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Contents

The regularisation Mission or “STDR”

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Initiated by two press releases of May 17 and June 21, 2013, a **Mission** to regularise undeclared assets, held abroad by French taxpayers, has been launched by a Directive of June 21 issued by Bernard Cazeneuve, deputy minister in charge of the Budget[1]. The mission is to be carried out by the “**STDR**” (service for the processing of corrective declarations).

We recall that further to the final declaration of G20 adopted on April 2, 2009 announcing “*The era of banking secrecy is over*”, France set up a regularisation **Cell** (while establishing for the future recovery times extended to 10 years[2]). Supposed to end on December 31, 2009, the works of this Cell were extended to December 31, 2010 and, in reality, until October 9, 2012, the date on which it could no longer take a decision on the dossiers filed.

However, the taxpayers concerned were able to continue filing complete and finalised dossiers with the Cell, but **lifting anonymity from the outset**. They then received an acknowledgement of receipt testifying to their spontaneous presentation of their dossier (of course different from taxpayers who are identified by the Administration without presenting themselves spontaneously).

1. Regularisation Cell/Mission: what has changed

– The team is no longer directly attached to the DGFIP (General Directorate of Public Finances) but to the **DNVSF** (National Directorate for the verification of tax situations); However, it comprises the **same officials** and it will be reinforced by a dozen civil servants as of the month of September 2013;

– The principle of the prior filing of an anonymous and detailed dossier containing unidentified corrective tax declarations and enabling to obtain an agreement in principle from the Cell disappears. Under the banner of **transparency**, the procedure implemented for the regularisation Mission now provides the filing of a complete file, with **anonymity** lifted, thereby immediately revealing the names of the taxpayers;

Remark: The real impact of this display towards greater transparency seems to be limited in practice because, with the experience of a hundred or so regularisation files at the time of the Cell, our firm CLC.avocats observed that all the candidates for regularisation, who had previously filed anonymous files, systematically accepted to lift the anonymity in order to settle the procedure;

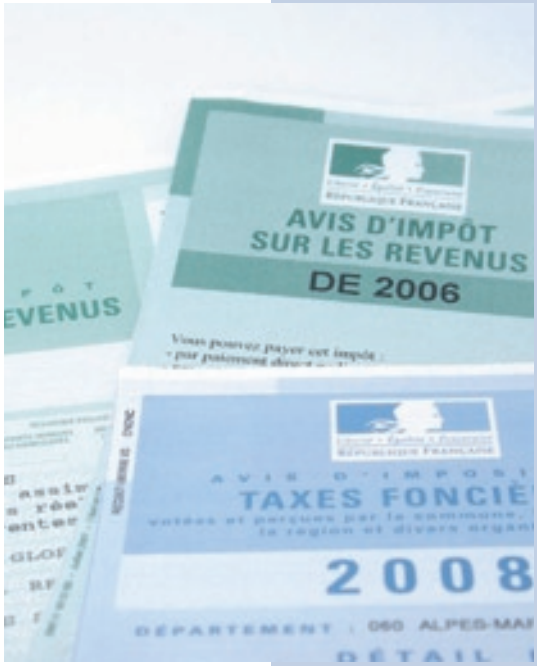
– The third change originates in a “mechanical” implementation of the extension of recovery periods, initiated as of 2009. Whereas under the Cell (2009-2010) the period of regularisation was most often set at **three years** with respect to income tax and **six years** with respect to wealth tax, i.e. **nine** corrective declarations, now with the “STDR” (2013), this same period is currently set at **seven years** for income tax and for wealth tax, i.e. **fourteen** corrective declarations;

Therefore, the extension of the regularised period mechanically gives rise, at the same tax rate, to an increase of the amount of taxes evaded and, consequently, of the cost of the regularisation;

1 These three documents which set out positive law with respect to this issue can be accessed in their full version on our website www.clc-avocats.com (electronic version of “Actua No.2”).
2 Cf. on the website www.clc-avocats.com our Ledgenda No.17 of June 2009.

- The strengthening of sanctions initiated in 2009 and amplified more recently, particularly by the institution of a nominal annual fine of 5% for the non-declaration of financial assets abroad, will considerably increase in several years, but progressively, the cost of regularisations. To reach, at the end of a period of 10 years, a total amount of 50% of the amount of these assets;

– As was the case before with the Cell, the “STDR” will apply the tax rules of common law but, as we shall see, by sometimes adopting in a few situations interpretations which are both questionable and less favourable (cf. following articles pages 5 and 7).



2. Practical aspects

– The years non-prescribed in the perimeter of the regularisation procedure are currently, with respect to income tax, the years 2006 to 2012 and with respect to wealth tax, 2007 to 2013;

– In most cases, fourteen declarations must be made, subject to special cases concerning duties on free transfers (droits de mutation à titre gratuit (DMTG)) and, in particular, inheritance tax, gifts by hand, and the specific case of residents who **transfer their tax domicile outside of France**. (cf. our article on page 5 on recovery periods);

– For the most part, the practical modalities of filing remain unchanged. The file will still include the perspective concerning the origin of assets, along with the corresponding documentary evidence, evidence of the amount of assets held and the income they have generated over the regularised period, as well as the various certificates from the financial institutions and from the taxpayer himself establishing the accuracy of the regularisation and of its perimeter;

– The taxations, along with late interest, are still calculated in the conditions of common law applicable to each year of regularisation, in consideration of the texts which were then in force. Their amount then constitutes liabilities to be taken into account for the calculation of wealth tax;

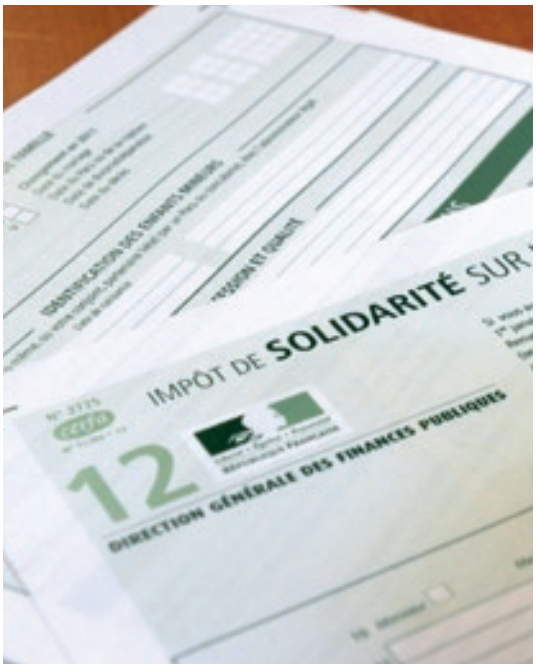
– The rate of 40% of the increase for a deliberate breach applicable to evaded taxes will be brought to 15% for **passive** fraudsters (those having received assets within the framework of an inheritance or donation), or to 30% for **active** fraudsters (those having constituted the assets when they resided in France);

– In the same way, the fine of 5% for the non-declaration of financial assets held abroad is reduced to 1.5% in the first case and to 3% in the second case.

