CAN THE SHARES OF COMPANIES OWNING FRENCH REAL ESTATE BE CATEGORIZED AS REAL ESTATE? SOME KEYS TO SOLVE THE RIDDLE

Authors
Xenia Lordkipanidze
Clement Pere

Tags
Capital Gains
France
Inheritance Tax
Immovable Property
Movable Property
Predominantly Real Estate
Wealth Tax

Xenia Lordkipanidze is a Partner in Overshield Avocats, Paris. She has extensive experience in international taxation of individuals in matters such as territoriality, tax treaties, income and wealth taxes, real estate tax, estate planning, transfers of residence, and exchanges of tax information. She also advises on asset reorganizations and represents clients in tax disputes.

Clement Pere is an Associate in the Tax Department of Overshield Avocats, Paris. His practice focuses on taxation of cross border transactions for individuals, including advance planning and representation of clients in tax disputes.

INTRODUCTION

"Why is a raven like a writing-desk?" the Mad Hatter asks Alice in a famous Lewis Carroll story.[1] "Why are shares of a company like a house?" is a question that French tax authorities (the "F.T.A.") and French administrative and civil judges have been attempting to answer for several years. It seems that no common solution has been reached thus far.

This article addresses case law in which various courts have attempted to characterize shares of stock in companies owning real estate as movable assets or as the equivalent of immovable assets for purposes of applying income tax and inheritance tax treaties between France and a treaty partner state.

BACKGROUND

French law is based on a common distinction between (i) natural or legal persons having legal rights and (ii) the subject matter to which those rights apply. In turn, the subject matter is divided between movable and immovable assets (sometimes referred to as "real estate" in this article), with no intermediate category.[2]

An immovable asset is a plot of land or a structure built on the land. Neither can be moved without being damaged or without damaging the land to which it is attached. Certain rights are also immovable due to their intrinsic link to immovable assets. An example would be real estate property rights, such as those embedded in a *usufruct* arrangement.

In comparison, a movable asset can be transported from one place to another or is intangible by its nature. The French Civil Code expressly includes shares of companies in the concept of movable assets, even where such companies own real estate.[3] Authors agree on the fact that such characterization covers shares of entities carrying on commercial activities and shares of entities that are merely civil (non-trading) companies. It is therefore clearly established under French civil law that company shares are categorized as intangible, movable assets that are separate and apart from the underlying assets that are owned.

This classification as movable or immovable property has significant tax implications. To illustrate, (i) the taxation of capital gains arising from the disposition of movable and immovable is different, (ii) the registration fees that may be due upon

1 Lewis Carroll, "Alice's Adventures in Wonderland," (1865).

2 Articles 516 et seq. of the French Civil Code.

3 Article 529 of the French Civil Code.

the purchase of real estate rather than shares is different, and (iii) the character of the asset as movable or immovable impacts on the imposition of French taxes of nonresidents, as capital gains realized by nonresidents generally are not taxed in France (subject to some exceptions), while real estate capital gains of nonresidents are taxed.

TAX CONCEPT OF A PREDOMINANTLY REAL ESTATE COMPANY

The historical distinction between immovable and movable property is why French tax law created an autonomous concept of a "predominantly real estate company." The definition of a predominantly real estate company varies depending on the tax being imposed. While it differs slightly for capital gains tax, gift/inheritance duties, or 3% real estate tax on real estate, the concept of a predominantly real estate company can be summarized as follows: A predominantly real estate company is a company or organization, regardless of form, in which more than 50% of the value of its assets consists directly or indirectly of

- real estate or rights relating to real estate, and
- shares or other rights in other companies that are predominantly real estate companies,

provided that the real estate is not used for the company's own industrial, commercial, agricultural or non-commercial professional activities.[4]

This concept allows the F.T.A. to treat the shares of companies owning real estate as real estate for tax purposes, where such assimilation is provided by the tax legislation. Thus, the transfer of shares of a predominantly real estate company is subject to real estate capital gain taxation in France, as if the transferor transferred real estate directly.[5]

LIMITATIONS TO THE CONCEPT

Nonetheless, the tax concept of a predominantly real estate company does not mean that the real estate companies shares are considered as real estate, *per se*. It only allows the F.T.A. to assimilate certain shares to real estate for domestic tax purposes.

