

## **HIDDEN TAXES ON FRENCH PROPERTY OWNERSHIP**

### **L'AFFAIRE BISO**

by Robert Urquhart and Patrick Toussaint, *Avocats à la Cour de Paris*

Practitioners will be aware of the possible assessment of French residential property owners to French income tax (*impôt sur le revenu*) assessed on a deemed income, based only on a multiple of the rental value of the property. The relevant provision of the French *code général des impôts* (CGI) is Article 164c, in translation as follows:-

*“Persons who do not have their residence for tax purposes in France but who own there one or several residences, in any way whatsoever whether directly or indirectly, are subject to income tax on a basis equal to three times the real rental value of that property or those properties unless income from French sources of the taxpayer is greater than that basis, in which case the actual income shall be used as a base for calculating income tax.”*

*“The provisions of the first paragraph do not apply to taxpayers of French nationality who prove that they are subject, in the country in which they have their residence for tax purposes, to a personal income tax on all their income and if this tax is at least equal to two-thirds of the amount they would have had to pay in France on the same tax basis”.*

Article 164c CGI is not enforced against UK resident French property owners because Article 24c the Anglo-French Double Tax Treaty of 22<sup>nd</sup> May 1968 provides as follows:

(c) *“A resident of a Contracting State who maintains one or more places of abode in the other Contracting State shall not be subject in that other State to an income tax according to an imputed income based on the rental value of the place or places of abode”*

Thus, Article 24c of the Treaty protects a resident of England (but not necessarily a British national, resident elsewhere) from a deemed income tax assessment in France as provided by Article 164C CGI. Care must therefore be taken when acting for non UK residents, as many tax treaties with France do not contain the protection afforded by Article 24c of the Anglo-French Treaty, and, of course, many purchasers are resident in countries, for example Bermuda, which do not have a tax treaty with France at all. Residents in tax havens owning residential properties in France are especially vulnerable to a 164c CGI assessment.

Let us consider for a moment the potential French tax due under Art 164c CGI were it to apply to a property owner:- value of property €1,000,000 – estimated annual rental

value €40,000 – deemed income under 164c CGI = €120,000 on which, depending on the relevant family quotient, a taxpayer could expect to pay French income tax of €45,000 approximately per annum, a sizeable sum by any standards, and particularly so, if several tax years are involved.

A recent article in the *Bulletin Fiscal Francis Lefebvre* “*La non-discrimination dans les conventions internationales*” written by Mr. Juilhard, RF 4/2003, argues that what is, or should be, taken into account is not the residence of a taxpayer, but the non-discrimination clause, if any, in the various tax treaties with France.

The text of Article 25 (1) of the Anglo French Tax Treaty is as follows:

*“The **nationals** of a contracting State shall not be subjected in the other Contracting State, to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.”*

The term “national” in this context means a British subject or a French citizen and the key to non-discrimination for treaty purposes contained in Art 25 is that of nationality, not one of residence as under Art 24 c of the Treaty.

In recent years, French case law (jurisprudence) has developed the issue of non-discrimination generally, which has led to a general principle that a national of one country that has entered into a double tax treaty with another containing a non-discrimination clause, shall be protected even if that person does not reside and/or is not domiciled, either in France or in his country of nationality.

This reasoning was upheld by the *Conseil d’Etat*, the highest French legal authority, in the matter of Benmiloud (CE 30<sup>th</sup> December 1996 no. 128611, RJF 2/97 no. 158 and conclusions page 74) and by the Administrative Court of Appeal of Marseilles in the BISO matter (CAA Marseilles 8<sup>th</sup> February 2000 no. 98-1683, RJF 3/01 no.363). This latter case concerned an Anglo-Italian family (Biso was Italian and his wife British), resident in Monaco, but owning residential properties in France.

The *Conseil d’Etat* recently gave its ruling in the BISO matter in an *arrêt* dated 11<sup>th</sup> June 2003 in an appeal from the Marseilles Administrative Court of Appeal.

The BISO *arrêt* merits careful study. Mr and Mrs Biso, both resident in Monaco, had been assessed for income tax in France under Article 164c CGI on a deemed income from properties owned by them in France. The French Fiscal Administration lost the argument at the hearing before the Administrative Court of Appeal of Marseilles and appealed to the *Conseil d’Etat*. After taking just over three years to come to a decision, the *Conseil d’Etat* held that the French Fiscal Administration, by seeking to tax a British subject and an Italian citizen resident in Monte Carlo on a deemed income basis under Article 164c would tax them differently from a French citizen resident in Monte Carlo who would not have been subjected to the same tax having regard to paragraph one of Article 7 of the Franco-Monegasque treaty of 18<sup>th</sup> June 1963. This difference in taxation, which arises only from a difference of nationality, infringes the non

discrimination clause contained in Article 25 (1) of the Anglo-French Treaty of 22<sup>nd</sup> May 1968.