For example, for assets held in Switzerland, the fine will be fixed in substance at the following rates according to the years:

2008: 1.5% or 3%, capped at € 10,000
2009: 1.5% or 3%, capped at € 10,000
2010: 1.5% or 3%, capped at € 1,500
2011: 1.5% or 3%
2012: 1.5% or 3%;

– In the event of a bank account held in the guise of an interposed structure (Trust, foundation, company, etc.) benefiting from a preferential tax regime, the provisions of Article 123 bis of the French Tax Code will be applied. This article provides in substances the liability to income tax on the real or flat rate profit of the structure increased by 25%. Applied to trusts, this doctrine is questionable (cf. our article on page 7 “Trusts and issues”.)



Our Opinion

The **extension** of the regularisation period which increases from nine to fourteen the total number of income tax and wealth tax declarations concerned will generally give rise to an apparent increase of approximately 50% of the tax cost of the operation.

In reality, this places those of the French residents now decided **in the same situation** as those regularised in 2009-2010. In effect, the latter then had to spontaneously attach to their income and assets subject to income tax and to wealth tax for the following years, their assets and income subsequently revealed.

The difference in the financial treatment relates, for assets held in Switzerland, to the **fine of 1.5%** (or 3%) **uncapped** for the years 2011 and 2012 and especially, for the bank accounts held through an **interposed structure** which benefits from a preferential tax regime, to the taxation of income according to the rules set forth in Article 123 bis of the French Tax Code.

The conditions of the implementation of these rules, in particular in the case of **withdrawals** made on these accounts, followed by the **liquidation of the structure** must be subject to particular attention in order to limit the additional cost of this “**STDR**” doctrine.

Some information: in 2012, 108,833 French taxpayers declared that they held accounts abroad as compared to 79,680 in 2011 and 75,732 in 2010.

Recovery period for assets held outside of France and their income

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Taxpayers are protected in the event of an omission by a **prescription** of the Administration's action. In effect, the recoveries which the latter may make are limited in time by what are called recovery periods.

Therefore, as a general rule:

– with respect to income tax, this period is of **three years**: in 2013, the Administration may therefore proceed with recoveries on the incomes of 2010 to 2012;

– with respect to wealth tax and DMTG (duties on free transfers), the period is also three years when the information has been brought to the Administration's attention, but **six years** otherwise: therefore, a taxpayer who mentions an under-evaluated apartment in his wealth tax declarations may, in 2013, be subject to an increase in value for the wealth taxes for 2010 to 2012. In the event where an apartment has not been declared at all, in 2013, the Administration may go back to the wealth tax for 2007.

With respect to the case of French residents holding undeclared bank accounts abroad, the recovery periods are extended, in the event of the omission to declare the foreign bank account, from three to ten years for income tax and from six to **ten years** for wealth tax and the DMTG (duties on free transfers).

This extension originates in the successive texts which have become progressively applicable and differentiated according to the categories of taxes and the countries in which the assets are held.

Without going back over the evolution of the texts, here is a practical presentation of the **recovery periods applicable in 2013 in the case of the regularisation** of assets held in Switzerland (income tax, wealth tax, inheritance tax, donations/gifts by hand), and even in the specific case of French residents who relocate.

i. **Income tax**: regularisation of the years 2006 to 2012

ii. **Wealth tax**: regularisation of the years 2007 to 2013

iii. **Inheritance tax**: case of a death prior to January 1, 2007: the recovery right is exercised until December 31, 2012 only as inheritance tax is now prescribed.

Case of a death since January 1, 2007: the recovery period is ten years, inheritance tax is therefore not prescribed in 2013 (for a death which occurred as of 2007 in year N, the prescription will only be acquired as of January 1 of year N+11).

iv. **Donations not revealed/gifts by hand**: the prescription period only starts to run as of the **revelation** to the Administration of the gift by hand and, at the latest, as of the death of the donor. Therefore, a gift by hand granted in 2000 by a donor who died before December 31, 2006 is now prescribed.

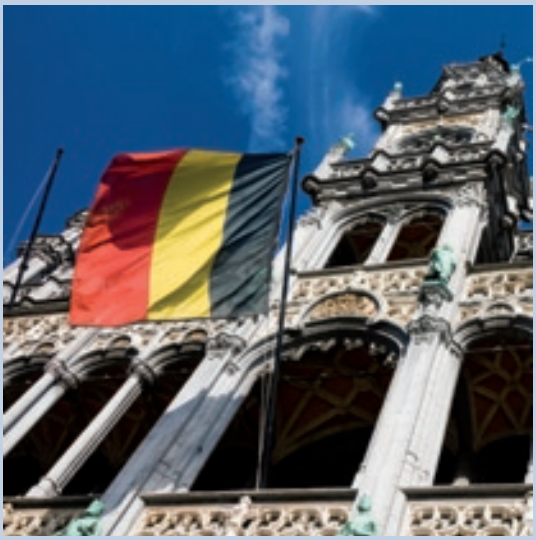
However, if the donor died since January 1, 2007, the gift by hand will only be prescribed ten years after the year of the death (with the prescription of the donation taking place along with that of the inheritance cf. iii).

v. **Specific case of relocations**:
let us take the example of a French resident who has validly relocated in 2013.
Although he is no longer a French resident, the tax administration may initiate against him an investigation of his personal tax situation **until December 31, 2023** relating to his undeclared assets held outside of France during his years of residence in France:

– with respect to income tax, over a period of ten years prior to the audit, without being able to go back further than 2006 (i.e. potentially from 2006 to 2012 for an audit triggered and settled in 2013);

– with respect to wealth tax, over a period of ten years prior to the year of the audit, without being able to go back further than 2007 (i.e. potentially from 2007 to 2013 for an audit triggered and settled in 2013);

– with respect to inheritance tax, over a period of ten years prior to the year of the audit, without being able to go back further than January 1, 2007.



Our Opinion

These extensions of the recovery periods applicable to French residents who hold undeclared assets abroad constitute for the tax administration an **anti-relocation weapon**, by allowing a non-negligible risk to be cast over them throughout the ten years following their departure.

The legal and financial issues of this “follow-up right” must be assessed by the candidates for relocation, and carefully measured by their Counsel.

Trusts and issues: the situation of French residents and of their Counsels

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An old legal instrument of Anglo-saxon law, the trust is not recognised by our civil law, but nevertheless produces effects in France. In this respect, it has been included for many years now in the French tax system.

Upon examining the dossiers filed with the regularisation Cell in 2009, the Administration noted that asset trusts had become a vehicle for tax evasion, in particular because of the ease with which they could dissolved, even in the case of so-called "irrevocable" trusts, which then revealed their fraudulent nature.