The impact of classifying shares as real estate or movable assets extends beyond domestic rules. While the current version of Paragraph 4 Article 13 (Capital Gains) of the O.E.C.D. Model Tax Treaty expressly deals with capital gains of predominantly real estate companies, attributing the right to tax capital gains to the State in which the underlying real estate is located, many bilateral tax treaties concluded by France contain provisions that do not distinguish between ordinary company shares

---

[4] *E.g.* French Tax Administration guidelines applicable to capital gains realized by non-residents: BOI-RFPI-PVINR-10-20 No. 120 (19/04/2019).

[5] Note however, that in most cases, the registration duties imposed on the purchaser remain at 5% for real estate companies shares instead of 6.2% for real estate. An exception applies when members of the company are entitled to an allocation of the underlying real estate.

and shares in predominantly real estate companies. Based on earlier versions of the O.E.C.D. Model Tax Treaty, the capital gains article in those tax treaties typically provides that real estate capital gains derived from the alienation of immovable property are taxed by the State in which the real estate is located. Treaties may also provide that real estate assets are subject to wealth tax in the State where the real estate is located. For these treaties, a question arises as to what is real estate and what is not. To answer this question, tax treaties refer to domestic law and, in the specific case of real estate, to the law of the State where the real estate is situated.

As simple as the solution may seem in theory, French practice is not consistent. The F.T.A. usually tends to claim that such shares should be considered as real estate for tax treaty purposes in order to allow French tax to be imposed on gains from the sale of those shares. However, the answer may vary depending on the wording of the tax treaty at issue.

In the absence of clear rules, it has been left to judges to decide how those shares are categorized for tax purposes. Depending on the court's classification, the answer will differ. The French judicial system is divided between civil courts and administrative courts. The former apply the civil law concepts with tax treatment based on the civil classification, while the latter apply taxation rules, even where the result contradicts the civil law principles.

APPROACH OF THE COUR DE CASSATION: CHARACTERIZE FIRST, TAX SECOND

In tax matters, the judicial system (consisting of judicial courts of original jurisdiction, courts of appeal, and the *Cour de Cassation*, which is the French Supreme Court for non-administrative matters)) has jurisdiction over disputes relating to (i) gift and inheritance duties and (ii) wealth tax. The scope of its jurisdiction has enabled the *Cour de Cassation* to clearly state its position on the characterization of shares in companies holding real estate.

Shares are Movable Assets

A judicial saga related to the France-Monaco inheritance tax treaty dated 1st April 1950 (the "France-Monaco Inheritance Tax Treaty") ultimately ended with a clear decision from the Plenary Chamber of the *Cour de Cassation*.[6] The case concerned the inheritance of a Moroccan national with heirs residing in France. As the deceased was domiciled in Monaco, the question arose as to which of the two states had the right to apply the inheritance duties on the shares of a Monegasque civil company owning French real estate.[7] The heirs considered that the shares should not be subject to inheritance tax in France as they were movable assets subject to Article 6 of the France-Monaco Inheritance Tax Treaty, which addresses shares,

6 *Cour De Cassation*, Plenary Chamber, 2nd October 2015, No. 14-14.256, P+B+R+I

7 The France-Monaco tax treaty applies in principle exclusively to French or Monegasque nationals but was applied to this case by virtue of the nondiscrimination clause in the France-Morocco tax treaty dated 29th May 1970.

bonds, claims, and similar items.[8] For the F.T.A., Article 6 was irrelevant. It argued that Article 2 regarding real estate applied even though Article 2 contained no specific provisions for real estate company shares.[9] This approach allowed for the imposition of inheritance tax in France, where the real estate was located.[10]

The court of original jurisdiction[11] and the Court of Appeal[12] both ruled that a real estate company's shares were movable assets and therefore fell under Article 6 of the France-Monaco Inheritance Tax Treaty, which precluded taxation in France.

The F.T.A. challenged this decision before the *Cour de Cassation* and their challenge initially succeeded. The *Cour de Cassation* decided in 2012 to reject the application of Article 6 of the tax treaty and to apply Article 2 related to real estate. It referred the case back to the Court of Appeal. This decision was a major upheaval in well-established civil case law based on Civil Code rules. For that reason, it was criticized as creating legal uncertainty. In a decision dated 9th January 2014, the Court of Appeal confirmed its original position that shares are shares, no matter what assets are owned by a company. In 2015, the *Cour de Cassation* confirmed the decision of the Court of Appeal in Plenary Chamber. It ruled that a civil judge should rely on civil law before inferring tax consequences.