The *Conseil d'Etat* had to consider two separate questions. The first was whether the difference in treatment under the Franco-Monegasque treaty of a French citizen would, or would not, interfere with the application of principle and the second was if a British resident in Monte Carlo was in the same position as a French national resident in Monte Carlo. The reply is reasonably clear. Firstly, an infringement of a non discrimination clause is determined by taking into account not only the tax provisions of internal law but also the tax provisions that can arise from other Treaties. On the other hand, Mrs Biso, although resident in Monte Carlo, was in the same position as a French resident in Monte Carlo and this is so even though she might escape French taxation, whereas a French national would have been subject to tax as if he were a French resident.

What therefore is the current tax position under Article 164c of a British subject who is resident in Monte Carlo? In accordance with the Biso *arrêt*, a British subject would appear protected from an 164c CGI assessment for the reasons given in the *arrêt*. If, on the other hand, a British subject is resident in, say, Bermuda, would he also be protected from an Article 164c assessment? The answer to this is more complicated in that a British subject resident in Bermuda is given some measure of protection by Article 25(1) of the Treaty, but then we need to look at the position of a French national resident in Bermuda, and whether the British subject would be treated in the same manner as the French national would be. It is felt therefore that even though the Biso *arrêt* has clarified certain of the reservations practitioners have had for some while about the extent of Article 164c CGI and the validity of the non discrimination clauses in tax treaties, it has not settled the matter conclusively.

We do not wish to spoil the good news but the difficulty with this particular case law generally and with BISO *arrêt* in particular is that it may well lead to a foreigner being treated in precisely the same manner as a French person would be, in the same situation. If this were followed to its logical conclusion, it would mean paradoxically that even if a British national taxpayer, resident in say Bermuda, were to escape taxation under Article 164c CGI because of the treaty non discrimination clause, that person might nonetheless still be required to pay French tax under Art 164c CGI.

The general principle was decided by the *Conseil d'Etat* where it considered the application of Article 25 of the Anglo-French double tax treaty concerning a person of British nationality resident in Hong Kong. In that case, (CE 3<sup>rd</sup> March 1993 no. 85626, RJF 4/93 no. 586) the *Conseil d'Etat* applied the two-thirds rule which is applicable to French nationals which, in turn, derived from the second paragraph of Article 164c CGI, quoted above.

This meant that the British national taxpayer had to show that he paid tax in Hong Kong on his worldwide income equivalent to two-thirds of the tax he would have paid, had he been a resident of France – he could not do so and was assessed to French tax under Art 164c CGI.

This case is 10 years old, but Bruno Gouthière of the Bureau Francis Lefebvre, in his relatively recent work *Les impôts dans les affaires internationales*” (edition as at 31<sup>st</sup> July 2001, study 27) referred to the principle of non-discrimination by stating that “non-discrimination only applies where there is a similitude of situations, particularly where residence is concerned” a position, which on the face of it, seems to re-affirm the position taken by the *Conseil d’Etat* in 1993.

In other words and in conclusion, although a British subject purchasing French residential property may well escape French taxation on a deemed income under the first paragraph of Art 164c CGI by claiming protection of the Anglo French Tax Treaty under Art 25 (1) under the non discrimination provisions, that same British purchaser resident in a tax haven (unless a Monte Carlo resident) might well fall foul of the second paragraph of Art 164c CGI under the two thirds’ rule and nonetheless be liable to tax in France on the basis of a deemed income, unless the taxpayer can show that he or she pays income tax locally at the level of at least two thirds of the amount that they would have had to pay in France on the same basis..

Practitioners are urged to be cautious in their advice.

\*\*\*\*\*

*Robert Urquhart is an ‘Avocat’ at the Court of Paris, a partner of De Pinna Notaries in London, and a member of the Premier Anglo French Property Law and Tax Group.*

*Patrick Toussaint is an ‘Avocat’ at the Court of Paris, practising in Paris, specialising in tax matters and a Member of the ‘Institut des Avocats Conseils Fiscaux’.*