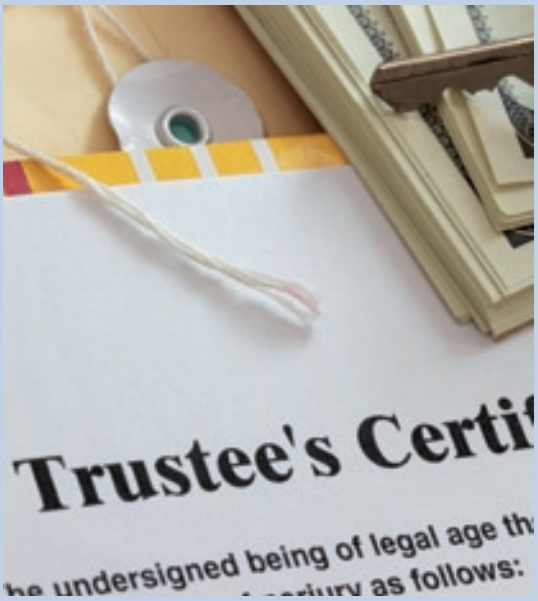
It is in this context that the Law of July 29, 2011 created an autonomous tax regulation, specifically intended to control this phenomenon.

It appears in substance under Article 792-0 bis of the French Tax Code.

The trust is defined, for the application of the tax law, as "*the legal relationship created under the laws of a State other than France by a person who has the capacity of constituent, by deed inter vivos or which takes effect on death, which places assets or rights under the control of an administrator, in the interests of one or several beneficiaries or to attain a specific objective*".

The new law for the taxation of trusts only applies when one of the following conditions is met:

– the constituent, within the meaning of French tax law, is domiciled in France;
– a beneficiary is domiciled in France;
– an asset, moveable or immoveable, is located in France.



The Legislator has implemented a regime of taxation and declaration which is fiscally restrictive and legally uncertain, imposed on both French residents (1) and on the administrators of trusts (2).

1. The situation of residents in France

i. Wealth tax and DMTG (duties on free transfers)

The assets placed in a trust are subject to wealth tax at the level of the "constituent" or of the beneficiary deemed to be a constituent (Art. 885 G ter of the French Tax Code). This is the case, in substance, when the constituent died before July 31, 2011 (Art. 792-0 Bis of the French Tax Code).

When the **constituent** or the **beneficiary deemed to be the constituent** are domiciled for tax purposes in France, all the assets or rights placed in the trust are taxable in France, regardless of their location (in France or abroad), subject, of course, to any tax treaties aimed at avoiding double taxation.

In the event of failure to declare, a **specific levy** is applicable in the same conditions as wealth tax but:

– with a larger basis as this tax applies to all assets, even those which are normally exempt from wealth tax, and without taking into account a threshold of taxation (€1,300,000 in 2013); and
– with a single and flat-rate tax rate of **1.5%** instead of the progressive wealth tax scale.

In the event of the transmission of assets placed in a trust, the DMTG are due on the date of the death of the constituent (independently of the actual date of the transmission), and they apply according to the same rules of territoriality as those provided in the event of direct holding.

In such cases, the applicable rate is that provided by common law, i.e. according to the degree of kinship between, on the one hand, the donor or the deceased – in this case the **constituent** – and, on the other hand, the donee or heir, i.e. the **beneficiary**.

However, when transmissions cannot be qualified as donations or inheritances within the meaning of common law or when the administrator of the trust is subject to the law of a non-cooperative State or when the trust was created after 2011, by a French resident at the time of such creation, the tax rate is increased to **60%**.

ii. The regularisation of undeclared trusts

The regularisation Cell of 2009 accepted, subject to the commitment of the constituent to end the trust, to regularise the assets held through a trust in the same conditions as if they had been held **directly** by physical persons.

However, the Circular of June 21, 2013 published by the Minster of the budget considers a trust as an "interposed structure", which gives rise to the application of specific and fiscally costly mechanisms such as the one established under Article 123 bis of the French Tax Code: in substance, it provides for the liability to tax of the real or flat-rate profit increased by 25%, of physical persons directly or indirectly holding at least 10% of the financial rights or voting rights in a "legal entity".

Moreover, the withdrawals made since January 1, 2006 from a bank account held through a trust may be qualified as distributions and, in this respect, be subject to taxation at the level of the constituent.

2. The liability of administrators

i. The administrators of trusts are bound to complete and file an annual declaration indicating the market value on January 1 of the year of the assets subject to the specific levy of 1.5%, but also to inform the French administration of the constitution, the modification or the extinction of a trust when (Art. 1649 AB of the French Tax Code):

– the constituent has his tax domicile in France;
– or at least one of the beneficiaries has his tax domicile in France;
– or the trust has at least one asset or right which is located in France;

it is an "**event-based**" **declaration** which must be filed upon the occurrence of the event in question.

ii. In the event of the breach of these declarative obligations, the constituent and the beneficiaries are jointly liable along with the administrator of the trust

for the payment of a fine of 5% of the assets or rights placed in the trust (the amount of which may not be less than €10,000).

Furthermore, the repressive policy currently carried out by the French authorities with respect to tax matters suggests that the trustee may also have his criminal liability incurred, in particular as an accomplice of the French residents concerned (cf. our article on page 12 concerning the penal risk).

The consequences of this situation have been spontaneous declarations by trustees.

Our Opinion

The regularisation of undeclared assets held abroad through a trust implies, in the light of Bercy's current doctrine, a cost far higher than that of the regularisation of assets held directly.

However, this doctrine is questionable in that it does not comply with the provisions of the Law of July 29, 2011. In effect, as **the trust has no legal personality**, it cannot be considered a "legal entity" within the meaning of Article 123 bis, i.e. "a legal person, organisation, "fiducie" or comparable institution".

That said, this Law of July 2011 created entirely new tax rules, whose scope of application appears sufficiently broad to target, according to the administrative doctrine, the "entities which are not called trusts". These may enter into the scope of application of the Law when they meet the definition of Article 792-0 bis of the French Tax Code (§40 BOI- DJC-Trust-20121016 published in the Bofip).

According to this doctrine, foundations, which have a legal personality, may fall within the scope of application of this tax legislation.

A new Franco-Swiss convention on inheritances?

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Following the European Council, then the G8 of Lough Erne, of May 22 and June 18, 2013, a new Franco-Swiss tax convention on inheritances, negotiated under the threat of a unilateral denunciation by France, was recently signed on July 11, 2013.

For the French Ministry of Economy and Finances, it should reinforce the fight against tax exile and fraud, as well as the bilateral dialogue between France and Switzerland.

In practice, the new text broadens the perimeter of taxable assets in France by integrating the indirect holding of real estate property (1), it renders the rules of territoriality more stringent (2) and considerably extends the scope of application of the exchange of information (3).

1. The Convention currently in force provides that "**real estate assets**" are only subject to inheritance tax in the State in which they are located. However, to define these assets, the Convention refers to French private law which provides that portions or shares in real estate companies cannot be considered, either legally or fiscally, as real estate assets.

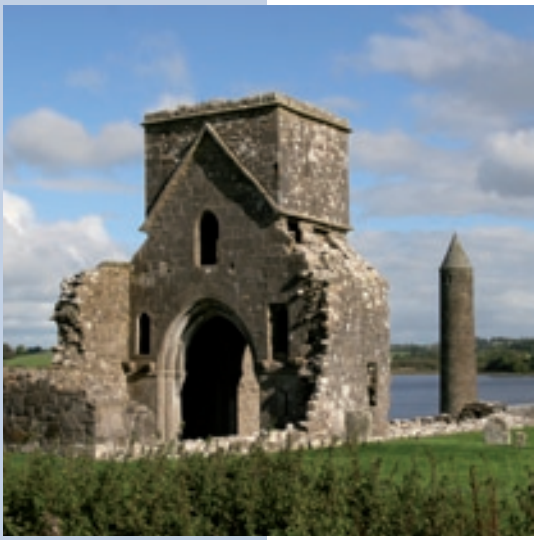
Therefore, the portions and shares of shareholders holding buildings in France are subject to inheritance tax in the **State of residence of the deceased**, and not in the one where the buildings are located (position confirmed by the French Administration in the Valleix ministerial response of April 21, 1997).