Before looking at the Court's reasoning, Article 1 of the France-Monaco Inheritance Tax Treaty addresses the meaning of terms not otherwise defined in the treaty in a fairly standard way. Paragraph (e) of Article 1 provides as follows:

> As regards the application of the provisions of this Convention by either of the Contracting Parties, any term not otherwise defined shall,

---

8 Article 6 provides as follows in relevant part:

> Stocks or shares, Government bonds, debentures, unsecured or secured debt-claims and all other property left by a national of one of the two States, to which Articles 2 to 5 do not apply, shall be subject to the following provisions:
>
> (a) If the deceased at the time of his death was domiciled in one of the two States, the property shall be liable to succession duties only in that State.
>
> (b) If the deceased was not domiciled in either State, the property shall be liable to succession duties only in the State of which the deceased was a national at the time of his death; if at the time of his death he was a national of both States, the French and Monaco authorities shall reach a special agreement in regard to each particular case.

All translations of French case law, statutory law, and tax treaties into the English language are unofficial.

9 Article 2 provides as follows in relevant part:

> 1. Immovable property and rights to immovable property forming part of the estate of a national of one of the two Contracting States shall be subject to succession duties only in the State in which it is situated.

10 Article 750 *ter* of the French Tax Code.

11 Nice judicial court, 25th March 2010, No. 08/2969.

12 Aix-en-Provence Court of Appeal, 1st Chamber, 3rd May 2011, No. 10/06591

> unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of this Agreement.[13]

Paragraph 2 of Article 2 then looks at the definition of immovable property:

> The question whether a given property or right is immovable property or a right in respect of immovable property shall be determined in conformity with the law of the State in which the property or the object of the right is situated.

Based on the reference to French domestic law, the F.T.A. argued that French tax law applied and under that law, the Monegasque company is considered as a predominantly real estate company within the meaning of French tax law, because its assets were of a real estate nature. That reasoning was rejected by the *Cour de Cassation*:

> After rightly finding that the shares in the Monegasque company constituted intangible movable properties and that, under the [France-Monaco Inheritance Tax Treaty], the company Cogest was subject to Article 6 * * * and not to Article 2, which concerns real estate and real estate property rights, the Court of Appeal correctly concluded * * * that the taxation of the shares transferred by the demise of their owner residing in Monaco fell within the jurisdiction of that State and not that of France.[14]

The *Cour de Cassation* did not impose any conditions to its decision. The principle is simple and applicable to all tax treaties with similar wording. Shares in a company owning real estate in France constitute "intangible movable assets" subject in principle, exclusively to inheritance tax in the State of residence of the deceased, unless the tax treaty provides otherwise.

In cases that come before the *Cour de Cassation*, the *Parquet General* provides legal advice to the court on the scope of the decision to be made. Here, the *Avocat General* made the following points to the court:

> It should first be noted that at no point did the French legislation use the term "real estate" or "real estate rights" in relation to SCI[15] shares; it merely characterized as French those foreign SCI shares that meet the criteria it sets out. However, what is sufficient under domestic law is not sufficient under the tax treaty. * * * I therefore consider that SCI shares, even those that are "predominantly real estate," do not have a "real estate nature" within the meaning of Article 2 of the [France-Monaco Inheritance Tax Treaty] dated 1st April 1950. And that the Court of Appeal was right to say so in its confirmatory judgment * * *.[16]

---

13 All translations into the English language are unofficial. Unless otherwise indicated, all translations of tax treaty provisions reflect text appearing on the I.B.F.D. website.

14 Unofficial translation by authors.

15 Private real estate company.

16 Unofficial translation by authors.

In the absence of a tax definition classifying shares of predominantly real estate companies as real estate, the holding in the case should be viewed as good authority to the issue addressed. In the 2015 annual report of the *Cour de Cassation*, the following comment was made regarding the case:

> [T]here cannot be a different definition in civil law and tax law for company shares which, according to the former, would be movable property and, according to the latter, would be immovable property. As several *Commissaires du Gouvernement*[17] have pointed out * * *, the tax judge must necessarily appropriate civil law concepts * * * since it is defined by the Civil Code.[18]

"In addition to gift and inheritance duties, judicial courts have jurisdiction to hear disputes relating to wealth taxation"

Decision in 2025 Case: Adopts Opposing View (In Appearance)

