR, which covers all taxes and may apply to both corporate and individual, in respect of domestic as well as international tax planning.

As rightly described by Professor Maurice Cozian, in 1996:

> the abuse of law is the punishment of highly gifted tax advisors. Even if they do not violate the law as opposed to vulgar tax fraudsters... abuse of law is a sin not against the black letter, but against the spirit of the law.[5]

2. Cass civ 24 April 1854, D 1854, I, 157.
3. 'De l'esprit des Loix' Montesquieu, published for the first time in October 1748 in Geneva, after 14 years of preparation.
4. L'abus de droit en droit comparé, Jean-Marc Tirard, Etudes à la mémoire du Professeur Maurice Cozian 2009.
5. L'abus de droit est le châtiment des surdoués de la fiscalité. Bien évidemment ils ne violent aucune prescription de la loi ; en cela ils se distinguent des vulgaires fraudeurs... L'abus de droit est un péché non contre la lettre, mais contre l'esprit de la loi.
Les grands principes de la fiscalité des entreprises, 1996, Litec, troisième édition, 21.

The present article based on the report prepared for the 2018 meeting of the Academy in Lisbon, specifically covers the application of the catch-all abuse of law legislation in the context of individual tax planning. It does not cover the plethora of targeted anti-avoidance provisions (eg interest limitation and thin capitalization rules, CFC rules, 'anti-rent a star' scheme...), which limit tax planning opportunities for individuals with French connections when the conditions of their application are met.

The French abuse of law procedure is a sword of Damocles that is hanging over the (too) creative tax planners' heads. It is then essential for anybody involved in French tax planning to understand under which circumstances the relevant procedure might be applied successfully by the French tax authorities, what are the consequences when this happens and what are the rules protecting the taxpayer.

Historical development

The doctrine of abuse of law developed by case law is a legal concept that imposes sanctions upon the use of a right when that use exceeds the limits of its reasonable use and enforcement.

This is a judicial creation issued for the first time during the 19th century by the '*Cour de Cassation*' (the French Supreme Civil Court) which was later taken over by the '*Conseil d'Etat*' (the French Supreme Administrative Court). The *Legrand* decision of the '*Cour de Cassation*' in 1867[6] relating to registration duties was based on fundamental principles and, among others, the adage '*Fraus omnia corrumpit*'.

Beginning with the *Clément Bayard* case in 1915,[7] the abuse of law doctrine was developed during the 20th century. In the case at hand, the French Cour de Cassation ruled that the right of ownership cannot be used maliciously.

In tax matters, the abuse of law doctrine was initially developed by case law since 1867, and was first enacted as a statutory provision in 1925, in relation to transfer taxes, and then, in 1941, in relation to income tax. It was subsequently codified in 1963 in Article 1649 quinquies B of the *Code Général des Impôts* (French tax code) and then transferred in 1983, in Article L 64 of the *Livre des procédures fiscales* (French tax procedure code).

As a general rule, French taxpayers are free to organize their activities and structure their transactions as they wish (the freedom of choice principle). However, such a freedom is subject to limitations (see below) on the ground of '*abus de droit*'. For a long time, courts have denied legal effects to transactions on the grounds of abuse of law, only if they were artificial or 'fictitious' (ie a sham).

However, in 1981, the *Conseil d'Etat* (Supreme Administrative Court) ruled that a transaction is abusive when the arrangement under review is fictitious, but also, when it cannot be justified by any reason other than the exclusive and intentional purpose of reducing or avoiding tax (12 June 1981 case).[8]

Further to a leading case of 27 September 2006 ('*Janfin*'),[9] Article L64 of the LPF was redrafted along the line of the wording of the case in order to improve legal certainty. It now provides that:

> In order to restore their true character, the tax authorities have the right to ignore, as not binding, acts which constitute an abuse of law, either because these acts are **fictitious** or because **seeking the benefit of a literal application of the law** or decisions contrary to the objectives of their authors, they cannot have been inspired by **any other motivation than avoiding or reducing the tax burden** that the person would have normally borne in view of his/her situation or his/her real activities.[10] (emphasis added)