It is therefore sufficient for Swiss residents who own real estate assets in France to purchase them or hold them under the guise of a structure to escape from inheritance tax.

The text of the new Convention remedies this situation by expressly providing that "*the expression 'real estate assets' also includes the shares, portions or other rights in a company, a trust fund or any other institution or entity, whose assets or property is comprised by over 50 percent of their value […] of real estate assets located in a contracting State […].*"

Under the new Convention, real estate assets located in France therefore bear inheritance tax, whether they are held directly or through a structure.

However, Switzerland has obtained that this taxation only applies if the deceased held (along with his family group) at least **half the securities** of the structure and if the **real estate assets** represent **more than one third of all the assets** of this structure; otherwise, the assets remain taxable in Switzerland.



2. With respect to the **territoriality** of tax, Article 11 of the new Convention relating to the elimination of double taxation provides, notwithstanding any other provisions of the Convention, two rules enabling France to tax:

- all **tangible movable property** (excluding bank assets) and **immoveable property located in France** even when the deceased is domiciled in Switzerland at the time of the death;
- **all assets** – including real estate assets located in Switzerland – received by an **heir domiciled in France** at the time of the death of the deceased (on the condition that the heir was domiciled for at least 8 years during the 10 years preceding the one in which he received the assets);
- the double taxation will be neutralised by the deduction of the tax paid in Switzerland from the French tax. In concrete terms, the Swiss cantons will continue to tax inheritances as before, and the French tax services will deduct the taxes paid in Switzerland from those due in France (it should be noted that the Swiss cantons levy very little or no inheritance tax in direct line and between spouses).

3. The exchange of information will apply from now on with respect to Inheritance matters, with the new Convention referring to the stipulations of the Convention of 1966 relating to income tax and wealth tax (the scope of which has been broadened to include the prevention of tax fraud and evasion).

The additional protocol provides reinforced mutual administrative assistance between the two countries for all tax matters. The French minister explained that this agreement is a first step towards the revolution which constitutes the **automatic** exchange of information.

The new rules will enable to obtain information on **unidentified taxpayers** who have followed a model of illegal behaviour. The requesting State must describe in detail and justify why it suspects that its taxpayers have breached their tax law.

In concrete terms, France could address grouped requests for information in which the taxpayers will not be nominatively identified and in which no element of identification of the financial Institution will have to be provided.

The wording adopted, very close to that of the OECD model convention, in its latest version, is consistent with the latest standards of the OECD with respect to the exchange of information.

Our Opinion

Initially scheduled to enter into force in 2014, this new convention will only take effect after a **cumbersome ratification process with an uncertain outcome**. This concerns in particular the vote of the French and Swiss Parliaments, and then an eventual referendum at the level of the Confederation. Therefore, these hurdles remain to be overcome on the Swiss side, although many elected officials have risen against the text which they consider “imperialist” and the Swiss population appears very opposed to it.

In the meantime, the current convention continues to apply.

Undeclared assets abroad: the penal risk for French citizens and their Counsels

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The French Tax Code (CGI) provides **three points** in the chapter "Penalties": late interest, tax sanctions and **criminal sanctions**.

The first, the purpose of which is to compensate any loss suffered by the Treasury due to the late collection of its debt, is not designed to punish, although it may be a deterrent.

The second concerns in particular increases of 10% in the case of failure to declare within the statutory time limits, 40% for a deliberate breach and 80% in the event of an abuse of law or fraudulent tactics.

The third sanctions **criminal offences committed with respect to tax matters** and is aimed at the persons, and their accomplices, who fraudulently avoid the establishment or the payment of taxes.

What are these offences (I) and how are their prosecutions organised (II)?

I. Tax offences

They include the general offence of tax fraud (1) as well as the breaches of common law which sanction fraudulent situations (2). In addition general principles of criminal liability, such as the sanction of complicity or an attempt, apply to these breaches (3).

1. The general offence of tax fraud and assimilated frauds

i. This offence punishes "*anyone who has fraudulently avoided or attempted to fraudulently avoid the total or partial establishment or payment of the taxes referred to in this code, or has voluntarily omitted to make his declaration in the prescribed time limits, or has voluntarily concealed a part of the sums liable to tax, or has organised his insolvency or prevented by other tactics the recovery of tax, or by acting in any other fraudulent manner*" (Art. 1741 of the French Tax Code).

Protean and applicable to any tax category, tax evasion is characterised when an attributable event allows to establish the existence of a **tactic** in view of deceiving the Administration. In particular, the material element of the breach relating to actions by "any other fraudulent manner" is extremely broad and lacks precision.

The intentional element, which is, however, clear in the text by the use of the adverb "fraudulently" and recalled in Article L.227 of the Book of Tax Procedures (LPF), is often inferred from the materiality

of the facts observed. It may be characterised by the reiteration of the concealment, the amount of the sums omitted, the lack of accounting or the existence of concealed accounting; elements which rule out simple negligence.

The penalties incurred are severe: a €500,000 fine and 5 years' imprisonment.

They are raised to **€1,000,000** and **7 years** when the assets are held in NCCT (non-cooperative countries and territories) or in "former NCCT" having concluded an agreement for the exchange of information with France **less than 5 years** before the time of the events. This provision, which entered into force on March 16, 2012, sanctions more severely French residents holding undeclared assets in the "tax havens".

In practice, this cause of criminal aggravation will no longer apply in the case of Switzerland on January 1, 2015 (amendment of August 27, 2009 to the Franco-Swiss convention which entered into force on January 1, 2010); the same will apply as from October 29, 2015 for Luxembourg, from January 1, 2016 for Singapore and from December 1, 2016 for Hong-Kong.

Furthermore, Article 1745 of the French Tax Code establishes **joint liability for the payment of taxes** and tax penalties between the fraudster sentenced and the legal person liable to the tax.

ii. Assimilated to a tax fraud is the fact, in view of enabling the wealth of another to wholly or partially avoid tax, of mediating either by favouring the deposits of securities abroad, or by issuing or cashing cheques or any other instruments created for the payment of dividends, arrears or any income from securities (Art. 1743-2° of the French Tax Code). The declaration of inexact or fictitious accounts, or the failure to declare such accounts is sanctioned by the same penalties (Art. 1743-1° of the French Tax Code).

In addition, may be punished by a fine of €4,500 and 5 years' imprisonment "any business agent, expert or any other person whose profession, either for his own account, or as a manager or paid employee of any company, association, group or business whatsoever, is to keep the accounts of several clients and who is convinced of having established or helped to establish false balance sheets, inventories, accounts and documents, of any nature whatsoever, presented to determine the basis of the taxes due by said clients" (Art. 1772-1-1°of the French Tax Code).