In addition to gift and inheritance duties, judicial courts have jurisdiction to hear disputes relating to wealth taxation.[19] It was in this context that the *Cour de Cassation* ruled at the beginning of 2025[20] on the question of the taxation of shares in predominantly real estate companies under the France-Luxembourg Income and Capital Tax Treaty dated 1st April 1958, as amended ("France-Luxembourg 1958 Income Tax treaty"), which is no longer in force and was rather unusual in its wording. On this occasion, the court ruled that shares of French companies predominantly owning real estate in France that were held by a Luxembourg resident were subject to French wealth tax under the France-Luxembourg 1958 Income Tax Treaty because the shares should be regarded as real estate assets for tax treaty purposes.

To reach its decision, the Court looked at the following provisions of the treaty:

- Paragraph 1 of Article 20 (Capital) provides as follows in respect to taxes on capital:

  > If the capital consists of immovable property and its accessory * * * the tax may be levied only in the Contracting State which, by virtue of the preceding Articles, is authorized to tax income derived from such property.

- Paragraph 1 of Article 3 (Income from Immovable Property/Capital Gains) identifies the treaty partner state that is empowered to impose tax on immovable property:

  > Income from immovable property and its accessories, including income from agriculture and forestry exploitation, shall only be taxable in the State where the property is situated.

[17] In a case that is argued before the *Conseil d'Etat*, the *Commissaire du Gouvernement* sets out the circumstances of the dispute, the arguments put forward by the parties and the questions raised before analyzing the case and giving his or her own opinion to the court without taking part directly in the court's final decision. In recent years, the *Commissaire du Gouvernement* is referred to as the *Rapporteur Public*.

[18] *Cour de cassation*, Annual Report 2015, p. 110. Unofficial translation by authors.

[19] Formerly the *Impôt de Solidarité sur la Fortune* ("ISF") and, since 1st January 2018, the Impôt sur la Fortune Immobilière ("IFI").

[20] *Cour de Cassation*, Commercial Chamber, 2nd April 2025, No. 23-14.568.

> This provision shall also apply to profits derived from the alienation of the property concerned.

- Paragraph 4 of Article 3 identifies the treaty partner state that is empowered to impose tax on gains from the sale of shares in company that essentially is a predominantly real estate company:

> Gains from the alienation of shares or other rights in a company * * * or other similar body or entity, the assets or property of which consist for more than 50% of their value of, or derive more than 50% of their value - directly or indirectly through the interposition of one or more other companies * * * or similar bodies or entities – from immovable property situated in a Contracting State or rights connected with such immovable property shall be taxable only in that State. For the purposes of this provision, immovable property pertaining to the business activities of such company shall not be taken into account.

There is no definition of real estate assets, either directly in the France-Luxembourg 1958 Income Tax treaty or by reference to the domestic laws of the States, but rather cross-reference between various provisions of the above-mentioned articles, resulting in the right to apply wealth taxation on assets being granted to the State entitled to tax the income originating from those assets and the capital gains originating from their disposition.

Based on the above, the *Cour de Cassation* concluded that shares in real estate private companies having their registered office in France, and owning real estate located in France must be regarded as real estate properties within the meaning of the tax treaty. The Court could have taken a more cautious approach. For example, it could have stated that shares in predominantly real estate companies should be assimilated to real estate assets for tax treaty purposes, rather than implying an actual characterization as real estate.

Following the decision, tax advisers wondered whether the intention of the *Cour de Cassation* was to abandon the civil law approach in favor of the purely tax law approach of the Administrative Supreme Court, which is discussed below. Also subject to conjecture was whether the new approach could be extended to other tax treaties. The consensus is that the impact of the 2025 decision likely will be limited. The current France-Luxembourg tax treaty dated 20th March 2018 ("the France-Luxembourg 2018 Income Tax Treaty") is drafted based on the O.E.C.D. model, which differs from its predecessor in that it includes interpretation guidelines that refer to the domestic law of the States, as follows:

- Paragraph 2 Article 6 (Immovable Property) provides as follows:

  The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. * * *

- Paragraph 2 of Article 3 (General Definitions) provides as follows:

  As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

- However, Paragraphs 1 and 4 of Article 21 (Capital) provide limitations to the foregoing rules as follows:

  1. Capital represented by immovable property referred to in Article 6, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.

