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France: Trends & Developments
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Trends and Developments

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How to Acquire a Property in France When Not a Resident of the Country: Practical Advice for Choosing the Most Suitable Holding Structure

Who hasn't dreamed of acquiring a pied-à-terre in Paris, a house in Provence, a chalet in the Alps or a vineyard in the Rhône Valley?

A successful acquisition involves not only finding your little corner of paradise, but also carefully finding the most appropriate holding structure.

This article aims to present some golden rules in legal and tax matters that should always be kept in mind before acquiring a property located in France.

*The **modus operandi** of a property acquisition in France*

In France, in contrast to a number of other countries, there is no standard solution for the acquisition of real property. In particular, the terms of acquisition are different depending on whether the property is sold or the shares of a company owning it are sold.

Acquiring the French property in your own name

Buying a property located in France is quite simple, and any person who is not a resident of France can acquire a French real property without any prior authorisation.

I) The letter of intent (*la lettre d'intention*):

Once the property has been identified, whether it is a piece of land, an apartment or a house, a letter of intent is usually sent by the potential purchaser to the real estate agent. It briefly

mentions the identified property, its proposed purchase price and – possibly – the essential conditions on which the potential buyer wishes to purchase.

II) The promise/agreement to sell (*la promesse/le compromis de vente*)

If a preliminary agreement is reached between the buyer and the seller, usually through a real estate agent, a unilateral promise to sell (or sometimes a bilateral agreement to sell) is negotiated between the parties and then signed. This document is already binding on the seller who is obliged to sell.

The buyer always still has the option not to buy, even if all the condition precedents are fulfilled, but they will lose the amount (*indemnité d'immobilisation*) that they will have paid when the promise was signed. This first document signed between the seller and the potential purchaser must therefore be negotiated with great care. The conditions precedent, in particular those benefiting one and/or the other party, must be drafted in a precise manner.

Indeed, after a period of two months after the signature of the promise, as a general rule, once all the conditions precedent have been fulfilled, a deed of acquisition is signed before one of the French *notaires* who have the monopoly of the conveyancing process.

III) The notarised deed of acquisition

It is through this notarised deed that the transfer of ownership of the real estate property is legally implemented. Because the transfer of

ownership gives rise to transfer duties (*droits d'enregistrement*), it is essential to identify at the outset the appropriate holding structure of the real estate property, in order to avoid any additional costs in case of a subsequent restructuring.

As a general rule, the structure should be set up between the signature of the promise to sell and the notarised deed of acquisition.

Acquiring the shares of a company owning the French real property

Assuming the shares of a company (French or foreign) owning the French real estate are transferred, the seller and purchaser sign an agreement which does not need the intervention of a *notaire*.

At the risk of stating the obvious, it is strongly recommended that buyers verify that the company sold is the legal owner of the real estate located in France. It is also advisable to have an audit carried out in order to identify the existing and latent liabilities of the company that will be taken over by the buyer as a result of the acquisition of the company shares (beware of the skeleton in the cupboard).

It is also recommended that a warranty clause be negotiated very carefully and that it be enforceable and easily implemented if necessary.

If it is signed in France, the purchase agreement should be reported to the French tax authorities and transfer duties paid by any one of the parties within 30 days following the signature.

If it is signed outside of France the purchase agreement should be reiterated before a French *notaire*, within 30 days following its signature. It is then for the *notaire* to levy transfer duties.

How to choose the appropriate holding structure

In order to choose the appropriate holding structure, certain fundamental principles as well as the facts of each particular case must be taken into consideration.

The fundamental principles to be taken into consideration when choosing the ownership structure

These principles arise from the international nature of the acquisition of a French property by a non-French resident. Although they may seem obvious, experience shows that they are often forgotten in the euphoria of the discovery of one's slice of heaven.

I) There is no standard holding structure that can be universally used to acquire a real estate property located in France

Indeed, it is necessary to identify, on a case-by-case basis, the most suitable holding structure according to the facts of each acquisition as enumerated in the lists of the factual elements to be taken into consideration below.

This is both a disadvantage and an opportunity.