6. Cass civ 20 August 1867, Legrand, DP 1871, 1, 337.
7. Cass Req 3 August 1915, Coquerel c/Clément Bayard, DP 1917, 1, 79.
8. CE, plén Fisc 10 June 1981, no 19079, Dr Fis, 1981, no 48-49; RJF9/1981 no 787.
9. CE, 27 September 2006, sté Janfin, n°260050 : RJF 5/06 n°648.
10. Afin d'en restituer le véritable caractère, l'administration est en droit d'écarter comme ne lui étant pas opposable, les actes constitutifs d'un abus de droit, soit que ces actes ont un caractère fictif, soit que, recherchant le bénéfice d'une application littérale des textes ou des décisions à l'encontre des objectifs poursuivis par leurs auteurs, ils n'ont pu être inspirés par aucun autre motif que celui d'éluder ou d'atténuer les charges fiscales que l'intéressé, si ces actes n'avaient pas été passés ou réalisés, aurait normalement supportées eu égard à sa situation ou à ses activités réelles.

In other words, France anticipated 10 years ago what was going to become the European Commission definition of aggressive tax planning, namely:

> aggressive tax planning consists in taxpayers reducing their tax liability through arrangements that may be legal but are in contradiction with the intent of the law.

Under what circumstances is French abuse of law applicable?

Article L64 of the LPF allows the French tax authorities to challenge any legal arrangement and to raise the taxes which would have been due in the absence of such an abuse in two types of situations:

i. The transaction is considered to be 'artificial', fictitious, or 'simulated' ie is a sham.
   In other words, it consists of dressing up an arrangement so that it appears to be something else (eg a gift taxable at 60 per cent is disguised into a sale never to be paid but taxable at 6 per cent) and/or
ii. Although the transaction is genuine, it is purely tax motivated and the taxpayer has obtained an improper tax benefit by a literal application of the relevant tax rules while disregarding the spirit of such rules.

It is interesting to note that, as opposed to the situation in some other jurisdictions and to the OECD 'Principal Purpose Test', the French statutory definition of abuse of law applies a sole purpose test which should be more protective of the taxpayers' interests.

Although the French tax authorities tried in 2014 to enlarge the scope of the abuse of law procedure by replacing the sole tax purpose test by a principal purpose test, this attempt was invalidated by the '*Conseil Constitutionnel*' (Constitutional Court) on the grounds that the proposed new test would have provided the French Tax Authorities with too much discretion, contrary to the constitutional principle of legality of offences.[11]

On the other hand, experience shows that in practice, the French Courts tend not to apply the 'sole purpose test' too strictly and tend to accept that a transaction may still be disregarded by the French Tax Authorities and driven by a tax motive, but only when the non-tax reasons alleged by the taxpayer are negligible (see eg the *Garnier Choiseul* case of 17 July 2013[12]).

What are the consequences of a successful application of Article L 64 LPF?

In addition to the payment of the avoided tax and the interest for late payment (4.8 per cent per year up until 31 December 2017, currently 2.4 per cent),[13] the taxpayer is subject to a special penalty of 80 per cent of the amount of the tax if he was primarily responsible for initiating the abusive transaction or was its main beneficiary. Otherwise, the additional penalty is reduced to 40 per cent if the relevant transaction has not been performed on the main initiative of the taxpayer or if the latter was the main beneficiary of the transaction. The French Tax Authorities have the burden of proving that the 80 per cent penalty is due.[14]

It has also become more and more frequent for the French Tax Authorities to consider that a transaction characterized as an abuse of law also constitutes a criminal offence ('*fraude fiscale*') giving rise to penal sanctions.

What are the rules protecting the taxpayer?

Under Article L64 B of LPF, a taxpayer can request that the French Tax Authorities confirm that a contemplated transaction will not be treated as an abuse

11. Conseil Constitutionnel DC, 29 December 2013, no 2013-685.
12. CE, 17 July 2013, no 352989, SARL Garnier Choiseul Holding.
13. art 1727 III of the FTC.
14. art 1729 b of the FTC.

of law. The taxpayer should provide the French Tax Authorities with all the relevant information necessary to assess the potentially abusive nature of the transaction. If the French Tax Authorities do not reply within 6 months, then the abuse of law procedure will not apply. This specific procedure is very rarely used.