  * * *

  2. All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

While the transposition of the 2025 decision to the France-Luxembourg 2018 Income Tax Treaty might seem understandable because tax law definitions are given prevalence over other laws, a somewhat comparable provision in the France-Monaco Inheritance Tax Treaty did not prevent the *Cour de Cassation* from applying civil law concepts in its 2015 decision. Moreover, nothing in the 2025 decision of the Commercial Chamber of the *Cour de Cassation*, based exclusively on an atypical wording, indicates that it intended to overturn the principle adopted by the same Court in 2015 in plenary session regarding a Monegasque company owning immovable property in France.

In the view of the authors, there is no reason to believe that the position of the *Cour de Cassation* in 2015 that was based on civil law principles has been undermined. Companies' shares are movable assets, even in presence of underlying real estate assets, for all the taxes entering the scope of the judicial courts' jurisdiction. However, as far as taxes subject to the jurisdiction of the administrative courts are concerned, the solution would be quite different.

APPROACH OF THE CONSEIL D'ETAT: TAX FIRST, CHARACTERIZE LATER

In tax matters, the administrative courts (administrative court, administrative court of appeal, and the *Conseil d'Etat* which is the French Supreme Court for administrative matters) have jurisdiction over disputes relating to personal and corporate income tax, including capital gains tax. Thus, the *Conseil d'Etat* has jurisdiction to rule on tax treaty issues related to the characterization of shares of holding predominantly real estate companies.

It would have been logical for the *Conseil d'Etat* to follow the analysis of the *Cour de Cassation*, as there is no tax definition of immovable property in the tax law. Only the civil definition exists. Nonetheless, the *Conseil d'Etat* followed its own path.

France-Belgium Treaty – First Case

Likely due to the lack of a specific definition of real estate in the tax law, the *Conseil d'Etat* has taken a fairly broad view of real estate for the application of international tax treaties. In two cases concerning the France-Belgium tax treaty dated 10th

March 1964 ("the France-Belgium Income Tax Treaty"), the *Conseil d'Etat* ruled that anything taxed as immovable property should be considered immovable property.[21]

In what is now a standard practice, the France-Belgium Income Tax Treaty contains provisions that address the definition of certain terms.

Paragraph 1 of Article 3 provides the taxing rule for income from immovable property:

> Income from immovable property including property accessory thereto and livestock and equipment used in agriculture and forestry shall only be taxed in the Contracting State in which such property is situated.

Paragraph 2 of Article 3 defines the term "immovable property" as follows:

> The term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated.

Paragraph 4 of Article 3 states that properties are taxable in the State where they are located (be it for income or capital gains) as follows:

> The provisions of paragraphs 1 to 3 shall apply to income derived from the direct use, letting or leasing, or use in any other form of immovable property, including income from agriculture and forestry enterprises. They shall also apply to gains from the alienation of immovable property.

Article 18 adopts a rule for income not otherwise mentioned in the treaty, as follows:

> In so far as the preceding Articles of this Convention do not provide otherwise, the income of residents of one of the Contracting States shall only be taxable in that State.

Article 22 adopts a rule for undefined terms, as follows:

Any term not specifically defined in this Convention shall, in so far as the context does not require otherwise, have the meaning ascribed to it under the law in each Contracting State which governs the taxes which are dealt with in the Convention.

For a Belgian resident holding shares in a French predominantly real estate company, the consequences of the classification of the shares were critical because

- capital gains on real estate properties are taxable in the State where the property is located, *i.e.* France (Article 3.4.) but
- capital gains on movable property are taxable in the State of residence of the transferor, *i.e.* Belgium (Article 18).

---

[21] Conseil d'Etat, 8th and 3rd sub-sections, 24th February 2020, No. 436392.

The F.T.A. guidelines to the France-Belgium Income Tax Treaty treat shares of predominantly real estate companies as immovable property,[22] and that was the basic argument of the F.T.A. in the case. On the other hand, the taxpayer argued that such guidelines went beyond the provisions of the tax treaty. The *Conseil d'Etat* adopted the position of the F.T.A.

> Article 244 *bis* A of the [French Tax Code], applicable to capital gains on real estate realized by individuals who are not tax residents in France * * * subjects to this regime capital gains realized by such individuals on the sale of shares they hold in companies or organizations, whatever their form, whose assets consist mainly, directly or indirectly, of real estate or real estate rights. The tax law thus treats shares in predominantly real estate companies as real estate properties when they are sold by a person who is not resident in France for tax purposes.[23]

"Two years later, the Conseil d'Etat had the opportunity to consider a second case with similar facts."