A very simple structure can be used for straightforward transactions involving an individual buying real estate of average value for their own personal use.

On the other hand, in the case of complex families (eg, with children from different marriages) or in the event of the acquisition of an exceptional property, imaginative solutions can be identified, even articulating, if necessary, legal instruments of French law and those of common law.

In any case, it is advisable not to keep already existing structures, without checking that they

are adapted to the particular circumstances and the objectives of the buyer.

II) It is necessary to ensure that the French legal instruments to be used to hold the property located in France do not entail negative consequences in the purchaser's country of residence

The French *société civile immobilière* ("SCI"), whose sole purpose is the ownership of real properties, benefits as a general rule from tax transparency, which makes it a very efficient instrument to hold a property, especially if the purchaser resides in France. On the other hand, the fact that the SCI has a legal personality may entail significant drawbacks in the country where the buyer is resident.

In other words, it is necessary to identify a holding structure that is effective both in France and in the purchaser's country of residence.

III) Never use a structure that operates in your country of residence to acquire a property located in France

Each state being sovereign, the legal and fiscal regime of the potential buyer's country of residence is necessarily different from that of France.

First of all, France is a civil law country. Common law concepts are therefore not applicable there. Consequently, a structure traditionally used to acquire a property in the USA, the UK or any other country will not necessarily be effective when acquiring a property located in France.

On the other hand, the use of estate planning instruments not known to the French legal system, as well as their combination with certain French concepts, can prove to be very efficient in certain cases.

IV) A trust can be used to hold an interposed company that acquires the property

Although in France a distinction is made between bare ownership and usufruct, the ownership of a property is absolute. It is not divided between legal ownership and economic ownership.

Therefore, a trust cannot be the direct owner of real estate because the legal ownership held by the trustee and the economic ownership owned by the beneficiaries cannot be properly registered in the land register after the notarial deed of acquisition has been signed.

Nevertheless, the effects of the trust are recognised by the French courts. Consequently, a company with legal personality (French or foreign) must necessarily be used to acquire the French property, if the purchaser's wish, during their lifetime or at the time of their death, is to use a trust.

V) Any change in the ownership structure generally triggers capital gains tax and registration fees

When a property has been acquired by a non-resident individual in their own name, the interposition, during the holding period, of a company between the original purchaser and the real estate property will, as a general rule, give rise to registration duties once again.

The potential capital gain generated upon this event is also taxable. As already said, it is therefore essential to select and set up the most suitable holding structure before the notarial deed is signed.

When it is necessary, for example, to hold the assets of a US person in a trust (in order for instance to avoid the probate procedure in the USA or for estate planning purposes), it may be

appropriate to acquire the real estate located in France through a company incorporated in France or abroad, depending on the circumstances.

Factual elements to be taken into consideration

The following are the main considerations that, in the authors' experience, should be looked at when determining the ownership structure of real estate property located in France.

I) Factual elements concerning the buyer

These include the following:

- What is their nationality and in particular are they considered as a US person?
- What is their country of residence? Do they intend to transfer their country of residence on one or more occasions during the period of ownership of the French property? Do they intend to transfer their residence to France?
- What is their marital status? Are they married? Bound by a marital agreement? Divorced? Widowed? Assuming they are married, what is their matrimonial regime?
- What are their wishes regarding the devolution of their worldwide assets and the real estate they plan to acquire in France?
- What are their projects regarding the property they plan to acquire? Renovate it or keep it as is? Use it with their family or rent it out or sell it in the near future?

II) Factual elements concerning the buyer's family

These include the following:

- Does the buyer have children (legitimate, adopted, natural, born out of wedlock)? Are they born of different unions?
- Are the children minors or adults?

- What is the children's country of residence? Do they intend to transfer their residence to another country? Do they plan to take up residence in France?
- Do any of the family members have a disability? What kind of disability?
- Are there any known or latent conflicts between family members?