This provision, which applies in the field of **direct taxes**, targets not only chartered accountants, statutory auditors and other auditors, but also the bankers, trustees or any other Counsel which issue for example **unique tax forms** ("imprimés fiscaux uniques" or "IFU") or any documents "of any nature whatsoever" in view of establishing the tax declarations of their clients. They may be sentenced jointly with their clients to pay the amounts in principal, penalties and fines, whose recording may have been compromised by their manoeuvres.

Point number 2 of this article also sanctions by the same penalties "*any person, directly or indirectly collecting* ***income abroad****, who does not mention them separately in his declaration* [annual income declaration]." This provision is specifically aimed at French residents and their income "*of any nature whatsoever.*"

These offences assimilated to tax fraud have a field of application which is more targeted. In practice, they are used less by the tax administration.

However, in the current context, they may be privileged to stigmatise the taxpayers or their Counsel in the particular case of undeclared assets abroad.

2. The common law offences which sanction tax fraud situations

i. The first of them is **money laundering**. Concerning tax fraud, it is the fact of assisting an operation of investment, concealment or conversion of the direct or indirect proceeds of fraud (Art. 324-1 of the Penal Code).

A so-called "consequential" offence, it requires, to be characterised, the existence of an original offence, in the case at hand, tax fraud. However, this offence of money laundering does not require that the offence having enabled to obtain the laundered sums took place on the national territory, or that the French courts have jurisdiction to rule on it.

N.B.: as this offence is a general offence, distinct and autonomous, the prescription which concerns it is independent from the one which applies to the original offence of tax fraud. As a result, the author of the money laundering may be prosecuted even if the offence of tax fraud was prescribed.

Money laundering is punishable by 5 years' imprisonment and a fine of €375,000, which are brought to 10 years and €750,000 when it is committed habitually or by using the facilities provided by the exercise of a professional activity, or when it is carried out by an organised band. Additional penalties may be imposed on physical persons, in particular the prohibition to exercise the profession at the origin of the offence and the confiscation of their assets.

ii. Forgery: This is another offence which may concern undeclared assets abroad. It is defined as any fraudulent altering of the truth, which may cause damage and accomplished by any means whatsoever, in writing or in any other medium of expression of thought, the purpose of which or which may have the effect of establishing proof of a right or fact having legal consequences (Art. 441-1 of the Penal Code).

Whereas **material forgery** consists in altering the formal medium of document (deleting a page, change of signature, etc.), **intellectual forgery** alters the very substance of the deed (wording of a letter with the letterhead of a false sender, omission of certain sums or information on accounting documents or declarations, etc.).

Forgery and its use are punishable by 3 years' imprisonment and a fine of €45,000. As for money laundering, the additional penalties of the prohibition to exercise the profession at the origin of the offence and the confiscation of assets may be pronounced against physical persons.

In practice, this offence is recorded to characterise one of the elements of tax fraud or money laundering. It is therefore rarely prosecuted as such with respect to tax matters.

However, it may justify, in itself, the use of the **judicial tax inquiry procedure** provided in Article L.228 of the Book of Tax Procedures (cf. II-2 below).

3. Criminal liability

i. According to Bercy's doctrine, "*the generality of the terms used by the Legislator authorises the prosecution of all those who have directly or indirectly committed acts incriminated by the texts, namely the main perpetrators, the co-perpetrators and their accomplices*."

In effect, Articles 121-6 and 121-7 of the Penal Code relating to **complicity by aid or assistance** and by instigation are applicable to tax fraud offences as well as to money laundering and forgery offences. The accomplice is punished "*as the author of the offence*."

In the same way, the authors of an attempt are punished as the principal author of the offence.

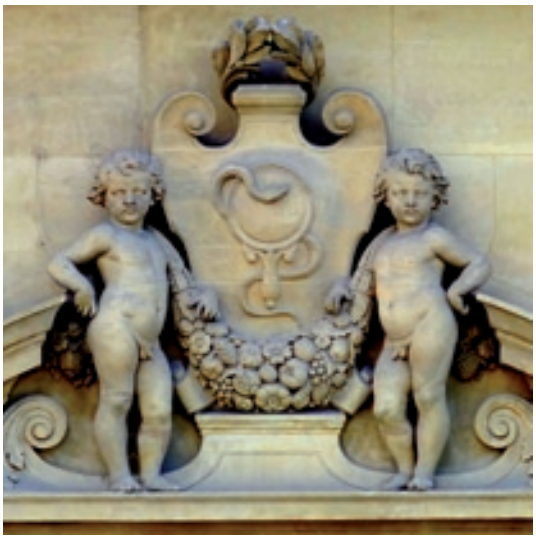
ii. Offences which are attributable to French residents who hold undeclared assets abroad necessarily imply a foreign element, but they remain punishable by the French courts.

French criminal law applies when **one of the facts constituting** the offence took place **on the territory of the Republic**. It also applies to offences committed by French citizens outside of the territory of the Republic if the facts are punishable by the laws of the country in which they were committed.

Furthermore, French criminal law applies to the **accomplice of an offence committed abroad**, when the offence is punished both by French law and by the foreign law and if a final decision by the foreign court has been recorded.

Finally, French criminal law applies t o any offence punishable with imprisonment committed by a French citizen or a foreigner outside of the territory of the Republic when **the victim was of French nationality** at the time of the offence. Legal entities, such as associations, may have the capacity of victim and the tax administration may join the proceedings as a civil party within the framework of a criminal trial.

iii. With respect to groups of companies, the case law of the criminal division of the Court of Cassation on November 7, 2012 recalled that a **foreign company which has a stable, permanent and autonomous establishment** on the French territory, may be charged with the offence of tax fraud. Therefore, subsidiaries and branches are concerned (cf. II.-3. below).



II. Prosecutions

They are framed by the prescription periods which vary significantly between tax fraud and common law offences (1).
The prosecutions for tax fraud of the French Tax Code must comply, under penalty of inadmissibility, with a derogatory procedure (2). The Administration has various means to ascertain fraud, in particular the right to search private homes (3). Finally, with respect to money laundering committed in an organised band, a derogatory procedure may by applied (4).

1. Prescription

i. The public action against tax fraud is prescribed at the **end of the third year** following the one in which the offence was committed. This period is adjusted as compared to common law to take into account, for tax matters, the annual budgetary period. The starting point for this period is fixed on the day when a declaration should have been filed or on the day a voluntarily inaccurate declaration is filed.

In the case of a **judicial tax inquiry procedure**, the complaint filed by the Administration enables to extend the **recovery period** until the end of the **tenth year** following the one for which the tax is due.

ii. With respect to the offences of money laundering and forgery, the prescription is that of common law, i.e. **three years** as of the day on which the offence was committed.

2. The exercise of legal action against the offence of tax fraud

i. The procedure is strictly governed by the Book of Tax Procedures as its Article L.228 requires, under penalty of **inadmissibility**, that complaints for tax fraud are filed by the Administration with the **assent of the Commission for Tax Offences** ("Commission des infractions fiscales" or "CIF).
On his side, the taxpayer has a period of thirty days to communicate the information he deems necessary. The ministry of the Budget is bound by this assent.