As opposed to the situation in some other jurisdictions, in France, if the French Tax Authorities consider that there is an abuse of law, the fact that the taxpayer has relied on a legal opinion does not provide protection against the application of the abovementioned penalties.

In case of litigation in relation to an alleged abuse of law, the key issue is the burden of proof. As a protective measure for the taxpayer, a reassessment on such a ground is subject to a specific procedure.[15] In the absence of agreement between the taxpayer and the French Tax Authorities, each of them may require the opinion of a special committee dealing only with abuse of law issues.[16]

The '*Comité de l'abus de droit fiscal*' (the Committee) is an independent body whose role is to issue non-binding advisory opinions in respect of tax reassessments made on the ground of abuse of law. The Committee does not have any French Tax Authorities representatives, but has, in addition to judges, a tax professor, an '*avocat*', a '*notaire*', and a CPA.

The opinions issued by the committee are not binding but are in practice very influential on tax courts (see Appendix Tables A1 and A2). Neither the French Tax Authorities nor the taxpayers are precluded from continuing litigating their case before the relevant tax court. However, the Committee's opinion shifts the burden of the proof, which is very important in practice due to the somewhat subjective nature of what is or is not an abuse of law. If the committee sides with the French Tax Authorities, then it is for the taxpayer to convince the courts that the relevant transaction is not constitutive as an abuse of law and vice versa.

Recent key cases of interest

The French Tax Authorities challenge transactions on the ground of abuse of law both in respect of domestic tax planning and international tax planning.

Abuses of law in respect of domestic tax planning

The abuse of law doctrine may be used by the French Tax Authorities when taxes (all taxes due either by corporations, corporate bodies or individuals) are avoided, partially or in full, and/or postponed.

You will find below the most interesting recent decisions given by the Committee or cases ruled by the French Supreme Courts in relation to taxes due by individuals.

Cases eluding gift and inheritance taxes are very frequently challenged by the French Tax Authorities followed by those avoiding capital gains tax for individuals as illustrated in Appendix Tables A1 and A2.

Abuses of law in respect to gift and or inheritance tax

- Donations disguised as sales

While donations are subject to gift tax at rates amounting to 60 per cent between unrelated persons, transfer duties at the rate of approximately 6.5 per cent are due on sales of real estate. It explains why one may prefer selling than gifting.

The intention of the seller, his/her situation (age, health, and wealth), those of the purchaser, as well as the modalities of the sale are taken into consideration by the committee and the Supreme Civil Court to qualify the existence of an abuse of law.

The Supreme Civil Court traditionally qualifies the existence of an abuse of law when the sale price is not paid by the purchaser[17] (generally younger than the seller). The health of the seller, the delay between the sale and the seller's death, as well as the importance

15. arts R 64-1 and R 64-2 of LPF.
16. art L64 of LPF.
17. Cass Com 8 February 2017, no 15-23.043 F-D.

of the seller's wealth compared with those of the purchaser are also taken into consideration by the Supreme Civil Court.

- Life insurance policies avoiding inheritance tax

Subscribing to a life insurance policy may allow avoiding inheritance tax under certain circumstances. A decision rendered by Administrative Appeal Court of Douai states that subscribing to life insurance policies representing 77.50 per cent of the wealth the first day of hospitalization a few days before death should be seen as constitutive of an abuse of law.[18]

- Donations disguised as loans

A free interest loan granted by a 99-year-old lender to his son has been considered as a disguised gift[19] by the Supreme Civil Court. In the present case, the Supreme Civil Court looked at the arrangements between the father and his son and considered the obligation to refund the loan as random.

Abuses of law in respect to capital gains tax

- Donation of shares before their sale to a third party

In order to avoid capital gains tax, one may expect to gift the shares to the children before selling them to a third party.

If the donation is fictitious because the donor does not intend to gift the shares, then the operation may be seen as an abuse of law. It has been qualified by the French Supreme Administrative Court as when the sale price has been apprehended by the donor.[20]

- Contribution of shares followed by their sale

In order to avoid capital gains tax, a taxpayer may contribute the shares to an intermediate company benefiting from a capital gains tax exemption, before selling them to a third party.