The *Rapporteur Public* advising the *Conseil d'Etat* justified this reasoning in the following way:

> Let us state at the outset that the criteria of civil law seem to us to be irrelevant, since the tax treaty expressly stipulates that, in order to define, in particular, the concept of "immovable properties," reference should be made to the tax legislation of the States.
>
> If we follow this approach, real estate within the meaning of the tax treaty will therefore be what French tax law characterizes and taxes as such.[24]

This reasoning might appear justified by the plain language of Article 22, and once the appropriate classification has been determined, the appropriate taxation can be applied. But this line of reasoning did not prevent the *Cour de Cassation* from characterizing real estate company shares as movable assets.

France-Belgium Treaty – Second Case

Two years later, the *Conseil d'Etat* had the opportunity to consider a second case with similar facts.[25] Again, a Belgian resident sold shares in a French predominantly real estate company. In its decision, the *Conseil d'Etat* confirmed its earlier analysis. The main argument underlying the taxpayer's appeal was that shares in predominantly real estate companies are never classified as real estate but are only taxed as such. The *Rapporteur Public* advising the *Conseil d'Etat* was the same individual who advised in the first case. In the following language, she explained there was no reason to reconsider the principal laid down in the first case

> [W]e see no reason to reconsider the position taken recently by the joint sub-sections. The purpose of tax legislation is not, in first instance, to define legal concepts, but to lay down rules for taxation.

---

22 French Tax Administration guidelines applicable to the France-Belgium tax treaty: BOI-INT-CVB-BEL-10-10 No. 130 (12/09/2012)

23 Unofficial translation by authors.

24 Unofficial translation by authors.

25 *Conseil d'Etat*, 8th section, 27th December 2021, No. 451625

> It therefore does not seem illogical to us, unless the reference in the tax treaty to the legislation governing the taxes covered by the tax treaty is given a very limited scope, to rely on the tax treatment reserved for a type of income in order to determine its classification within the meaning and for the purposes of the tax treaty.[26]

The Court adopted the views of the *Rapporteur Public*. It upheld the principle that, for tax treaty purposes, shares in predominantly real estate companies must be treated as real estate for the sole reason that French tax law taxes them as such.

This reasoning raises logical and practical issues. First, it creates confusion between "assimilation" for applying a tax regime and "characterization" of assets as immovable property. In fact, the *Conseil d'Etat* did not use the term "characterization" in its reasoning, but rather "assimilation" because there is no tax definition of immovable property, as previously noted. In order to avoid resorting to the definition of civil law as followed by the *Cour de Cassation*, the *Conseil d'Etat* preferred to rely exclusively on the applicable tax regime.

The approach of the *Conseil d'Etat* contravenes the classic legal syllogism dear to French legal practitioners, under which (i) the court determines the applicable rule of law based on a specific factual situation (ii) in order to deduce the appropriate ruling, as illustrated by the following logic path:

Characterization → Tax regime → Practical application

Instead, the *Conseil d'Etat* applied a pre-chosen approach to "hardwire" a specific conclusion:

Domestic Tax Regime → Assimilation → Practical application

The approach of the *Conseil d'Etat* may well lead to double taxation situations. In comparison to France, the Belgian Supreme Court concluded that shares of a predominantly real estate company are not real estate assets and should therefore be taxed only in the country of residence of the transferor.[27] The decision did not involve the taxation of capital gains, but rather the nature of the income received by a Belgian resident who held shares in a French look-through company receiving real estate income. The Belgian Supreme Court analyzed the French tax law and ruled that the shares were not real estate assets because no French tax provision defined the shares as such. This also corresponds to the Belgian approach in which the shares of real estate companies are considered as movable assets. In its decision, the court upheld the grounds raised by the applicant, in particular:

> Income distributed by a real estate private company to its Belgian resident shareholder, a natural person, cannot be classified as income from real estate as referred to in Article 3 of the France-Belgium Income Tax Treaty, even if a taxation on the profits made by that [company] was paid in France by that shareholder as rental income tax pursuant to [its look-through nature].[28]

---

[26] Unofficial translation by authors.

[27] Belgian Supreme Court, 29th September 2016, F.14.0006.F.

[28] Unofficial translation by authors.