In the event of the assent of the commission, the Administration files a complaint.
The Public Prosecutor may then open a preliminary investigation which will be conducted under his direction or require the opening of a judicial inquiry which will be conducted by an examining judge. Finally, the Public Prosecution Office

may decide to directly refer the matter to the criminal Court. On its side, the Administration can bring a civil action.

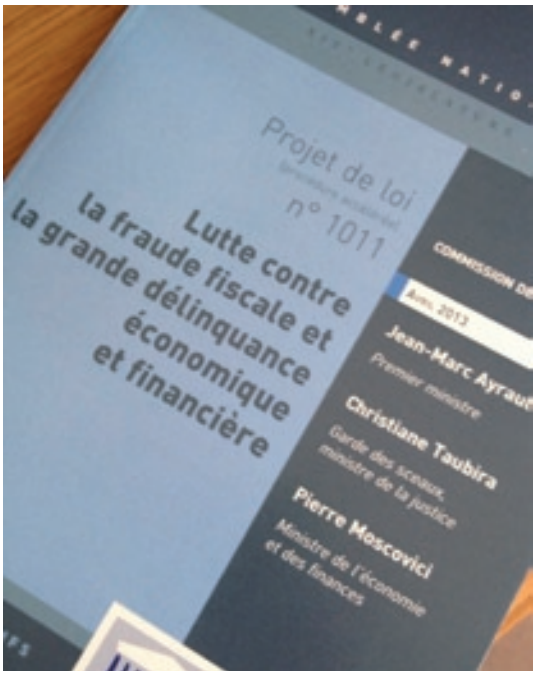
ii. The judicial tax inquiry procedure:
When the minister of the Budget establishes the existence of **characterised presumptions** that a tax offence is committed with the **risk that the integrity of proof may be compromised**, the CIF examines the matter **without the taxpayer being advised** of the referral or **informed of its opinion**. This risk must result:

- either from the use, for the purposes of avoiding tax, of accounts or contracts subscribed with organisations established in a State or territory which has not concluded with France, since **at least three years** from the moment the facts occurred, an administrative assistance agreement enabling the exchange of any information necessary to apply French tax legislation;
- or the interposition, in a State or territory referred to above, of individuals or legal entities or any body, trust or similar institution;
- or the use of a **false identity** or of **false documents** within the meaning of Article 441-1 of the Penal Code, or any other **falsification**;
- or of a fictitious or artificial tax domicile abroad;
- or of any other **tactic** intended to deceive the Administration.

The particularly broad terms of "*false*", "*any other falsification*", "*tactic intended to deceive the Administration*" enable the latter to resort in an almost discretionary manner to this derogatory and clandestine procedure. The Administration must, however, justify "*characterised*" presumptions and a risk of "*the integrity of proof being compromised*."

According to a Circular from the minister of the Budget on November 2, 2010, "*the use of this mechanism may be contemplated in the presence of elements of presumptions of* ***complex fraud*** *based on the use of tax havens or processes of falsification*": for example, the case of a taxpayer suspected of having concealed the major part of the sale price of the securities of a company by the interposition of an entity in a tax haven of which he is supposed to be the economic beneficiary.

The procedure is entrusted to the **national Brigade for the suppression of tax offences**, a specialised service attached to the Home Office and which acts on the request of the Public Prosecutor or within the framework of a letter rogatory delivered by an examining judge. It comprises 13 officials from the tax administration who may implement the **prerogatives of judicial police**, such as police custody, searches, telephone tapping (cf. Actua No.1 p.4 and 5).



3. The search of private homes and seizure procedure

Referred to in Article L 16 B of the Book of Tax Procedures, this procedure enables the Administration to search for proof of fraud by **searching any places**, even private (taxpayers or third parties), where elements and documents relating to the fraud may be held or **be accessible** or available and proceed with their **seizure, regardless of the medium** (cf. for a more detailed study, Actua No.1 p.3).

By a judgement of February 26, 2013, the commercial division of the Court of Cassation validated "the seizure of all dematerialised documents **accessible in the premises visited**". This jurisprudence therefore enables to seize documents saved on servers located **outside of the premises visited but also outside of France**, such as "cloud" or networks.

Therefore, in the case of an international business which has an IT system organised as a network, its stable establishment in France may be searched enabling to seize the electronic data stored in the servers in the holding located abroad.

4. The exercise of legal action against the offences of money laundering and forgery

They are included in the common law of the provisions of the Code of Criminal Procedure.

However, with respect to the offence of money laundering, and when it is committed by an **organised band**, special provisions may apply, i.e.: national surveillance of individuals or property, infiltration, police custody of 96 hours with the deferred intervention of the lawyer, searches and home visits at night, interception of correspondence (telephone tapping), sound and the fixing of images (placing of microphones), the seizure of electronic data and garnishment orders (Art. 706-73 et seq. of the Code of Criminal Procedure).

This mechanism is reserved for offences which are listed exhaustively and committed in the most serious cases. However, the government, in its draft bill relating to the **fight against tax fraud** and serious economic and financial crime, wishes to extend to tax fraud Articles 1741 et seq. of the French Tax Code.

Our Opinion

In 2012, 1127 files were transmitted to the CIF and 987 complaints were filed, 139 of which for complex tax fraud. Their number has continued to increase since the G20 meeting in London on April 2, 2009.

This trend may continue but this evolution will find its limits: for example, the case of the draft bill relating to the fight against tax fraud.

In fact, this draft bill, which **violates fundamental rights and freedoms**, has been subject to much criticism. The national consultative Commission of Human Rights recalled the exceptional character which should govern the use of the procedure applicable to organised gangs, and revealed breaches of the principles of lawfulness and fairness of proof, and found "*an unjustified setback of defence rights*." The president of the National Council of Bar Association, the body which represents all French lawyers, stigmatises "*a draft bill which intends to generalise suspicion and denunciation*." Due to serious disagreements between the National Assembly and the Senate, the draft bill was withdrawn from the agenda and its discussion will resume in the autumn.

On their side, the public authorities in the person of the minister of the Budget, propose under certain conditions an alternative in the press release of June 21, by inviting "*taxpayers who hold undeclared assets abroad to render themselves compliant with the law at the earliest opportunity*."

Daniel Sciora, painter

Le Silence des murs
Diptych, Oil on canvas

A kind of silent enigma,
a storm of fixed matters…
it is no longer a case
of believing, but of seeing
what is… and to wonder.

http://sciora.free.fr/

Daniel Sciora was born in Paris in 1945.
After the Arts Décoratifs of Nice, he "went up" to Paris and enrolled at the Académie Julian.
He was taught there by Edouard Mac'Avoy, which proved to be a fundamental meeting…

For Sciora, 1963 was to be essential.
He met Riberzani, Le Cloarec, Brandon, Four and Bezard. The Picasso retrospective, at the Grand Palais and the meeting with Braque proved to be decisive: "Painting is to render present that which is absent."
At the Académie Julian, he was awarded the Prix Maurice Pierre and became a member of the Salon d'Automne.