III) Facts concerning the French property

These include the following:

- Is the property owned by a single buyer or several?
- Is it a building, a piece of land, a house or a flat?
- What is the market value of the property?
- Will the acquisition and renovation of the property be financed by loans?
- Will it be renovated or is it usable as-is?
- Will it be used by the buyer and their family or rented out (annually or seasonally)?
- Will it be kept for a long period or resold quickly or in the medium or long term?
- What is the worldwide wealth of the buyer and the importance of the property located in France?

Last but not least, the essential element to consider are the purchaser's wishes in the event of their death: do they wish the property to remain in the family or to be attributed to one or more designated persons?

All of these elements must be taken into consideration in order to identify the most appropriate holding structure. Of course, a certain number of compromises will have to be made because no structure is likely to fulfil all the objectives sought by the purchaser.

Hence the need for the purchaser to know some essential notions regarding the legal and

tax regime applicable in case of ownership of a real estate property located in France by a non-resident.

What a potential buyer needs to know about the French legal and tax environment

The legal regime applicable to real estate located in France

First of all, although a property can be owned by several persons in joint ownership (the French concept of *indivision*), it is often more appropriate to use a company whose share capital is divided among the owners.

The ownership of a property (or of shares in a company) can be divided into usufruct and bare ownership. This division can be very useful to prepare the transfer of the property to one's descendants.

Any French or foreign company can acquire a property located in France. The interposition of a company makes it possible to solve a certain number of practical problems at the time of the purchaser's death.

In such a case, it is essential to take particular care in drafting the company's articles of association so that they can organise the functioning of the company according to the purchaser's wishes, in particular if they envisage donating shares while keeping the control over the company and therefore over the property.

In addition to drafting the articles of association, it may also be recommended that our clients (usually members of a family) execute a shareholder's agreement.

French inheritance law, including forced heirship, is no longer necessarily applicable when the purchaser is not resident in France. Nevertheless, this principle is not absolute and it is advisable to question whether the rules of inheritance devo-

lution that may apply in France in favour of the heirs correspond to the wishes of the purchaser.

In any case, appropriate structuring makes it possible to set aside the application of French inheritance law and to limit the practical complexities entailed in international successions.

The tax treatment applicable to a property located in France

The French tax system may seem complex, particularly in view of the fact that all the steps to be taken with the tax authorities must be carried out in French! Nevertheless, once understood in their broad outlines, they are certainly singular but not necessarily more complicated than those applicable in other jurisdictions.

As a general observation, it should be noted that, unfortunately, French tax law no longer allows for substantial tax savings depending on the holding structure chosen.

The concept of a "real estate company" (*société à prépondérance immobilière*), for example, allows France to tax real estate located on its territory, in the hands of its ultimate non-resident owner, even if a complex chain of ownership is used with several companies incorporated abroad interposed between the non-resident purchaser and the property located in France.

In addition, France benefits from a very broad network of tax treaties signed with other states, although these treaties do not cover all taxes due in France. Whereas 130 treaties concern income and wealth tax, only 35 treaties apply to inheritance tax and only six concern gift tax.

The main taxes due in France in the case of real estate ownership are set out below.

I) Income tax on the rental income from the property

Income tax is levied when individual owners receive rents. The applicable tax regime will depend on whether the property is rented unfurnished or furnished.

Corporation tax is always due in respect of rental income received by a company. In particular, when a limited liability company is interposed in the holding structure and the property is made available to the shareholder for free, a theoretical rental income (corresponding to the estimated rent the company should have received) will therefore be added-back in the company's profits for corporation tax purposes.

II) Taxation of capital gains upon the sale of the real estate

Capital gains are taxed differently depending on whether they are realised by an individual or by an interposed company.

The sale of shares of companies qualifying as the aforementioned real estate companies (*sociétés à prépondérance immobilière*) are also subject to capital gains tax. Their taxation is similar but not identical to that of real estate properties.

In a nutshell, the longer the property or the shares of *sociétés à prépondérance immobilière* have been owned by an individual (in their own name), the lower the tax on capital gains (progressive tax rebates apply). A total exemption is granted after 30 years of ownership.