The Supreme Administrative Court ruled that these operations of contributing the shares before their sale should be qualified as an abuse of law when the sale price is not reinvested in another economic activity.[21]

The committee considered that reinvesting within 3 years following the sale justifies the absence of abuse of law[22] and that the absence of reinvestment during this period may be justified under certain circumstances.[23]

Numerous advisory opinions of the committee and case laws discuss whether or not contributions of shares followed by their sale should be seen as constitutive of an abuse of law.

Finally, the law has been modified. The contribution of shares followed by their sale within 3 years without subsequent reinvestment is as a general rule a taxable event for the contributor, regardless of his/her intention and the circumstances of the operations.

Abuses of law in respect to wealth tax

There are few decisions regarding the existence of an abuse of law aimed at avoiding wealth tax. One of them is a perfect transition to the next section dealing with abuses of law in respect of international planning.

A non-resident of France owning the usufruct of French company's shares was subject to wealth tax. In order to avoid it, these shares were contributed to a Dutch holding company. The committee considered that due to the lack of substance and the artificiality of the ownership structure, it was constitutive of an abuse of law.[24]

18. CA Douai 29 September 2003, no 02-2777.
19. Cass Com 8 February 2017, no 15-21.366 F-D.
20. CE 14 October 2015, no 374440; CE 5 February 2018, 409718.
21. CE 27 July 2012, no 327295, 10ème et 9ème S-s, Berjot.
22. Avis du Comité d'Abus de droit 2015-16.
23. Avis du Comité d'Abus de droit 2015-23 and 2017-06.
24. Avis du Comité de l'abus de droit, no 2013-06.

Abuses of law in respect of international tax planning

The French Tax Authorities are also applying the abuse of law concept in relation to international tax planning, particularly in order to defeat treaty shopping, as the two following examples show.

Min c/Sté Bank of Scotland CE, 29 December 2006.[25]

Although this ruling of the Supreme Administrative Court does not concern individual tax planning, it is worth mentioning as it illuminates the circumstances in which the French Tax Authorities consider a cross border arrangement to be abusive.

In this case, the Supreme Administrative Court looked at a financial arrangement between a British bank and a US company. The bank bought the usufruct of shares without voting rights of the French subsidiary of the US parent company. Subsequently, the French company distributed dividends to the bank, which immediately requested a refund of the French withholding tax as well as the transfer of the '*avoir fiscal*' (tax credit). The French Tax Authorities rejected the bank's claim on the grounds that the beneficial owner of the shares was not the bank but the US parent company. The Supreme Administrative Court agreed with the French Tax Authorities to disregard the arrangement as an abuse of law on the ground that the usufruct arrangement was motivated solely by the aim of benefiting from the transfer of the '*avoir fiscal*', which was available under the France–UK tax treaty but not under the France–US tax treaty.

Min c/Mr Verdannet (CE, 25 October 2017).[26]

This is another good example of when an international tax planning scheme is considered to be aggressive and disregarded by the French Tax Authorities and the Supreme Administrative Court as being constitutive of an abuse of law.

This recent case concerns an individual who signed an agreement in his personal name to buy a real-estate property in the French Alps. Shortly after, he incorporated a Luxembourg company, which was substituted as the buyer. A couple of years after the purchase, the Luxembourg company sold the property, making a significant profit. Capital gains tax was not due in France under the provisions of the tax treaty between France and Luxembourg, with no tax being due in Luxembourg either. The French Tax Authorities set aside the substitution of the Luxembourg company on the basis that its only '*raison d'être*' was for the individual to avoid French capital gains tax. The Supreme Administrative Court upheld the tax assessment on the basis that under the circumstances, the Luxembourg company had indeed no other reason for being involved in the transaction than to enable the taxpayer to avoid the capital gain to be taxed. Concerning the issue of whether or not the double non-taxation resulting from the literal application of the France–Luxembourg tax treaty then in force was against its spirit, the Supreme Administrative Court did not go further than asserting that it was obvious that this could not possibly have been the intent of the treaty's negotiators!