From 1963 to 1971, Sciora participated in numerous collective exhibitions. He was the youngest exhibitor of Peintres Témoins de Leur Temps at the Galliera Museum in Paris. He discovered lithography with Mourlot and worked for years with Claude Jobin.
He then embarked upon a succession of individual exhibitions: in Caen, Tokyo (Takashimaya Gallery) and in Paris (Galerie Le Nombre d'Or).

Since then, Daniel Sciora has presented his work in New York, Tokyo, Singapore, Fukushima, Osaka, at the Fondation Daniel et Florence Guerlain, at the Galerie de Francony and at the Galerie Yoshii in Paris.

At the same time, he participates in theatrical adventures (decors). He organised at the Trianon de Bagatelle a "Tribute to Van Gogh" and a "Tribute to Toulouse Lautrec" at the Musée d'Albi. He has also created monumental sculptures.

Daniel Sciora has illustrated many books, including: "La Symphonie pastorale" by Gide and "Jacques Brel" (Grésivaudan edition), "Splendeurs d'Italie" (A. Vial edition) and "Charles Aznavour" (Francony edition).

Many of his works appear in public collections: The Modern Art Museum in Paris, the International Foreign Trade Centre, the Public Hospitals of Paris, Kyoto Museum, etc.

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Liberté • Égalité • Fraternité
RÉPUBLIQUE FRANÇAISE

BERNARD CAZENEUVE
MINISTRE DELEGUE AUPRES DU MINISTRE DE L'ECONOMIE ET DES FINANCES,
CHARGE DU BUDGET

Communiqué de presse | *Communiqué de presse*

www.economie.gouv.fr

Paris, le 17 mai 2013
N° 596

Lutte contre la fraude fiscale : Bernard CAZENEUVE rappelle qu'il n'y aura ni amnistie, ni cellule de régularisation

Bernard CAZENEUVE, Ministre délégué chargé du Budget, rappelle, comme il l'avait indiqué dès le 9 avril à l'Assemblée Nationale, qu'il n'y aura ni amnistie, ni cellule de régularisation opaque appliquant des règles dérogatoires au bénéfice de contribuables qui se seraient rendus coupables de fraude fiscale. Ces méthodes appartiennent à un passé révolu.

Au contraire, les sanctions de la fraude fiscale, en particulier des fraudeurs détenant des comptes non déclarés à l'étranger, ont été fortement alourdies. Les moyens de contrôle de l'administration ont également été puissamment renforcés. Le projet de loi relatif à la lutte contre la fraude fiscale et la grande délinquance économique et financière permettra de poursuivre l'amélioration des moyens de contrôle et de renforcer la sanction des fraudes les plus graves, tandis que le renforcement de la coopération internationale permet, chaque jour davantage, l'accès à de nouvelles informations.

Les contribuables doivent donc déclarer à l'administration fiscale l'ensemble de leurs avoirs pour respecter leurs obligations puisque ceux qui fraudent seront identifiés et très lourdement sanctionnés. Les modalités administratives dans lesquelles ils peuvent exercer leur droit à rectifier leurs déclarations font l'objet d'une réflexion, notamment pour permettre d'en assurer la pleine transparence. En tout état de cause, ces contribuables acquitteront, dans des conditions de droit commun, l'ensemble des impositions à leur charge et, le cas échéant, les pénalités applicables au regard de leur situation, qui est naturellement différente de celle des contribuables qui seraient identifiés par l'administration sans se présenter spontanément à elle.

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MINISTÈRE DE L'ÉCONOMIE
ET DES FINANCES

Liberté • Égalité • Fraternité
RÉPUBLIQUE FRANÇAISE

PIERRE MOSCOVICI
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BERNARD CAZENEUVE
MINISTRE DELEGUE AUPRES DU MINISTRE DE L'ECONOMIE ET DES FINANCES, CHARGE DU BUDGET

Communiqué de presse | *Communiqué de presse*

www.economie.gouv.fr

Paris, le 21 juin 2013
N° 672

Traitement des déclarations rectificatives des contribuables détenant des avoirs à l'étranger : transparence et droit commun

Bernard CAZENEUVE, ministre délégué chargé du Budget, a présenté hier avec Christiane TAUBIRA, ministre de la Justice, le projet de loi relatif à la lutte contre la fraude fiscale et la grande délinquance financière devant l'Assemblée Nationale. Ce projet de loi renforce considérablement les moyens de l'administration fiscale, de la police et de la justice, dans leur lutte contre les fraudeurs, et alourdit les sanctions encourues. L'Assemblée a également voté cette nuit un amendement gouvernemental, déposé à l'initiative de Pierre MOSCOVICI, ministre de l'Economie et des Finances, qui prévoit qu'à partir de 2016, tout pays qui ne prendrait pas l'engagement de conclure un accord permettant l'échange automatique d'informations sera inscrit sur la liste des Etats et territoires non-coopératifs (ETNC).

C'est dans ce contexte que le Gouvernement appelle les contribuables détenant des avoirs non déclarés à l'étranger à se mettre au plus vite en conformité avec le droit, dans les conditions définies dans la circulaire ci-jointe. Ces dispositions respectent, dans les conditions de droit commun, les principes de transparence et de justice, qui sont les garants du respect de l'égalité des citoyens devant l'impôt. La circulaire précise à chaque agent de l'administration fiscale les conditions applicables de droit, en établissant précisément les modalités de dépôt et de traitement des dossiers.

Dans ce cadre, le taux de pénalité pour manquement délibéré, qui peut être modulé par l'administration en application du droit commun, sera de 30% pour les fraudeurs dits « actifs », et de 15% pour les fraudeurs dits « passifs », qui ont, par exemple, hérité d'avoirs non déclarés à l'étranger. De même, l'amende annuelle proportionnelle pour défaut de déclaration des avoirs à l'étranger sera plafonnée, respectivement, à 3% et 1,5% du montant de ceux-ci.

Ces règles ont été présentées hier au Parlement par Bernard CAZENEUVE dans le cadre de la discussion par l'Assemblée nationale du projet de loi relatif à la lutte contre la fraude fiscale.

Les dossiers, déposés auprès du service des impôts des particuliers dont relève le contribuable, ou directement auprès de la direction nationale des vérifications de situations fiscales (DNVSF), seront traités par cette dernière qui assurera un traitement centralisé et homogène des demandes. Les contribuables devront s'acquitter du paiement intégral des impositions éludées et non prescrites dans les conditions de droit commun ainsi que des pénalités et amendes correspondantes.

Le Gouvernement écarte toute amnistie, toute condition dérogatoire au droit commun, tout anonymat et toute tractation occulte. Il sera rendu compte au Parlement, par un rapport annuel, du suivi précis du traitement des déclarations enregistrées par l'administration fiscale dans ce cadre.

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MINISTÈRE DE L'ÉCONOMIE
ET DES FINANCES

Liberté • Égalité • Fraternité
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LE MINISTRE DELEGUE
CHARGE DU BUDGET

Paris, le 21 JUIN 2013

à

Monsieur le Directeur général des Finances Publiques

Objet : Traitement des déclarations rectificatives des contribuables détenant des avoirs à l'étranger.