This divergent interpretation by the French and Belgian courts is likely to give rise to situations of double taxation in the event of a sale of shares in a predominantly real estate company. Each State would consider that it has jurisdiction to ultimately tax the same gain. The authors are not aware of any cases where the tax authorities of both States had the opportunity to confront the analysis in order to find a common solution.

As a final anecdotal point, some advisers point to the weakness of the F.T.A.'s position by referring to a signed, but not yet in force, replacement income tax treaty between France and Belgium. It contains an express provision that is like Paragraph 4 of Article 13 (Capital Gains) of the O.E.C.D. Model Treaty discussed above, despite Belgium's reservation to the provision, due to the insistence of the F.T.A.

RECENT CASE IN LOWER COURT – A MORE SENSIBLE APPROACH

A recent decision by the Montreuil Administrative Court suggests resistance on the part of a court of original jurisdiction to the assimilation approach of the *Conseil d'Etat*.[29]

In the case, shares in a French predominantly real estate company were sold by a Dutch company. The assets of the French company consisted mainly of shares in two French private companies predominantly owning real estate.

The France-Netherlands tax treaty dated 16th March 1973 ("France-Netherlands 1973 Income Tax Treaty") contained articles similar to those mentioned above. Immovable property was defined in accordance with the law of the State in which the property is located. In addition, an undefined term has the meaning assigned to it by the laws of that State governing the taxes covered by the tax treaty, unless the context requires a different interpretation.

Despite the recommendation of the *Rapporteur Public* that was in line with the two decisions of the *Conseil d'Etat*,[30] the Montreuil Administrative Court applied a two-step approach to reaching its decision.

- Under the first step, it looked to the domestic law of France that addresses the taxation of capital gains realized on the sale of immovable property. It determined that while French domestic law assimilates the sale of predominantly real estate company shares to a sale of real estate, mere assimilation is not, by itself, sufficient when analyzing the terms of a tax treaty.
- Under the second step, the court looked to the terms of the provisions of the France-Netherlands 1973 Income Tax Treaty applicable to the sale of

---

29 Montreuil Administrative Court, 7th May 2025, No. 2301787.

30 The Rapporteur Public recommended the following:

> If you fall within the scope of the Baartmans decision, you can only interpret Article 13(1) of the [France-Netherlands 1973 Income Tax Treaty] as bringing the capital gain in dispute within the scope of real estate income, with the consequence that it is taxable in France. You will therefore reject the conclusions seeking exemption from tax.

> immovable property, Paragraph 1 of Article 13 (Capital Gains). That provision allocates to France the right to tax gains from the alienation of immovable property located in France as well as the right to tax gains from the alienation of shares or comparable interests in a company whose assets consist mainly and directly of immovable property located in France.

The Court determined that the Dutch company did not directly own immovable property in France. In addition, the Court determined that the target company which issued the shares that were sold by the Dutch company was not a company whose assets consist mainly of immovable property since it directly owned no immovable property in France. Rather, it owned shares of lower-tier companies which, in turn, owned immovable property. Such indirect ownership of immovable property was not sufficient to trigger tax in France under Paragraph 1 of Article 13 (Capital Gains). According to the Court:

> [Paragraph 1 of Article 13] must be interpreted as limiting taxation in * * * [France] to cases where the assets are directly constituted by immovable properties, in the absence of any clarification as to the indirect nature of the company's holding of immovable properties.[31]

Accordingly, neither of the fact patterns set out in Paragraph 1 of Article 13 were present. The shares transferred by the Dutch company were neither real estate properties nor shares of a company directly holding real estate properties.

In sum, the Montreuil Administrative Court made an effort at every stage to characterize the facts. It did not infer the characterization of shares as real estate for tax treaty purposes based on the sole fact that the transfer of these shares was subject to the real estate capital gains regime under domestic law. Such resistance from the court of original jurisdiction of the case provides some degree of hope that the evolution of the administrative case law on the topic will be more aligned with the classic legal characterization method.

CONCLUSION

The question of a tax treaties' classification of shares in predominantly real estate companies is particularly relevant as many tax treaties do not yet contain express provisions on this subject. As we have seen, the analysis may vary in light of the nature of the tax at stake and of the drafting of the relevant provision in each applicable treaty.

So, considering the French tax cases discussed above, do not be surprised if, when asked whether the shares of a company are properly characterized as movable property or immovable property, a well-informed tax advisor will answer "Well, it depends."

---

31 Unofficial translation by authors.