Interposition of foreign companies in order to avoid capital gains tax

An Italian citizen resident in Monaco was a former French resident exercising her activity as a real-estate broker in France. She set up four companies registered, respectively, in France, Luxembourg, Denmark, and the UK, which purchased four flats located in Cannes. The four flats were sold soon after their acquisition. These sales were not taxable either in France, Luxembourg, Denmark, or the UK by application of the tax treaties, respectively, signed by France with Luxembourg, Denmark, and the UK. The committee[27] considered that the abuse of law was

25. CE, 29 December 2006, no 283314, Ste Bank of Scotland.
26. CE plén fisc 25 October 2017, no 396954, Cts Verdannet.
27. Avis du Comité de l'Abus de droit 2016-53.

qualified in the case at hand, as the use of the four companies was artificial and that the Contracting States in signing the tax treaties have no intention to allow avoiding taxes in all countries.

The French tax authorities (FTA) do not only challenge the abuse of tax treaty, but they are also applying the abuse of law doctrine in relation to the constitution of foreign trusts:

DRESG/Eugenie L[28]

A UK resident gifted the shares of a Luxembourg company holding a French company to his wife. Immediately after the gift, she transferred the shares of the Luxembourg company to irrevocable and discretionary trusts. The French Tax Authorities used the abuse of law doctrine considering the operations as artificial and motivated only to avoid French gift tax that is due when the shares of a French company are gifted between spouses.

However, the Administrative Court of Paris confirmed among other considerations that the constitution of a trust which is motivated by estate planning considerations cannot be seen as an abuse of law having for sole motive the avoidance of gift/inheritance taxes, despite the favourable tax treatment it implies.

Requirements to report aggressive tax planning arrangements

Such a requirement currently does not apply in France. This is because in 2013, the Constitutional Court[29] struck down a proposal for intermediaries to report tax optimization schemes to the French Tax Authorities, on the ground that this would have restricted the freedom of enterprise as resulting from Article 4 of the 1789 Declaration of Human and Civil Rights and especially those of tax advisors.

Conclusion

Although France recognizes the freedom for the taxpayer to '*choose the less taxed way*', this right is not without limits. Respecting the letter of a statute is not sufficient. A transaction will be disregarded not only if it is artificial, but also in the case of lack of substance and/or if it does not comply with the spirit of the relevant rules. As a consequence, tax planning in France should be contemplated and implemented with great care. Any structure, eg French or foreign company, involved in a transaction should have both legal and economic substance. Likewise, any arrangement should have other sufficient reasons for its implementation other than achieving a tax benefit.

It should also be noted that few significant changes, if any, will affect the French limits in respect of international individual tax planning as a result of the implementation of the EU 'ATAD' Directive and the OECD anti-BEPS package. First, these measures do not apply to individual taxpayers. Moreover, they only concern income tax treaties and no other taxes, which are also subject to Article L 64 of LPF. Lastly, French case law is already consistent with action 6 of the OECD anti-BEPS package that proposes introducing, in income tax treaties, as a minimum standard, a provision aimed at the elimination of double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

28. CAA Paris 19 March 2018, no 16/09096.
29. DC, 29 December 2013, no 2013-685

Appendix

Table A1 Abuse of law cases (submitted to the abuse of law committee)

Taxes	Year	Cases examined	Advisory opinion favourable to the: FTA	Taxpayer
	2017	3	2	1
Gift and	2016	4	4	0
inheritance tax	2015	3	0	3
	2014	2	1	1
	2013	3	3	0
Income tax	2017	35	15	20
	2016	39	29	10
	2015	11	9	2
	2014	24	11	13
	2013	32	16	16
	2017	5	2	3
Corporation tax	2016	6	3	3
Withholding tax	2015	2	0	2
	2014	8	8	0
	2013	7	6	1
Wealth tax	2014	2	1	1
	2013	1	0	1

Table A2 Abuse of law cases (submitted to the abuse of law committee)

Year	Cases		Advisory opinion favourable to the:	
	Received	Examined	FTA	Taxpayer
2008	30	30	19	11
2009	15	18	13	5
2010	18	14	7	8
2011	21	18	12	6
2012	52	55	40	15
2013	54	43	25	18
2014	38	37	21	16
2015	25	18	10	8
2016	58	49	36	13
2017	44	43	19	24

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