Alors que le Gouvernement intensifie la lutte contre la fraude et l'évasion fiscales, il m'apparaît important de vous préciser les conditions dans lesquelles j'entends que soient traitées les déclarations rectificatives adressées par des contribuables détenant des avoirs non déclarés à l'étranger à l'administration fiscale.

Leur traitement doit naturellement être organisé dans le strict respect du droit en vigueur.

Les modalités de traitement retenues sont rendues publiques, par la mise en ligne de la présente instruction, afin d'assurer la parfaite transparence de l'action du Gouvernement en la matière. Il convient également d'assurer un suivi précis des déclarations enregistrées dont vous me ferez rapport régulièrement. Un rapport annuel sera transmis au Parlement.

Sont concernés par ce dispositif les contribuables personnes physiques détenant des avoirs à l'étranger, qui se font connaître auprès de l'administration fiscale et qui rectifient spontanément leur situation fiscale passée en acquittant l'ensemble des impositions éludées et non prescrites dans les conditions de droit commun ainsi que les pénalités et amendes correspondantes.

Seules les déclarations et rectifications spontanées effectuées par des contribuables personnes physiques auprès de l'administration fiscale sont concernées. Ainsi, sont exclus de ce dispositif les contribuables dont la démarche ne serait pas véritablement spontanée, c'est-à-dire ceux qui font l'objet d'un examen de situation fiscale personnelle, de contrôles relatifs aux droits d'enregistrement, ou d'une procédure engagée par l'administration ou les autorités judiciaires portant sur des actifs et comptes non déclarés détenus à l'étranger. Il en ira de même lorsque les avoirs ont pour origine une activité occulte, sanctionnée par l'application de la majoration de 80 %.

1. Les modalités pratiques de dépôt des dossiers

Les contribuables procéderont au **dépôt de déclarations** couvrant toute la période non prescrite. Outre ces déclarations, vous vous assurerez que le dossier du contribuable comprend :

- un **écrit exposant de manière précise et circonstanciée l'origine des avoirs** détenus à l'étranger, accompagné de **tout document probant** justifiant de cette origine ou constituant un faisceau d'éléments de nature à l'établir ;

- les **justificatifs relatifs aux montants des avoirs détenus, directement ou indirectement, à l'étranger et des revenus de ces avoirs** sur la période régularisée ;

- lorsque les avoirs ont pour origine une succession ou une donation, une attestation de l'établissement financier étranger précisant l'absence d'alimentation du compte par le contribuable ou tout autre justificatif permettant de constater que le compte n'a pas été alimenté par le contribuable postérieurement à la succession ou à la donation ;

- une attestation du contribuable selon laquelle son dossier est sincère et porte sur l'intégralité des comptes et avoirs non déclarés détenus à l'étranger qu'il possède ou dont il est l'ayant droit ou le bénéficiaire économique.

Les dossiers, déposés selon les conditions usuelles auprès du service des impôts des particuliers dont relève le contribuable ou de la Direction nationale des vérifications de situations fiscales (DNVSF), seront traités par cette dernière qui assurera un contrôle centralisé et homogène des demandes.

2. Les conséquences fiscales de la démarche

Les contribuables devront s'acquitter du paiement intégral des impositions supplémentaires à leur charge.

Ces impositions supplémentaires seront calculées en faisant application de l'ensemble des dispositions en vigueur au titre de chacune des années concernées. Ainsi, par exemple, si un compte bancaire est détenu par l'intermédiaire d'une structure interposée (trust, fondation, société…) bénéficiant d'un régime fiscal privilégié, les dispositions de l'article 123 bis du code général des impôts (CGI) seront applicables.

Les impositions seront dues dans la limite de la prescription fiscale à la date de dépôt du dossier en application des dispositions de droit commun du livre des procédures fiscales (LPF).

S'agissant plus particulièrement des avoirs financiers à l'étranger non déclarés, les prescriptions allongées spécifiques, prévue à l'article L. 169 du LPF (en matière d'impôt sur le revenu et de prélèvements sociaux) et à l'article L. 181-0 A du LPF (en matière d'ISF et autres droits d'enregistrement), s'appliqueront de plein droit.

Par ailleurs, les impositions supplémentaires seront assorties conformément au droit commun des pénalités et amendes suivantes :

→ **les intérêts de retard au taux légal** prévu à l'article 1727 du CGI ;

→ **la majoration de 40 % pour manquement délibéré** prévue à l'article 1729 du CGI, ou, en cas de défaut déclaratif dans les délais légaux, la majoration de 10 % prévue à l'article 1728 du CGI ;

→ **l'amende pour non déclaration des avoirs à l'étranger** qui est prévue, selon le cas, au IV de l'article 1736 du CGI (comptes bancaires non déclarés), à l'article 1766 du CGI (contrats d'assurance-vie non déclarés) ou au IV bis de l'article 1736 du CGI (trusts et structures assimilées).

Cette amende s'applique sur la période régularisée dans la limite de la prescription prévue au 2ème alinéa de l'article L. 188 du LPF et pour chaque manquement déclaratif.

Pour les comptes bancaires non déclarés, elle est due en cas de détention directe du compte comme en cas de détention indirecte.

Toutefois, dans la situation où la démarche est effectuée par les héritiers au nom du défunt, les droits supplémentaires mis à la charge des héritiers, à l'exception des droits de succession, seront assortis des seuls intérêts de retard. En revanche, les pénalités de droit commun (intérêts de retard, majoration et amende) s'appliqueront aux impositions supplémentaires dus par les héritiers au titre de leur propre situation fiscale (période postérieure au décès).

Afin de tenir compte de la démarche spontanée du contribuable, la majoration pour manquement délibéré et l'amende pour défaut de déclaration des avoirs à l'étranger seront réduites, dans le cadre des dispositions du 3° de l'article L. 247 du LPF, dans les conditions suivantes, conformes au droit commun, qui tiennent compte de l'origine des avoirs à l'étranger :

<table>
<tr><td rowspan="2">Origine des avoirs</td><td colspan="2">Barème appliqué</td></tr>
<tr><td>Taux de la majoration pour manquement délibéré</td><td>Amende plafonnée pour chaque manquement déclaratif</td></tr>
<tr><td>Avoirs reçus dans le cadre d'une succession ou d'une donation</td><td rowspan="2">15 %</td><td rowspan="2">à 1,5 % de la valeur des avoirs au 31 décembre de l'année concernée</td></tr>
<tr><td>Avoirs constitués par le contribuable lorsqu'il ne résidait pas fiscalement en France</td></tr>
<tr><td>Autres origines (ex : avoirs constitués par le contribuable lorsqu'il résidait fiscalement en France)</td><td>30 %</td><td>à 3 % de la valeur des avoirs au 31 décembre de l'année concernée</td></tr>
</table>

Lorsque le montant de la remise transactionnelle excèdera le seuil de 200 000 € prévu à l'article R. 247-4 du LPF, la proposition de transaction, rédigée dans les termes décrits ci-dessus, sera soumise à l'avis du Comité du contentieux fiscal, douanier et changes, en application de cet article.

Enfin, la transaction pourra être remise en cause et déclarée caduque s'il s'avère ultérieurement que les déclarations des contribuables n'étaient pas sincères.

Bernard CAZENEUVE