

The future of social levies on income derived from French real estate assets held by non-residents: an EU law perspective

Since the adoption of the Second Amended Finance Bill for 2012 on August 16, 2012, natural persons who are not French tax residents are liable for the payment of social levies (*contribution sociale généralisée* - general social contribution - and *contribution pour le remboursement de la dette sociale* - social debt repayment contribution) on rental income and capital gains derived from real estate assets located in France.

This scheme has been challenged before European courts and its future looks uncertain.

Since the Second Amended Finance Bill for 2012 adopted on August 16, 2012, natural persons who are not French tax residents for the payment of social levies on rental income and capital gains derived from real estate assets located in France.

Currently, the applicable rate is 15.5%, as per the provisions set forth in Articles 1600-0 C *et seq.* of the French General Tax Code and Articles L136-1 *et seq.* of the French Social Security Code.

For the record, these social levies include primarily:

- the *contribution sociale généralisée* (general social contribution, hereinafter “CSG”),
- the *contribution pour le remboursement de la dette sociale* (social debt repayment contribution, hereinafter “CRDS”),
- the *Prélèvement social* (social levy) of 2%, and
- the *Contribution additionnelle* (additional contribution) of 0.3%.

According to an assessment report presented to the French National Assembly, these social levies amounted to

244 Million euros for 2012.

It should be underlined that all of these social levies are used to finance compulsory French social security schemes (e.g. sickness insurance benefits, family benefits, old-age pension benefits, etc.) or to wipe off the related deficits.

Severely criticized in particular in regards of the European legislation (Article 13 §1 of Regulation n°1408/71) and the decision issued in 2000 by the European Court of Justice of the European Communities, (*CJEC 15/2/2000, C-169/98*), these levies seem in contradiction with European rules that tend to avoid overlapping of applicable social security legislations in several Member States.

The European Commission launched infringements proceedings against France in this respect (*EU Pilot 2013/4168*) but such proceedings were interrupted when the *Conseil d'Etat* (French Supreme Administrative Court) requested a preliminary ruling from the Court of Justice of the European Union ("CJEU").

The question referred for a preliminary ruling was as follows :

“Do the tax levies on income from assets, such as the CSG, the CRDS, the social levy of 2% and the additional contribution to that levy, have, by virtue of the mere fact that they contribute to the financing of compulsory French social security schemes, a direct and relevant link with some of the branches of social security listed in Article 4 of Regulation No 1408/71 of the Council of June 14, 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community , and do they thus fall within the scope of that regulation?”

The CJEU has not rendered its ruling but the Advocate General Sharpston has delivered her opinion.

Through her line of reasoning, we can easily perceive what should be the position of the CJEU, it being recalled that the CJEU's decision will be binding and that France will have to amend its legislation to comply with the terms of such decision.

To grasp full understanding of the issue at stake, a few clarifications are needed:

Is Regulation No 1408/71 (the “Regulation”) applicable?

The Regulation is a so-called coordination Regulation. As such, it is not intended to harmonize the social security schemes of each Member State but rather aims at establishing conflict of law rules to avoid that a taxpayer contributes to the financing of several social security schemes while being covered by only one of such schemes.

The Regulation must be interpreted in the light of the objective pursued by Article 48 of the Treaty on the Functioning of the European Union related to freedom of movement of workers but it is important to note it can only apply if a social levy has a direct and sufficiently relevant link with the legislation governing one of the branches of social security.

This was found to be the case when a social levy is specifically allocated to the funding of a Member State's social security scheme, irrespective of whether benefits are obtained in return.

In the present matter, according to the position adopted by the Court of Justice of the European Communities in 2000, French social levies (CSG, CRDS) are recognized as being *"specifically allocated to the financing of the French social security scheme"* and, consequently, have a sufficient link to trigger the application of the Regulation.

In addition, while the decision rendered in 2000 by the above Court concerned income derived from the exercise of a professional activity, it could be expected that the rationale would also apply to income derived from the assets of the relevant taxpayer. Any decision to the contrary would be likely to create significant discrepancies in the level of protection afforded by Article 13(1) of the Regulation, depending on the source of the income.

Lastly, if the Regulation aims at ensuring the free movement of salaried and non-salaried workers within the European Union, the effective exercise of a professional activity is in fact irrelevant.

Indeed, according to an established case-law, the Regulation applies to any person who is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in the Regulation, irrespective of the existence of an employment relationship.

What is the impact of this ?

Application of Article 13 §1 of the Regulation – which is an absolute rule (subject, however, to the exceptions provided for in Articles 14 quater and 14 septies of the Regulation) – means that any person falling within the scope of the Regulation must be subject only to the legislation of the Member state from which he/she effectively enjoys a coverage, irrespective of whether he/she resides in another Member State.

Consequently, non-residents should not be subject to the social levies on their rental income and real estate capital gains derived from real assets located in France applied pursuant to a legislation of a Member State (i.e. French State in the present matter) other than that of their State of residence.

On the other hand, it should be specified that this exemption from social levies also applies to any taxpayer residing in France and receiving foreign source income insofar as he/she is registered with a social security scheme other than the French one (e.g. because he/she exclusively exercises his/her professional activity outside France).

This seems to be confirmed by Article L136-1 of the French Social Security Code according to which the persons liable for the payment of such social levies are *"those natural persons who are domiciled in France for income tax purposes and for whatever reason, come under a mandatory French sickness insurance scheme"*.

This is precisely why we believe that there should not be any distinction between non-residents domiciled in the European Union and non-residents domiciled outside the European Union.

While some differences of treatment do exist between these two categories of non-residents (e.g. before the Finance Bill for 12015, real estate gains were taxed at the rate of 19% for EU residents and 33.33% for non-EU residents), we are of the opinion that the basis of the above reasoning could be extended.

As such, any non-resident could expect a future gain of 15.5% on future transactions related to their real estate assets located in France should the CJEU supports this approach in its forthcoming ruling. Yet, if France is required to repeal the relevant French law provisions, this will not have retroactive effect and, consequently, it will not be possible to obtain the refund of social levies already paid.

Our recommendation: make a claim

While no refund will be automatic, each non-resident can lodge a claim with the French Tax Authorities to challenge the payment of the social levies, and obtain a refund of such levies.

It must be noted that such a claim must be lodged before the expiry of the applicable statutes of limitations, i.e.:

- For real estate capital gains: before December 31 of the second year following that during which the challenged tax has been paid.
- For rental income: before December 31 of the second year following that during which the tax notice has been received.

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