Conversely, the longer the property or the shares of *sociétés à prépondérance immobilière* have been indirectly held through a limited liability company, the higher the tax on capital gains (because, in substance, the annual amortisations booked throughout the past period are added-back to the amount of capital gain).

III) Wealth tax on real property (*Impôt sur la fortune Immobilière* – IFI)

IFI is due by the individual(s) who is/are the ultimate owner(s) of the property held in France. This tax is due, as a general rule, regardless of the ownership structure, as soon as the market value of the property or company shares held by the individual exceeds EUR1.3 million on 1 January of each year.

In principle, the loans financing the acquisition of the real property and the subsequent renovation/construction works carried out are deductible from the wealth tax basis. Some deduction limits are applicable in particular with regard to properties having a significant value.

IV) Gift and inheritance taxes

Subject to the application of tax treaties, gift and inheritance tax are due in respect of French real properties even when the donor/deceased and the donees/heirs are not residents of France. As a general rule, this is also true when the property is held through an intermediary company, by application of the concept of *sociétés à prépondérance immobilière* mentioned above.

*Tax transparency and reporting obligations:
How does France know the identity of the ultimate foreign resident owners of the holding structures owning real estate located in France?*

In order for the above tax regimes to be efficient, the French tax authorities have implemented two main measures which have proved to be so efficient that they have now been adopted by its neighbour states (eg, Spain and Portugal as long as the 3% tax is concerned, and the UK in relation to reporting obligations for the UK's connecting trusts). The main measures are the following.

I) The annual 3% tax on real property

* * *

The annual 3% tax is due, as a general rule, by any French or foreign company interposed in the ownership structure of a property located in France. As its name suggests it is due each year, and calculated on the market value of the underlying real estate, without any deduction for loans or other expenses.

This tax can, however, be avoided as long as each company involved in the ownership structure is not incorporated in a tax haven and reveals (or makes a commitment to reveal, upon request from the French tax authorities) the identity of its shareholders.

II) Reporting obligations of trustees

The fact that a trust governed by foreign law holds real estate located in France, through one or more French or foreign companies, creates a connection with France that requires the trustee to file both annual and event-based returns.

This will allow the French tax authorities to levy the IFI as well as estate and gift taxes when due in France, in the hands of the original settlor of the trust or in those of the beneficiaries “deemed settlors” (when the initial settlor passed away) in the same manner as if no trust had been used.

To conclude, although the French tax authorities can collect taxes due in respect of real estate located in France regardless of the holding structure used, the tax burden can be significantly reduced provided that the appropriate holding structure has been identified. It is also necessary to implement it, as mentioned above, before signing the deed of acquisition.

You now have all the ingredients to successfully acquire real estate in France. All that is missing is to find it. It is then the job of the purchaser’s French lawyer, working in close co-operation with professionals in the buyer’s country of residence, to identify the appropriate holding structure on a case-by-case basis. As already mentioned, beware of “standard solutions” when acquiring property in France.

Tirard Naudin is a highly regarded Paris-based boutique law firm co-founded in 1989 by Jean-Marc Tirard and Maryse Naudin, which 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 is managed by Ouri Belmin. 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. It has considerable expertise in property tax issues and the creation of efficient structures for non-resident investors. Tirard Naudin acts regularly as "lawyer's lawyers", providing specialist support for other firms and their clients.

AUTHORS



Maryse Naudin began her career in the tax department of one of the major accounting firms, where she was in charge of the real estate practice and the South-East Asia clientele,

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Ouri Belmin started his career working on corporate transactional matters and real estate issues for the Paris offices of UK law firms, before joining the financial services

department of one of the Big Four audit firms. After more than ten years of practice as a senior lawyer at Tirard Naudin, he is now the firm's managing partner. Ouri Belmin advises corporate clients on all French aspects of international taxation (restructuring, acquisitions, litigation). He also assists high net worth individuals in relation to their estate planning. He has been involved in numerous tax litigations and has an excellent knowledge of all stages and aspects of French tax procedure. Ouri Belmin is a member of the Union Internationale des Avocats (UIA) and the Institut des Avocats Conseils Fiscaux (IACF).

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